YCAP

LEX ARBITRI

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

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In This Issue

YCAP Board of Directors

Toronto Symposium a Success

On September 27, 2007, the Toronto offices of Osler, Hoskin & Harcourt LLP hosted a YCAP Symposium dealing with current issues in international arbitration. Bill Rowley of McMillan Binch Mendelson LLP acted as Special Guest and Senior Commentator of the Symposium.

Ian Laird of Fulbright & Jaworski LLP (Washington, D.C.) kicked off the symposium with a discussion about whether there is an emerging jurisprudence in international investment law. After reviewing the approaches taken by various tribunals, he concluded that despite there being no precedent system, arbitrators can and do look at how other arbitrators have solved similar problems. This balance, he says, leads to at least some consistency between decisions while preserving the focus on the facts of each individual case.

Continued on page 2…

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LEX ARBITRI
Spring/ Summer 2008
Volume 4, Number 1

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MEMBERSHIP

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

YCAP SYMPOSIUM A SUCCESS (continued)

Martin Valasek of Ogilvy Renault LLP (Montreal) and Vikki Andrighetti of BCF LLP (Montreal) spoke about the Supreme Court of Canada's decision *Dell Computer Corp v. Union des consommateurs*, 2007 SCC 34 ("*Dell*"). The panel noted that the decision in *Dell* is consistent with the Supreme Court's overall deference to arbitration clauses. In *Dell*, the Supreme Court upheld the validity of an arbitration clause entered into by a corporation and a consumer in an online contract. In so doing, the Court overturned the holding of the Quebec Court of Appeal that the clause was not valid because it was not bought to the attention of the consumer. The panel also discussed the test formulated by the Supreme Court to determine whether a court claim should be stayed and referred to arbitration, and highlighted some practical concerns about Canada's version of the *kompetenz-kompetenz* doctrine.

Todd J. Grierson-Weiler of naftaclaims.com and investmentclaims.com (Calgary) spoke to the group about Canada as an arbitration venue and mused on various improvements that might be made. He noted that most arbitration professionals leave Canada to get more practical experience in arbitration. He also commented that we have an opportunity to attract parties to use Canada as a venue for arbitration but that the profession as a whole needs to make a more concerted effort to attract such business. During the question period, Bill Rowley noted that there are many companies in Canada who can be served by arbitration as well and that practitioners do not need to cross a border or an ocean to find clients.

The Symposium was well attended by young Canadian arbitration practitioners in Toronto and Montreal.

SYMPOSIUM PHOTOS

Speakers Martin Valasek and Vikki Andrighetti

Participants Tina Cicchetti, Josh Ingram, and Annie Finn

Presenter Ian Laird and Reuben East

Vikki Andrighetti, Martin Valasek, Todd J. Grierson-Weiler and Bill Rowley

LEX ARBITRI
Spring/ Summer 2008
Volume 4, Number 1

Recent Developments In International Arbitration

LCIA'S DECISION UNDER THE *CANADA-US SOFTWOOD LUMBER AGREEMENT*

On March 3, 2008, the London Court of International Arbitration (LCIA) issued a decision in a dispute between the United States and Canada under the *Canada-US Softwood Lumber Agreement* (SLA), which came into force on October 12, 2006.

The US Government initiated the dispute on August 13, 2007, alleging, among other things, that Canada had failed to properly take into account the "adjustment factor". The adjustment factor is a technical provision in the 2006 SLA that affects the way certain export measures under the Agreement are calculated.

The Arbitration Panel was instituted mid-September 2007 and is chaired by Dr. Karl-Heinz Böckstiegel of the University of Cologne. The LCIA decided against Canada on the issue of the start date of the "adjustment factor". However, it agreed with Canada that Alberta and British Columbia were exempt from the "adjustment factor", and that the adjustment factor only applies to provinces that chose a quota option. The Panel further ruled that each Party must bear its own costs. The applicable remedy will be determined in the next stage of proceedings.

