YCAP

LEX ARBITRI

The E-Newsletter of
Young Canadian Arbitration Practitioners
Jeunes praticiens canadiens de l'arbitrage

Spring/Summer 2013
Volume 9 Number 1

In This Issue:

Tips for Success as an International Arbitration Associate

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After months of toiling away on securities litigation and bankruptcy cases, you receive a long-awaited email from a renowned international arbitration partner at your law firm. The partner would like to staff you on a high-profile international arbitration. You recognize that this is your potential entrée into international arbitration – a notoriously difficult field to break into. How will you add value to the team despite your lack of experience? What practical skills will you need to succeed? How can you ensure that this first international arbitration won't be your last?

There are no hard and fast rules for succeeding as a young international arbitration practitioner. The arbitration community is full of colorful characters, each with different approaches, quirks and expectations of associates. However, in my experience, there are five nearly universal tips for success.

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Tip No. 1: Become an expert

When staffed on a new arbitration, your first priority is to master the facts and become an expert on your case. Arbitrations rarely are won on the law, as sexy as the law can be. The partner and the senior associates on the team may not have the opportunity to get as intimately acquainted with the documents and facts as you because they will be dealing with many cases at once. This means that if you learn the documents inside and out, you will become a "go-to" person on the team regardless of your experience level.

In addition to becoming an expert on the facts of your specific case, you should also understand the relevant industry. If the arbitration involves a gold mine, for example, you should know the basics of the gold mining industry, i.e. know the major gold producers, gold price trends, the basic vocabulary of gold mining, etc. You will be a better lawyer for it and your clients will appreciate your understanding of their business.

My first investment treaty case involved electricity transmission in a South American country. I knew the case inside and out. I read every document and I knew more about that country's electricity grid and regulatory framework than I ever thought I would know (or want to know!). I knew I had succeeded at becoming an expert in the case when – even though I had only been an associate for a few months – the partner asked me to conduct some of the direct examinations and to "second chair" the main cross-examinations. The latter meant sitting next to the cross-examining attorney during witness questioning and being on high alert the whole time. To second chair an examination effectively, you must be an expert in the case and a multitasker! Your role is to follow the cross examination script and prepare documents for the examining attorney, all the while listening to the witness's answers, pointing out inconsistencies and suggesting additional lines of questioning.

Being asked to second chair an examination shows you have gained the trust of your team, and the best way to achieve this is to master the facts of your case. With trust comes greater responsibility, and greater responsibility leads to a soaring career.

Tip No. 2: Hone your writing skills

Clear and persuasive writing is central to effective advocacy in international arbitration. Even a brilliant attorney's career can get stalled if this crucial skill is not mastered. Writing skills are key in arbitration – even more so than in domestic litigation – as parties almost exclusively plead arbitral cases in writing. For instance, arbitration attorneys typically draft witnesses' sworn statements based on interviews. Thus, even direct witness testimony is primarily written by arbitration counsel.

A recent billion dollar investment treaty case I was involved in demonstrates the importance of written advocacy in international arbitration. Over the course of the six years leading up to the final hearing, the parties filed nine written briefs, 26 witness statements, and seven expert reports. This amounted to roughly 3,570 pages of written submissions on the record, without including the countless letters exchanged between the parties and the tribunal. After this protracted written phase, the oral hearing lasted a mere nine days.

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To master written advocacy in international arbitration, you must develop the ability to synthesize complex issues, facts and arguments in a clear and simple manner. Clarity and simplicity are rooted in the structure of your written arguments. Structuring an argument is the first step to winning an argument. You want your pleadings to set out a seamless cascade of arguments, each flowing effortlessly from the last and leading to an inevitable conclusion that supports your client's case.

Effective writing also requires consideration of the audience which in an international arbitration, will be culturally diverse. In general, you should adopt a sober tone. Aggressiveness, irony, long sentences and numerous adjectives are seldom effective. Instead, let the arguments speak for themselves, and allow the arbitrators develop their own sense of outrage upon learning the facts, i.e. instead of saying that the other party's conduct was "egregious", describe the facts that will lead the reader to conclude that the conduct was egregious.

To become a great writer, you need to become obsessed with writing. Clear, persuasive drafting is an art that you learn over the course of years; it is a craft you learn by doing. The most effective way to develop your writing skills is to run redlines and scrutinize every change that a more senior attorney makes to your drafts. Learning from these changes is critical because ultimately, you will become a great writer by emulating the writers you work with while developing your own style. There is a famous anecdote at my firm where an associate handed in a brief, and after partner comments, only *one* of his original sentences remained. That associate later made partner (a partner renowned for his prose!), so do not be discouraged when you receive a heavy mark-up. The key is to learn and improve – it will take time to find your voice.

Tip No. 3: Develop arbitration-specific expertise

International arbitration is a niche practice and to succeed in the field, it helps to have a genuine interest in this area of law. By building expertise, you will be a more effective attorney in at least two ways.

First, there is no Westlaw or Lexis for arbitration practitioners (or at least not yet) and so it is critical to keep abreast of the latest developments and to know where to find additional information on specific issues. This is especially important in investment treaty arbitration which has its own body of substantive law in addition to procedural rules. Signing up for newsletters and discussion groups (like the Kluwer Blog, IAReporter, OGEMID, etc.), and getting familiar with the key arbitration resources (i.e. investmentclaims.com, ITA, Kluwer, Investor State Law Guide, authoritative treatises, etc.) is absolutely critical. Building a knowledge base and learning to leverage arbitration-specific tools will help you add value as a junior team member staffed on an arbitration.

Second, to succeed as an international arbitration practitioner in the long term, you need to get involved in the field and network with other practitioners. Successful arbitration lawyers and arbitrators tend to move in academic circles, write journal articles, attend and speak at conferences, etc. Doing these things will help you develop your expertise and get your name out there.

