Kluwer Arbitration Blog

2023 Year in Review: A Look Back at Arbitration in Canada (Part 2)

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This Part 2 continues reflections on key arbitration-related developments in Canada during 2023. Whereas Part 1 addressed the courts' approaches to arbitrator independence and impartiality and the unconscionability of arbitration agreements, this Part 2 shines light on different takes on procedural fairness and "fresh evidence" in post-award proceedings.

What is "Proper Notice"?

The past year has seen a plethora of international arbitral awards recognized in Canadian provinces, despite attempts to challenge them on various grounds, such as: (a) the award allegedly pertaining to issues that were not covered by the agreement and the award not being capable of prospective execution thereby making it impossible to determine post-award penalties and interest (*Chenco Chemical Engeneering and Consulting v. DFD Fluoride Chemicals Co. Ltd. (China PR)*); (b) the awards not being for a "definite and discernable amount" (*Costco Wholesale Corporation v. TicketOps Corporation*); (c) the party being unable to present its case (*Prospector PTE Ltd. v. CGX Energy Inc.*), including because the arbitration clause provided for a summary procedure of only two days and did not permit the participation of third parties or a party was not permitted to depose witnesses (*Costco*) or because the arbitrator ignored or failed to consider or admit certain evidence (*EDE Capital Inc. v. Guan* ("*EDE Capital*") and *Vento Motorcycles, Inc. v. United Mexican States* ("*Vento*")); (d) the tribunal exceeding its jurisdiction (*EDE Capital*), or (e) the tribunal's composition not being in accordance with the parties' agreement (*Vento* and *IC2 Fund v. Wires*).

One notable exception is *Tianjin Dinghui Hongjun Equity Investment Partnership v. Du* ("*Tianjin*") where the Ontario Superior Court refused to recognize an award due to improper notice. The case concerned an award of the Shenzhen Court of International Arbitration ("SCIA") arbitral tribunal. Though respondents appeared to be represented by counsel during the arbitration, they later argued that they had no actual knowledge of the arbitration proceeding or that said counsel represented them in it. The respondents first unsuccessfully sought to set the award aside in China. After the award was recognized in China and in Hawaii in *ex parte* "special proceeding," respondents learned of the latter and moved to dismiss the "special proceeding." Respondents succeeded on their motion, with the Hawaii State court finding that "a court […] need not recognize a foreign country judgment if the defendant in the proceeding in the foreign court did not

receive notice of the proceeding in sufficient time to enable the defendant to defend."

In the meantime, recognition proceedings in Canada were already underway, and the hearing on plaintiff's application to recognize the award had already taken place. Once respondents obtained the Hawaii judgment, they sought to introduce it and the transcript of the Hawaii hearing in the Canadian proceeding as "fresh evidence." Though the Ontario Superior Court refused to admit these documents, it agreed that respondents had not received proper notice of the arbitration proceeding, such that the award could not be recognized in Ontario as per Art. 36(1)(a)(ii) of the Model Law.

The Court rejected plaintiff's argument that arbitration materials were notified in accordance with the notification instructions envisaged in the parties' contract because:

- plaintiff's principal knew that the respondents were in Canada in March 2020 and their return to China was uncertain due to the pandemic-related restrictions;
- plaintiff made no attempt to engage in "friendly consultation" or "amicable negotiation" with the respondents;
- SCIA's packages addressed to the respondent's domicile and company addresses were returned as undeliverable;
- having been in contact with one of the respondents and having other means of communicating with him (*e.g.*, WeChat), plaintiff did not advise the SCIA that the respondents might still be in Canada or suggest any other means of contacting them outside of Chian during the "unprecedented times" (para. 76).

The re-delivery of packages at the company address that were signed for by the designated representative for service on the company (with which the two respondents were affiliated) was not considered as proper service (para. 76).

While recognizing that "the court should defer to decisions made by the court in the seat of the arbitration on questions decided by that court," the Ontario court held that the Chinese court that refused to set the award aside had not addressed the issue of "proper notice" (para. 88). Plaintiff's Chinese law expert's evidence that personal service on the respondents was not required under the SCIA rules or Chinese law, in the Ontario court's view, did not "address the specific requirements of Article 36(1)(a)(ii) of the Model Law regarding 'proper notice'" (para. 90). Neither did the notice to respondents' alleged counsel amount to "proper notice" because the law firm in question was purporting to act for the respondents without their direct authorization or instructions (para. 116). Notably, the SCIA had satisfied itself with the power of attorney and copies of respondent's identity documents that the law firm filed. Ordinarily, "a party's participation in a proceeding (including through counsel) would […] evidence that a party had notice of that proceeding" (para. 97). Here, however, the power of attorney was not signed by the respondents personally, rather by someone purporting to have their power of attorney who was an authorized representative of the other corporate arbitration respondents represented by the law firm in question (para. 98). The Ontario Court, therefore, concluded that "notice received by [the law firm] acting under the power of attorney signed by another power of attorney does not amount to proper notice" (para. 108).

