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In This Issue:

- **YCAP Updates**
 - 2012 Spring Symposium
 - 2012 Calgary Pub Night
 - 2012 Build Your Brand
 - 2011 Fall Symposium
 - Thank You Martha Harrison
- **Recent Developments in International Arbitration**
 - Effect of Arbitration Clauses on Class Action Proceedings
 - The Jerusalem Arbitration Center – A New Form of Dispute Resolution in the Middle East
 - 2012 ICC Rules and a New Generation of Emergency Arbitrator Provisions
 - A New Resource: Arbitrationlaw.com
- **Case Comments**
 - *Shaw Satellite GP v Pieckenhagen*
 - *Cargill v Mexico*
 - *Gallo v Canada*
 - *Mercer International v Canada*
- **International Arbitration Calendar**

YCAP 2012 SPRING SYMPOSIUM JOINTLY PRESENTED WITH ICDR Y&I

On June 21, 2012 two panels of distinguished speakers will address the following topic:

“To Defer or Not to Defer? Canadian, American and ICSID Perspectives on the Review of Arbitral Rulings on Jurisdiction.”

Live locations at Arbitration Place (Toronto) and DLA Piper LLP (Washington). Webcast also available.

To register for the event (free of charge), contact Mandy Sawier at SawierM@adr.org

LEX ARBITRI

Spring/Summer 2012

Volume 8, Number 1

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YCAP PUB NIGHT IN CALGARY

Joanne Luu, Student-at-Law, Burnet, Duckworth & Palmer LLP

On May 14, 2012, YCAP organized a Pub Night at the Libertine Pubic House in Calgary on the eve of the Western Canadian Arbitrator's RoundTable (WCART) conference.

By 6 p.m. sharp, several young lawyers (and lawyers-to-be like myself) had settled into the ale house. Within the hour, a steady stream of YCAP members and senior practitioners filed in, and the room was abuzz.

With a few friendly introductions, I quickly discovered that the WCART conference had drawn attendees, not just from western Canada, but also from across North America, including Toronto and Salt Lake City. Many lawyers took the time to share their impressions on the evolving arbitration landscape, and just as many shared their background: where they went to law school and how their practice has developed through the years. As I took a step back, I saw a gregarious crowd, eagerly catching up as if they were old high school friends.

The evening seemed to have drawn to a close as quickly as it started. The junior lawyers were left cheerfully recounting the evening with each other. It was perhaps a little surprising how quickly we seemed to relate to the pressures of a young legal career and an intense interest in arbitration. We exchanged business cards and promised to stay in touch. In this way, the YCAP Pub Night was not only an excellent opportunity for young lawyers to rub shoulders with senior practitioners, but also, to meet each other as we begin to build our careers.

A special thank you to the WCART members in attendance, including: Dan J. McDonald (Burnet, Duckworth & Palmer LLP), Frank Foran (Borden Ladner Gervais LLP), Jack Marshall (John J. Marshall, Q.C. Professional Corporation), Tina Cicchetti (Fasken Martineau DuMoulin LLP), Angus Gunn Jr. (Borden Ladner Gervais LLP), and Gerry Ghikas (Borden Ladner Gervais LLP), as well as Steven Anderson from the International Centre for Dispute Resolution.

SENIOR PRACTITIONERS OFFER INSIGHT FOR BUILDING YOUR BRAND IN ARBITRATION AND MEDIATION

Eric Morgan, Associate in the litigation department of Osler, Hoskin & Harcourt LLP (Toronto).

On May 2, 2012, several senior practitioners met with junior members of the Ontario bar to provide advice on building a career in arbitration and mediation.

The event, entitled "Build Your Brand", was a mentoring dinner at Campbell House in Toronto co-sponsored by The Advocates' Society ("TAS"), Young Canadian Arbitration Practitioners ("YCAP") and the Toronto Commercial Arbitration Society ("TCAS"). The event was hosted by Sonia Bjorkquist, one of the co-chairs of TAS's Arbitration and Mediation Advocacy Practice Group and a partner at Osler, Hoskin & Harcourt LLP.

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CONTRIBUTIONS

News or event contributions are greatly welcomed.

Please contact one of the members of the Newsletter Committee, or email us at: newsletter@ycap.ca.

MEMBERSHIP

If you are interested in becoming a member of YCAP, please contact: YCAP@ycap.ca

Barry Leon, another co-chair of TAS's Arbitration and Mediation Advocacy Practice Group and head of the International Arbitration Group at Perley-Robertson, Hill & McDougall LLP/s.r.l., made some introductory remarks which touched on a number of topics, including:

1. The importance of having both mentors (someone who provides advice) and sponsors (someone who promotes and opens doors for you).

2. The skills required for a career in arbitration and mediation. Leon discussed the 'Canadian advantage' in arbitration advocacy. He thought our skills in litigation are more aligned with international arbitration advocacy than the skills in any other legal tradition. These include our style, advocacy skills, document production approach, and use of experts and reports.

3. How to build your profile and reputation. Within your firm, this may include:

- being the 'go to' person on arbitration clauses and issues most likely to arise (e.g. obtaining evidence and the enforcement of awards); and
- assisting lawyers with existing arbitration practices on articles, speeches, and cases.

The challenge is that arbitration is a niche and there may be only a few partners who work in the area. It also involves international travel and expense, and may not be understood well by other practice areas.

Outside your firm, building your profile and reputation can involve:

- attending conferences (e.g. through TAS' arbitration group, YCAP and TCAS); and
- writing for publications (you can start by co-authoring) and speaking whenever possible.

In arbitration, networking is particularly important. It is not just about getting known and getting work. It is about getting to know the arbitrators as well as the people in the institutions.

4. Finding your competitive advantages.

Your competitive advantages may include language skills; your knowledge of industries; your legal expertise and specialties; bar admissions in other jurisdictions; and nationality (although multiple nationalities can be a disadvantage as an arbitrator, as they may disqualify you).