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Tip No. 4: Focus on language skills

International arbitration is, obviously, *international*. Thus, learning or perfecting a second or even a third or fourth language is extremely valuable. Rare are the international arbitrations where all documents and all parties are unilingual, so multilingual attorneys are sought after. Canadians have an advantage in this respect as many speak at least two languages (this may explain why there are so many Canadians in international firms). Learning Spanish was my ticket to a dream job doing investment treaty arbitration in Latin America. Had I not developed this language skill, my current career path would not have been open to me.

Tip No. 5: Be flexible

The international aspect of arbitration is fascinating but taxing. Clients, experts, witnesses and arbitrators are often scattered in different time zones, leading to conference calls at odd hours and frequent international travel. Arbitration hearings are usually held in neutral third countries which can mean long stints overseas. Travel is exciting at first – my arbitration career has taken me to interesting places around the world I never would have thought to visit on vacation like Yemen and Paraguay – but over time, it can get challenging especially when you have a family and young children. Being flexible is key, as is developing a knack for getting over jet lag quickly.

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International arbitration is a fascinating area of law. It is a difficult field to break into, so once you get your foot in the door you need to make the most of it. Following the tips in this article will hopefully set you up for success.

YCAP PUB NIGHT IN CALGARY

Joanne Luu Associate, Burnet, Duckworth & Palmer LLP
Valerie Quintal, Associate, Burnet, Duckworth & Palmer LLP

In what appears to be shaping up to be an annual tradition, on 13 May 2013, YCAP organized a Pub Night at Rush in Calgary on the eve of the Western Canadian Commercial Arbitration Society (WCCAS) conference.

As self-classified “novices” (rather than complete first-timers) to this event, it was immediately apparent how our impressions of this year’s event were different from the last. Faces were more familiar, as we reconnected with past attendees and chatted with colleagues entering the arbitration sphere.
While last year, those junior members of the crowd (i.e. us) could be described as being in “shock and awe” of the names and faces in attendance, this year, we were able to speak more deeply about the various issues in arbitration, including: the growth of international arbitration, and its differences with domestic arbitration, and the increasing trend towards greater document production.

The room was abuzz, until of course, a noticeable hush befell the room when the Toronto Maple Leafs suddenly lost in overtime to the Boston Bruins – ending their Stanley Cup run for the year. Needless to say, the YCAP Pub

Night drew attendees from across North America, including Texas, and of course, Toronto.

A special thank you to the WCCAS members who attended.

IMAQ 4TH ANNUAL SYMPOSIUM IN MONTREAL

Charlotte Verdebout, Student-at-Law, Stikeman Elliott LLP

On May 24, 2013, McGill's Faculty of Law hosted the fourth Annual Symposium of the Quebec Institute of Mediation and Arbitration (IMAQ).

The theme of this year's conference was "The Potential of Arbitration as an Effective and Efficient Means of Resolving Commercial Disputes". This full-day conference was an excellent opportunity for young lawyers (even some lawyers-to-be), senior practitioners, in-house counsels and arbitrators, to hear and debate the cost-effectiveness and efficacy of commercial arbitration.

Welcoming words from Prof. Frédéric Bachand, Chair of the Organizing Committee, and Mr. Thierry Bériault, President of IMAQ, paved the way for the rest of the day, which consisted of two conferences, three panels of three to four speakers each and an open discussion. The program ended with warm thanks from Ms. Diane Sabourin, President of the IMAQ Arbitration Committee, and an invitation to attend a cocktail reception, featuring Hon. Marie Deschamps.

Prof. Gélinas opened the conference by introducing the topics that were to be addressed by the different panels. Prof. Gélinas portrayed arbitration as becoming less and less flexible, reproducing the rigidity of the civil litigation process. He emphasized the importance of enabling arbitration to adapt to the specific needs of each case, and encouraged practitioners to take advantage of the benefits offered by arbitration as an alternative dispute resolution mechanism.

The first panel addressed drafting arbitration clauses, and was moderated by Mr. Pierre Bienvenu, with speakers Mr. Lev Alexeev, Mr. Alain Prujiner and Ms. Marie-Christine Dupont. These practitioners provided numerous tips on the goals of arbitration clauses in terms of scope, clarity and effectiveness. The panelists also pointed out examples of common pitfalls to be avoided with respect to pathological clauses, multiplicity of contracts or parties, parallel proceedings and the intervention of courts.

Hon. Pierrette Rayle moderated the second panel on the choice of arbitrators. The panel consisted of Ms. Marie-Claude Martel and Mr. Babak Barin. These three panelists advised on how to carry out the selection process of arbitrators in a way that is efficient but still harmonious in light of the expectations of each party and their counsel. Numerous criteria were mentioned in selecting the most appropriate arbitrator, such as the arbitrator's skills and qualifications, reputation, moral authority, experience and impartiality.

During the lunch session, Ms. Sophie Nappert addressed whether Quebec should have its own arbitral institution. Ms. Nappert considered the contribution a Quebec arbitral institution would have in further developing arbitration in Quebec, notably in terms of promotion and credibility. Ms. Nappert suggested that such an institution should model itself after well-

regarded international arbitration institutions, and how they have developed and financed themselves to become successful.

After lunch, the third panel was comprised of arbitrators, and included Mr. Olivier Després, Hon. Benjamin Greenberg, Hon. Joseph R. Nuss and Mr. Max Mendelsohn. The speakers addressed their experiences that have helped them develop efficient and effective means of conducting arbitration proceedings. Similar to Prof. Gélinas, the panel emphasized the importance of maintaining the flexibility of arbitration, especially with respect to arbitral procedure, which should be tailored to each case.

In following, Prof. Geneviève Saumier and Prof. Arthur Oulaï moderated an open discussion, during which panelists, lecturers and conference participants joined in a discussion on the numerous topics addressed throughout the day.

