YCAP

LEX ARBITRI

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

Fall/Winter 2012
Volume 8 Number 2

In This Issue:

LETTER FROM THE YCAP PRESIDENT

Dear colleagues,

As I am approaching the end of my tenure as the President of YCAP, I wanted to take a moment to reflect on what has been a wonderful two years for me and to share some of my enthusiasm for this organization.

YCAP is a thriving organization with more than 100 members and 9 law firm sponsors. The Board, with the assistance of organizing committees made up of our members, organizes interesting symposia twice a year with terrific speakers and engaged audiences. The focus on offering our symposia by webcast allows us to bring our events literally around the globe to our many members practicing arbitration not just throughout Canada, but also across Europe and Asia. Through this newsletter, our members have an opportunity to learn about recent developments in arbitration and to share their knowledge and experiences by submitting articles. Soon we will have a newly designed website to add to our LinkedIn and Facebook pages, which will hopefully help us to be even closer to our members and provide them opportunities to network with one another.

LEX ARBITRI
Fall/Winter 2012
Volume 8, Number 2

Personally, I have been inspired by the dedicated Board members who selflessly dedicate their time and energy to the organization. It is a talented group and I am grateful for having had the opportunity to work with all of them. I have also been enriched by YCAP's members who are enthusiastic about arbitration and who are willing to share that enthusiasm. I wanted to thank those of you that I have met and worked with and to encourage all of you who are interested to attend this year's AGM and get involved. I assure you that you will get out more than you put in and I look forward to seeing where the next Board takes YCAP!

Kind regards,

Tina

TO DEFER OR NOT TO DEFER, THAT IS THE QUESTION: ICDR Y&I AND YCAP JOINT SYMPOSIUM ON THE REVIEW OF ARBITRAL RULINGS ON JURISDICTION

Christina Doria, Associate at Baker & McKenzie LLP in Toronto

The International Centre for Dispute Resolution Young & International ("ICDR Y&I") and the Young Canadian Arbitration Practitioners ("YCAP") held a joint symposium on June 21, 2012 with live audiences at DLA Piper in Washington DC and Arbitration Place in Toronto. Webcast participants joined in from Canada, the U.S. and as far away as Egypt and the Netherlands. Entitled "To Defer or Not to Defer?" the symposium gave Canadian, American, and ICSID perspectives on the level of deference given to arbitrators' rulings on jurisdiction in enforcement decisions.

The event was opened by **David Bigge** (U.S. State Department) who welcomed the attendees. **Mark Luz** (Department of Foreign Affairs and International Trade Canada) and **Stephanie Cohen** (Independent Arbitrator) moderated the symposium. The panel included **J. Brian Casey** (Bay Street Chambers), **Daniel Taylor** (Perley-Robertson, Hill & McDougall LLP/s.r.l), **Kiera Gans** (DLA Piper LLP), and **Meg Kinnear** (secretary-general, ICSID).

The symposium was broken down into four parts: An overview of the review of arbitration awards; Canadian perspectives; American perspectives; and ICSID perspectives.

The overview was presented by J. Brian Casey who made the following points:

- The tribunal receives its powers from the agreement of the parties, and the parties may agree that the tribunal has the power to determine questions regarding its own jurisdiction. However, the jurisdiction of the seat of the arbitration has a supervisory power.

- The core question is: how intrusive will the jurisdiction with the supervisory power be? Parties should select the seat of the arbitration carefully, typically preferring a jurisdiction that is *not* very intrusive.

LEX ARBITRI
Fall/Winter 2012
Volume 8, Number 2

CONTACT

YCAP
c/o Tina Cicchetti
Fasken Martineau DuMoulin LLP
Suite 2900
550 Burrard St.
Vancouver, BC V6C 0A3
Canada

Email: YCAP@ycap.ca

Website: www.ycap.ca

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

• The question of the degree of deference that a court may give to an arbitral tribunal arises in two situations: Firstly, at the front-end of the arbitration with respect to whether the tribunal has jurisdiction to determine its own jurisdiction (known as "competence-competence" or "kompetenz-kompetenz") and secondly, at the back-end of the arbitration, when the court is reviewing the award at the legal seat of the arbitration.

Canadian perspectives were presented by Daniel Taylor who discussed the case of *Mexico v. Cargill*,[1] a NAFTA case where the seat of the arbitration was Ontario. In enforcement proceedings before the Ontario courts, Mexico argued that the tribunal lacked jurisdiction to award certain damages to Cargill. Taylor noted the following about how the Ontario Court of Appeal resolved the case.

• The Ontario Court of Appeal applied Canadian domestic standards of administrative law to review the decision.