5. Tips on Mediation

In the area of mediation, several practitioners offered practical advice, agreeing that it is helpful to speak privately with the mediator the day before the mediation to tell him or her what the real issues are and whether there are any client issues to be handled delicately. Individuals also discussed the benefits of a plenary. They agreed that the plenary should not be used for posturing but rather to ask questions about an aspect of the case, the parties' motivations or the approach to a future business relationship.

In addition to Barry Leon and Sonia Bjorkquist, the mentors present were Brian Casey, Cynthia Kuehl, Earl Cherniak, Q.C., David McCutcheon, J.L.

McDougall Q.C., Joel Richler, John Judge, Kathleen Kelly, Paul Michell, and Randy Pepper.

YCAP FALL SYMPOSIUM 2011

Vincent Cérat Lagana, Associate at Fasken Martineau (Montreal)

The 2011 YCAP Fall Symposium was held on November 24th in the Montreal offices of Fasken Martineau. The event included more than 20 participants while many more were able to watch and listen via webcast.

The Symposium showcased two panels debating current topics in Canadian arbitration. Ms. Tina Cicchetti and Mr. Martin Valasek acted as moderators. The first panel discussed the topic of arbitration law reform in Canada. Mr. Christopher Richter analyzed the arbitration provisions which were included in the project to reform the Québec Code of Civil Procedure. Professor Anthony Daimsis discussed various issues relating to jurisdiction over arbitration in Canada including the various applications of the New-York Convention with respect to the enforcement of arbitral awards.

The second panel discussed recent developments in Canadian arbitration case law. Mr. Romeo Rojas briefed the audience on the recent developments in Alberta case law; Mr. Michael Kotrly did the same for Ontario and Mr. Philippe Charest-Beaudry concluded the presentation with the recent developments in Québec.

For those interested in viewing the webcast of the symposium, it can be found at the following link: <http://webcasts.pqm.net/client/fasken-martineau/event/256/en/>.

THANK YOU MARTHA HARRISON

YCAP would like to extend a special thank you to Martha Harrison of Heenan Blaikie's Toronto office for her contributions to Lex Arbitri. Martha, who recently stepped down as editor of Lex Arbitri, made significant contributions to this publication over the years, having served on the newsletter committee since 2007 and as editor since 2010. Lex Arbitri's current co-editors – Devin Bray, Heather Bray and Romeo Rojas – look forward to working with the newsletter committee and the YCAP membership on future issues.

EFFECT OF ARBITRATION CLAUSES ON CLASS ACTION PROCEEDINGS

Lev Alexeev, Associate at Stikeman Elliott LLP

Two recent decisions (one from the Court of Appeal of Québec and another from the Federal Court) address the impact of arbitration clauses and class action waivers on class action proceedings.

In *Télu's Mobilité v Comtois*, the Quebec Court of Appeal unanimously decided that Telus' commercial clients (i.e. companies or natural persons carrying on an enterprise) were ineligible to be part of a proposed plaintiff class as they were bound by an arbitration clause in their agreements with Telus, which was combined with a class action waiver.¹ The *Quebec Consumer Protection Act*, which prohibits pre-dispute arbitration clauses, was of no avail to the plaintiffs

because it does not apply to commercial transactions (i.e. transactions between companies, between companies and natural persons carrying on an enterprise, or between natural persons carrying on an enterprise).

Similarly, in *Murphy v Amway*, the Federal Court of Canada also denied in its entirety a motion for certification of a class action as the contract between the parties (a natural person and a company) contained an arbitration clause and a partial class action waiver.² In this case, the plaintiffs were alleging a violation of the *Competition Act*.

In sum, these two decisions demonstrate that an arbitration clause and class action waiver, even when part of a standard form contract (or “contract of adhesion” as such agreements are called in Québec), is an effective way of precluding class action proceedings (except, in certain jurisdictions, for consumer claims³), which should be considered by businesses wishing to minimize their class action risk.

¹ See *Télu Mobilité v Comtois*, 2012 QCCA 170, [2012] QJ No 521.

² See *Murphy v Amway*, 2011 FC 1341, [2011] FCJ No 1642.

³ See, for instance, *Seidel v TELUS Communications Inc.*, [2011] 1 SCR 531.

THE JERUSALEM ARBITRATION CENTER – A NEW FORM OF DISPUTE RESOLUTION IN THE MIDDLE EAST

Tamar Meshel, Legal Advisor to the Jerusalem Arbitration Center.

About two years ago, Mr. Oren Schahor, a retired Major General of the Israeli army and the President of the International Chamber of Commerce (ICC) Israel, and Mr. Samir Hulleileh, a prominent Palestinian businessman, recognized that the absence of an effective mechanism for the resolution of business disputes between Israelis and Palestinians constitutes a major barrier to trade between the two sides. To fill this vacuum, they envisaged the creation of a local arbitration center to resolve such disputes and thereby increase cross-border trade, strengthen bilateral relations, and achieve new levels of cooperation between Palestinians and Israelis. Today, this vision is becoming a reality in the form of the Jerusalem Arbitration Center (JAC), a joint Israeli-Palestinian arbitration institution dedicated to the resolution of cross-border business disputes that is scheduled to be launched in October 2012. Actively supported by the ICC and closely modeled after its leading International Court of Arbitration, the JAC constitutes a neutral, professional, apolitical, and cost effective local arbitration center, as well as a rare example of collaboration in the region.

