12th
Edition

2018-2019

The Baker McKenzie **International Arbitration Yearbook**

Canada

Canada

Matt Latella,[1] Christina Doria[2] and Glenn Gibson[3]

A. Legislation and rules

A.1 Legislation

International arbitration in Canada is, for the most part, a matter of provincial 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 UNCITRAL 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 adopted the New York Convention.

In March 2014, the Uniform Law Conference of Canada ("ULCC") released a final report and commentary with recommendations for a

[1] Matthew Latella is a partner in Baker McKenzie's Toronto office, and head of the Baker McKenzie Canadian international arbitration group. He has been recognized as an "outstanding professional" by the Legal 500 Canada in Dispute Resolution. In addition to a varied litigation and arbitration practice, Matt has successfully prosecuted and defended several of the leading Canadian cases on the enforcement of international arbitration awards and obtaining interim relief in support of same.
[2] Christina Doria is a senior associate in Baker McKenzie's Toronto office where she practices international arbitration and commercial litigation. Christina is on the steering committee of Baker McKenzie's International Arbitration Associates Forum, an Executive Board member of the ICDR Young & International (ICDR Y&I), and a Board member of Young Canadian Arbitration Practitioners (YCAP). Christina has served as an arbitrator under the ICDR Rules. She has acted on commercial arbitrations under UNCITRAL, AAA/ICDR, ADRIC, CAA and CPR rules, as well as on investor-state arbitrations under ICSID, UNCITRAL and NAFTA.
[3] Glenn Gibson is an associate in Baker McKenzie's Toronto office where she practices international arbitration and commercial litigation. She is a contributor to www.globalarbitrationnews.com, and the Baker McKenzie International Arbitration and Litigation Newsletter.

new Uniform International Commercial Arbitration Act ("Uniform Act"), updating Canada's laws relating to international commercial arbitration in accordance with the UNCITRAL Model Law amendments The ULCC has since adopted the amended Uniform Act, which is open for adoption into federal and provincial legislation.

Two Canadian provinces have so far adopted the 2006 amendments to the UNCITRAL Model Law, which offer a more flexible interpretation of some of the more rigid requirements of the New York Convention. In March 2017, Ontario was the first province to adopt the amendments with the International Commercial Arbitration Act 2017, SO 2017, c 2 ("Ontario ICAA"). British Columbia followed suit in May 2018 by amending its own International Commercial Arbitration Act, RSBC 1996, c 233 ("BC ICAA"). Whereas Ontario attached the UNCITRAL Model Law as a schedule to the Ontario ICAA, British Columbia incorporated the 2006 amendments directly into the BC ICAA along with other developments, including a higher threshold for removing an arbitrator and broad powers for tribunals to grant interim measures and preliminary orders. Ontario and British Colombia are two of 25 jurisdictions worldwide that have incorporated the 2006 amendments to the UNCITRAL Model Law, and it is anticipated that Alberta will follow suit in 2019.

The legal framework for investor-state arbitration in Canada is currently evolving. Canada is a party to 37 BITs, known as Foreign Investment Promotion and Protection Agreements, which contain investor-state arbitration provisions. In November 2018, Canada, the United States and Mexico signed the USMCA to replace NAFTA. Once ratified, USMCA will displace and significantly alter the provisions for investment arbitration that were contained in Chapter 11 of NAFTA. Canada is a party to the Canada-European Union Comprehensive Economic Trade Agreement and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, both of which contain provisions for investment arbitration.

A.2 Institutions, rules and infrastructure

Canada remains a jurisdiction that strongly supports international arbitration, making major Canadian cities like Toronto, Montreal, Calgary and Vancouver a welcome "seat" of arbitration. In particular, organizations such as the Toronto Commercial Arbitration Society, the Western Canada Commercial Arbitration Society and Young Canadian Arbitration Practitioners are dedicated to the continued awareness and promotion 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. It also has a stable political system and reasonable visa entry requirements.

Local arbitration institutions in Canada include ADR Chambers, the ADR Institute of Canada ("ADRIC"), ICDR Canada, and British Columbia International Commercial Arbitration Centre ("BCICAC"). Canada has also attracted the presence of the ICDR, the ICC, CIETAC, and JAMS. CIETAC opened a new North American headquarters within the Vancouver Economic Commission's Asia Pacific Centre in July 2018. 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.

B. Cases

B.1 NAFTA award compensating investors for damages following environmental assessment upheld by Federal Court

In *Canada (Attorney General) v Clayton*,[4] the Government of Canada sought an order setting aside an award of a NAFTA tribunal in favor of certain investors in a quarry and marine terminal project in Nova Scotia ("Investors").

The Investors' project was halted after a joint federal-provincial environmental assessment panel determined that the project would cause significant adverse environmental effects and would impact "core values of the affected communities" and "lead to irrevocable and undesired changes of quality of life." More specifically, the environmental assessment panel concluded that the local people, communities and economy of a "unique" region of Nova Scotia would be adversely affected, as "[i]ts core values, defined by the people and their governments, support the principles of sustainable development based on the quality of the local environment." The majority decision of the NAFTA tribunal found that Canada had violated its NAFTA obligations of national treatment and fair and equitable treatment. In particular, the tribunal found that the provincial government in Nova Scotia had created a legitimate expectation on the part of the Investors that their project was welcomed, and the Investors relied on the encouragement of the province to their detriment.

