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Commercial Arbitration and the Canadian Justice System: Recent Decisions of the Supreme Court of Canada

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Overview

Commercial arbitration – both domestic and international – is an established and frequently employed dispute resolution mechanism in Canada, and one that is legislatively protected. With respect to international commercial arbitration in particular, the accepted culture and approach is consistent with the 1985 UNCITRAL Model Law on International Commercial Arbitration (the Model Law); that is to say, the courts take a very non-interventionist approach. There are some limits to this, though, which we will discuss.

We begin this chapter with a brief background on Canadian arbitration legislation. We then discuss *Seidel v TELUS Communications Inc*[1] and *Yugraneft Corp v Rexx Management Corp*,[2] the Supreme Court of Canada's most recent decisions that analyse and explain how the Canadian justice system and private arbitration processes co-exist. *TELUS* deals with the relationship between consumer protection legislation, class actions and mandatory arbitration clauses, and *Yugraneft* with the interaction between local Canadian limitation periods and the enforcement of foreign arbitral awards in Canada. These decisions significantly add to the Supreme Court's body of case law on arbitration in Canada and provide clarity to users of commercial arbitration.

Arbitration legislation in Canada

International commercial arbitration started to become a respected substitute for court proceedings in Canada in the late 1980s and early 1990s, as Canada's federal and provincial governments realised its relevance and importance to Canada's commitment to international trade and commerce. In 1986, Canada became a signatory to the United Nations Convention on the Reciprocal Recognition and Enforcement of Foreign Arbitral Awards, which was adopted by the United Nations Conference on international commercial arbitration in New York on 10 June 1958 (the New York Convention). This led the way to the adoption of the New York Convention and, later, the Model Law as part of local law in Canada.[3]

Canada is a confederation of ten provinces and three territories, each of which has a separate and independent judicial system, as does the federal jurisdiction. Each jurisdiction controls court proceedings and the administration of justice therein, including alternative dispute resolution procedures. As such, each Canadian jurisdiction, including the federal jurisdiction, has a separate commercial arbitration regime – though, notably, these regimes resemble one another.

The provincial legislation governing commercial arbitration divides it into two categories: international commercial arbitration and domestic arbitration. Each province has both a domestic arbitration act and an international arbitration act, which adopts the Model Law as the law applicable to commercial arbitrations that are international in scope. In general, the domestic acts apply to any arbitration under an arbitration agreement unless it is excluded by some other act or law or the international act applies. In Ontario, for example, the International Commercial Arbitration Act, RSO 1990, chapter I.9 governs international commercial arbitrations. It adopts the Model Law, with some modifications, and incorporates the Model Law as a schedule to the act. The Arbitration Act, 1991, SO 1991, chapter 17 governs domestic arbitrations. It applies to any arbitration unless its application is excluded by law or the International Commercial Arbitration Act applies. The federal government has also adopted the Model Law, with some modifications, for all commercial arbitrations, both domestic and international, which fall within the federal jurisdiction.[4]

The provincial international arbitration acts allow domestic courts to intervene in an international commercial arbitration only on very restricted grounds. Further, the international arbitration acts do not provide for rights of appeal to the domestic courts unless the parties expressly provide for an appeal in their arbitration agreement. By contrast, the domestic arbitration acts allow for greater court involvement in domestic arbitrations.

TELUS – Consumer arbitration clauses and class actions

Introduction

On 18 March 2011, the Supreme Court released its decision in *TELUS*. In that case, the plaintiff, Ms Seidel, had commenced an intended class action in the British Columbia Supreme Court, notwithstanding an arbitration clause in her contract, to the effect that any claim, dispute or controversy arising out of or relating to the contract should be referred to and determined by private and confidential mediation and, failing a settlement, by arbitration. Under her contract, Ms Seidel also waived any right to commence or participate in any class action against TELUS.