Trade across the Green Line is currently valued at around US\$ 5 billion a year, mostly comprised of sales by Israelis to Palestinians. As the Israeli side is often the stronger negotiating party, the designated governing law in such cross-border transactions is usually Israeli law and Israeli courts are often chosen as the forum for the resolution of disputes. This situation, however, creates difficulties for both sides and hinders the development of further bilateral trade. On one hand, a Palestinian party may be reluctant to appear before the courts of its Israeli counterparty, which it may view as unfavourable. The Israeli party, on the other hand, may find the enforcement of decisions and rulings of Israeli courts in the Palestinian Territories to be virtually impossible. As domestic alternatives to litigation agreeable to both sides are scarce, the need for a neutral, effective and enforceable dispute resolution mechanism is great.

While the advantages of international arbitration in this regard are well known, it seems that Israeli and Palestinian parties are not turning to international arbitral institutions or ad-hoc tribunals to resolve their disputes. This may be the result of a lack of awareness to and understanding of international arbitration among some local lawyers and business people, as well as a certain degree of impracticality in submitting local and relatively small disputes to an international institution or tribunal.

The JAC is designed to address these challenges and effectively use arbitration in the Israeli-Palestinian context. In addition to being the first joint initiative of its kind, the JAC is tailor-made for the type and scope of disputes usually arising between the two sides, and accounts for the often uncertain conditions in the region. Professionally, the JAC is guided by the International Court of Arbitration of the ICC, and its structure and rules are based to a large extent on those of the ICC Court. It will consist of three main bodies: a Board of Directors comprised of an equal number of Israeli and Palestinian, and a majority of international business people; a Court, which will have similar functions to the Court of Arbitration of the ICC and will be comprised of an equal number of Israeli and Palestinian, and a majority of international, arbitration experts; and a Secretariat, which will manage the daily aspects of JAC arbitrations and will be comprised of an Israeli and Palestinian Deputies and an international Secretary General. The JAC headquarters and hearing center will be located in East Jerusalem, with two back offices in Tel Aviv and Ramallah.

The JAC has obtained the approval and support of both the Israeli and Palestinian governments, while maintaining an apolitical agenda and strictly limiting its own jurisdiction to business disputes between Israelis and Palestinians. With the assistance of several international law firms and arbitration experts, the establishment of the JAC has been accompanied by educational and professional training on international arbitration and the JAC rules and procedures for local lawyers, judges and business people from both sides, as well as a major redrafting of the Palestinian arbitration law.

A local, independent, professional, and apolitical arbitral institution applying well-established international arbitration principles, the JAC is intended to provide a neutral and effective solution for business disputes arising between otherwise hostile parties, and presents a unique opportunity to strengthen economic cooperation and generally improve relations between Palestinians and Israelis.

For more information on the Jerusalem Arbitration Center, please contact: icc@chamber.org.il or info@iccpalestine.com.

THE 2012 ICC RULES AND A NEW GENERATION OF EMERGENCY ARBITRATOR PROVISIONS

Brendan Green, Associate at Herbert Smith LLP (Paris)

A widely discussed innovation in the 2012 International Chamber of Commerce Rules of Arbitration ("ICC Rules") is the introduction of provisions on interim and conservatory measures (Article 28) and the appointment of an emergency arbitrator to award such measures before the constitution of the arbitral tribunal (Article 29, Annex V). Read together with similar provisions in the 2010 revision of the Stockholm Chamber of Commerce Arbitration Rules

("SCC Rules") and the recent 2012 Swiss Rules of Arbitration ("Swiss Rules"), the ICC Rules evidence growing consensus in the arbitration community regarding the need for such mechanisms as well as an agreement in respect to their basic contours.

The ICC had created a similar mechanism with its Rules for a Pre-Arbitral Referee Procedure, which came into force on 1 January 1990. However, the Rules went largely unused. In fact, the ICC considered revoking them in 2000.⁴ Several new cases then arose in quick succession. However, the ICC Pre-Arbitral Referee Procedure was never fully embraced by the arbitration community. This is likely attributable to the fact that the procedure was not incorporated into the ICC Rules. Rather, it was a separate "opt-in" mechanism, meaning that parties had to provide for the application of the procedure in their arbitration clause.

The new generation of emergency arbitrator proceedings has remedied this shortcoming by providing for an "opt-out" mechanism. Pursuant to Article 29(6)(c) of the ICC Rules, the emergency arbitrator provisions do not apply where the parties have agreed to opt out of them. Similarly, Article 43(1) of the Swiss Rules provides for emergency relief, "unless the parties have agreed otherwise." However, the ICC has been slightly more conservative than either the Swiss Chambers or Arbitration Institute of the SCC. The ICC emergency arbitrator procedure is grandfathered in, applying only where the arbitration agreement in question was concluded after the coming into force of the new ICC Rules on 1 January 2012 (Article 29(6)(a)).

All three institutions have opted to provide broad discretion to the emergency arbitrator in deciding the procedure to be followed. Pursuant to Article 5(2) of Annex V of the ICC Rules, the emergency arbitrator is to conduct proceedings in a manner she "*considers to be appropriate*" but must, "*act fairly and impartially and ensure that each party has a reasonable opportunity to present its case.*" Article 43(6) of the Swiss Rules and Article 7 of Annex II to the SCC Rules provide for a similar level of discretion, requiring the emergency arbitrator to take the urgency of the application into account, while acting fairly and providing an opportunity for both parties to be heard.

Similar discretion exists with respect to the measures available and the test to be applied in deciding whether to award such measures. Article 28(1) of the ICC Rules gives the tribunal (or emergency arbitrator) authority to grant "any interim or conservatory measure it deems appropriate." Similar levels of discretion exist under both the SCC Rules (Article 32(1)) and the Swiss Rules (Article 26(1)). It thus falls on the emergency arbitrators to develop the standards and tests to be applied. This is in stark contrast to Article 2.1(a) of the ICC Pre-Arbitral Referee Procedure, which enunciated a test requiring applicants seeking interim measures to demonstrate (a) urgency and (b) immediate and irreparable loss. (The Referee had broader discretion to order narrowly defined types of relief, including ordering a party to make a payment to the other party or a third party, continue performance of contractual obligations, or preserve evidence (Article 2.1(b), (c), and (d))). Although the new emergency arbitrator proceedings do not define an applicable test, early experience from the SCC suggests that the criteria of urgency and irreparable harm are likely to be frequently invoked. Provided this practice continues, these provisions may achieve the predictability sought by the ICC Pre-Arbitral Referee Procedure, while maintaining flexibility to tailor relief to each specific case.