On its application before the Federal Court, the Government of Canada argued that the NAFTA tribunal had exceeded its jurisdiction by reviewing an administrative decision made by a state party. The Federal Court disagreed. The court applied the analysis from *Mexico v Cargill*[5] in determining whether the tribunal has exceeded its jurisdiction. The court found that the issue decided by the NAFTA

[4] 2018 FC 436.
[5] 2011 ONCA 622.

tribunal was whether Canada breached its obligations under NAFTA through its conduct in relation to the environmental assessment. Any discussion by the tribunal of Canada's domestic law was found to be incidental to these main issues and not a true jurisdictional error.

B.2 Whether the court has jurisdiction to consolidate arbitration proceedings without the consent of the parties

Two decisions of the trial level court in Alberta came to opposite conclusions on the question of whether the court has jurisdiction to consolidate arbitration proceedings without the consent of all parties. Section 8(1) of the Alberta International Commercial Arbitration Act[6] ("Alberta ICAA") provides for an application of the "parties" to consolidate proceedings.

In *Japan Canada Oil Sands Limited v Toyo Engineering Canada Ltd*,[7] the court found that it had jurisdiction to consolidate a domestic arbitration with an international arbitration on the contested application of one of the parties. Both parties to a project agreement for the expansion of the Hangingstone oil sands project in Northern Alberta initiated arbitrations to deal with disputes arising out of the project. The owner named the contractor's guarantor as a party to the international arbitration and then applied to have the arbitrations consolidated. The contractor had consented to consolidation through a provision in the project agreement, but the guarantor had not. The court interpreted section 8(1) of the Alberta ICAA as not requiring the consent of all parties for consolidation, despite the use of the term "parties" in that section.

A few months earlier in *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited*,[8] the same court applied a strict interpretation to the term "parties" in section 8(1) of the Alberta ICAA and declined to consolidate two international arbitrations on the application of one of the parties. The court acknowledged that it seems

[6] RSA 2000, c I-5.
[7] 2018 ABQB 844.
[8] 2018 ABQB 207.

counterintuitive to allow one party to refuse consolidation, but held that control over the arbitration process by the parties would be sacrificed if the court were to consolidate without the consent of all the parties.

In British Columbia, the International Commercial Arbitration Act is clear that multiple disputes can only be consolidated if "all parties agree."[9] In *South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd*,[10] the respondent transportation authority had initiated a multiparty arbitration under three separate contracts for the design and construction of a new passenger ferry. The transportation authority filed a single notice of arbitration, which had the effect of consolidating the disputes without the consent of the parties. The lower court held that the notice of arbitration was nonetheless valid. The British Columbia Court of Appeal overturned the decision of the lower court and held that the transportation authority's unilateral action to force the parties to three separate contracts into a single dispute was a procedure not known to the ICCA.

B.3 Uber driver class action referred to international arbitration in the Netherlands

In *Heller v Uber Technologies, Inc*,[11] a Toronto-based Uber driver ("Plaintiff") sought to bring a class action on behalf of Uber drivers in Ontario against Uber, the ridesharing and food delivery company. The Plaintiff alleged that Uber had violated Ontario's Employment Standards Act 2000.[12] The Plaintiff entered into a service agreement with Uber that is governed by the law of the Netherlands and includes an arbitration clause selecting the Netherlands as the seat of arbitration. Uber moved to have the Plaintiff's proposed class action stayed in favor of arbitration in the Netherlands. Uber's motion was

[9] RSBC 1996, c. 233, s 21.
[10] 2018 BCCA 468.
[11] 2018 ONSC 718.
[12] SO 2000, c. 41.

successful: the Ontario Superior Court of Justice stayed the Plaintiff's proposed class action.

As a preliminary matter, the court held that the arbitration agreement between the parties was governed by the International Commercial Arbitration Act 2017 rather than the Arbitration Act 1991, which governs domestic arbitration. For the ICAA to apply, the arbitration agreement must be "international" and "commercial." The arbitration agreement was clearly international because parties to the agreement had their places of business in different countries. The Plaintiff argued that the agreement was not a commercial agreement but an employment agreement. The court disagreed because the service agreement expressly stated that it did not create an employment relationship between Uber and the drivers. In characterizing the agreement as a commercial one, the court described it as a commercial contract for the sale or use of intellectual property.

The Plaintiff's argument that the case should be excepted from referral to arbitration because the proposed class action involved an alleged employment relationship also failed. The court held that whether employment claims are arbitrable is a question of mixed fact and law and the kompetenz-kompetenz principle applied.

B.4 An application to set aside a tribunal's finding of jurisdiction is not confined to the evidentiary record before the tribunal

On an application to set aside a tribunal's finding of jurisdiction, the Russian Federation ("Applicant") filed additional expert evidence not placed before the tribunal when it gave its preliminary ruling. The additional evidence sought to demonstrate that the expert evidence of Luxtona Ltd. ("Respondent") that was relied upon by the tribunal was unqualified and biased. The Respondent moved to strike the additional evidence. The Ontario Superior Court of Justice dismissed the

Respondent's motion to strike and allowed the additional evidence filed by the Applicant.[13]

The court cited with approval a number of foreign decisions dealing with this issue and the standard of review on applications to set aside a tribunal's finding of jurisdiction pursuant to articles 16(3) and 34(2) of the UNCITRAL Model Law. The court emphasized that while the foreign decisions were not binding, they were indicative of the consensus international view of the interpretation of the Model Law and noted the importance of an interpretation that would enhance, and not undermine, the confidence of the international community in Ontario as an arbitral seat. Applying the correctness standard articulated in *Mexico v Cargill, Incorporated*, the court held that it was not confined to either the findings of fact or the record consulted by the tribunal in reaching their conclusion on jurisdiction.

[13] *Russian Federation v Luxtona Ltd.*, 2018 ONSC 2419.