Given its findings with respect to notice, the Court did not delve into the respondents' public policy argument, and only noted that public policy was "'truly an exceptional defence' that only applies to acts that are 'illegal in the forum […] or repugnant to the orderly functioning of social or commercial life' such as awards resulting from 'corruption, bribery, fraud and similar serious

cases'" (para. 121).

Reading this case one might wonder: how appropriate is it to burden a party with verifying that the opposing counsel is the truly authorized representative? Is it unreasonable for a party to assume that the corporate respondent's chairman (who is also a respondent) would be aware of an arbitration, if the corporate respondent is participating in the arbitration? Should arbitral institutions reassess their processes to make sure this case remains a lone instance?

How "Fresh" is the Evidence Introduced in Post-award Judicial Proceedings?

A recurring issue debated across the country over the past couple of years has been the type of assessment that courts are entitled to perform when an arbitral tribunal's decision on jurisdiction is contested in accordance with Art. 16 of the Model Law: is it a *review* or a *de novo* determination? Last year was no exception. The position that appears to have become entrenched is: *de novo*, meaning that courts "can and may entirely disregard [an arbitral tribunal's] competence decision" (*Hypertec Real Estate Inc. v. Equinix Canada Ltd.*, paras. 22, 25; see also *Luxtona*, para. 40).

One of the practical consequences of this stance is that parties frequently seek to adduce new evidence when requesting annulment / set aside, or opposing recognition and enforcement. This, in turn, prompts the following question: can such evidence be adduced as of right or must it meet some test? In June 2023, in the *Luxtona* saga, which was previously discussed on this blog (*see, e.g.*, here and here), the Court of Appeal for Ontario confirmed that *Dallah* was the "leading case in the area" and upheld the Divisional Court's judgment which stated that evidence could be adduced as of right. It is somewhat reassuring that the Court of Appeal noted that "where a party has participated fully in the arbitration, its failure to raise a piece of evidence before the tribunal may be relevant as to the weight the court should assign that evidence" (para. 42).

Luxtona, however, is not the only case on the matter, nor is it universally applicable in all situations. This is evident from a March judgment of the Ontario Superior Court in *Tianjin*, which did not even mention *Luxtona*. In *Tianjin*, respondents challenged the award on grounds of public policy, lack of notice of the arbitration proceeding, and lack of opportunity to present their defence. The Court held that two requirements guided the exercise of its discretion when deciding whether to consider fresh evidence: "(i) would the evidence, if presented at the hearing, probably have changed the result (e.g. is it relevant and material to the issues in dispute); (ii) did the evidence exist, and could it have been obtained before the hearing by the exercise of reasonable diligence?" (para. 30).

In November 2023, the Ontario Superior Court in *Xiamen International Trade Groupe Co., Ltd. v. LinkGlobal Food Inc.* recalled another test, which it had established in 2021 in *Vento* and which is applicable when the award is challenged on procedural fairness grounds (*Xiamen*, para. 41). Because "procedural fairness grounds are conceptually distinct from jurisdictional grounds," the Superior Court in *Vento* held that the appropriate test was the test applicable on applications for judicial review (*Vento*, paras. 44, 50).

It is worth mentioning that the term "fresh evidence" has been used to denote two things: (i) evidence that was not put before the arbitrators and is only being advanced in court proceedings, and (ii) evidence that was not introduced before the court hearing on the annulment / set aside / recognition application and is only presented later. An example of the latter case is *China Yantai*

Friction Co. Ltd. v. Novalex Inc. where the Ontario Superior Court held that, because respondent sought to introduce multiple affidavits before the application for recognition of an arbitral award was heard, those affidavits did not constitute "fresh evidence". As such, the Court did not apply the *Tianjin* nor any other test (paras. 37-39).

What to Expect in 2024?

Though there are no evident contenders for a Supreme Court ruling yet, this year might hopefully bring some clarity with respect to the applicability of the *Vavilov* test in appeals of domestic commercial arbitral awards, a question that remained largely unresolved in 2023. A bit more predictability when it comes to "fresh evidence" in post-award proceedings would also be appreciated.

In terms of events, the calendar for 2024 is already looking very promising, with the Western Canada Commercial Arbitration Society ("WCCAS") conference taking place in Calgary on May 7, CanArb Week returning to Toronto on June 3-4, ICC Canada conference moving to Vancouver on October 10 and the ADR Institute of Canada ("ADRIC") conference celebrating the organization's 50th anniversary in Toronto on October 23-25.

Readers may also look forward to the "Canadian Arbitration Report" which is being prepared by the Chairs of the Report, Janet Walker, CM and Hon. Barry Leon, with the assistance of FTI Consulting, and based on the Canadian Arbitration Survey information collected and processed by FTI Consulting. The Report will document and shed light on the practice of domestic and international commercial arbitration by arbitrators, arbitration counsel, arbitral assistants, and experts – and by businesses – based in Canada.

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

Additional 2023 year in review posts are available here.

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