Another area of consensus is the relationship between the emergency arbitrator and the arbitral tribunal eventually appointed. Under all three sets of Rules, the arbitral tribunal is free to revisit the findings of the emergency arbitrator, and to modify or set aside her order (ICC Rules, Article 29(3); Swiss Rules, Article 43(8); SCC Rules, Appendix II, Articles 9(4) and 9(5)). The ICC Rules provide the arbitral tribunal with the power to hear claims for damages out of one party's failure to comply with an emergency arbitrator's order (ICC Rules, Article 29(4)). The Swiss Rules have a similar provision, providing that the arbitral tribunal may rule on claims for damages caused by "an unjustified interim measure or preliminary order" (Swiss Rules, Article 26(4)).

The provisions of the 2012 revision to the ICC Rules regarding interim measures and the emergency arbitrator procedure are thus best understood in the broader context of similar mechanisms enacted by other institutions, as well as a previous attempt by the ICC itself. The "opt out" nature of the emergency arbitrator procedure is evidence of the growing consensus regarding the necessity of such measures. However, the ICC has taken a cautious approach ensuring that no party will be subject to emergency arbitrator proceedings where they have not consented to them. Read with the recent revisions of the Swiss Rules and SCC Rules, these new provisions of the ICC Rules also show a remarkable degree of agreement on the basic outlines of the procedure: A rapid, flexible procedure that invests considerable discretion in the emergency arbitrator, but reserves the ultimate decision on the force and consequences of her orders to the arbitral tribunal eventually appointed.

⁴ Emmanuel Gaillard & Philippe Pinsolle, "The ICC Pre-Arbitral Referee: First Practical Experiences" (2004) 20:1 Arbitration International 13-37.

NEW ONLINE RESOURCE: ARBITRATIONLAW.COM

In April 2012, JURIS launched a new website Arbitrationlaw.com, an online resource for international arbitration research. Established for the arbitrator, practitioner, scholar and student, the legal database contains a vast collection of primary source material, commentary from expert authors and a wide range of print and online publications. Arbitrationlaw.com also connects its users directly to leading arbitral institutions, law firms specializing in international arbitration and is outfitted with a comprehensive roster of arbitrators. The website maintains a blog, which promotes ongoing discussions of issues and developments of interest to the ADR community, as well as a list of upcoming arbitration conferences. Registration is free and Arbitrationlaw.com is presently welcoming new and insightful blog submissions. Please visit the website for more details.

COMPETENCE-COMPETENCE DOES NOT APPLY TO PARTIES SEEKING ARBITRATION

Mary Paterson, Associate in Osler, Hoskin & Harcourt LLP's litigation group, YCAP Board of Directors, and
Stephanie Fularczuk, Associate in Osler, Hoskin & Harcourt LLP's litigation group.

In March 2012, the Court of Appeal for Ontario in *Shaw Satellite G.P. v Pieckenhagen*⁵ refused to stay a court action in favour of arbitration even though the contract contained an arbitration clause. In this unusual case, the

defendants tried to stay the court action even though some of the defendants were not party to the agreement. The Court refused to apply the competence-competence principle (that an arbitrator has the jurisdiction to determine her own jurisdiction), instead making it clear that a party seeking to stay a court action in favour of arbitration must acknowledge that it is a party to the arbitration agreement itself. This common sense approach signals that the Court may not apply the competence-competence principle when it would lead to inefficient dispute resolution.

1. The Facts

The plaintiff, Shaw Satellite, is a Canadian satellite television broadcaster licensed under the *Broadcasting Act*. The twenty-three defendants in this case are owners and/or operators of three apartment buildings in Toronto. Shaw alleges that the defendants fraudulently gained access to programming by using false names to get Shaw residential subscriber accounts and satellite receivers. The defendants allegedly connected the satellite receivers to an unauthorized satellite master antennae television system that allowed hundreds of their tenants to watch the programming. Shaw sued in Ontario Superior Court alleging conspiracy, conversion, contravention of the *Radiocommunication Act* and breach of the *Shaw Residential Agreement* (which contained the arbitration agreement).

Bell ExpressVu Limited Partnership commenced a similar action based on similar facts and some of the same defendants. However, the defendants in the Bell ExpressVu action did not move to stay that action in favour of arbitration as Bell ExpressVu's consumer contract did not contain an arbitration clause.

2. Superior Court of Justice

The defendants brought a motion under s. 7(1) of the *Arbitration Act* to stay Shaw's action, arguing that the arbitration agreement should be enforced.⁶ In dismissing the motion at first instance, Justice Perell gave three reasons for his decision:

1. **The defendants did not establish that they were parties to the arbitration agreement:** To obtain relief pursuant to s. 7(1) of the *Arbitration Act*, the moving party must establish that he is party to an arbitration agreement. Justice Perell found that because the defendants refused to characterize themselves as parties to the arbitration agreement, they were not eligible for relief under s. 7(1). Justice Perell further held that the competence-competence principle did not apply because the defendants were not resisting arbitration by saying that the arbitrator did not have jurisdiction (which would have been within the arbitrator's jurisdiction); instead, they were seeking arbitration.

