Kluwer Arbitration Blog

Highlights from CanArb Week 2023

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Practitioners from Canada and around the world gathered in Toronto from October 16-18, 2023, for the fourth iteration of CanArb Week. The week opened with a keynote address from Canada's Ambassador to the United Nations, the Hon. Robert Rae, who invoked Blaise Pascal with a reminder that "law without force is powerless, but force without law is tyranny". Ambassador Rae related the practice of arbitration to the resolution of disputes on a political level, both of which require the parties to have humanity and to accept the presence and jurisdiction of an intermediary. He spoke about the difficulties of creating a political framework that is universally accepted, in much the same way the international arbitration framework requires acceptance. While creating and maintaining these frameworks may be difficult, he cautioned against wallowing in futility and instead offered advice for persevering in the creation of these vital frameworks: engage, and be prepared to change, converse, and agree.

The three-day conference featured panels organized by leading Canadian and international arbitration organizations, including the ADR Institute of Canada, Singapore International Arbitration Centre, Vancouver International Arbitration Centre, Toronto Commercial Arbitration Society, Western Canadian Commercial Arbitration Society, the Chartered Institute of Arbitrators and the Young Canadian Arbitration Practitioners.

Conference co-chairs Janet Walker and The Hon. Barry Leon also presented the Canadian Arbitration Report 2023, which was prepared with the assistance of FTI Consulting and covers the work of Canadian-based arbitration practitioners and experts in domestic and international arbitration of all types. Delegates engaged with a range of theoretical and practical issues with domestic and international implications, a few of which are highlighted below.

What's the matter with "*deciding the matter*?"

Article 16(3) of the UNCITRAL Model Law directs a court to "*decide the matter*" where a party timeously objects to a preliminary ruling of an arbitral tribunal finding that it has jurisdiction. Recent cases in Canada have raised challenging questions about the nature of the court's decision and process under Article 16(3), including whether it is *de novo*, admits fresh evidence, or includes some element of deference. CIArb Canada organized a discussion to address these cross-cutting

questions with Professor Joshua Karton (Queen's University) and Professor Anthony Daimsis (University of Ottawa), moderated by Lisa Munro (Lerners LLP).

The legislative landscape in Canada is varied, with certain provinces having departed from the baseline Model Law rule that negative jurisdictional rulings of international tribunals may be subject to a set aside application under Article 34, but not a challenge under Article 16(3). For example, Section 16(6) of British Columbia's *International Commercial Arbitration Act* authorizes the Supreme Court of British Columbia (a trial level court) to "*decide the matter*" of a challenge to a positive or negative jurisdictional ruling. British Columbia's domestic *Arbitration Act*, at Section 23, offers similar recourse to positive or negative jurisdictional rulings.

There are, of course, difficulties with that approach. Professor Daimsis noted that a party who goes to court to seek a declaration of no arbitral jurisdiction would be turned away; but if the same party goes to arbitration, and later seeks to challenge a tribunal's finding of jurisdiction, the court will hear the question *de novo.* The idea that what happened before the arbitrator does not matter results in a waste of resources. To counter this, Professor Daimsis suggested that a party ought to have a right to challenge jurisdiction in court at the outset, but only with respect to "true questions of consent" – things like non-signatories, "strangers" to the arbitration, and integration clauses excluding arbitration. He continued that if a party does not raise a true question of consent, the challenge should be deferred until after a tribunal decides, and then subject to review – not a *de novo* procedure. He underlined that the "A" in ADR means something, and this structure would reflect the choice of parties to consent to arbitration while conserving resources where a court can definitively rule up front on the scope of party consent.

Professor Karton noted that some other jurisdictions allow challenges of negative jurisdictional rulings, pointing to New Zealand and Singapore. This, in his view, misunderstands the intent of parties in consenting to arbitrate certain issues against certain parties. While States have the power and moral right to legislate, and should not be used to enforce unjust awards, the structure of the New York Convention pushes the State's role in considering the jurisdiction of a tribunal to the end of the process. The multiplication of opportunities to challenge a tribunal's jurisdiction is problematic; Professor Karton described it as a "*minefield of loops*".

These questions have recently been squarely before the courts in Canada. In *Luxtona*, the Ontario Court of Appeal affirmed a lower court's determination that an Article 16(3) challenge is a proceeding *de novo* (lower court judgments were previously addressed on this blog). *De novo* in this context means a full hearing from scratch, including a consideration of fresh evidence. Notwithstanding the ruling in *Luxtona* that an Article 16(3) proceeding is not a review in any sense, judges in Canada often also write about standards of review, drawing conceptual links to the review of administrative decisions. Professor Daimsis pointed to the 2007 Supreme Court of Canada decision in *Dell*, where the Supreme Court of Canada enunciated a "*uniquely Canadian*" test for determining when a court should refer jurisdictional questions to a tribunal, first. *Dell* ruled that courts can and should decide jurisdictional challenges that raise pure questions of law, implying strongly that judges are better at interpreting questions of law than arbitral tribunals. In Professor Daimsis' view, the *Dell* holding has seeped from its original context – referrals to arbitration – into other areas, including proceedings to challenge arbitral rulings on jurisdiction.

The panel discussed the evolution of Canadian case law on arbitral jurisdiction, which began with the "*powerful presumption*" set out in a British Columbia Court of Appeal judgment in *Quintette Coal Ltd.* that an international arbitration tribunal acts within its jurisdiction. In 2011, the Ontario

Court of Appeal in *Cargill* applied a non-deferential standard of review from Canadian administrative law – the correctness standard – to a post-award challenge to the jurisdiction of a NAFTA tribunal. In *Cargill*, the court put significant weight on the decision of the UK Supreme Court in *Dallah*,, which also considered an international tribunal's jurisdictional holding *de novo* (both *Cargill* and *Dallah* were previously discussed on this blog, for example here and here). Professor Karton observed that case law outside of Canada on the meaning of "*decide the matter*" is sparse, and that it is hard to read an element of deference into Article 16(3) of the Model Law. It would also be difficult to reconcile a deferential review under Article 16(3) with set-aside proceedings under Article 34, where there is no deference to a tribunal's findings on jurisdiction.

