YCAP

LEX ARBITRI

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YCAP Steering Committee

A Significant Step in the Right Direction — Canada signs ICSID

On December 19, 2006, Canada signed the International Centre for Settlement of International Disputes (ICSID) Convention. Ratification of the Convention by Canada requires implementing legislation in all provinces and territories. To date, only five Canadian jurisdictions have passed the necessary legislation. These jurisdictions are Ontario (1999), British Columbia, Saskatchewan, Newfoundland and Labrador, Nunavut (all four in 2006). The Government of Canada is working to convince provinces and territories that have not yet done so to pass legislation implementing the Convention.

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Created by the World Bank in 1965, the ICSID is a recognized autonomous international convention designed to promote the free flow of international investment. The Convention provides a system for the settlement and arbitration of investment disputes between states and investors from other states party to the Convention. The disputes are administered by the ICSID in Washington, D.C..

Once parties consent to an ICSID arbitration, neither party may withdraw its consent unilaterally. ICSID arbitrations are conducted in accordance with the provisions of the Convention and its regulations. The arbitral awards bind the parties and are exempted from any appeal or control of domestic courts in states party to the Convention.

Many international investment agreements allow investors to choose between ICSID and ad hoc arbitration using, for example, UNCITRAL arbitration rules. NAFTA Chapter Eleven disputes allow private investors to litigate under the Additional Facility Rules of ICSID (provided either but not both is a party to the Convention) or the UNCITRAL Rules. However, with the imminent ratification of the Convention by Canada, NAFTA parties will be able to bring a dispute under the ICSID Convention. Joining ICSID is thus a significant step forward for the Canadian arbitration practice.

Since 1997 there have been 65 concluded ICSID cases and there are currently 85 pending cases. The Convention has been adopted in 143 other countries.

For more information about ICSID, see its website http://www.worldbank.org/icsid

Recent Developments In International Arbitration

Supreme Court of Canada Upholds Dell's Arbitration Clause

For four days in 2003, Dell Computer Corporation's website contained a pricing error for handheld computers. During this time, a Quebec consumer ordered one of the mispriced computers. Soon thereafter, Dell posted a notice on its site indicating the pricing mistake and informed the Plaintiff that his order would not be processed.

The Union des consommateurs, a Quebec consumer advocate organization, applied to Quebec Superior Court to institute a class proceeding in the name of all consumers who purchased or tried to purchase the mispriced product during the relevant period. Dell filed a motion asking the Superior Court to stay the case for lack of jurisdiction in light of the arbitration clause contained in its Standard Terms and Conditions posted on its website. This clause mandated disputes be resolved through binding arbitration in the National Arbitration Forum, a Minneapolis, Minnesota-based alternative dispute resolution centre.

Quebec Superior Court dismissed Dell's motion and authorized the class action. It held that under article 3149 of the Civil Code of Quebec, Quebec consumers were incapable of waiving the jurisdiction of Quebec courts. The Quebec Court of Appeal dismissed Dell's appeal on the basis

that the arbitration clause was not expressly brought to the attention of the consumer pursuant to article 1435 of the Civil Code.

In a 6-3 decision, the Supreme Court of Canada allowed Dell's appeal from the Quebec Court of Appeal and ruled that the dispute should be referred to arbitration at first instance. Madam Justice Deschamps, writing for the majority, found that the waiver reliance prohibition applied only in cases containing a "foreign element" related to the jurisdiction of a foreign state and the arbitration clause contained no such foreign element.

In addition to the three parties, and an internet policy intervenor, three private alternative dispute resolution centres, ADR Chambers Inc., ADR Institute of Canada, and the London Court of International Arbitration were granted intervenor status and made submissions to the court.

To read the Supreme Court of Canada decision in this case, see http://scc.lexum.umontreal.ca/en/2007/2007scc34/2007scc34.pdf

Ontario Arbitration Act Amended – Religious Arbitrations Out

On February 23, 2006, Bill 27, the Family Statute Law Amendment Act, 2006 received Royal Assent, ending a long debate regarding religious arbitration in the Ontario legal process. Previous to this reform, the Ontario Arbitration Act allowed for religious laws and legal institutions to be used in the settlement of family disputes. The provisions of the Arbitration Act, made the faith-based decisions in individual mediations legally binding.