2. **In the alternative, the question of law exception to the competence-competence principle applies:** There is an exception to the competence-competence principle in which a court can determine an arbitrator's jurisdiction if "the challenge involves a pure question of law, or one of mixed fact and law that requires for its disposition 'only superficial consideration of the documentary evidence in the record'."⁷ Justice Perell found that this case falls within this exception because only a superficial consideration of the documentary evidence was required to determine that the

dispute was not about breach of the agreement but rather about conspiracy, conversion, and contravention of the *Radiocommunication Act*.

3. **In the alternative, the statutory exception found in s. 7(5) of the Arbitration Act applies and a stay should not be granted:** Pursuant to s. 7(5) of the *Arbitration Act*, a court may grant a partial stay of proceedings where it is reasonable to separate the matters dealt with in an agreement from other matters in the action. Justice Perell refused to grant the stay finding that it would not be reasonable to allow part of the dispute to proceed to arbitration while allowing the companion Bell ExpressVu action to proceed in court, especially when some of the Shaw defendants were not parties to the *Shaw Residential Agreement* and would not be subject to the arbitrator's jurisdiction. Accordingly, a stay would have resulted in a multiplicity of proceedings, duplication of resources, inefficiency, increased costs, and delay.

3. Court of Appeal for Ontario

The defendants appealed to the Court of Appeal for Ontario. The Court of Appeal dismissed the appeal but did not discuss the competence-competence principle, instead relying on the statutory text of the Ontario *Arbitration Act*. The Court of Appeal relied on the following reasons which were also articulated by Justice Perell:

1. **The defendants did not establish that they were parties to the arbitration agreement:** The defendants' refusal to agree that they were parties to the arbitration agreement disentitled them to seek relief pursuant to s. 7(1) of the *Arbitration Act*.

2. **In the alternative, the statutory exception found in s. 7(5) applies and a stay should not be granted:** Granting a partial stay under s. 7(5) of the *Arbitration Act* would not be reasonable in the circumstances of this case. The issues in dispute should be determined in one forum and the only forum that had jurisdiction over the entire dispute was the court.

4. Significance and Implications

The common sense approach taken by both courts clearly establishes that defendants seeking to rely on an arbitration agreement cannot simultaneously reserve the right to deny that they are party to that same agreement. Defendants cannot ask the Court to enforce the arbitration agreement without acknowledging that they are party to the agreement.

Notably, the Court of Appeal did not comment on the competence-competence principle. Another approach to this case would have been to allow the arbitrator to decide whether she had jurisdiction over the dispute. Justice Perell refused to adopt this approach saying that the competence-competence principle applies if the issue for the arbitrator is whether a party *resisting* arbitration is a party to the arbitration agreement. He does not explain why the competence-competence principle would not apply to a party who *seeks*, rather than *resists*, arbitration. Regardless of the explanation, the practical effect of this decision is that the courts will not slavishly follow the competence-competence principle when to do so would lead to duplication and inefficiency.

⁵ 2012 ONCA 192.

⁶ 2011 ONSC 4360.

⁷ *Seidel v TELUS Communications Inc*, 2011 SCC 15 at para 29 quoting in part *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 85.

THE STANDARD OF REVIEW WHEN DETERMINING IF AN ARBITRAL TRIBUNAL PROPERLY ASSUMED JURISDICTION - *MEXICO V CARGILL*

Christina Doria, Associate at Baker & McKenzie LLP (Toronto).

The Ontario Court of Appeal in *United Mexican States v Cargill* ("*Cargill*")⁸ clarified the standard of review on the question of whether an arbitral tribunal acted outside its jurisdiction, holding that the standard of review is one of correctness. Notwithstanding that the standard of review is correctness on the issue of jurisdiction, the Court warned that a high level of deference should be afforded to international arbitral tribunals.

On May 10, 2012 the Supreme Court of Canada dismissed Mexico's application for leave to appeal the Ontario Court of Appeal's decision.⁹

The Dispute between Cargill and Mexico

Cargill, a US company that 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. Cargill manufactured its product in the US, then had the product imported to Mexico through CdM. CdM then distributed the product in Mexico. Mexico enacted a number of 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 Cargill production in the US and lost sales of CdM in Mexico.

Procedural History

Mexico moved to set aside the award in the Ontario Superior Court under the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law"), which is adopted in Ontario's *International Commercial Arbitration Act*¹⁰ Mexico argued that the tribunal exceeded its jurisdiction in 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. Finding that an objection to the merits was beyond the scope of the Model Law, 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.

The Decision of the Court of Appeal

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. It also warned courts to "limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals."¹¹

Two issues were before the Court of Appeal. First what is the standard of review for reviewing a decision of an arbitral tribunal under Article 34(2)(a)(iii)

of the Model Law? Second, did the application judge err in its application of the standard of review.

The Court began its analysis by considering Article 34(2) 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 contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

The Court affirmed that reviewing courts in Canada have repeatedly recognized that international arbitral tribunals should be afforded a high degree of deference and that courts "should interfere only sparingly or in extraordinary cases."¹² The Court considered the English Supreme Court decision of *Dallah Real Estate and Tourism Holding Co v Ministry of Religious Affairs of the Government of Pakistan*¹³ ("*Dallah*") which dealt with the review of a tribunal's jurisdiction under Article V of the *New York Convention*. Citing the *Dallah* case, the Ontario Court of Appeal held that the tribunal's decision has *prima facie* merit since the challenging party has the onus to set aside the award. The Court then held that the tribunal could not act beyond its jurisdiction, stating:

The tribunal therefore had to be correct in the sense that the decision it made had to be within the scope of the submission and the NAFTA provisions. Its authority to make any decision is circumscribed by the submission and the provisions of the NAFTA as interpreted in accordance with the principles of international law. It has no authority to expand its jurisdiction by incorrectly interpreting the submission or the NAFTA, even if its interpretation could be viewed as a reasonable one.

I conclude that the standard of review of the award the court is to apply is 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.

...

