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The Baker McKenzie **International Arbitration Yearbook**

Canada

Canada

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A. Legislation and rules

A.1 Legislation

International arbitration in Canada continues to be, for the most part, a matter of provincial and territorial jurisdiction. Each province and territory has enacted legislation adopting the UNCITRAL Model Law, occasionally with slight variations, as the foundational law for international arbitration. Canada's federal parliament has also adopted a commercial arbitration code based on the Model Law, which is applicable when the federal government or one of its agencies is a party to an arbitration agreement or where a matter involves an area of exclusive federal jurisdiction under Canada's constitution. In addition, each of the provinces and the federal government has, either directly or indirectly, adopted the New York Convention.

In March 2014, the Uniform Law Conference of Canada (ULCC) released a final report and commentary with recommendations for the implementation of a new Uniform International Commercial Arbitration Act (the "Uniform Act"), updating Canada's laws relating to international commercial arbitration in accordance with the 2006

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Model Law amendments. The ULCC has since approved the Uniform Act, which is open for adoption into federal and provincial legislation.

A.2 Institutions, rules and infrastructure

Canada remains a jurisdiction that strongly supports international arbitration. In particular, organizations such as the Toronto Commercial Arbitration Society (TCAS), the Western Canada Commercial Arbitration Society (WCCAS) and Young Canadian Arbitration Practitioners (YCAP) are dedicated to the continued awareness and promotion of arbitration.

Canadian cities, such as Toronto, Montreal, Calgary and Vancouver are frequently considered for the seat of arbitration. Canada is distinct in having a dual heritage of common law and civil law (in the province of Québec). Canada offers highly regarded international arbitrators and experienced arbitration counsel. It has excellent hearing facilities, quality interpretation and translation services, modern and efficient transcription services, and highly qualified experts. Canada also has a stable political system and reasonable visa entry requirements.

There are two main local arbitration institutes in Canada: ADR Chambers and the ADR Institute of Canada (ADRIC). Canada has also attracted the presence of the ICDR, the ICC and JAMS. The ICDR has established itself in Canada, offering dispute resolution services for international and domestic disputes nationwide. ICC Canada operates through the Canadian Chamber of Commerce, which is Canada's National Committee of the ICC. JAMS has a location in Toronto and released its International Arbitration Rules in September 2016.

Each of the LCIA, the ICC (and ICC Canada), TCAS, ADR Chambers, and ADRIC have partnered with Arbitration Place, a premier venue for arbitrations. Located in Toronto, Arbitration Place hosts resident and member arbitrators, an arbitral secretary, hearing

facilities, arbitration support and resources, and continuing legal education.

Finally, Canada has courts that understand and support the arbitration process. In cases where parties to an arbitration resort to courts in Toronto, such cases are heard by a specialized group of commercial judges, known as the Commercial List.

B. Cases

Over the last decade, Canadian courts have continued to give broad deference to arbitration agreements and arbitral tribunals, developing robust jurisprudence relating to the application of the Model Law and the New York Convention.

B.1 Staying court proceedings in favor of an agreement to arbitrate

The Supreme Court of Canada in *Seidel v. TELUS Communications Inc.*[3] addressed the issue of whether provincial laws can restrict the operation of an arbitration clause. In Canada, the provinces have the power to legislate in the area of property and civil rights, to the exclusion of the federal government.

Michelle Seidel ("Seidel") entered into a contract with TELUS Communications Inc. ("TELUS"). The contract included an arbitration clause that purported to waive any rights of a consumer to commence or participate in any class action against TELUS related to any claim against it. A dispute arose with respect to how TELUS calculated its air time for billing purposes. Seidel filed a claim for false representation with the Supreme Court of British Columbia (BC). TELUS sought to stay the proceeding in favor of arbitration, arguing that the arbitral tribunal should determine whether it had jurisdiction over the matter. Seidel maintained that since she was seeking remedies under the BC Business Practices and Consumer

[3] 2011 SCC 15.

Protection Act[4] (BPCPA), she had a right under the Act to go to court and to try to certify her action as a class.

At the trial level, TELUS' application was dismissed. TELUS appealed and was successful. The Court of Appeal stayed Seidel's action, holding that it is for the arbitrator to determine which claims are subject to arbitration and which ought to go before a court.