The last speaker of the day was Hon. Marie Deschamps, who shared her views on the evolution of arbitration and elaborated on how arbitration has adapted over the years in order to meet the needs of its users. No need to say that this final speech was the reflect of the whole Symposium: interesting, opening up a lot of areas to think about and reflecting the speaker's fervor but also clear-sightedness towards arbitration.

PARIS ARBITRATION ACADEMY 2013

H.L. Bray, LLB, LLM, SJD & PhD Candidate, Max Planck Institute

Hosted in Paris, France, the International Academy for Arbitration Law ("Academy") offered a three-week course in English on International Investment Arbitration from July 1 to July 19, 2013. The intensive program included a 15-hour general course spanning over the three weeks, five 5-hour special courses, several workshops on institutional arbitration, and two lectures – the inaugural lecture and the Berthold Goldman lecture. For the 2013 session, the Academy chose 85 participants from 46 different countries. Participants included students, practitioners, academics, magistrates, and government representatives.

The Academy commenced with the inaugural lecture given by former President of the International Court of Justice, Gilbert Guillaume, titled "The Financial Default of States Before the International Judge and Arbitrator." The Berthold Goldman lecture was delivered by Yves Derains and addressed the landmark *Chromalloy v. Egypt* case.

The general course titled "International Investment Arbitration: The Perspective of the Arbitrator" was taught by Professor David Caron. The course traced the major stages of the arbitral process and raised several provocative questions, including: How do arbitrators think about the work in front of them? How do panels approach their work? How should panels work? What is the task of the arbitrators? Professor Caron offered insights into the role of an investment-treaty arbitrator and effectively laced each lecture with anecdotal evidence, personal observations, and case study analysis.

Experts in the field of commercial and investment treaty arbitration taught the five special courses. These courses offered concentrated and focused lectures on cutting-edge issues in international arbitration. Professor Andrea Bjorklund, Professor Susan Franck, Professor Horacio Grigera Naon, Professor Alain

Prujiner and Professor Brigitte Stern offered special courses in procedural challenges in investment arbitration, empirical assessments of investment arbitration, competence-competence, arbitration and consumer law, and the use of public international law in investment arbitration, respectively. Students also attended workshops and seminars on specific institutional arbitrations, including ICSID Arbitration (Paul Jean Le Cannu), Dubai International Arbitration Centre (Nassib Ziadé), ICC Arbitration (José Ricardo Feris), and Permanent Court of Arbitration (Brooks Daly).

Participants additionally had the opportunity to participate in a voluntary essay competition (the Laureate of the Academy), various cocktail receptions, and a brown bag lunch hosted by Emmanuel Gaillard where he spoke about his book *Legal Theory of International Arbitration.* In their spare time, the participants could explore the many attractions and cuisine available in the City of Lights and develop contacts with people from every region of the world.

Students and young practitioners interested in receiving specialized and advanced training in international arbitration should consider applying to the Academy for the 2014 summer session. It provides the perfect platform to sharpen your arbitration law skills, enter into vibrant debates with individuals from all over the world, and benefit from the expertise of renowned arbitral experts. For more information, please see the Academy website, http://arbitrationacademy.org/.

ULCC DISCUSSION PAPER PROPOSES CHANGES TO *INTERNATIONAL COMMERCIAL ARBITRATION ACT*

Robin McNamara, Summer Student at Perley-Robertson, Hill & McDougal LLP/s.r.l.

A Working Group established by the Uniform Law Conference of Canada ("ULCC") will present a new Uniform *International Commercial Arbitration Act* ("Uniform ICAA") for final approval by the ULCC in August 2013. The Uniform ICAA is a modernized version of the original Uniform ICCA that was first drafted in 1986 and used as a template for the provincial and federal governments to model their respective international commercial arbitration legislation. It incorporates two principal subjects: the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention").

In order to generate feedback, the Working Group released a Discussion Paper in January 2013. The Discussion Paper contains a number of specific policy recommendations and identifies issues requiring further consideration. Several of the proposed changes highlighted in the new Uniform ICAA focus on the topic of this YCAP newsletter, efficiency in arbitration.

Efficiency in time and cost is always a concern in arbitration proceedings, but the Working Group is very conscious of the need to balance efficiency with other important goals. It considers amending the Uniform ICAA to afford arbitrators additional powers to issue *ex parte* orders and consolidate related arbitration proceedings, but questions whether these are consistent with the consensual nature of arbitration. Likewise, it advocates the harmonization across Canada of limitation periods for the recognition and enforcement of arbitral awards. The Working Group determined, however, that establishing a

common limitation period for the commencement of arbitration could conflict with the limitation period established by the parties' choice of substantive law.

Updating the Uniform ICAA

International arbitration legislation in Canada is in need of modernization and re-harmonization in order to reflect the developments in international arbitration over the last thirty years. The new Uniform ICAA is a welcome step towards an efficient and effective Canadian arbitration system. With a respected judicial system, geographic proximity to the US and a mixture of common and civil law traditions, Canada is well-situated to conduct international arbitrations and enjoys an enviable reputation of being "arbitration-friendly". But in order for Canada to compete against other jurisdictions in the market for international arbitration business, it is important that international arbitration legislation in Canada is truly consistent with the Model Law and the New York Convention in order to provide parties a greater level of predictability and consistency no matter where their arbitration is situated across Canada.

International law and 'best practices' in international arbitration have changed substantially since the Uniform ICAA was first developed in 1986. The original 1985 text of the Model Law was amended by UNCITRAL in 2006, and until now the ULCC had not considered whether these amendments should be adopted in the Uniform ICAA.