• The Court held that the issue of the arbitrability of the dispute ought to be determined by a standard of "correctness", rather than a more deferential standard of "reasonableness".

• Nonetheless, the Court provided for a high degree of deference to the arbitral tribunal, stating that arbitral decisions should be interfered with only rarely and that on judicial review courts should not interfere with the merits of an arbitration.

American perspectives were presented by Kiera Gans who highlighted three U.S. cases that reviewed arbitration awards on the basis of jurisdiction: *First Options v. Kaplan*,[2] *Ecuador v. Chevron*,[3] and *Argentina v. BG*[4].

• In *First Options*, the Third Circuit Court of Appeals vacated an award which determined that a third party was bound to an arbitration agreement. The U.S. Supreme Court affirmed the decision holding that, presumptively, the arbitrability of a dispute is subject to independent review by the courts. Under *First* Options, the question of "who has the primary power to decide arbitrability" turns on whether the parties agreed to submit the question to arbitration. If there is "clear and unmistakable" evidence that the parties agreed to submit a question of arbitrability to the tribunal, courts will apply a deferential standard of review to the tribunal's ruling. Absent such clear and unmistakable evidence, courts will apply a *de novo* standard of review.

• In *Ecuador v. Chevron*, Ecuador sought a stay of arbitration proceedings initiated by Chevron in light of a parallel court action in the U.S. The Second Circuit Court of Appeals upheld the District Court's decision to deny the motion on the basis that issues of waiver and estoppel are conditions precedent to arbitration, which are procedural issues that presumptively fall to the tribunal to determine. Since the existence of an

[1] 2011 ONCA 622 aff'd [2011] SCCA No 528.
[2] 514 U.S. 938 (1995).
[3] 638 F. 3d 384 (2nd Cir. 2011).
[4] 764 F. Supp. 2d 21 (D.D.C. 2011).

agreement to arbitrate was not at issue, the Court held that the *First Options* test did not apply, but that if it did, the parties' agreement to use the UNCITRAL Rules provided "clear and unmistakable" evidence that they had submitted questions on the "existence or validity" of the arbitration agreement to the tribunal.

• In *Argentina v. BG Group*, the D.C. Circuit Court of Appeals vacated an award which determined that a tribunal had jurisdiction despite the failure of the claimant to comply with a provision in the bilateral investment treaty requiring the claimant to litigate in the Argentinian courts for an 18-month period before initiating arbitration. The Court concluded that this was a precondition to arbitration which was not a "procedural" matter for arbitrators but rather an issue as to whether the parties agreed to arbitrate at all. As a result, the Court held that the question of arbitrability was for the courts to decide.

ICSID perspectives were presented by Meg Kinnear who discussed the following key points:

• The ICSID philosophy is to keep parties out of national courts. Post-award remedies are built into the ICSID system so there are no issues related to setting aside an award at the seat of the arbitration. The remedy most often sought is annulment, which gives an ad hoc committee established by ICSID the ability to review the award.

• Since parties to ICSID agree that the only recourse for an award is within the structure of ICSID, one advantage to the system is that there are no 'levels' of court review post-award. A disadvantage is that if the award is annulled, the parties must re-start the proceedings.

• An annulment based on jurisdictional error may be made where there has been a "manifest excess in power". The moving party must prove that the tribunal exceeded its power and that it was manifest. "Manifest" has been interpreted to mean "plain, clear, or egregious".

• In the *Sempra v. Argentina*[5] arbitration, the award was annulled because the tribunal erred in its analysis of the legal test regarding 'economic necessity'. The decision received considerable criticism that the ad hoc annulment committee had been too interventionist.

• Kinnear countered that annulment committees have shown high deference to ICSID tribunals and noted that annulment is an exceptional remedy under ICSID; of 341 cases registered, 11 have been annulled in whole or in part.

[5] ICSID Case No. ARB/02/16, Decision on Annulment (June 29, 2010).

ARBITRATION PLACE: A SIX MONTH REFLECTION ON THE NEW CENTRE IN TORONTO

Be-Nazeer Damji, In-house counsel, Arbitration Place

On April 18, 2012, Canada's who's who of the arbitration and litigation bar and many others gathered to celebrate the official launch of Arbitration Place, a new state-of-the-art arbitration facility located in the heart of Toronto's financial district. The private venture lead by Canadian businesswoman Kimberley Stewart is a response to the growth of international and domestic arbitrations taking place in Toronto.

Indeed, a recent study commissioned by Arbitration Place and conducted by Boston-based Charles River Associates revealed that arbitrations taking place in Toronto in 2012 will bring about C$256.3 million into the city's economy. This is approximately C$100 million more than what the Toronto International Film Festival brought in.[6] The study also forecasts that arbitration's economic impact on the city will grow by almost 7% in 2013 to about C$273.3 million.