The main issue before the Supreme Court of Canada was whether the BPCPA manifests a legislative intent to relieve customers of their contractual commitment to arbitration. The court also had to determine whether the issues about the effect of the BPCPA ought to be decided by the court in first instance, or by the arbitral tribunal.

On the procedural issue, the court held that, as a general rule, any challenge to an arbitrator's jurisdiction should first be determined by the arbitral tribunal, absent any legislated exceptions. However, a challenge can be dealt with by the court if it involves a pure question of law. Because the legal effect of Section 172 of the BPCPA is a question of law on undisputed facts, it was properly decided by the court of first instance.

On the substantive issue, the court held that Seidel had a statutory right under the BPCPA to bring an action to the court of first instance under Section 172, and, once the action was brought under that section, the legislative protections in the BPCPA applied, rendering the arbitration agreement void.

On the question of whether the claim may proceed as a class action, the court found that because the class action waiver formed part of the arbitration clause, it too was void, pursuant to Section 3 of the BPCPA.

Notably, the majority of the court had no issue bifurcating the claims that fell within the BPCPA and those that could still be arbitrated. Claims that fell within the consumer legislation were to proceed to

[4] SBC 2004, c 2.

court, but the other claims, dealing with simple breach of contract, would have to be arbitrated. This demonstrates the court's willingness to hold people to their agreements unless legislation clearly provides otherwise.

In 2013, the Federal Court of Appeal in *Kerry Murphy v. Amway Canada Corporation*[5] echoed the Supreme Court of Canada's decision, confirming that Canadian courts will hold parties to their agreement to arbitrate, unless there is express legislative language in a statute that excludes or prohibits arbitration agreements or class action waivers.

In the last decade, several Canadian provinces have adopted legislation that protects a consumer's right to take a claim to court and to bring a class action in court, in some cases rendering an arbitration clause invalid.

B.2 Tribunal's competence to determine its own jurisdiction

In *United Mexican States v. Cargill, Inc.*,[6] the Ontario Court of Appeal confirmed the competence of a tribunal to rule on its own jurisdiction, and clarified the test for setting aside an international commercial arbitration award on jurisdictional grounds under the Model Law, holding that the applicable standard of review is correctness.

Cargill, a US company that domestically produces HFCS — a low-cost substitute for sugar cane used primarily in soft drinks — distributed its product in Mexico through its wholly owned subsidiary in Mexico, CdM. Mexico enacted trade barriers, which caused Cargill to shut down a number of its production plants. Cargill initiated arbitration proceedings in Toronto, claiming that Mexico breached NAFTA Chapter 11. Cargill was successful and was awarded damages for lost sales of its production in the US and lost sales of CdM in Mexico.

[5] 2013 FCA 38.
[6] 2011 ONCA 622.

Mexico moved to set aside the award in the Ontario Superior Court on the basis that the tribunal exceeded its jurisdiction by awarding damages for Cargill's lost sales to CdM. Mexico's position was that Cargill was a producer and exporter, but not an investor in Mexico. The court of first instance held that Mexico's objection went to the merits of the dispute and not the tribunal's jurisdiction. The court dismissed Mexico's application. It held that the standard of review when considering whether an arbitral tribunal exceeded its jurisdiction is one of reasonableness. On appeal, Mexico was once again unsuccessful. However, the Court of Appeal reached a different conclusion, holding that the standard of review for questions on the tribunal's jurisdiction is one of correctness.

The court began its analysis by considering Article 34(2) of the Model Law and held that none of the grounds therein allows a court to review the merits of a tribunal's decision. Article 34(2)(a)(iii) of the Model Law gives the court the power to set aside a decision of an international arbitral tribunal if the award deals with a dispute not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration.