Anomalies in the provincial implementing legislation have developed as provinces made unique amendments and these may be perceived to be inconsistent with the Model Law and the New York Convention. For example, Ontario no longer has implementing legislation for the New York Convention, and arbitrators in Quebec have limited authority to issue interim measures. Even though the provincial and federal governments each hold jurisdiction over international arbitration, non-uniformity makes Canadian law less accessible to foreign users.

Proposed changes to the Uniform ICAA promote efficiency in arbitration

In all, the Discussion Paper makes five policy recommendations and identifies twenty-three issues deserving of further consideration. The following is a summary of three of the key proposed changes that would make arbitration more efficient.

***Ex parte* orders**

One of the more controversial articles of the 2006 amendments to the Model Law empowers arbitrators to make *ex parte* preliminary orders. The purpose of this provision is to preserve the asset in dispute or one party's ability to pay by preventing a respondent from dissipating its assets in advance of judgment. If arbitrators lack the authority to impose *ex parte* orders, however, the party seeking the interim order is left either to initiate court proceedings or provide notice to the respondent in the arbitration, which would seem to defeat the purpose of seeking the order in the first place.

There is a concern, however, that issuing orders without notice is contrary to the consensual nature of arbitration. Arbitrators derive authority from consent of the affected parties which, by definition, is absent in an *ex parte* order. Ultimately, however, the Working Group determined that this concern is

mitigated by the short time-span of *ex parte* orders, and tentatively endorsed the adoption of the 2006 amendments in the new Uniform ICAA.

Limitation periods in arbitration proceedings

Across provincial jurisdictions, limitation periods for recognition and enforcement of a foreign arbitral award vary substantially. In Alberta, for example, recognition and enforcement of a foreign arbitral award is subject to a two-year limitation period,[1] but the limitation period in BC is six years. The Discussion Paper considers whether these limitation periods should be harmonized.

The *status quo* is confusing and might allow foreign claimants to circumvent the shorter provincial limitation period. A party that is statute-barred from directly enforcing a foreign arbitral award against assets in Alberta, for example, may be able to avoid Alberta's limitation period by passing through BC. Instead of bringing its application directly in Alberta, the party might first have the award recognized in BC and then enforce it in Alberta under the *Reciprocal Enforcement of Judgments Act*. In fact, the Discussion Paper suggests streamlining this process by making Canadian judgments recognizing and enforcing international arbitral awards binding in other provinces. Similar to the *ex parte* orders discussed above, such a change enhances the efficiency of the system by eliminating the need for an additional court proceeding.

In contrast, the Working Group did not recommend the harmonization of limitation periods with respect to the commencement of international arbitration proceedings. The limitation period for the commencement of arbitration can either be considered a procedural or substantive matter, depending on the law of the contract and seat of arbitration chosen by the parties. If legislation at the seat of the arbitration were to mandate a limitation period for the commencement of arbitration, this could conflict with the limitation period established by the parties' choice of substantive law. In order to avoid this potential obstacle, the Working Group decided that parties should retain the ability to choose a limitations law that they deem appropriate.

Consolidating arbitration proceedings

Multiple arbitrations can arise from the same underlying circumstances where the dispute involves multiple contracts with separate arbitration clauses. A multiplicity of related proceedings is inefficient because it wastes legal resources and creates the possibility of conflicting results. For these reasons, courts seek to consolidate multiple legal proceedings whenever possible. Likewise, the Arbitration Rules of the International Court of Arbitration of the International Chamber of Commerce ("ICC Rules") allow for the consolidation of arbitral proceedings without party consent in certain circumstances.

Consolidating arbitration proceedings is complicated, however, because, unlike a court, arbitrators derive authority purely from the consent of the parties. Out of deference to this principle, the Working Group contemplated including an express requirement for the consent of all involved parties in order to consolidate arbitration proceedings. This amendment to the Uniform ICAA

[1] Which had to be clarified by the *Supreme Court of Canada in Yugraneft Corporation v Rexx Management Corporation* 2010 SCC 19, [2010] 1 SCR 649.

would sacrifice efficiency in order to bolster confidence in the predictability and integrity of the arbitration system.

Conclusion

The Discussion Paper is a thoughtful and cautious step towards a more efficient system of international arbitration in Canada. In its discussion of *ex parte* orders, limitation periods and consolidation of proceedings, the Working Group recognizes the importance of efficiency but is careful that greater efficiency does not come at the expense of party consent.

Once the ULCC approves the new Uniform ICAA, it will be up to the provincial, territorial and federal governments to adopt it through implementing legislation. Although the core of the original Uniform ICAA was implemented in all Canadian jurisdictions, much of the implementing legislation included variations to the original language and substance. For the Uniform ICAA to have its intended effect, each government must implement it in the same manner, so the hope this time around is that the governments will act together. Another potential issue is whether all governments will be willing to coordinate on a timeline for the enactment of the Uniform ICAA.

USING ARBITRATION CLAUSES TO ENHANCE PROCEDURAL EFFICIENCY

Joseph Chedrawe, Associate, Freshfields Bruckhaus Deringer*

Arbitration has recently come under fire for not being the efficient process some once claimed it to be. In a 2010 survey, 100% of respondents found that arbitrations take too long and are too costly.[2] The average commercial arbitration lasts between 2 to 3 years and some are reported to have taken more than 10 years.[3] A number of arbitral institutions have re-examined their rules and procedures in an attempt to reduce the duration and cost of arbitrations.[4] There have also been attempts to address efficiency matters after the arbitral process has already begun by considering how parties can enhance efficiency.[5] Another path to efficiency involves addressing procedural matters in arbitration clauses.

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* With research assistance from Ibrahim Attar, Intern, Freshfields Bruckhaus Deringer. The views expressed herein are those of the author and do not necessarily reflect those of Freshfields Bruckhaus Deringer or any of its clients.

[2] 2010 Survey by the Corporate Counsel International Arbitration Group as reported in Lucy Reed "More on Corporate Criticism of International Arbitration" *Kluwer Arbitration Blog*, 16 July 2010.