The Bill provides that family arbitration agreements be in writing, each party receive independent legal advice before entering into an agreement, an inability to waive a right of appeal, the agreement must take into account the best interests of the children, and family law arbitrators be regulated and trained.

For years under the Arbitration Act, the decisions of religious institutions were accepted as binding under Ontario law and courts generally accepted their decisions as binding. A controversy erupted in 2003, however, when Syed Mumtaz Ali, a retired Muslim lawyer, stated his intention to open a school for Islamic arbitrators. The McGuinty government appointed former attorney general Marion Boyd to report on the issue, especially as it related to the status of women in family law disputes. Following the Boyd report, Bill 27 was introduced which ended the privileged status of religious arbitrations in Ontario. Not only did the Bill forestall the entry of sharia law in Ontario, it essentially ended the status of other religious laws already used in Ontario. Under the Bill, family arbitration must be conducted exclusively in accordance with the laws of Ontario and other Canadian jurisdictions.

To read Bill 27, see http://www.ontla.on.ca/bills/bills-files/38_Parliament/Session2/b027ra_e.htm

IN DEPTH:
Federal Courts Rules amended to make registration of foreign arbitral awards more expeditious

by Azim Hussain and Alejandro Manevich, Ogilvy Renault LLP

* The authors wish to disclose that they were counsel for TMR Energy Ltd., the award creditor in this case.

Actus curiae neminem gravabit. This Latin maxim, meaning "the act of the court shall prejudice no one", has long guided the administration of justice in common law courts. Where a court's error might cause prejudice to a party, it is the duty of the court to set matters right. Fortunately, this principle has seldom needed application in Canadian courts. Recently, however, it was raised by the unusual dilemma at issue in the 2005 judgment of the Federal Court of Appeal, *TMR Energy Ltd.* v. *State Property Fund of Ukraine*, [2005] 3 F.C.R. 111 (C.A.) ("*TMR Energy*").

In *TMR Energy*, the Court held that Federal Court prothonotaries have no jurisdiction to register foreign arbitral awards, and that as a result, the award creditor's registration of such an award by a prothonotary was null. The Court acknowledged that *it was either the Federal Court itself that had erred in referring the initial application for registration to a prothonotary or the prothonotary erred in assuming jurisdiction over the application, but no error was ascribed to the award creditor*. Nonetheless, the Court told the creditor it must start over again.

With its recent amendment to the *Federal Courts Rules* ("Rules"), the Rules Committee of the Federal Court ("Rules Committee") has responded to this decision. The amendment modifies the Rules to clarify the authority of prothonotaries to register foreign arbitral awards, as they had routinely done prior to TMR Energy.

The interpretation of the Rules and the role of prothonotaries

The Court in *TMR Energy* expressed in very stark terms prothonotaries' lack of authority to register an arbitral award. For the Court, whether a judge or prothonotary registered the award was a question of *ratione materiae* jurisdiction, tantamount to a choice between different courts.

Prothonotaries, having no inherent jurisdiction or authority, may only act where permitted to do so by an enactment. The *Federal Courts Act* ("Act") does not expressly delineate the statutory jurisdiction of prothonotaries, indicating only that their powers "shall be determined by the Rules", and providing also that the Rules may empower a prothonotary to exercise any authority or jurisdiction, even of a judicial nature.

The registration of foreign arbitral awards is done by way of application. Prior to the recent amendment, Rule 50 granted prothonotaries broad authority to hear motions, and very limited authority to hear certain actions. However, the Rule was silent concerning their authority to hear applications. Rules 326 to 334, on the registration of foreign arbitral awards, are similarly mute as to the role of prothonotaries. They do, however, refer to the "Court", which is in turn defined in Rule 2 to include "a prothonotary acting within the jurisdiction conferred under these Rules".

The Court in *TMR Energy* noted that the Rules made a basic distinction between actions and applications, which initiate proceedings, and motions, which do not. Because applications initiate proceedings, the broad authority of prothonotaries to hear motions could not extend to applications. Consequently, the absence of any express authorization to hear applications meant that prothonotaries could not do so under the Rules.

