Kluwer Arbitration Blog

2023 Year in Review: A Look Back at Arbitration in Canada (Part 1)

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In 2023, Canadian courts were called to rule on a multitude of fascinating issues, including distinguishing arbitration from expert determination (*Clearspring Capital Partners II v. Logistik Unicorp Holdings*), exercising their inherent powers to appoint a notable international arbitration law firm as *amicus curiae* (*Hypertec Real Estate Inc. v. Equinix Canada Ltd.*), and holding that a third-party beneficiary of a contract must arbitrate contractual warranty claims when said contract provides for arbitration in "all disputes" (*Husky Oil Operations Limited v. Technip Stone & Webster Process Technology Inc.*). A few themes, however, appear to have dominated in various provinces: arbitrator independence and impartiality, unconscionability of arbitration agreements, procedural fairness, and the admissibility of new evidence in post-award proceedings. In addition to judicial developments, several initiatives and events enriched 2023. With the number of Canadian developments to be highlighted, this post proceeds in two parts. Part 1 addresses arbitrator impartiality and independence and the unconscionability of arbitration agreements, as well as salient events and initiatives, whereas Part 2 shines light on the courts' approach to procedural fairness and "fresh evidence."

Appointments or Facebook Friendships – Which Ones Give an *Aroma* of Arbitrator Conflict?

Arbitrator independence and impartiality was questioned last year by parties for a wide variety of reasons, including (unsuccessfully) because of Facebook friendships between arbitrators and counsel (*see, e.g.*, *Costco Wholesale Corporation* v. *TicketOps Corporation*, paras. 86-90, and *Tourigny v. Chabot*, para. 11). Two cases related to arbitral appointments, however, are worth mentioning (not least because both addressed the landmark UK judgment in *Halliburton v. Chubb* and the IBA Guidelines).

One previously discussed on this blog is *Aroma Franchise Company Inc. et al. v. Aroma Espresso Bar Canada Inc.*, wherein the Ontario Superior Court set aside a $10 million award because of an undisclosed subsequent arbitral appointment.

The second one is *Vento Motorcycles, Inc. v. United Mexican States*, wherein the same court refused to set aside a NAFTA award rendered in an ICSID-administered arbitration, despite finding that the arbitrator's conduct gave rise to a reasonable apprehension of bias (paras. 117-132). Vento

sought to set aside the award pursuant to Arts. 34(2)(a)(ii) and 34(2)(iv) of the Model Law. With respect to the latter, Vento questioned the impartiality of Mexico's appointee because during the arbitration the State offered and awarded [the arbitrator] prestigious and potentially lucrative opportunities to be listed on panels of arbitrators under two different trade agreements," a fact of which Vento became aware through public sources only after the award was rendered. Namely, Mexico had indicated to its appointee the intention to put him forward for these rosters but only confirmed that appointment on the day that the award was issued.

The Court agreed with Vento that, even though they do not involve any direct financial compensation and do not constitute actual appointments to panels, appointments to rosters of panelists are valuable professional opportunities and, on their own, were reasons enough to give rise to a reasonable apprehension of bias (paras. 118, 121). The Court opined that, "as a result of Mexico holding out the possibility of the appointments to the rosters during the arbitration, […] an informed person, viewing the matter realistically and practically, would conclude that it is more likely than not that [said arbitrator], whether consciously or unconsciously, would have 'a leaning, inclination bent or predisposition towards' Mexico, or that he could be influenced by factors other than the merits of the case as presented by the parties in reaching his decision" (para. 120). Said arbitrator was, therefore obliged to disclose the State's "offers" to appoint him to those rosters because those offers were likely to give rise to justifiable doubts as to his impartiality or independence. The fact that neither he nor Mexico disclosed these circumstances only compounded the finding of a reasonable apprehension of bias.

Yet, the Court decided to exercise its "discretion under [Article 34(2) of the Model Law] not to set aside the award." In considering whether to exercise that discretion, the Court held it could examine factors such as "the seriousness of the breach, the potential impact of the breach on the result, and the potential prejudice flowing from the need to redo the arbitration were the award to be set aside" (para. 123).