[3] C Bühring-Uhle, Gabriele Lars Kirchhof, Gabriele Schere, *Arbitration and Mediation in International Business* (2006) p 85.

[4] The ICC issued new rules in 2011 which took effect on January 1st 2012 and focused on expediting case processing and the introduction of case management conferences. The ICDR issued amended rules in 2009, which took effect that year, and also issued guidelines in 2008 disfavoring lengthy discoveries. The LCIA Rules are also currently under review.

[5] The Debevoise & Plimpton LLP Protocol to Promote Efficiency in International Arbitration identifies procedures that generally make an arbitration more efficient once proceedings have commenced, at <http://www.debevoise.com/files/News/2cd13af2-2530-40de-808a-a903f5813bad/Presentation/NewsAttachment/79302949-69b6-49eb-9a75-a9ebf1675572/DebevoiseProtocolToPromoteEfficiencyinInternationalArbitration.pdf>.

As the genesis of the arbitral process and the clearest expression of the parties' will and intent, the arbitration clause represents an important starting point from which to examine how to enhance arbitral efficiency. This note will consider procedural matters parties may wish to address in their arbitration clauses in order to enhance efficiency in arbitration. The choice of arbitration is consensual and, subject to any mandatory rules in the seat of arbitration, parties are given significant latitude in determining how the process is carried out. If parties wish to have a more efficient process, they may reflect this in the arbitration clause.

Once a dispute has already begun, attempts to agree on procedural matters involving pleadings, document disclosure, experts, witnesses, and the like may contribute to the inefficiency of the process. Procedural matters can be addressed early in the arbitration clause leaving the parties free to concentrate on actually resolving the dispute rather than arguing over procedure. It will naturally be more difficult to agree on procedural matters at the dispute stage since the parties are by then at odds.[6] Parties are more willing to agree on the procedural specifics of an arbitration at the contracting stage when their relationship is still amicable. With this frame of mind, parties are more likely to reach a consensus on procedural matters. Once a dispute arises, they are less predisposed to quickly and easily agree on procedural terms.

Contracting parties may sometimes be too quick to adopt institutional model clauses without any modifications. Model clauses, however, do not generally address procedural points beyond the number of arbitrators, seat, language, rules, and applicable law.[7] Institutional rules address some but not all procedural matters and typically only address those matters involving requests for arbitration, response dates, and tribunal constitution.[8] Institutional rules do not generally deal with procedural matters which tend to increase costs and lengthen proceedings such as the length of pleadings, the number of witnesses (fact and/or expert), or documentary disclosure.[9] Modifications to model clauses do occur and parties should consider doing so in order to enhance the efficiency of possible future arbitral proceedings. Any modifications should be undertaken, however, with the awareness that certain modifications may result in an arbitral institution refusing to administer the arbitration.[10]

Some arbitral institutions offer fast track procedures.[11] Fast track procedures may include:[12]

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[6] P Friedland, *Arbitration Clauses for International Contracts 2nd ed.* (2007), p 70.
[7] ICC Arbitration and ADR Rules (2012), p 80; LCIA Arbitration Rules (2010), p 26.
[8] ICC Arbitration and ADR Rules, Articles 3-5 (pleadings, request to arbitrate, and response), and 12 (constitution); LCIA, Arbitration Rules, Articles 1-2 (request to arbitrate and response).
[9] Where these subjects are mentioned, it is in the context of ascertaining the powers of the tribunal to examine witnesses or control procedures: ICC Arbitration and ADR Rules, Article 24 and LCIA Arbitration Rules, Articles 20 and 21 (where the powers of the tribunal over these subjects is confirmed but very little in terms of procedure is outlined).
[10] J Paulsson, N Rawding, et al., *The Freshfields Guide to Arbitration Clauses in International Contracts 3rd ed.* (2010), p 128.
[11] The ICC, SCC, and Swiss Chamber of Commerce all have fast track procedures. Parties must select these procedures expressly either at the start of the arbitration or in

- limitations on written pleadings (by length and/or number of pleadings to be submitted);
- limitations on the number of days of pleadings;
- shortened time limits for rendering an award;
- shortened periods for submissions of documents; and
- quicker appointment of tribunals by institutions.

In drafting an arbitration clause, parties should consider whether the arbitral institution identified has a fast track procedure option and whether incorporating that option is desirable. Should the contracting parties desire *ad hoc* arbitration, they may develop their own fast track procedures, although great care should be taken when doing so.

When drafting an arbitration clause, parties should consider addressing certain procedural matters regarding any future arbitration in order to take advantage of the flexibility of the arbitral process.[13] In non-administered arbitrations, where the parties desire greater specificity in their clauses, they should consider the following elements when drafting their clauses:[14]

- what qualifications the arbitrators should have;
- whether or not the arbitrators can issue provisional measures;
- whether confidentiality is necessary;
- what scope of document disclosure is required;
- whether a preliminary or summary disposition of certain issues is desirable;
- what rules of evidence should apply;
- the time period for the issuance of an award;
- which governing law will apply to the arbitration;
- arbitral jurisdiction to decide arbitral jurisdiction; and
- whether tribunal appointed experts are desirable.

Contracting parties and practitioners may also wish to consider incorporating, in whole or in part, the IBA Rules on the Taking of Evidence in International Arbitration.[15]

Arbitration clauses should be viewed as opportunities to enhance the efficiency of possible future arbitral proceedings and parties should consider procedural matters early when drafting an arbitration clause. Of course caution must be

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their clause. ICC Rules, Article 30 and appendix; Swiss Rules of International Arbitration, chapter V; SCC Rules for Expedited Arbitrations.

