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Canada

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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 (the "ULCC") released a final report and commentary with

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recommendations for a new Uniform International Commercial Arbitration Act (the “Uniform Act”), updating Canada’s laws relating to international commercial arbitration in accordance with the 2006 UNCITRAL Model Law amendments. The ULCC has since adopted the amended Uniform Act, which is open for adoption into federal and provincial legislation.

In March 2017, Ontario became the first Canadian province to adopt the 2006 amendments to the UNCITRAL Model Law. Ontario is one of only 23 jurisdictions worldwide to have adopted the 2006 amendments. The Ontario International Commercial Arbitration Act, 2017, SO 2017, c 2 (“ICAA”) offers a flexible interpretation of some of the more rigid requirements of the New York Convention.

The legal framework of 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. Canada’s trade agreement with Mexico and the United States, NAFTA, also contains provisions for investment arbitration. The future of NAFTA, in particular the investment arbitration provisions, is uncertain as the parties are currently renegotiating the agreement. The Comprehensive Economic and Trade Agreement (CETA) between the European Union and Canada was signed 30 October 2016. The Investment Court System (ICS), a permanent forum where investor-state arbitration between the parties will be heard, has been hotly debated and is currently subject to legal scrutiny in the European Union and is not yet in force. Finally, Canada has yet to ratify the Trans-Pacific Partnership, a multilateral trade agreement that will likely also include an investor-state dispute settlement mechanism.

The ICAA imposes a limitation period for enforcement proceedings of 10 years from the date the award was made, or, where there was a proceeding to set aside an award, 10 years from the date on which the proceedings concluded. Previously, the limitation period for enforcement of an arbitration award was two years. Additionally, the



ICAA incorporates provisions that clearly outline a tribunal's powers to grant interim measures and broaden the interpretation of an arbitration agreement.

A.2 Institutions, rules and infrastructure

Canada remains a jurisdiction that strongly supports international arbitration, generally making major Canadian cities a welcome seat of arbitration. In particular, organizations such as the Toronto Commercial Arbitration Society (TCAS), the Western Canada Commercial Arbitration Society (WCCAS) and 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. 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 the British Columbia International Commercial Arbitration Centre (BCICAC). Canada has also attracted the presence of the ICDR, the ICC and JAMS. 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.

The LCIA, the ICC (and ICC Canada), TCAS, ADR Chambers, ADRIC, and ICDR have partnered with or cooperate with Arbitration Place, a premier venue for arbitrations. Located in Toronto and

Ottawa, 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 generally 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

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

B.1 Arbitration agreements can deviate from the structure of arbitration legislation

In *Newfoundland and Labrador v. ExxonMobil Canada Properties*,⁴ the Newfoundland and Labrador Supreme Court Trial Division dismissed an application for an order setting aside an arbitral award under domestic arbitration legislation. The award confirmed that certain insurance premiums were deductible in the calculations of a royalty owing to various companies with an interest in the Hibernia Project. In contrast to the legislation, which empowers a court to set aside an award where an arbitrator has misconducted themselves, or where an arbitration or award has been improperly procured, the parties' arbitration agreement included Article 34(2) of the UNCITRAL Model Law as the grounds on which the award could be set aside.

The court held that the tribunal did not make a jurisdictional error and its interpretations were justifiable in fact and law. The court's holding confirmed that sophisticated parties may create arbitration agreements that deviate from the structures of provincial and federal legislation, as

⁴ 2017 NLTD(G) 147.



long as the agreed process does not unduly infringe on the courts' inherent jurisdiction and provides for a process that protects the principles of fundamental justice.

B.2 Ability of award holders to seize the assets of state-owned entities

The Supreme Court of Canada refused leave to appeal the Ontario Court of Appeal's determination that the shares held by a company, Kyrgyzaltyn JSC (the "Company"), which was wholly owned by the Kyrgyz Republic (the "Republic"), could not be seized to satisfy an arbitral award against the Republic in enforcement proceedings.⁵ The Court of Appeal⁶ emphasized the separate legal personalities of the Republic and the Company and affirmed that neither contract nor trust law principles could justify holding the Company responsible for any debts of the Republic. Rather, the Company owned the shares, and the Republic did not have an equitable or other right in them.