It is important, however, to remember that 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. To the contrary, courts are expected to intervene only in rare circumstances where there is a true question of jurisdiction.¹⁴

On the issue of the application of the standard of review, the Court of Appeal noted that the inquiry under Article 34(2)(a)(iii) is restricted to the issue of whether the tribunal dealt with a matter beyond the submission to arbitration,

rather than how the tribunal decided the issues within its jurisdiction. The Court held that the tribunal acted within its jurisdiction by correctly identifying its jurisdictional limits to award damages and considered Cargill's losses as they arose from Mexico's breaches of NAFTA.

Conclusion

The *Cargill* case applied the standard of correctness on the very narrow issue of whether the dispute was within the scope of the submission to arbitration. Where the assessment of the tribunal's decision did not involve a review of the merits, the standard of correctness was appropriate. While this case may, at first blush, appear to remove deference afforded to arbitral tribunals, in actuality, this decision confirms that arbitral tribunals ought to be given a high degree of deference and interfered with only rarely.

⁸ 2011 ONCA 622, [2011] OJ No 4320.

⁹ See *United Mexican States v Cargill*, [2011] SCCA No 528.

¹⁰ RSO 1990, c I-19.

¹¹ *Cargill*, supra note 1 at para 46.

¹² *Cargill*, *ibid* at para 33, citing *Quintette Coal Ltd. v Nippon Steel Corp* (1990), 50 BCLR (2d) 207 (CA), leave to appeal ref'd, [1990] SCCA No 431; *United Mexican States v Karpa* (2005), 74 OR (3d) 180 (CA); and *Canada (Attorney General) v SD Myers, Inc*, [2004] 2 FCR.368.

¹³ [2011] 1 AC 763.

¹⁴ *Cargill*, supra note 1 at paras 41, 42 and 44.

GALLO V CANADA¹⁵

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The *Gallo v Canada* case involved a NAFTA Chapter 11 claim of over \$355 million in respect to the closing down of a landfill site by the Ontario government. The facts in brief are as follows. In September 2002, an Ontario company (the 'Enterprise') purchased an abandoned mine ('Adams Mine') in Northern Ontario. At that time, the Adams Mine had obtained certain administrative approvals to be used as a waste disposal site. In April 2004, the Ontario legislature enacted the *Adams Mine Lake Act* ('AMLA') prohibiting waste disposal at the mine, revoking the existing approvals, and providing a limited amount of compensation to the Enterprise. The claimant sought relief under NAFTA Article 1105, Article 1110 and customary international law.

The tribunal bifurcated the proceedings to address Canada's jurisdictional objections, which focused on whether the claimant possessed legal standing, as a preliminary matter. The claimant asserted standing under NAFTA Article 1117, which provides that "an investor of a Party, on behalf of an enterprise of another Party that is a juridical person that the investor owns or controls directly or indirectly" may raise a NAFTA claim. At issue was *when* the "investor of a Party" obtained ownership of the "enterprise of another party." More specifically, Canada's primary argument was that the claimant had to prove that he owned the Enterprise prior to the introduction of the AMLA to satisfy the tribunal's jurisdictional requirement.¹⁶ For its part, the American claimant, Vito Gallo on behalf of the Enterprise, argued that he had been the owner of the Enterprise since September 9, 2002, which was evidenced by two backdated corporate resolutions and a share certificate. The claimant also asserted, in a subsidiary claim, that NAFTA Article 1117 does not limit *when* ownership or control of the "enterprise of another party" ought to occur.

In considering the factual record, the tribunal appeared most concerned with the evidence presented by the claimant. Specifically, the tribunal noted the absence of written and circumstantial evidence and personal involvement of Mr. Gallo regarding the purchase of the mine;¹⁷ the scarcity of written evidence and personal involvement of Mr. Gallo involving the incorporation of the Enterprise;¹⁸ Mr. Gallo's lack of participation in the management of the mine;¹⁹ and inconsistent information on the tax returns of Mr. Gallo and the Enterprise.²⁰ In weighing the evidence, the tribunal concluded that the "factual record is full of unusual circumstances and outright mistakes"²¹ but was "prepared to accept that Mr. Gallo became at some unproven time the Enterprise's owner of record."²² In other words, there was no evidence detailing the exact date that Mr. Gallo gained ownership of the Enterprise, only that he eventually possessed the title of sole shareholder. Since the claimant was unable to prove foreign ownership or control of the Enterprise prior to the introduction of the AMLA, the tribunal determined that it lacked jurisdiction *ratione temporis*. In addressing the claimant's subsidiary Article 1117 claim, the tribunal opined that "ownership or control must exist at the time the measure which allegedly violates the Treaty is adopted or maintained."²³

Portions of the *Gallo* decision are redacted, which may limit its utility for future cases. However, *Gallo* is instructive on at least two grounds. First, the tribunal clearly places a premium on documentary and corroborating evidence, which ought to resonate with investor-state dispute practitioners. The case turned on whether Mr. Gallo could prove that he acquired ownership of the Enterprise prior to the enactment of the AMLA. Although the tribunal appeared willing to overlook certain peculiarities and mistakes on the factual record, it was particularly troubled with two facts - the inexistence of contemporaneous corporate resolutions and the absence of contemporaneous tax filings - because both facts appeared to put into question certain obligations undertaken by Mr. Gallo and the Enterprise as well as weaken the plausibility of the claimant's version of events.²⁴ According to the tribunal, the claimant's failure to put forth sufficient reliable and credible evidence was fatal to its claim.²⁵

Interestingly, the tribunal also noted the expert testimony of Western University Law Professor, Bruce Welling, positing that "[a]bsent compelling documentary or forensic evidence to the contrary, an Ontario court would accept the Enterprise's share register as conclusive evidence of Mr. Gallo's status" and that the appropriate venue to challenge such authenticity was the "Courts of Ontario."²⁶ Curiously absent from the tribunal's reasoning on this crucial temporal issue was 'documentary or forensic evidence' demonstrating that Mr. Gallo did not in fact own the Adams Mine prior to the enactment of the AMLA. The tribunal's failure to revisit Professor Welling's testimony on this matter also raises deeper issues concerning the burden of proof in jurisdictional claims as well as the appropriate interplay between domestic law and international law. Specifically, the tribunal failed to explain why Canada did not have to pursue a statutory remedy under s. 250 of the *Ontario Business Corporations Act* to challenge the authenticity of Mr. Gallo's share certificate or why the tribunal had the authority to question the validity of the corporate records in place of Ontario courts.