Ms Seidel's complaint was that TELUS unlawfully charges its customers for incoming calls based on when the caller connects to TELUS's network, but before the customer answers the call. Her claims (for declaratory and injunctive relief, and damages) were principally based on sections 171 and 172 of the British Columbia Business Practices and Consumer Protection Act, SBC 2004, chapter 2 (BPCPA). Section 3 of the BPCPA, which was central to the appeal, provides as follows:

> *Any waiver or release by a person of the person's rights, benefits or protections under this Act is void except to the extent that the waiver or release is expressly permitted by this Act.* [Emphasis added.]

The British Columbia Court of Appeal, overturning the judge of first instance, stayed Ms Seidel's action in favour of arbitration. Section 15 of the Commercial Arbitration Act, RSBC 1996, chapter 55 (the CAA) provides that where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, the defendant may apply to have the action stayed.

The issue on appeal to the Supreme Court of Canada was whether Ms Seidel's claims under the BPCPA had been prop-

erly stayed. The principal question was whether section 3 of the BPCPA created an exception to the mandatory language of section 15 of the CAA. Stated differently: did section 3 mean that claims under sections 171 and 172 could only be heard by a court and not by an arbitral tribunal?

Discussion

Competence-Competence Principle

In a split 5-4 decision, the Supreme Court ruled that section 3 of the BPCPA did, in fact, create such an exception. There was no disagreement that the competence-competence principle had general application.[5] It is now beyond doubt in Canada that an express legislative direction that arbitrators are to consider the scope of their own jurisdiction, coupled with the use of language similar to that found in the New York Convention and the Model Law amounts to incorporation of the competence-competence principle.

In such circumstances, absent a challenge to the arbitrator's jurisdiction based solely on a question of law (or one of mixed fact and law requiring only superficial consideration of the evidence in the record), the existence or validity of an arbitration agreement to which legislation like the CAA applies must be considered first by the arbitrator, and the court should grant the stay. In this case, all judges of the Supreme Court agreed that the British Columbia Court of Appeal had properly accepted and endorsed this approach. However, the Supreme Court was divided as to the correct result of that approach on the facts of this case.

The effect of section 3 of the BPCPA

It is readily apparent from how the majority and the dissent, respectively, characterised the core issue that the court is deeply divided about the role of arbitration in today's Canadian justice system. Justice Binnie,[6] for the majority, framed the issue as one of "access to justice", noting that "private arbitral justice, because of its contractual origins, is necessarily limited".[7] The dissenting opinion, penned by Justices LeBel and Deschamps, focused not on access to justice simpliciter but, rather, whether access to justice must mean "access to a judge". They observed as follows:

> *In an effort to promote and improve access to justice, and to make more efficient use of scarce judicial resources, legislatures have adopted new procedural vehicles designed to modify or provide alternatives to the traditional court action. These alternatives include class actions and arbitration, both of which have been endorsed by this Court. In this case, the consumer's contract provides that in the event of a dispute, the exclusive adjudicative forum is arbitration. This is a forum our courts have long accepted as an efficient and effective access to justice mechanism. Thus, the question in this case is instead whether access to justice means – and requires – access to a judge.*[8]

In contrast, Justice Binnie concluded that section 3 of the BPCPA should be interpreted to mean "that to the extent the arbitration clause purports to take away a right, benefit or protection conferred by the BPCPA, it will be invalid".[9] Embedded in this reasoning is the notion that it is a right, benefit or protection under the BPCPA to assert a consumer complaint in the courts. The corollary is that being required to assert the same complaint before an arbitral tribunal is tantamount to an impairment of such right, benefit or protection. Justice Binnie offered two justifications for his approach:

- In the consumer context, declarations and injunctions (remedies provided for under the BPCPA) are the most efficient remedies in terms of protection of consumers' interests and the deterrence of wrongful suppliers' conduct;[10] and
- By contrast, arbitrations are "private and confidential", lack precedential value and an order made by an arbitrator would not bind third parties.[11]