To review the LCIA decision see:
http://www.international.gc.ca/eicb/softwood/pdfs/Award03-03-2008.pdf

BASEBALL ARBITRATOR THOMAS R. ROBERTS DIES

Thomas T. Roberts, a prominent American labour arbitrator, died in February at the age of 84 in Palos Verdes Peninsula, California.

Thomas Roberts arbitrated and mediated labour-management disputes for more than 40 years and taught at Loyola University.

Mr. Roberts served as an arbitrator between major league baseball players and owners since 1974. He rose to prominence in 1983 when he ruled that then-Dodger pitcher Fernando Valenzuela could earn $1 million for a year's salary, a high watermark at the time. His most enduring legacy was his ruling that during the 1985 season, baseball team owners colluded to limit free-agent players' opportunities. He made findings of fact that no teams signed free-agents unless their former teams passed on them first, which he deemed a "strong indication of concerted action" prohibited by the governing collective agreement.

Mr. Robert's findings led to owners agreeing to pay affected players $280 million in settlement in 1990.

On several occasions during the 1980s, baseball owners terminated Mr. Roberts as arbitrator. In 1986, Mr. Roberts ruled that teams had to negotiate drug-testing clauses with the Baseball Players' Union and could not negotiate on a player-by-player basis.

Mr. Roberts regularly sat as arbitrator in entertainment, manufacturing, broadcasting, service and airline industry disputes. In 1991, the American Arbitration Association awarded Mr. Roberts with the Distinguished Service Award.

ARBITRATION SCORES AGAIN: PROPOSED AMENDMENTS TO THE *CANADIAN WHEAT BOARD ACT*

On March 3, 2008, the Minister of Agriculture and Agri-Food and Minister for the Canadian Wheat Board tabled Bill C-46, *An Act to amend the Canadian Wheat Board Act* in the House of Commons. One of the proposed amendments introduces alternative dispute resolution (including arbitration) for disputes between the Wheat Board and its customers under the Canadian Wheat Board Act.

Under the proposed arbitration process, parties will be able to resolve disputes regarding proposed or ongoing commercial grain transactions. If the Bill is adopted, producers and grain elevator companies will have recourse to alternative dispute resolution instead of proceeding through often lengthy and costly court proceedings.

Read Bill C-46 in its current form at:
http://www2.parl.gc.ca/HousePublications/Publication.aspx?Docid=3318470&file=4

DUBAI LAUNCHES ARBITRATION CENTRE WITH THE LONDON COURT OF INTERNATIONAL ARBITRATION

In a joint venture with the London Court of International Arbitration (LCIA), the Dubai International Financial Centre (DFIC) of the Emirate of Dubai has established a new international financial arbitration centre. Inaugurated by the Deputy Ruler of Dubai, Sheikh Maktoum Bin Mohammed Bin Rashid Al Maktoum, the DIFC-LCIA Arbitration Centre (the "Centre") plans to offer alternative dispute resolution services to burgeoning commercial enterprises from around the Emirate and the wider Middle East.

The Centre's Rules are being touted as a close adaptation of the LCIA Rules, with changes tailored for the local market. According to the Centre, its Rules are universally applicable and designed to be compatible with both civil and common law systems, in the hopes of securing the Emirate as a venue for international alternative dispute resolution.

The Centre has access to the LCIA's roster of arbitrators. Its key functions will include appointing tribunals, determining challenges to arbitrators and controlling costs.

Read more about the LCIA-DFIC joint venture on LCIA's website:
http://www.lcia.org/NEWS_folder/news_main.htm

INVESTOR'S NEWS: MORAL DAMAGES AWARDED FOR BREACH OF FAIR AND EQUITABLE TREATMENT

A commercial undertaking abroad can cost you life, but be sure to claim moral damages if you ultimately appear before an international panel!

On February 6, 2008, a Panel of the International Centre for Settlement of Investment Disputes (ICSID) found the Government of the Republic of Yemen in breach of its obligation to provide an Omani construction company with fair and equitable treatment. Damages were awarded at 25 Million USD, 1 Million of which was awarded for moral loss.