Second, in deciding the temporal limitations of NAFTA Article 1117, the tribunal stated firmly that "the investor must prove that he owned or controlled directly or indirectly the "juridical person" holding the investment, at the critical time."²⁷ The tribunal further explained that, since the claimant did not

demonstrate that the Enterprise was owned by a NAFTA-protected person at the relevant time, it was impossible for the Enterprise to be nursing a nascent NAFTA claim that could be later acquired by a NAFTA-protected person (in this case Mr. Gallo) and raised as a viable claim.²⁸

Implicit within this logic, however, is a situation where an investor-claimant may not have to own or control the “juridical person” at the relevant time. For instance, if an Enterprise possesses a legitimate nascent NAFTA claim (i.e. the Enterprise is owned or controlled by a NAFTA-protected person, which has allegedly been harmed by a host government’s measure) but its NAFTA-protected owner/controller is unwilling or unable to raise that claim, it remains an open question as to whether another NAFTA-protected person could subsequently acquire ownership or control of that Enterprise and raise the nascent claim as a viable claim under NAFTA.

¹⁵ Award, PCA Case No 55798, 2011.

¹⁶ *Ibid* at para 139.

¹⁷ *Ibid* at paras 155-169.

¹⁸ *Ibid* at paras 170-221.

¹⁹ *Ibid* at paras 231-244.

²⁰ *Ibid* at paras 245-249.

²¹ *Ibid* at para 281.

²² *Ibid* at para 283.

²³ *Ibid* at para 325.

²⁴ *Ibid* at paras 290-296.

²⁵ *Ibid* at para 297.

²⁶ *Ibid* at para 126.

²⁷ *Ibid* at para 325.

²⁸ *Ibid* at para 327.

MERCER INTERNATIONAL'S REQUEST FOR ARBITRATION

Heather Bray, International Arbitration Law Clerkship with Dr. Todd Weiler

On April 31, 2010, Mercer International submitted a Request for Arbitration ('Request') under the ICSID Additional Facility Rules against Canada for alleged breaches of various provisions of NAFTA Chapter Eleven.²⁹ Mercer International, a limited liability company organized under the laws of the State of Washington, owns and operates Celgar, a pulp mill and electricity generation facility located in Castlegar, British Columbia ('BC').

Nestled within the Selkirk Mountains and positioned at the confluence of the Columbia and Kootenay rivers, Celgar prides itself on being the “most energy efficient, lowest carbon footprint, pulp mill” in BC generating “more electricity than any other BC pulp mill.”³⁰ Celgar’s traditional pulp production operations combined with its complementary business activity of producing and selling renewable energy not only provides important products for consumers but, as one of the largest employers in the region, helps maintain the vitality of the community.

The NAFTA claim arises generally within the BC energy regulatory framework and specifically in response to restrictions placed against Celgar pulp mill and its ability to sell electricity. There are two major electric distributors within BC. The first one, BC Hydro, a provincially owned enterprise, provides electricity to 90 percent of the province. The second, FortisBC, in contrast, is a privately

owned utility that services a small geographic area within the province. FortisBC generates its own power as well as purchases power from BC Hydro for resale to its own customers. In 1993, BC Hydro and FortisBC concluded an agreement ('3808 Agreement') that permitted FortisBC to purchase electricity from BC Hydro at an embedded cost rate, as opposed to the higher market rate.³¹ This Agreement did not prohibit FortisBC from selling to its customers the embedded cost power obtained from BC Hydro. Celgar is the only pulp mill located within FortisBC service area and regularly purchased electricity from FortisBC at the embedded cost rate, despite the fact that it has electrical self-generation capabilities.³²

In its Request, Mercer international argues that it relied on the above regulatory framework applicable to the FortisBC service area and through its subsidiary Celgar developed and implemented an investment strategy that sought to maximize its return as a producer and seller of renewable energy.³³ Specifically, Mercer made strategic capital investments, including a green energy project, concluded an agreement with FortisBC promising Celgar a supply of energy at FortisBC's average embedded cost rate, and finalized an agreement with BC Hydro, whereby Celgar promised to sell BC Hydro all energy produced above an established baseline.³⁴

In 2009, Mercer International's strategic plans were allegedly frustrated when the BC Utilities Commission, a government regulatory body, granted BC Hydro's application to amend the 3808 Agreement between Fortis BC and BC Hydro.³⁵ The amendment prohibited FortisBC from selling embedded cost power to any of its customers unless those self-generating customers first fully supplied their own power needs. Consequently, this amendment restricted Celgar's access to any embedded cost power so long as it had a surplus of self-generated electricity.³⁶ These consequences, however did not affect Celgar's competitors, which are outside the FortisBC service area. Other pulp mills and entities that generate and sell electricity within BC continued to have access to embedded cost power.