In the Court's view, the "potential impact of the breach on the result" was the most important factor in this case because the arbitrator in question was not a sole arbitrator, rather a member of a three-person tribunal. In reaching its conclusion the Court appears to have made several assumptions about the tribunal's inner workings (and arguably minimized the relevance of some uncontested facts):

- Mexico's appointee spent significantly more time on the case than the other two arbitrators. Yet, the Court concluded that this did not mean that the other two arbitrators were not involved in the drafting because adopting such a view would be, first, "contrary to the strong presumption of impartiality and independence that applies with respect to [those two arbitrators]," and, second, "inconsistent with the role of the President of the Tribunal under the ICSID Rules" which is to "preside at its deliberations" (paras. 126).
- Because there was no evidence that the arbitrators were regularly sitting together, the Court held that "tasks *could not* be rotated among the arbitrators and it *appears unlikely that the Tribunal would have adopted* a process where one arbitrator would have been assigned the task to go through the case to brief the other arbitrators."
- Since all arbitrators signed the award, the Court's "reasonable conclusion [was] that all three arbitrators shared the same view as to the disposition of the arbitration and the reasons set out in the award" (para. 127).

The Court's comments regarding the "seriousness of the breach" are somewhat puzzling: the Court

underscored the absence of any "suggestion that [the arbitrator]'s conduct during the arbitration gave rise to a reasonable apprehension of bias" (despite having concluded, a few paragraphs above this statement, that the offers of appointment were "sufficient in themselves to give rise to a reasonable apprehension of bias").

The Court's assessment of the "potential prejudice flowing from the need to redo the arbitration," is arguably also somewhat questionable. Apart from arbitration costs and the duration of the arbitration, the Court considered the fact that the events underlying the dispute between the parties took place approximately 20 years ago. In the Court's view, "ordering the parties to redo the arbitration […] would raise serious concerns regarding the impact of a considerable amount of time on witnesses' recollections." Was the Court here crossing a bridge it had not reached?

Uber Echoes

In 2020, the Supreme Court of Canada's judgment in *Uber Technologies Inc. v. Heller* sent shockwaves across the legal community (this judgment was previously discussed, *e.g.*, here and here). These were still felt in 2023, as parties tried to avoid arbitration and proceed in courts by arguing that their arbitration agreements were unconscionable, oftentimes unsuccessfully (see, e.g., two British Columbia cases: *Spark Event Rentals Ltd. v. Google LLC* and *Petty v. Niantic Inc.*; the unconscionability argument was also addressed in *Costco*, paras. 80-82, albeit in the context of post-award proceedings). In *Lochan v. Binance Holdings Limited*, however, the Ontario Superior Court refused to stay court proceedings, finding that the parties' arbitration agreement was unconscionable. Plaintiffs commenced a proposed class action under section 133 of the Ontario *Securities Act* against the world's largest crypto trading platform, Binance. The latter sought to stay the class action in favour of HKIAC arbitration under Hong Kong law. The Court refused the stay, finding that plaintiffs signed an "unnegotiable 'click' contract" where the "details, including the changeable location of the arbitration clause, were buried out of sight, and the logistical complexity and expense of arbitration were not revealed anywhere" (para. 50). Because "Binance […] engineered the arrangement to take advantage of the complexity that was hidden behind the superficially benign appearance of an arbitration clause," the Court deemed that the "information deficit was at a maximum" (para. 51). The idea that accepting Binance's approach, *i.e.*, "giving the contractually stipulated foreign law primacy over Ontario's regulatory regime," would pit "the policy objectives of arbitration statutes directly against the policy objectives of securities legislation in a way that makes no overall sense" (para. 43) likely reassured the Court in its decision to refuse a stay.

Events and Other Initiatives

During the past year, numerous arbitration-related events were scattered across the country. To name just a few, members of the Canadian and international arbitration community had the opportunity to explore salient issues related to energy and climate change disputes at the joint ICCA-VanIAC Conference in Vancouver, explore forces and technologies driving change in international dispute resolution at ICC Canada conference in Toronto, and ponder over a number of other topics during the CanArb Week, also in Toronto.

During CanArb Week, the Young Canadian Arbitration Practitioners ("YCAP"), in cooperation

with the Secretariat, released a report that will be invaluable in understanding "The Cost of Arbitration in Canada".

** 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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