The dissenting judges were unusually critical of the majority's approach, noting: "In our view, [the majority's] interpretation represents an inexplicable throwback to a time when courts monopolized decision making and arbitrators were treated as second-class adjudicators."[12] To explain their position, Justices LeBel and Deschamps first carefully reviewed Canadian jurisprudence on arbitration, concluding that, until the late 1980s, Canadian courts had been openly hostile towards arbitration. That hostility eventually gave way to a new approach, under which, where a legislature intends to exclude arbitration as a vehicle for resolving a particular category of legal disputes, it must do so explicitly.[13]

Next, they explained that the CAA was influenced by the Model Law.[14] As to the proper interpretation of the BPCPA, they reasoned that section 3 was intended to protect substantive rights – however, in what forum these rights are to be dealt with is a procedural matter:

> *An arbitrator can grant the remedies contemplated in s. 172 of the BPCPA against TELUS. The arbitration agreement between Ms. Seidel and TELUS does not therefore constitute an improper waiver of Ms. Seidel's rights, benefits or protections for the purposes of s. 3 of that Act. Consequently, the BPCPA, in its current form, does not provide a court considering a stay application under s. 15 of the CAA with a reason for refusing to grant it. Section 3 of the BPCPA does not prohibit agreements under which consumer disputes are to be submitted to arbitration or that otherwise limit the possibility of having a proceeding certified as a class proceeding, since s. 172 of the BPCPA merely identifies the procedural forum in which an action with respect to the rights, benefits and protections provided for in s. 172 may be brought in the public court system. However, s. 172 does not explicitly exclude alternate fora, such as an arbitration tribunal from acquiring jurisdiction.*[15]

Implications

One may debate why the majority considered section 3 of the BPCPA to reflect a legislative intent to oust the parties' clear choice in favour of arbitration.[16] The contention that section 172 of the BPCPA confers a right, benefit or protection that is sheltered under section 3 of the BPCPA presupposes that having to bring a section 172 claim in an arbitration proceeding constitutes an impairment of a substantial right. However, given the evolution and acceptance of commercial arbitration in Canadian courts in the past two decades, that presupposition is open to discussion.

The majority's argument that arbitration is antithetical to the public purposes of section 172 (in that private arbitration cannot offer the same remedies set out in section 172) is also not so clear cut. Firstly, any arbitral award is enforceable in the courts and thus open to public scrutiny. This would also engage the principle of deterrence, with which the majority appears to have wrestled. Moreover, as the dissent correctly pointed out, under modern statutes in Canada, including in British Columbia, arbitrators have the jurisdiction to grant "specific performance, rectification, injunctions and other equitable remedies".[17] Viewed in this light, there is considerable scope to suggest that the dissenting reasons may be more persuasive.

In the final analysis, however, the Supreme Court may simply have added British Columbia to the list of existing jurisdictions where consumer class actions will be permitted to proceed (subject to meeting the usual certification requirements) even in the face of clear arbitration agreements. The result is therefore not remarkable and it appears that – except in the consumer context and even then only where the legislature has intervened – commercial arbitration in Canada will continue to thrive, as it has over the past 20 or so years.

Yugraneft – Enforcement of foreign arbitral awards and local limitation periods

Introduction

In Canada, final arbitration awards are recognised as legally binding between parties without the need for any judicial proceedings. However, a party that wishes to enforce a final award by the customary means of seizure and sale, garnishment, contempt and the like, must first apply to the local court to obtain judgment enforcing the award. Usually, this is a straightforward summary proceeding. While this seems simple in theory, the reality can be more complex. When it comes to the enforcement of an arbitral award, the local rules of the enforcing jurisdiction are engaged. Most significantly, local limitation periods apply, as the Supreme Court recently decided in *Yugraneft*.

In *Yugraneft*, it was held that the imposition of a time limit for the enforcement of an international commercial arbitral award is a procedural rule permitted by article III of the New York Convention. Consequently, the question as to whether the enforcement of an arbitration award is subject to any time limit depends on the wording of any limitations legislation in the province where the award is sought to be enforced.