The Omani private constructor, Desert Line Projects LLC ("Desert Line"),

which had been in operation in Yemen since 1997 entered into a number of commercial contracts with the Yemeni government to build roads. The investor was ultimately denied payment notwithstanding the completed work. The investor complained, but instead of being paid under a domestic arbitration award obtained, it was coerced into an unfavourable settlement under physical duress.

Desert Line filed a Notice of Arbitration under the ICSID Convention on September 30, 2005, alleging breach of fair and equitable treatment and coercion on part of the Yemeni government under the Yemen-Oman Bilateral Investment Treaty (BIT). The Panel, presided by Prof. Pierre Tercier of University of Fribourg, heard the case despite the fact Desert Line did not secure an "investment certificate" (a declaration from the Yemeni government that the investment was validly registered) pursuant to the BIT. The Tribunal was nevertheless satisfied that the investor was in compliance with international and Yemeni law. Finding in favour of the company, the Tribunal awarded moral damages, including loss of reputation, in the amount of USD $1 million.

Moral damages are exceptionally rare in investment arbitration. So far, they have been awarded in ICSID proceedings in *S.A.R.L. Benvenuti and Bonfant v.People's Republic of the Congo*, ARB/77/2, Award (August 8, 1980), reprinted at (1982) 21 I.L.M. 740.

Read the ICSID decision in *Desert Line Projects LLC v. Yemen*, ICSID Case No. ARB/05/17 at: http://ita.law.uvic.ca/documents/DesertLine.pdf

EXPANDING THE FREE FLOW OF INVESTMENTS: ICSID IMPLEMENTATION LEGISLATION PASSED IN CANADA

On March 13, 2008, Bill C-9, *An Act to Implement the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (the ICSID Convention) received Royal Assent in Canada. As a result, the Government of Canada now has an opportunity to deposit the instrument of ratification with the World Bank, after which the ICSID Convention will become fully binding on Canada.

Canada's implementation of the ICSID Convention, which has been ratified by over 140 countries across the world, will provide Canadian investors with access to ICSID's conciliation and arbitration mechanism to resolve disputes with investments host countries in cases of discriminatory treatment or expropriation. In addition, NAFTA private investors will be able to use the ICSID forum in NAFTA Chapter 11 arbitrations against Canada, the United States and Mexico.

The next procedural step is for the ICSID Convention to be introduced and ratified at the provincial level. While British Columbia, Ontario, Newfoundland, Saskatchewan and Nunavut have already implemented such legislation, the remaining provinces and territories have not.

THQ/JAKKS ARBITRATION MOVES ON

THQ Inc., publisher of World Wrestling Entertainment (WWE) video games such as the popular Smackdown vs. Raw series, and Jakks Pacific, former manufacturer of WWE action figures, were in court regarding a royalty dispute and the use of the WWE likenesses in video games. This ADR "match" has shown that courts may get involved in a dispute if an arbitration does not proceed as envisioned in the arbitration agreement.

LEX ARBITRI
Spring/ Summer 2008
Volume 4, Number 1

THQ and Jakks Pacific are in the process of arbitrating the royalty rate to be paid by THQ to Jakks Pacific for WWE video game sales under the companies' joint venture agreement. Under the terms of the agreement, the royalty rate effective as of July 1, 2006 was to have been determined by agreement, or failing that, by arbitration. Following numerous delays, THQ filed an action in California Superior Court to compel arbitration and to appoint an arbitrator. After a trial judge appointed an arbitrator, Jakks Pacific petitioned the California Court of Appeals to disqualify all but one of the potential arbitrators considered by the judge, based on its interpretation of when potential arbitrators were required to complete disclosure questionnaires. The California Court of Appeals has denied Jakks Pacific's petition, paving the road for the arbitration to commence.