B.3 Parties cannot avoid an agreements to arbitrate by deliberately failing to name contracting parties

In *Northwestpharmacy.com Inc. v. Yates*,⁷ the British Columbia Supreme Court granted a stay of court proceedings in favor of arbitration and extended an arbitration agreement to include a party that was not a signatory to the agreement. The plaintiff, Northwestpharmacy.com Inc. ("Northwest") was a Panamanian company that relied on alternative payment processing systems offered by a group of corporate defendants, including Epic Capital Group, LLC ("ECG") and Omega Group Inc. ("Omega") to sell prescription drugs online, mainly in the US, where it is not regulated. The relationship broke down, and the plaintiff brought an action

⁵ *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic and Kyrgyzaltyn JSC*, [2017] S.C.C.A. No. 74 (S.C.C.); *Entes Industrial Plants Construction & Erection Contracting Co. Inc. v. Kyrgyz Republic, et al.*, [2017] S.C.C.A. No. 75 (S.C.C.).

⁶ *Belokon v. Kyrgyz Republic*, 2016 ONCA 981.

⁷ 2017 BCSC 1572.

claiming fraudulent misrepresentation and conspiracy against ECG and individuals associated with the companies. In the court action, the plaintiff did not name Omega as a defendant, the company with which it had an arbitration agreement.

In staying the proceedings, the court's flexible approach reiterated that non-signatories to a contract may be considered parties to an arbitration agreement. The court emphasized that the dispute was ultimately contractual and Northwest had tried to avoid arbitration by not naming the contracting party as a defendant to avoid the application of the arbitration clause. The court also rejected Northwest's assertion that the arbitration agreement was null and void because it was induced by, or was used as, an instrument of fraud. The court emphasized that under the "doctrine of separability" only where the allegation of fraud directly impeaches the arbitration clause, may a court decline the stay.

B.4 Whether the agreement to arbitrate includes counterclaims between the parties is not a "true question of jurisdiction"

In *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*,⁸ the Ontario Court of Appeal considered an arbitration award for a dispute over the construction of a slurry pipeline for a nickel mine in Madagascar. The Court of Appeal upheld the lower court's decision that the arbitrator's determination of whether counterclaims were within the scope of the arbitration agreement was not a "true question of jurisdiction" and therefore not reviewable by a court under Article 34 of the UNCITRAL Model Law.

In this case, the claimants objected to the counterclaims proceeding to arbitration because the parties had not followed the dispute resolution process in the contract. The Court of Appeal reasoned that not every dispute submitted to arbitration will necessarily draw in counterclaims. Rather, the Court held that the determination of

⁸ 2017 ONCA 939.



whether a counterclaim is a “true question of jurisdiction” will depend on the contractual intention of the parties, as determined by all the surrounding circumstances, and it will not permit a party initiating an arbitration to completely ignore pre-arbitration dispute resolution requirements.

B.5 Successful parties can be reimbursed for enforcement expenses

In *Sociedade-de-Fomento Industrial Private Limited v. Pakistan Steel Mills Corporation (Private) Limited*,⁹ the British Columbia Supreme Court accepted the request of Sociedade-de-Fomento Industrial Private Limited (“SFI”) to be reimbursed for the considerable expenses it incurred enforcing a foreign arbitral award against the respondent, Pakistan Steel Mills Corporation (Private) Limited (“PSM”). After the award was not paid, SFI began identifying PSM’s assets around the world to assist in satisfying the award. SFI learned that PSM was to take delivery of a cargo of coal and obtained a freezing order preventing removal of the coal from British Columbia. Pursuant to its undertaking in damages, SFI reimbursed various losses incurred by Oceanwide Services GmbH (“Oceanwide”), which chartered the vessel that was detained for 30 days pursuant to the freezing order.

The British Columbia Supreme Court accepted that SFI was, in turn, entitled to be reimbursed for the amounts it paid to Oceanwide during the 30-day period. The expenses included demurrage charges, costs for additional bunker fuel, port charges and crew supplies or victuals. In assessing the reasonableness of the daily hire of the vessel, the court emphasized that the onus was on the responding party to provide expert evidence that the amounts claimed were not reasonable, which PSM failed to do. The Court also found that PSM was fully aware of the third-party expenses being incurred and chose to “lie in the weeds” as the expenses mounted while the vessel was detained. Accordingly, the Court held that all of the amounts paid to Oceanwide were

⁹ 2017 BCSC 1465.

reasonable and recoverable by SFI. This decision has been appealed to the British Columbia Court of Appeal and will be heard in 2018.

C. Funding in international arbitration

In Canada, third-party funding is a relatively new and expanding industry. There are currently several large funders operating in Canada. Typically, the funds are advanced to parties through an investment arrangement, similar to a contingency fee structure, where the payment to the funder depends on success.

Some third-party funding firms make loans to the parties and secure the loan through an assignment of the proceeds, rather than taking an interest directly in the case itself. If an agreement to fund an arbitration is structured as a loan, statutory interest rate caps will apply to the transaction. For example, Section 347 of the Canadian Criminal Code caps all interest rates at 60% per year throughout Canada.