In this case, Yugraneft Corporation, a Russian company in the business of developing and operating oilfields in Russia, purchased materials from Rexx Management Corporation, an Alberta company. Following a contractual dispute and an international commercial arbitration before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation on 6 September 2002, the tribunal awarded just under US$1 million to Yugraneft. On 27 January 2006, Yugraneft applied to Alberta's Court of Queen's Bench for recognition and enforcement of the award. The application was dismissed and an appeal to Alberta's Court of Appeal was unsuccessful. Leave to appeal to the Supreme Court was granted which, following oral argument in December 2009, issued its ruling dismissing the appeal on 20 May 2010.

Discussion

Applicable limitation periods

The principal issue was whether the enforcement proceeding was subject to any limitation period and, if so, whether it should be the two year period applicable to a "remedial order" (section 3 of Alberta's Limitations Act, RSA 2000, chapter L-12) or the 10-year period applicable to a "judgment or order for the payment of money" (section 11). Yugraneft argued that section 11 should apply since a foreign arbitral award possesses all the hallmarks of a judgment and because there was ambiguity as to whether section 3 was intended to apply. Rexx argued that section 3 should apply since the Alberta legislature intended the two-year limitation period to apply to all causes of action, unless one of the exceptions enumerated in the Limitations Act expressly applied.

On the threshold issue as to whether the imposition of a local limitation period for the enforcement of a foreign award was contrary to the New York Convention, the Supreme Court held that this was a procedural – and therefore permissible – rule:

- As a treaty, the New York Convention should be interpreted in good faith in light of its object and purpose. When it was drafted, it was well known that common law states generally treated limitation periods as procedural in nature. The permissive language in article III (as opposed to an express prohibition) suggests that the drafters intended to permit limitation periods to be established by and in Contracting States.[18]
- In fact, 53 Contracting States have subjected the enforcement of foreign arbitral awards to some form of time limit.[19]
- The application of time limits "is not a controversial matter" given that leading scholars take it for granted that article III permits local limitation periods.[20]

In concluding that section 3 of the Limitations Act applied to a foreign award, the Supreme Court held that an arbitral award is not a judgment or a court order and that, in general, "arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators".[21] The Supreme Court further pointed out that other statutes, like Alberta's Reciprocal Enforcement of Judgments Act, RSA 2000, chapter R-6 (RESA)[22] and British Columbia's Limitation Act, RSBC 1996, chapter 266, expressly referred to judgments and awards when prescribing limitation periods, whereas the Limitations Act did not.

Discoverability

The Court also held that the two-year limitation period in section 3 of the Limitations Act was subject to the discoverability rule, which "makes ample allowance for the practical difficulties faced by foreign arbitral creditors, who may require some time to discover that the arbitral debtor has assets in Alberta".[23] The Court then established the following rules for determining when a limitation period, such as the one set out in section 3 of the Limitations Act, begins to run in respect of enforcing a foreign award:

- the limitation period will not be triggered until the possibility that the award might be set aside by the local courts in the country where the award was rendered has been foreclosed;
- even then, the time limit will not be engaged until the creditor knew or ought to have known that the bringing of an enforcement proceeding was warranted;
- an enforcement proceeding will be warranted only once the creditor has learned, exercising reasonable diligence, that the debtor possesses assets in the relevant jurisdiction; and
- when the underlying contract identifies the jurisdiction in which the debtor is registered (or has an office), it is presumed that the creditor knows or ought to know that a proceeding is warranted.

Implications

The Supreme Court has – at least for the time being – resisted the opportunity to pronounce that arbitral awards are at least functionally equivalent to judgments. This is perhaps somewhat surprising given that the Supreme Court has, in the past decade, consistently held that arbitral proceedings are "autonomous" and are to be afforded judicial deference (see, eg, *Desputeaux v Éditions Chouette (1987) inc*, 2003 SCC 17; *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34; and *Rogers Wireless Inc v Muroff*, 2007 SCC 35). On the other hand, the Supreme Court has clarified what until now had been an arguably ambiguous issue and promulgated clear rules, providing certainty for users of commercial arbitration.