[12] The SCC Rules for Expedited Arbitration provide that parties should submit their documents within 10 days and that only one written statement (including witness evidence) should be submitted in addition to the statements of claim and defense (Article 19(i),(ii), and (iii)). The Swiss Chamber of Commerce Rules Expedited Procedures limit submissions to a statement of claim and a statement of defence, provide that the dispute should be decided on documentary evidence only, limit witness testimony and oral arguments to a single hearing, and require a decision to be rendered within 6 months of the transmission of case to the arbitral tribunal (Article 42(1)). SIAC Rules replicate the Swiss Rules in this regard (Article 5).

[13] P Friedland, *Arbitration Clauses for International Contracts 2nd ed.* (2007), p 70.

[14] P Friedland, *Arbitration Clauses for International Contracts 2nd ed.* (2007), pp 71-96.

[15] G Born, *International Arbitration and Forum Selection Agreements: Drafting and Enforcing 4th ed.* (2012), pp 98-99; The IBA Guidelines for Drafting International Arbitration Clauses (2010), paras 55-59.

had as what the parties may gain in arbitral efficiency, they may lose in procedural flexibility. Contracting parties should seek specialist legal advice when drafting detailed arbitration clauses to ensure an appropriate balance between efficiency and flexibility. As institutions continue to revise their rules and procedures, there is still much contracting parties can do to enhance efficiency.

CASE COMMENT: STAYS OF MULTI-PARTY LITIGATION IN FAVOUR OF ARBITRATION

Eric Morgan, Associate at Osler, Hoskin & Harcourt LLP in Toronto

Courts in Ontario, Alberta and BC have recently analyzed when multi-party litigation will be stayed in favour of arbitration in situations where some of the litigants are not parties to an arbitration agreement. The cases emphasize that a stay of the litigation will not be granted, and the case can proceed in court, only where it is clear that a party and/or the dispute is not subject to an arbitration agreement.

Ontario: *Alpina Holdings*[16]

In January 2010, Alpina Holdings Inc. (Alpina) and Data & Audio-Visual Enterprises Wireless Inc. (DAVE) entered into an agreement which Alpina rescinded later that year. In August 2012, Alpina commenced a court action for damages against DAVE, its chairman and its president. Alpina claimed that the agreement with DAVE was a franchise agreement and that DAVE and the two individuals had breached their obligations under the applicable franchise legislation.[17] The agreement between Alpina and DAVE included a mandatory arbitration clause.

DAVE and the individual defendants sought a stay of the action in favour of arbitration. Alpina submitted, in part, that the individuals were not parties to the Alpina-DAVE agreement and therefore had no standing to seek a stay. DAVE and the two individuals argued that, although the individuals were not signatories to the agreement, the agreement referred to them, such that they were subject to the arbitration clause.

The Ontario Superior Court agreed with DAVE and the individuals. Under the Alpina-DAVE agreement, each party agreed to indemnify the other and this provision extended to each party's shareholders, officers, employees and others. The individual defendants, DAVE's chairman and president, were therefore immediately identifiable under the agreement. The Court emphasized that whether a particular party is a party to the arbitration agreement is a question properly within the scope of the jurisdiction of the arbitrator. Here, it was not clear that the chairman and president would not be found by the arbitrator to be parties for the purpose of the arbitration. The fact that they were not signatories to the agreement was not alone determinative of their rights and obligations under the agreement. The scope of the arbitration agreement and who is a party to the arbitration agreement are questions within the jurisdiction of the arbitrator. As such, Alpina's court action was stayed pending the

[16] *Alpina Holdings Inc.* v. *Data & Audio-Visual Enterprises Wireless Inc.*, 2013 ONSC 3087.
[17] *Arthur Wishart Act*, 2000, S.O. c. 3.

arbitrator's decision whether he or she would assume jurisdiction over the parties and the matters at issue between them.

Alberta: *Yaworski*[18]

The *Yaworski* decision involved a lawyer who, through his professional corporation (Yaworski PC), became a special or income partner of the Gowlings law firm. Yaworski PC and Gowlings agreed on the terms of their partnership in a 2004 letter that contained an arbitration clause. In 2009 Mr. Yaworski left Gowlings and commenced a court action in his personal capacity against the firm. Gowlings applied to have the claim stayed. Mr. Yaworski argued that he was not a party to the letter with Gowlings and so was not bound by the arbitration clause.

Unlike the Ontario Superior Court in *Alpina*, the Alberta courts did not focus primarily on whether the arbitrator should determine Yaworski's status as a party to the arbitration. In this case, it was clear that Mr. Yaworski was not a party to the agreement and therefore was not subject to the arbitration clause. At first instance, the chambers judge held that, while a court cannot order third parties to submit to arbitration, the court can stay court actions involving such third parties for the estimated time of the arbitration if it appears just and equitable to do so. The Alberta Court of Appeal similarly commented that arbitration clauses could not be circumvented by having a related party commence a lawsuit, and that the arbitration might effectively resolve the dispute. Mr. Yaworski's personal claim was stayed pending the outcome of the arbitration between Yaworski PC and Gowlings.

BC: *Robinson*[19]

The BC Supreme Court examined the issue of staying multi-party litigation in the context of a proposed class action against National Money Mart Company ("Money Mart", a franchisor), its franchisees, and certain Money Mart directors and officers. The plaintiff commenced a proposed class action in relation to certain loan agreements between Money Mart's franchisees and the proposed class of customer plaintiffs. The loan agreements to which Money Mart and the directors and officers were not a party contained arbitration clauses.

With respect to the Money Mart franchisees, the plaintiffs only claimed breaches of consumer protection legislation that, under statute, they had a right to commence in court.[20] Against Money Mart (the franchisor) and the named directors and officers, the plaintiff alleged breaches of the consumer protection legislation as well as unjust enrichment, constructive trust and (against Money Mart alone) conspiracy.