The court concluded that the standard of review to be applied is one of "correctness," in the sense that the tribunal had to be correct in its determination that it had the ability to make the decision it made. However, the fact that the standard of review on jurisdictional questions is correctness does not give the courts a broad scope for intervention in the decisions of international arbitral tribunals. On the contrary, courts "should interfere only sparingly or in extraordinary cases."[7]

[7] *United Mexican States v. Cargill, Inc.,* 2011 ONCA 622 at para 33, citing *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 50 B.C.L.R. (2d) 207 (C.A.), leave to appeal ref'd, [1990] S.C.C.A. No. 431; *United Mexican States v. Karpa* (2005), 74 O.R. (3d) 180 (C.A.); and *Canada (Attorney General) v. S.D. Myers, Inc.* [2004] 2 F.C.R. 368).

The court held that the tribunal acted within its jurisdiction by correctly identifying its jurisdictional limits to award damages and considered Cargill's losses that arose from Mexico's breaches of NAFTA.

B.3 Recognition and enforcement of arbitral awards

In *Yugraneft Corp. v. Rexx Management Corp.*,[8] the Supreme Court of Canada confirmed that courts are required to enforce international arbitration awards pursuant to both the Model Law and the New York Convention, but held that the enforcement of a foreign arbitral award is subject to provincial limitation periods.

Yugraneft Corp. ("Yugraneft"), a Russian company, obtained an arbitral award against Rexx Management Corp. ("Rexx") and sought to have the award recognized and enforced in Alberta. Both the Alberta court of first instance and the Alberta Court of Appeal held that the enforcement of a foreign arbitral award was subject to provincial limitation periods, and that Yugraneft was unable to enforce the award as the two-year limitation period set out in the Alberta Limitations Act had elapsed.

Yugraneft appealed to the Supreme Court of Canada. In dismissing the appeal, the Court reviewed Article III of the New York Convention, which stipulates that recognition and enforcement must be "in accordance with the rules of procedure of the territory where the award is relied upon." Accordingly, local rules of procedure would apply to the extent they do not conflict with the Convention. The court found that limitation periods fall within the meaning of "rules of procedure," as that term is used in Article III of the New York Convention. Alberta was only required to provide foreign awards with treatment as generous as that provided to domestic awards rendered in Alberta, which, under the domestic legislation, are also subject to a two-year limitation period.

[8] 2010 SCC 19.

The ULCC's model Uniform Act establishes a 10-year limitation period within which to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. If the Uniform Act is enacted by the Canadian federal, provincial and territorial legislatures, the limitation period to enforce international commercial arbitration awards will, in some provinces, be extended.

B.4 Use of a freezing order to secure an international arbitration award

In *Sociedade-de-Fomento Industrial Provate Ltd. v. Pakistan Steel Mills (Private) Ltd.*,[9] the British Columbia Court of Appeal considered, for the first time, whether a *Mareva* injunction could be used to secure an international arbitration award, in circumstances where the parties had little connection to the enforcing jurisdiction and where the arbitration award could have been enforced elsewhere.

Sociedade-de-Fomento Industrial Private Limited (SFI), an iron ore mining and exploring company based in India, obtained an ICC award against Pakistan Steel Mills Corporation (Private) Limited (PSM) for almost USD 9 million (the "ICC Award"), but faced challenges in its enforcement. After learning that PSM was making arrangements to import coal from Canada, SFI obtained an *ex parte Mareva* injunction, preventing PSM from removing the coal from the jurisdiction without first paying security for the award into the BC court.

The coal vessel was detained for 30 days without PSM posting cash security, during which time SFI increased the pressure on PSM by obtaining orders appointing a receiver to market the coal for sale and increasing the amount of security PSM was to post, in order to cover the mounting expenses. PSM eventually posted the requisite security after 30 days, and the vessel departed for Pakistan. SFI then obtained judgment against PSM for the full amount of the award, plus post-award interest. PSM subsequently applied for an order that the

[9] 2014 BCCA 205.

Mareva had been wrongly granted and seeking a declaration that SFI should be liable for damages stemming from the detention of the coal. The chambers judge held that SFI was liable for damages in an amount to be determined, based on her conclusion that SFI had not made full and frank disclosure to the *ex parte* judge of its ability to enforce its award in Pakistan. This conclusion was based, in part, on the chambers judge's conclusion that the limited association of either party with BC made the ability of SFI to enforce its award elsewhere and, in particular, in Pakistan, a material fact that should have been disclosed to the *ex parte* judge who originally granted the *Mareva*.