Conclusion

In Canada, there is a vibrant arbitration culture involving seasoned counsel as well as neutrals. Recently, for example, the Toronto Commercial Arbitration Society was founded. Its mission is to promote and develop a world centre in Toronto for arbitration excellence to resolve international and domestic disputes by providing qualified arbitrators, experienced counsel, innovative research and a supportive legal environment, regardless of the location of the parties or their systems of law. It also seeks to promote the use of arbitration to resolve commercial disputes.[24]

This vibrancy is the result of a judicial system that is deferen-

tial toward alternative dispute resolution mechanisms, but which, nonetheless, has established clear limits on arbitrations. Notably, however, the Canadian judicial system has also clearly articulated that – generally speaking – agreements to arbitrate will be upheld in Canadian courts of law.

Notes

1 2011 SCC 15 [*TELUS*].
2 2010 SCC 19 [*Yugraneft*].
3 J Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (Huntington, NY: Juris Publishing, Inc., 2005) at 2-4.
4 Ibid at 21 and 23.
5 Ibid, para 29 and 89-121.
6 Justice Binnie resigned shortly after this decision was released, as did Justice Charron, who sided with the dissent.
7 Ibid, para 7 and 22.
8 Ibid, para 52.
9 Ibid, para 31.
10 Ibid, para 35.
11 Ibid, para 35, 38-39.
12 Ibid, para 55.
13 Ibid, para 89-121, esp para 103.
14 Ibid, para 109-121, esp para 109-110.
15 Ibid, para 164.
16 See the Ontario Consumer Protection Act, 2002, SO 2002, chapter 30 Sched A, section 7.
17 *TELUS*, supra at para 146-148.
18 *Yugraneft*, supra at paras 19-20.
19 Ibid at para 21.
20 Ibid at para 22.
21 Ibid at para 44.
22 The RESA has a six year limitation period for the enforcement of judgments and arbitral awards rendered in reciprocating jurisdictions, which Russia is not; hence, Yugraneft's application was brought under the Model Law, as enacted in Alberta pursuant to the International Commercial Arbitration Act, RSA 2000, c I-5.
23 *Yugraneft*, supra at para 49.
24 See http://torontocommercialarbitrationsociety.com.

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Mike is the co-lead of FMC's National ADR Practice Group in addition to also being the department manager of the FMC Toronto Litigation Practice Group. Mike focuses on the resolution of complex commercial disputes in the financial and resources industries. Mike has appeared at all levels of Ontario courts and the Supreme Court of Canada. He has acted as arbitration counsel on many ad hoc and institutional arbitrations, both domestic and international. Mike has taught and written extensively about ADR. He is an executive member of the National ADR Section of the Canadian Bar Association, as well as a member of the Toronto Commercial Arbitration Society. In August 2011, he co-chaired a half-day programme on ADR at the Annual Meeting of the CBA.

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Tammy is the co-chair of FMC's National ADR Practice Group in addition to being the department manager of the FMC Calgary Commercial Litigation Group. Tammy's depth of experience and commitment to client service is reflected in the variety and calibre of her work over the past 23 years as a litigator at FMC. She was most recently recognised in *Chambers Global 2011 Guide* as a leading dispute resolution lawyer.

Tammy has appeared before all levels of the Alberta courts, as well as the BC Supreme Court and the Federal Court of Canada. She is frequently called upon to speak and present on topics related to advocacy, principled negotiation and mediation, and litigation practice (both within the firm and to other members of the bar).

Tammy has represented clients in a wide variety of commercial disputes. Currently, her practice focuses on clients in the energy, telecommunications and financial sectors regarding complex claims involving environmental, commercial and intellectual property issues.

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Chloe is an associate with FMC's Litigation and Dispute Resolution Group. Her practice involves a variety of commercial and civil litigation matters. Chloe has experience in estate litigation matters as well as in trusts and estates litigation. Alternative dispute resolution is a significant part of her practice and she has recently acted as co-counsel in an ad hoc international arbitration.

During law school, Chloe participated in the Callaghan Memorial Moot, in which her team placed first and won the award for best respondent factum. While pursuing her JD, Chloe also studied at the Centre for Transnational Legal Studies in London, England, a programme run by the Georgetown University Law Centre JD, BA

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