In its Request, Mercer International argues that Canada, both directly and through the actions of BC Hydro and the BC Utilities Commission, failed "to implement a uniform policy concerning access to embedded cost power ... either specifically for pulp mills with self-generating capabilities or more generally for a broader class of industrial power users with self-generation capabilities, while such users simultaneously are selling self-generated power to the market."³⁷ Taking the stance that Canada's actions amount to discriminatory treatment, Mercer International further pleads, "Celgar mill will be among the first to be squeezed and potentially rendered unprofitable and in a worse-case scenario, forced to shut down."³⁸

Mercer International contends that, as a consequence of these actions, Canada has breached NAFTA's National Treatment (Article 1102),³⁹ Most-Favored Nation Treatment (Article 1103),⁴⁰ Minimum Standard of Treatment (Article 1105)⁴¹ and State Enterprise (Article 1503)⁴² provisions. These arguments provide at least three points that are worthy of note.

First, Mercer's argument that Canada failed to ensure that BC Hydro, as a State Enterprise, acted inconsistently with Canada's Chapter Eleven obligations provides a unique opportunity for a NAFTA tribunal to revisit Article 1503 of NAFTA. This Article obliges that each Party ensure that a State Enterprise that it maintains or establishes acts in a manner consistent with its NAFTA obligations "wherever such enterprise exercises regulatory,

administrative or other governmental authority that the Party has delegated to it.” In *UPS v Canada*, the tribunal interpreted Article 1503 as a *lex specialis* provision applicable to the acts of State Enterprises, separate and apart from customary international law rules on State responsibility. Based on this interpretation, the tribunal found that the actions of Canada Post, an entity responsible for postal services in Canada, were not actions attributable to Canada.⁴³ Notwithstanding whether or not the acts of BC Hydro are ultimately considered attributable to Canada, this case will no doubt provide interesting insight into the scope and nature of Article 1503 of NAFTA.

Second, regarding the viability of the National Treatment claim under Article 1102, it will be interesting to learn if Mercer International can locate an appropriate comparator group that is in like circumstances. While investors in the same economic or business sector in BC that are in direct market competition with Celgar are readily identifiable, the fact that Celgar is the only pulp mill within the FortisBC service area and the only pulp mill with a generation facility operation in BC that is not a BC Hydro customer may serve as an obstacle to its discrimination claim.

Finally, Mercer International argues that the discriminatory changes in the legal framework regulating energy in BC negatively impacted its reasonable investment-backed expectations contrary to Article 1105. Although the protection of an investor’s legitimate expectations is a tantamount consideration of Article 1105’s fair and equitable treatment standard, a NAFTA tribunal has yet to find a violation of Article 1105 based solely on an investor’s failed expectations.

Whether interested in international arbitration, international investment law, NAFTA Chapter Eleven or the regulation of natural resources, this case will surely be an interesting one to follow.

²⁹ See generally *Mercer International Inc v Canada*, Request for Arbitration, ICSID Case No ARB(AF)/12 (30 April 2012).

³⁰ *Ibid* at para 9.

³¹ *Ibid* at para 37.

³² *Ibid* at para 36.

³³ *Ibid* at para 50.

³⁴ *Ibid* at paras 51-53.

³⁵ *Ibid* at para 55.

³⁶ *Ibid* at para 57.

³⁷ *Ibid* at para 6.

³⁸ *Ibid* at para 43.

³⁹ *Ibid* at paras 83-90.

⁴⁰ *Ibid*.

⁴¹ *Ibid* at paras 91-94.

⁴² *Ibid* at paras 81-82.

⁴³ *United Parcel Service of America v Canada*, Award and Separate Opinion, Ad hoc-UNCITRAL Arbitration Rules (24 May 2007) at para 62.



International Arbitration Calendar 2012

As of May 2012

Date	Place	Organization	Topic	Web Address
21 June 2012	Toronto, ON / Washington DC / Webcast	YCAP/ ICDR Y&I	To Defer or Not to Defer? Canadian, American and ICSID Perspectives on the Review of Arbitral Rulings on Jurisdiction.	www.ycap.ca www.icdr.org
26-27 June 2012	Ottawa, ON	University of Ottawa	Certificate in Arbitration and International Arbitration	www.continue.uOttawa.ca/arbitration
9-11 September 2012	Miami, FL	ICDR / IBA	10 th Annual Miami International Arbitration Conference	www.aaauonline.org/courseSection.aspx?course=395
24-27 September 2012	Paris, France	ICC	PIDA Training: International Commercial Arbitration - Study of a mock case under the 2012 ICC Rules of Arbitration	http://iccwbo.org/events/registrationrol.aspx?CodeICMS=S1210
30 September – 5 October 2012	Dublin, Ireland	IBA	IBA Annual Conference 2012	http://www.int-bar.org/conferences/Dublin2012/
2-4 October 2012	Washington DC	ICC / AAA / ICSID	Ninth Annual Seminar on International Commercial Arbitration: How to Handle a BIT Arbitration	https://www.wcl.american.edu/arbitration/seminar.cfm
8-9 October 2012	Paris, France	ICC	Training on the 2012 ICC Rules of Arbitration	http://www.iccwbo.org/events/registrationrol.aspx?CodeICMS=S1228

Date	Place	Organization	Topic	Web Address
24 October 2012	Montreal	YCAP	Fall Symposium	www.ycap.ca
25 October 2012	Montreal	ICC Canada	Annual Conference	http://www.chamber.ca/index.php/en/icc-arbitration/
25-26 October 2012	Halifax, NS	ADR Institute of Canada	Annual National Conference	http://www.amic.org/
11-13 November 2012	Miami, FL	ICC	International Arbitration in Latin America	http://www.iccwbo.org/events/registrationrol.aspx?CodeICMS=S1217
26 November 2012	Paris, France	ICC	Third-Party Funding in International Arbitration	http://www.iccwbo.org/events/registrationrol.aspx?CodeICMS=S1211
3-6 December 2012	Paris, France	ICC	Advanced PIDA Training: International Commercial Arbitration – Study of a complex mock case under the 2012 ICC Rules of Arbitration	http://www.iccwbo.org/events/id34191/index.html