SFI appealed this ruling to the BC Court of Appeal, which unanimously concluded that the chambers judge had erred in failing to properly apply BC's international arbitration legislation, which incorporates the New York Convention and the UNCITRAL Model Law.[10] These laws require BC courts to recognize and enforce international arbitration awards in the same manner as domestic awards. The BC Court of Appeal held that the chambers judge erred in making an implicit assumption that there was an onus on SFI to turn first to Pakistan's courts because of the parties' limited association with British Columbia. Further, the court held that the chambers judge failed to properly address the fact that a real and substantial connection is legislatively presumed to exist in a proceeding to enforce an international arbitral award, and that her *de facto forum non conveniens* analysis applied to the *Mareva* stage was "illogical." Moreover, since the New York Convention expressly contemplates an action by a petitioner to enforce a foreign arbitral award, the court held that it would not be logical to recognize the presumed jurisdictional connection for the final judgment, but disregard it for interlocutory purposes. The BC Court of Appeal further held that the availability of enforcement proceedings in a foreign jurisdiction did not imply an onus on the party to look first to that foreign jurisdiction. In addition, the court concluded there had been no material

[10] *International Commercial Arbitration Act*, RSBC. 1996, c. 233; *Foreign Arbitral Awards Act* RSBC 1996, c 154.

nondisclosure, noting that SFI had not said it was not possible to enforce its award in Pakistan, but that it would be challenging, which implies it could have been enforced, but with some difficulty. On 18 December 2014, PSM's application for leave to appeal the BC Court of Appeal's decision to the SCC was dismissed.

In four recent cases against the Kyrgyz Republic (the "Republic"),[11] unrelated applicants sought to enforce investor-state and international commercial arbitration awards against the Republic by seizing assets of a company, Kyrgyzaltyn JSC (the "Company"), which was wholly owned by the Republic. Each applicant successfully obtained *Mareva* injunctions, freezing the assets of the Company shares and dividends of a Canadian mining company, Centerra Gold. Ultimately, the injunctions were dissolved, as the Superior Court of Ontario and the Court of Appeal found that the assets were the property of the Company and not the Republic. In these cases, the Ontario court applied a combination of Kyrgyz corporate law, New York law and Ontario procedural law in order to arrive at its conclusion.

C. Trends and observations

Canada remains a jurisdiction that strongly supports international arbitration. International institutions and local organizations alike are establishing ever deeper roots in large Canadian cities and the Canadian judiciary is becoming increasingly familiar with the nuances of international arbitration. Across the legal profession, there is a growing familiarity with international arbitration, the promotion and utilization of arbitration for international commercial matters, and the promotion of Canada as an ideal place to arbitrate international commercial disputes.

[11] *Valeri Belokon v. The Kyrgyz Republic, Kyrgyzaltyn JSC and Centerra Gold Inc.*, 2016 ONCA 981; *Sistem Mühendislik Inşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic and Kyrgyzaltyn JSC*, 2016 ONCA 981; *Entes Industrial Plants Construction & Erection Contracting Co. Inc.*, 2016 ONCA 981; and *Valeri Belokon v. The Kyrgyz Republic, Kyrgyzaltyn JSC and Centerra Gold Inc.*, 2016 ONSC 4506.

Canadian courts hold parties to the bargains they have made through enforceable arbitration agreements. Where an arbitration agreement exists between parties and it is arguable that the arbitration agreement is valid and covers the subject matter of the dispute, Canadian courts have shown a willingness to stay judicial proceedings in favor of arbitration. There is however an exception in consumer actions, where legislation may specifically invalidate an agreement to arbitrate.

Courts are also being called upon to address issues of interim relief. Although arbitrators are given broad powers to grant interim relief, the courts have demonstrated an inclination to make interim orders for injunctions, and for the detention, preservation and inspection of property, which are consistent with the Model Law. The SFI and Kyrgyzaltyn matters discussed above demonstrate a growing sophistication of Canadian courts across different provinces to address complex, multijurisdictional enforcement proceedings, including by way of injunctive relief. Canadian courts have addressed such matters in a balanced, sensible manner, without hesitating to apply the laws of other jurisdictions, when necessary.