Some of the defendants, including Money Mart's directors and officers, applied to stay the claims in the court action that were not based on breaches of the consumer protection legislation, arguing that the claims against Money Mart and its directors and officers touched on subjects that would be within the scope of

[18] *Yaworski* v. *Gowling Lafleur Henderson LLP*, 2012 ABQB 424; affirmed on appeal, 2013 ABCA 21; leave to appeal denied, 2013 CanLII 30410.
[19] *Robinson* v. *National Money Mart Company*, 2013 BCSC 967.
[20] *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, ss. 3 and 172. The Supreme Court of Canada held in *Seidel* v. *TELUS Communications Inc.*, 2011 SCC 15, that an arbitration clause in a standard form consumer contract is invalid in respect of claims under s. 172.

the arbitration agreement if the same claims had been advanced against the franchisees. It is worth noting that, unlike the Ontario and Alberta arbitration legislation, a party to the litigation who is not a party to the arbitration agreement (such as the directors and officers in this case) may apply for a stay under the BC *Arbitration Act*.[21]

The Court considered that it, rather than the arbitrator, could determine whether the arbitrator would have jurisdiction since it was a question of statutory interpretation in the context of the pleadings and the loan agreements. It also seems to have been clear that only the franchisees were parties to the arbitration clause (unlike the facts in *Alpina*, discussed above).

The Court denied the application for a stay. Between the parties to the arbitration agreement (the proposed class and the franchisees), the only causes of action (breaches of consumer legislation) could not, by statute, be subject to arbitration. The arbitration agreement was therefore not engaged by the claims against the franchisees. The agreement could not be invoked by Money Mart and its directors and officers as grounds for staying the court action as they were not parties to it. The Court concluded that allowing a stay of the litigation against Money Mart and its directors and officers would deny the proposed class any relief since they could not commence arbitration against these parties. With arbitration not an option, allowing the claims to proceed in court would not result in a multiplicity of proceedings.

Conclusion

These three cases show that courts may stay litigation in favour of arbitration even when the litigation involves parties who are not signatories to the arbitration agreement. On the one hand, the court may stay litigation in favour of arbitration when a litigant, although a non-signatory to an arbitration agreement, raises a jurisdictional issue for the arbitrator, as in *Alpina*, or where the arbitration may effectively resolve the issues between the litigants, as in *Yaworski*. On the other hand, the *Robinson* decision shows that where the arbitration agreement is not triggered by the scope of the initiated proceedings, a court is unlikely to grant a stay and instead the litigation will proceed.

ELI LILLY AND NAFTA: ATTEMPTING TO RECLAIM INTELLECTUAL PROPERTY RIGHTS VIA NAFTA CHAPTER 11

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Eli Lilly and Company ("Eli Lilly"), an American pharmaceutical company, recently filed its second "Notice of Intent to Submit a Claim to Arbitration Under NAFTA Chapter Eleven" ("NOI"). Eli Lilly alleges that the Government of Canada has violated a number of its obligations under NAFTA Chapter Eleven as well as several of Canada's international treaty obligations by failing to "correct" judicial outcomes with respect to two of their pharmaceutical patents: Strattera (for the treatment of ADHD) and Zyprexa (for the treatment of schizophrenia). Eli Lilly alleges that by failing to prevent the invalidation of their pharmaceutical patents by the Federal Court of Canada (invalidations upheld by the Federal Court of Appeal, and leave denied by the Supreme Court) the government of Canada has breached NAFTA Articles 1102 (national

[21] RSBC 1996, c 55, s. 15.

treatment), 1105 (minimum standard of treatment) and 1110 (expropriation and compensation).

The NOI filed by Eli Lilly on June 13, 2013 closely resembles its first NOI filed in November of 2012. In the new NOI, however, Eli Lilly has further specified its damages claim due to the subsequent invalidation of their Zyprexa patent (leave to appeal the invalidation of the Zyprexa patent was denied by the Supreme Court of Canada in May, 2013, exhausting all domestic avenues of appeal), augmenting its claim from "not less than CDN $100 million" to "not less than CDN $500 million". Eli Lilly has also added counsel with the addition of the Washington D.C. office of Covington and Burling LLP along with Gowling Lafleur Henderson LLP in Ottawa.

The Promise Doctrine and Canada's International Intellectual Property Obligations

Eli Lilly's claim centers on an approach to determining the "utility" of a patented invention developed by Canadian courts known as the "Promise Doctrine". Traditionally, an invention need not have any real-world practical application, as long as it possessed a "mere scintilla of usefulness". Similar approaches, used in many other jurisdictions and to some extent in Canada, set an extremely low threshold for utility of patentable inventions. According to Eli Lilly, however, the utility test in Canada has been modified by the courts contrary to Canada's international obligations under the WTO's *Trade-Related Intellectual Property Agreement* ("TRIPS"), the *Patent Cooperation Treaty* ("PCT"), and the *Agreement on Trade-Related Aspects of Intellectual Property*.

Under Canada's present system, this traditional "mere scintilla of usefulness" approach will apply where a patent application does not claim a specific level of utility. However, if the inventor claims that an invention is useful in a certain way or to a certain degree under the Promise Doctrine, then the invention must fulfill such claims in order to be considered "useful".

Eli Lilly argues that Canada has an international obligation to enforce the "mere scintilla" standard for utility as opposed to the sometimes stricter Promise Doctrine. It is argued that the Promise Doctrine has the effect of discriminating against the pharmaceutical industry, where Canada is obliged to make patents available without discrimination as to field or technology. Eli Lilly argues that Canada is obligated to apply the same standard in granting and assessing the validity of patents regardless of the type of invention claimed. Interestingly, however, the Promise Doctrine can be traced back at least to *Consolboard v MacMillan Bloedel* [1981] 1 S.C.R. 504, which did not deal with the pharmaceutical industry. Though the Promise Doctrine has been disproportionately used to invalidate pharmaceutical patents, Supreme Court of Canada jurisprudence indicates that it is equally applicable across any field of invention.