The Court rejected the argument that any defect in the proceedings in TMR Energy could be cured by Rule 56, which stipulates that any non-compliance with the Rules is a question of irregularity not nullity. In the Court's view, Rule 56 applies only to rules concerning "matters of form as opposed to matters of jurisdiction". Moreover, as the Act incorporated by reference the allocation of powers in the Rules, the non-compliance was with the Act, not just with the Rules. The Court also rejected the application in this case of the *de facto* officer doctrine, which in certain circumstances treats as valid an act by a public official who unknowingly but with colour of authority acts without jurisdiction.

In response to this decision, the Rules Committee amended Rule 50 to state expressly that prothonotaries may hear applications to register foreign arbitral awards. Its discussion of this issue is instructive. In the *Regulatory Impact Analysis Statement* to SOR/2007-130 (June 7, 2007), the Rules Committee specified that the amendment was to "make clear that foreign judgments and awards can be registered by prothonotaries." It noted also that the word "Court" in the Rules had always been interpreted, in practice, as including prothonotaries, and that prothonotaries had historically exercised the power to register awards prior to the comprehensive reform of the Rules in 1998. Indeed, before *TMR Energy*, prothonotaries had routinely registered foreign arbitral awards, even after the 1998 reform. This was precisely one of the arguments made before the Court: as the spirit of the reform of the Rules was to foster efficiency, it would be very odd indeed if the reform should bring about a prohibition on prothonotaries registering awards. The Rules Committee apparently agreed with this view, suggesting that the 1998 reform may have inadvertently narrowed the authority of prothonotaries by failing to specify an authority that they had previously exercised.

Expeditiousness of registration of foreign arbitral awards

The registration of foreign arbitral awards is unquestionably intended to be expeditious and even mechanical, consistent with the norms in the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention"). Given the significant role and authority of prothonotaries in handling interlocutory and summary matters, it is understandable why the Federal Court would also assign applications for registration of such awards to prothonotaries, and why it made sense, at least as a matter of policy, for prothonotaries to have the authority under the Rules to register arbitral awards.

In *TMR Energy*, the Court expressly conceded that absent the jurisdictional issue, the award debtor would have had no basis to challenge the appropriateness of the registration of the award, having been long out of time. Indeed, the Court accepted that the debtor had only raised the prothonotary's jurisdiction as a "strategic afterthought" after having unsuccessfully challenged the seizure of one of its assets (a transport plane). In light of these facts, and emphasising the responsibility of Canadian courts to uphold the integrity of international arbitration and arbitral awards, the creditor had argued that even if the

registration was null, the Court could simply correct its own mistake by issuing a retroactive order registering the award. In this instance, however, the Court held that it was necessary to re-examine the merits of the original ex parte registration proceeding and the adequacy of the materials submitted. In particular, the Court held that disclosure on an *ex parte* application under Rule 328 to register an award is deficient where it fails to address the legal issues that arise not just from the registration itself, but from any contemplated execution proceedings pursuant to the registration. Accordingly, it was not prepared to grant the creditor any such relief, and instead required it to begin the registration process anew.

Conclusion

While a Federal Court prothonotary's power to hear and determine an application for the registration of a foreign arbitral award is now beyond question, the amendment was not in time to vindicate the actus curiae neminem gravabit principle in this case. The Federal Court of Appeal's decision nullifying the registration of the arbitral award meant that the seizure of the debtor's assets was lifted. Unsurprisingly, the plane was flown out of the country shortly thereafter. Nevertheless, the Supreme Court of Canada granted the creditor leave to appeal the Court of Appeal's decision, undoubtedly seeing the public importance of the issues raised in the case, both as a matter of the proper administration of justice and Canada's treaty obligations under the New York Convention. Since the parties settled out of court prior to the hearing, the Supreme Court never got a chance to adjudicate on the matter.

It can only be hoped, as the Rules Committee's response would appear to indicate, that the case of *TMR Energy* will be an outlier in the broader trend in Canada towards respect for international arbitration and the recognition of foreign arbitral awards.