Calendar Of Upcoming Events

Date	Place	Organization	Topic	Web Address:
April 24-25, 2008	Chicago	ICDR	ADR after NAFTA	www.adr.org
April 25, 2008	Washington D.C.	ABA/Juris Conferences LLC	Second Annual Investment Treaty Arbitration Conference: A Debate and Discussion	www.jurisconferences.com
April 27-30, 2008	Los Angeles	IPBA	Inter-Pacific Bar Association 18th Annual Conference	www.ipba2008.com
April 30, 2008	Montreal	YCAP/YAF	Agreements to Expand the Scope of Judicial Intervention in Arbitral Proceedings: Camel's Nose or Cat's Meow?	www.ycap.ca
April 30-May 2, 2008	Montreal	ICC	ICC Arbitration Workshop	www.iccwbo.org
May 2008	Chicago	Global Conference Group	International Commercial Arbitration: Hands On Experience	www.globalconferencegroup.com

Date	Place	Organization	Topic	Web Address:
			Conference	
May 9-11, 2008	Tylney Hall	LCIA	European Users' Council Symposium	www.lcia-arbitration.com
May 21, 2008	Brussels	Association for International Arbitration	Arbitration and Mediation in the ACP-EU Relations Conference	www.arbitration-adr.org
May 26-27, 2008	Geneva	WIPO	Workshop for Mediators in Intellectual Property Disputes	www.wipo.org
May 29-30, 2008	Geneva	WIPO	Advanced Workshop for Mediators in Intellectual Property Disputes	www.wipo.org
June 2-4, 2008	Houston, Texas	ICC/FIDIC	The Resolution of Disputes under International Construction Contracts	www.iccwbo.org
June 7, 2008	Dublin	Arbitral Women	Roundtable	www.abitralwomen.com
June 8, 2008	Dublin	LCIA	European Users' Council Symposium	www.lcia-arbitration.com
June 8-10, 2008	Dublin	ICCA	ICCA Conference	www.iccadublin2008.org
June 18, 2008	Dallas, Texas	Institute for Transnational Arbitration	3rd Annual Dallas Roundtable for Young International Arbitrators	www.cailaw.org/ita
June 19, 2008	Dallas, Texas	Institute for Transnational Arbitration	19th Annual ITA Workshop: Damages in International Arbitration	www.cailaw.org/ita
June 23, 2008	Paris	ICC	Cross-Examination in Arbitration Proceedings	www.iccwbo.org
September 12,	Hong Kong	HKIAC	Investor-State Arbitration: Lessons	www.hkiac.org

Date	Place	Organization	Topic	Web Address:
2008			for Asia	
September 13-14, 2008	Sao Paulo, Brazil	Institute for Transnational Arbitration	Mock Arbitration: Insider Insights in Complex Energy Disputes	www.cailaw.org/ita
September 18-19, 2008	The Grove	LCIA	Young International Arbitration Group Symposium	www.lcia-arbitration.com
September 19-21, 2008	The Grove	LCIA	European Users' Council Symposium	www.lcia-arbitration.com
October 11, 2008	Buenos Aires, Argentina	LCIA	Latin America and Caribbean Users' Council Symposium	www.lcia-arbitration.com
October 12-17, 2008	Buenos Aires, Argentina	IBA	IBA Conference 2008	www.ibanet.org
October 13-16, 2008	Paris	ICC	International Commercial Arbitration	www.iccwbo.org
October 21-22, 2008	Geneva	WIPO	Arbitration workshop	www.wipo.org
October 21-22, 2008	Kuala, Lumpur	HKIAC	International ADR Conference	www.hkiac.org
November 9-11, 2008	Miami	ICC	International Commercial Arbitration in Latin America: The ICC Perspective	www.iccwbo.org
November 14, 2008	Paris	AAA/ICC/ICSID	Joint Colloquium on International Arbitration	www.iccwbo.org
December 8-9, 2008	Paris	ICC	Arbitration and Expertise	www.iccwbo.org

With our compliments.

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