Also relevant to Eli Lilly's allegations is the Canadian doctrine of "Sound Prediction". If it is impossible or impractical, at the time a patent application is filed to demonstrate utility, a patent may still survive a utility challenge, if the patentee discloses a sufficient factual basis upon which a sound inference of utility can be made.

Eli Lilly notes that the PCT obliges Canada not to enforce patent application requirements different in form or content from, or additional to, those which are provided for in the PCT. They argue that in order to meet the requirements for

Sound Prediction, as set out by Canadian courts, the disclosure required is far beyond that which is required under the PCT and required by other signatory states. The goal of the PCT is to allow international patent seekers to prepare a single application to be submitted in a number of jurisdictions without the need to reformulate their applications; this goal would be frustrated by allowing signatory states to enforce differing form requirements for patent applications.

Alleged NAFTA Chapter Eleven Breaches

Eli Lilly argues that as a result of Canada's alleged breaches of its international obligations under various treaties, their investments in Canada have been directly or indirectly expropriated. Subject to conditions requiring proper purpose, non-discrimination, due process and compensation, expropriation of a foreign investment of a U.S. company is forbidden under Article 1110 of NAFTA. By failing to alter the outcome of the Federal Court of Canada decisions invalidating the Zyprexa and Strattera patents, Eli Lilly argues that Canada has expropriated their investments in Canada related to these drugs.

Eli Lilly also argues that the development of the Promise Doctrine in Canada has frustrated its reasonable expectations as a NAFTA investor at the time that NAFTA and TRIPS came into force. Further, Eli Lilly argues that these developments arbitrarily and discriminatorily alter the regulatory framework governing their investment in Canada. As a result Eli Lilly argues that Canada's actions breach the requirement under Article 1105 of NAFTA to provide a minimum standard of treatment. In its NOI, however, Eli Lilly does not address the fact that the Promise Doctrine can be traced back to Supreme Court decisions preceding the entry into force of both of these treaties.

Finally, Eli Lilly alleges that the development of Canadian patent law unfairly disadvantages them while granting an advantage to domestic generic drug manufacturers. Article 1102 of NAFTA forbids NAFTA Parties from treating NAFTA investors less favorably than its own domestic investors. These allegations do not address foreign generic drug manufacturers operating in Canada, and do not indicate how Eli Lilly's treatment in Canada is any more than incidental to its status as a foreign investor.

Eli Lilly's NOI demonstrates a novel attempt to enforce intellectual property rights through international arbitration and highlights Canada's unique approach to evaluating the utility of patented inventions.

Eli Lilly must wait 90 days from the filing of its NOI before it can file its Notice of Arbitration in order to formally commence proceedings, including the appointment of the arbitral tribunal. It will be interesting to see whether Canada will make a jurisdictional objection based on the fact that the breaches alleged arise from judicial decisions rather than government measures and whether such judicial decisions can amount to a breach of the NAFTA.

International Arbitration Calendar 2013

As of July 2013

Date	Place	Organization	Topic	Web Address
16-18 Aug 2013	Ottawa	NAB CIArb	Introduction to International Arbitration and Accelerated Route to Membership Program	http://www.internationalarbitrators.org/
22-24 Aug 2013	George Town, Malaysia	CIArb, Malaysia	CIArb 2013 International Arbitration Conference	http://ciarb2013.com/
16-17 Sep 2013	Toronto	RMMLF	Special Institute on International Energy and Minerals Arbitration	http://torontocommercialarbitrationsociety.com/images/RMMLF.pdf
23 Sep 2013	Toronto	OBA YLD & International Law Section	OBA Young Lawyer Division & International Law Mentorship Dinner	http://www.cbapd.org/details_en.aspx?id=ON_13INT0923T
26-27 Sep 2013	Washington D.C., USA	WCL	Understanding Damages and Compensation in International Commercial and Investment Arbitration	http://www.wcl.american.edu/arbitration/
30 Sep – 03 Oct 2013	Paris	ICC	Advanced ICC Institute PIDA Training on International Commercial Arbitration	http://www.iccwbo.org/training-and-events/all-events/
03 Oct 2013	Toronto	OBA, CIArb	Navigating Your First Arbitration	TBA
05-06 Oct 2013	Boston, USA	LCIA	LCIA North American User's Council Symposium	http://www.lcia.org/Conferences/Conference_Schedule.aspx
10-11 Oct 2013	Seoul, Korea	WIPO	WIPO Arbitration Workshop	http://www.wipo.int/amc/en/events/

21-24 Oct 2013	Hong Kong	HKIAC, IPBA	ADR in Asia Conference – International Arbitration in Asia: A Behind the Scenes Review	http://www.hkiac.org/index.php/en/events
24 Oct 2013	Toronto	YCAP	Fall Symposium	www.ycap.ca
24-25 Oct 2013	Toronto	ADRIC, ICC	Gold Standard ADR	http://www.amic.org/
7 Nov 2013	Toronto	TCAS	Annual TCAS Conference	http://torontocommercialarbitrationsociety.com/component/content/article/8-events/46-Annual-TCAS-Conference.html
7 Nov 2013	Washington D.C., USA	WCL	Symposium: Salient Issues in International Commercial Arbitration	http://www.wcl.american.edu/arbitration/
20-22 Nov 2013	Paris	ICC	ICC Institute Masterclass for Arbitrators	http://www.iccwbo.org/training-and-events/all-events/
2 Dec 2013	Singapore	Maxwell Chambers Singapore	Singapore International Arbitration Forum (SIAF)	http://www.maxwell-chambers.com/index.php?option=com_events&Itemid=18
5 Dec 2013	Paris	ICC	International Arbitration and Substantive Applicable Law	http://www.iccwbo.org/training-and-events/all-events/