The panelists next considered whether express language delegating jurisdictional questions to the tribunal could achieve a deferential standard of review. In *First Options of Chicago*, the Supreme Court of the United States supported the application of a deferential standard of review of jurisdictional awards if the parties clearly and unmistakably reserved the issue for the tribunal. After *First Options*, lower courts have reached mixed results about whether parties do so by incorporating institutional arbitration rules that empower tribunals to decide their own jurisdiction. But that approach is not without controversy; the American Law Institute's recently published Restatement of the U.S. Law of International Commercial and Investor-State Arbitration proposes that such incorporation by reference does not satisfy the "clear and unmistakable" test. If the Restatement is followed, it would move U.S. law on this issue toward the non-deferential approach taken in Canada and the United Kingdom.

International highlights from CanArb Week 2023

Exploring Canada – Asia Dispute Resolution Opportunities

Prominent Canadian practitioners are in every major commercial centre around the world, and Canada's connections with Asia are rapidly developing. The Singapore International Arbitration Centre organized a panel of Prof. Benjamin Hughes (SIAC Court of Arbitration and Fountain Court Chambers), Donny Surtani (Crown Office Chambers/Arbitration Place), J. Christopher Thomas KC (JC Thomas Law Corporation), John Judge (Arbitra International/Arbitration Place) and Kevin Nash (SIAC Court of Arbitration) to discuss the significant economic and social ties between Canada and Asia. The panel noted growing demand for dispute resolution professionals across Asian markets, where Canadian practitioners are well-regarded as counsel and as arbitrators. The Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) is expected to enhance this key trade and investment corridor. In particular, the panelists pointed out the practical assistance to parties of having common law jurisdictions on both sides. Particularly after the decision of the Privy Council in *Convoy Collateral Ltd.*, this offers a robust platform for obtaining and enforcing conservatory measures from courts or, increasingly, from arbitral tribunals. The panel also noted that jurisdictions like Singapore and Hong Kong provide confidence in award enforcement, referring to the flexibility of the common law to adapt – such as the recognition of the *Marex* tort – to protect judgment creditors against unlawful interference by third parties.

What are the key dispute issues?

Elizabeth Robertson (ICDR) hosted a wide-ranging breakfast discussion about artificial intelligence, the role of arbitrators to encourage mediation, party involvement in procedural hearings, and the arbitrator's duty of disclosure. Brian Casey (Bay Street Chambers) and Robin Dodokin (Dodokin Law) debated the opportunities and pitfalls presented by AI. This issue is developing rapidly, and the panelists noted the advent of draft guidelines for the use of AI in arbitration published in August 2023 by the Silicon Valley Arbitration and Mediation Center.

The case for emergency relief

Alison FitzGerald (Bennett Jones) facilitated a discussion hosted by the Toronto Commercial Arbitration Society with Stephanie Cohen (Independent Arbitrator) and Prof. Loukas Mistelis (Clyde & Co) on emergency relief in arbitration. A need for emergency relief may arise in many ways, but common situations involve relief to stop the sale of products or services, to preserve licensing or brand value, to prevent draws on letters of credit, or to preserve evidence. The panelists noted that seeking emergency relief in court can have advantages, and certain courts have developed features and experience tailored to international parties, including the Southern District of New York, Singapore International Commercial Court, and courts in London and Paris. The clear trend, however, is in favor of interim relief from tribunals and emergency arbitrators, particularly where multiple jurisdictions are in play. Where to seek emergency relief is an important consideration for parties and their counsel, and the panelists noted that the courts of the seat of arbitration, or the location of assets or evidence – and possibly the location of the respondent – are generally safe options.

What is reasonable and appropriate for arbitrators to disclose?

The scope of arbitrator disclosure has been a hot topic in the wake of the UK Supreme Court's judgment in *Halliburton v. Chubb* and, in Canada, the Ontario Superior Court in *Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc. et al.* (which was recently discussed on this blog). Junior Sririvar (McCarthy Tetrault) moderated a panel of international experts to explore what is reasonable or appropriate across different contexts, including efforts to establish new guidelines and standards of practice. Sarah Vasani, FCIArb (CMS Cameron McKenna) provided an overview of the *Halliburton* case, noting that the UK Supreme Court, applying an objective standard, did not find a real possibility of bias, notwithstanding its conclusion that the arbitrator had failed to make required disclosures of appointments by a party during the pendency of the arbitration. The UK Law Commission's proposed revisions to the Arbitration Act 1996 would codify, consistent with *Halliburton*, that the relevant perspective under English law is objective: that of a fair minded and informed observer. Dana MacGrath, FCIArb (MacGrath Arbitration) noted that in the United States, "*evident partiality*" is the standard under Art. 10(b) of the Federal Arbitration Act. The FAA duty of disclosure may be supplemented by the rules of arbitral institutions in any given case. Early cases out of the United States focused on the financial interests of arbitrators, but the recent trend is to consider a broader context, including relationships between counsel and arbitrators. Vasuda Sinha (Freshfields Bruckhaus Deringer) explained that under the French Code of Civil Procedure, arbitrators have a duty to disclose "any circumstance"

that may affect his or her independence or impartiality. “Notorious” circumstances – such as reporting in widely read industry news – are excluded from the duty; information that is public, but requires substantial research to uncover, is not.

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