Unlike contingency arrangements, third-party agreements often more closely resemble private commercial transactions. The funding agreement is not between counsel and the party, and therefore the relationship is not governed by the rules of professional conduct bearing on legal counsel. Although there is no case law that has directly addressed the issue, it is likely that litigation privilege, which protects communications made for the dominant purpose of litigation, would protect communication between the client, counsel and a funder.

Both NAFTA and the UNCITRAL Model Law are silent with respect to third-party funding. If the CETA ICS is implemented, it will require parties to disclose the identity of any third-party funders. Accordingly, potential providers and users of third-party funding in international arbitration may look to laws and judicial opinions relating to litigation funding for guidance, including with respect to whether the arrangements must be disclosed and whether they are permissible.



Canadian jurisprudence on third-party funding has been shaped by the class actions context and cases concerning contingency fee arrangements, where the courts have retained significant supervisory roles. In private commercial litigation and arbitration, a potential obstacle to the development of third-party funding lies in the doctrines of maintenance and champerty. These torts remain in existence as possible barriers to a third party improperly inserting itself into litigation. The doctrines could theoretically enable a defendant to bring an action for special damages against a third-party funder or constitute sufficient grounds to have a funding agreement set aside by the courts.

That said, third-party funding of litigation in Canada is not champertous *per se*. However, nor is it given free rein by Canadian courts, which continue to show a willingness to scrutinize third-party funding arrangements. It remains to be seen whether the consent-based, contractual nature of arbitration or its private nature provides a further rationale for permitting the parties be funded as they see fit, without scrutiny or criticism by opposing parties. Some recent decisions in the litigation context suggest that Canadian courts are developing a cautiously permissive approach to litigation funding that would at least apply equally to arbitral disputes.

In *Houle v. St. Jude Medical Inc.*,¹⁰ the Ontario Superior Court conditionally allowed a litigation funding agreement in a class action. The court accepted that the funding agreement was necessary because neither the representative plaintiff nor class counsel were willing to accept the risk of adverse costs and neither could finance the action. The court, however, was concerned that the funder's recovery was uncapped and its eventual recovery might be unfair and disproportionate and that the termination agreement interfered with litigation autonomy as a result of the termination agreement. The court proposed resolving both of these issues by making any termination and the contingency fee subject to court approval.

¹⁰ 2017 ONSC 5129.

In *Schenk v. Valeant Pharmaceuticals*,¹¹ the first Canadian case to consider single-party commercial litigation funding, the court determined that a litigation funding agreement was not necessarily champertous, and there was “*no reason why such funding would be inappropriate in the field of commercial litigation.*”

Two recent decisions suggest that Canadian courts may not require a litigant to disclose its litigation funding agreements. In *Seedlings Life Science Ventures LLC v. Pfizer Canada Inc.*,¹² the Canadian Federal Court determined that outside the class actions context, there was no jurisdiction to review a litigation funding agreement in a patent dispute. This decision could have significant implications for third-party funders in international arbitration because the Federal Court’s jurisdiction is constrained by statute, similar to the limits of an arbitral tribunal’s jurisdiction, which is defined by the parties’ agreement to arbitrate. The prothonotary determined that because the funding agreement did not affect or determine the validity of the rights asserted in the action, a defendant had no legitimate interest in enquiring into the reasonability, legality or validity of a party’s financial arrangements, its counsel’s fee structure or the manner in which it chose to allocate litigation risks.

Most recently, in *Yaiguaje v. Chevron Corp.*,¹³ the Ontario Court of Appeal reversed a determination of a single motion judge of the Court of Appeal that would have required plaintiffs to post CAD 942,951 as security for costs of an appeal related to enforcement of a CAD 9.5 billion Ecuadorian judgment against Chevron Corporation. The motion judge found that the plaintiffs had not established that they were impecunious or that third-party litigation funding was unavailable. In overturning the decision, the Court of Appeal held that, while the question of whether the plaintiffs had access to third-party funding “*was left unanswered,*” “*there should be no bright line rule that a litigant must establish that such funding is unavailable to*

¹¹ 2015 ONSC 3215.

¹² 2017 FC 826.

¹³ 2017 ONCA 827.



successfully resist a motion in an appeal for security for costs.” The panel went on to add that its conclusion was particularly appropriate in this case where counsel for the appellants had disclosed that he was operating under a contingency fee arrangement and there was evidence that Chevron Corporation had sued some of the appellants’ former third-party funders and that the funders had withdrawn their financial support.