Perhaps TMR Energy Ltd. can find solace as well in the recent U.S. case of Bowles v. Russell, another case in which the actus curiae doctrine was very much at issue. There, the U.S. Supreme Court ruled that a petitioner convicted of murder could not appeal his conviction since he was time-barred, despite the fact that his appeal was filed within the time limit prescribed by a lower court, since the court in question had erroneously provided a limit several days longer than prescribed by the applicable statute. Unlike the acts in that case, the administrative acts of the Federal Court in TMR Energy may have prejudiced the material interests of the company's principals, though not their liberty.

To read the Federal Court of Appeal's decision in this case, please see: http://reports.fja.gc.ca/cgi-bin/print.pl?referer=http%3A%2F%2Frecueil.cmf.gc.ca%2Fen%2F2005%2F2005fca28%2F2005fca28.html

International Arbitration Calendar 2007

As of September 2007

Date	Place	Organization	Topic	Web/E-mail Address:
September 8-16, 2007	Oxford	Chartered Institute for Arbitrators	Diploma in International Commercial Arbitration	www.arbitrators.org
September 14, 2007	London	British Institute of International and Comparative Law	The Emerging Jurisprudence of International Investment Law	www.biicl.org
September 14, 2007	The Grove	LCIA	Young International Arbitration Group Symposium	www.lcia-arbitration.com
September 14-16, 2007	The Grove	LCIA	European Users' Council Symposium	www.lcia-arbitration.com
September 17-20, 2007	Paris	ICC	Negotiating, Drafting, Managing International Contracts & Conflict Resolution (PIDA)	www.iccwbo.org
September 27, 2007	Toronto	YCAP	Current Issues in International Arbitration	www.ycap.ca
September 27, 2007	Toronto	ADR Institute of Canada, Advocates' Society & others	The Roger Fisher Tribute	www.advocates.ca
September 28, 2007	Toronto	ICDR	ADR after NAFTA	www.adr.org
September 28, 2007	Toronto	LECG & Arbitration Roundtable of Toronto	Cocktail Reception	www.lecg.com www.arbitrartionrountable.com
September 28-29, 2007	Rome	ADR Center & others	International Commercial Disputes	www.adrmeda.org

Date	Place	Organization	Topic	Web/E-mail Address:
September 29, 2007	Toronto	LCIA	Current Issues in International Arbitration	www.lcia-arbitration.com
September 30, 2007-October 3, 2007	Toronto	Osgoode Professional Development Program, York University	Intensive International Arbitration Workshop	www.law.yorku.ca/pdp
October 1, 2007	Toronto	ICC	Drafting Arbitration Clauses in International Contracts	www.iccwbo.org
October 8-11, 2007	Paris	ICC	International Commercial Arbitration	www.iccwbo.org
October 11-12, 2007	Singapore	Juris Conferences LLC/SIAC/ABA and others	Second Annual Asian Leading Arbitrators' Symposium on the Conduct of International Arbitration	www.jurisconferences.com
October 14-19, 2007	Singapore	IBA	IBA Conference 2007	www.ibanet.org
October 16-17, 2007	Geneva	WIPO	Arbitration workshop	www.wipo.org
October 22, 2007	Paris	ICC	Arbitration: a corporate viewpoint	www.iccwbo.org
October 29-30, 2007	Paris	ICC	Dispute Resolution in International Oil & Gas Contracts	www.iccwbo.org
November 4-6, 2007	Miami	ICC	International Commercial Arbitration in Latin America: The ICC Perspective	www.iccwbo.org
November 6-7, 2007	Miami	Juris Conferences LLC	Latin American Leading Arbitrators' Symposium on the Conduct of International Arbitration	www.jurisconferences.com
November 8-9, 2007	Caracas	IBA	Arbitration and dispute resolution conference	www.ibanet.org

Date	Place	Organization	Topic	Web/E-mail Address:
November 16, 2007	Paris	AAA/ICC/ICSID	Joint Colloquium on International Arbitration	www.iccwbo.org
November 19-20, 2007	Paris	ICC	International Advanced Arbitration Practice Workshop (IAAP)	www.iccwbo.org
February 2, 2008	New York	LCIA	North American Users' Council Symposium	www.lcia-arbitration.com
June 8-10, 2008	Dublin	ICCA	ICCA Conference	www.iccadublin2008.org

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