Not surprisingly, Stewart, identifying the trend in the market, seized the moment to open Arbitration Place. Stewart wanted to build and operate a world-class facility that would compare very favourably to the best hearing facilities in the world and would put Canada on the map for international arbitrations. Arbitration Place has partnered with ICC Canada (ICC's national committee) and the London Court of International Arbitration (LCIA) to raise awareness of international arbitration norms and practices in Canada, to extend Arbitration Place's international reach, and also to provide Arbitration Place brand recognition in the Canadian business community.

The centre also serves as a residence for arbitrators, similar in nature to barristers' chambers in London, where arbitrators can lease space and operate their independent practice. Five Resident Arbitrators are leasing space at Arbitration Place, including former United Nations ambassador and world renowned arbitrator Yves Fortier C.C. Q.C., former Supreme Court of Canada justice Ian Binnie Q.C., former associate chief Justice Coulter Osborne Q.C., Stanley Fisher Q.C. and Thomas Heintzman O.C. Q.C. Arbitration Place has also associated itself with Member Arbitrators who do not lease any office space in the facility but have access to the services offered by the centre.

Most recently, on September 5, 2012, Arbitration Place named its Advisory Board which includes Bill Graham, Canada's former foreign minister, Anne Marie Whitesell, former Secretary General of the ICC, and Patrick Garver, former general counsel of Barrick Gold, amongst others, to provide strategic direction to the centre. The breadth of experience and the calibre of the individuals on this board will boost the centre's cachet in the Canadian market and will further thrust Arbitration Place onto the world scene.

Numerous press articles have covered the media attention Arbitration Place and Toronto have garnered in the last six months. Global Arbitration Review, which attended the launch of the centre, has since released two additional

[6] Figures from TIFF are from the period of 2008-2009. J. Melnitzer, Arbitration is good for a city's coffers, LegalPost article dated September 12, 2012 (http://business.financialpost.com/2012/09/12/arbitration-is-good-for-a-citys-coffers/)

articles which highlight the benefits of Toronto as an arbitral seat. Awareness has increased amongst international arbitration practitioners around the world that Canada has many advantages as a seat for international arbitration. Its reputation for neutrality, its reliable courts, its common law and civil law heritages, its official bilingual status and the fact that it is right next to the United States make Canada a natural location for international arbitrations. Barry Leon, head of international arbitration at Perley Robertson Hill & McDougall and Chair of ICC Canada says that he "and several others have been impressed at recent international arbitration events in Dublin, Paris and Singapore, by the number of practitioners -- Europeans, Americans and Asians -- who are aware of Canada's newest state-of-the-art arbitration hearing facility."

Arbitration Place has also allocated significant resources in hosting several educational programmes. On a monthly basis, Arbitration Place organizes "Arbitrator of the Month" seminars, which have become popular with the local bar. In June 2012, YCAP held its Spring Symposium at Arbitration Place on the topic of the deference given to arbitrators' rulings on jurisdiction, in recent proceedings. In May 2013, Arbitration Place will be hosting a conference on Arbitration in Brazil which will focus on the opportunities and challenges of doing business in Brazil, which will be followed in June 2013 by the LCIA symposium.

Recently, the centre collaborated with Toronto arbitration practitioners in preparing a proposal for the International Bar Association, which culminated in Toronto being selected to host an International Bar Association (IBA) Regional International Arbitration Conference in June 2014.

"The last six months have been demanding and have required a lot of focus from the team at Arbitration Place; however, this has also been very rewarding", says Stewart. Although the centre has obtained official City of Toronto support, it has not received any public funding to promote its vision, unlike Singapore, where the government has heavily invested in arbitration facilities like Maxwell Chambers to attract international hearings. Arbitration Place is thus counting on the support of the domestic legal community to help fuel the venture and its continued investment.

As the CRA study notes, domestic arbitration cases have an average economic impact of C$370,000, while international cases generate five times more, at over C$1.7 million. It is thus in the local counsel's vested interest to support facilities that rival the best in the world and promote Toronto as a seat. Other than arbitrations, Arbitration Place also provides its facilities to conduct any pre-hearing procedures such as examinations for discovery, other out-of-court examinations and mediations.

Stewart is confident that Toronto will gain some international tracking and expects a gap of ten years before international cases start to take place in the city. She estimates that this is the amount of time it will take for counsel to stipulate Toronto as the seat in arbitration clauses, for disputes to arise under those contracts and for arbitrations to be initiated as a result. Arbitration Place is the right idea at the right time. As Fortier observes in GAR, until six months ago, Toronto did not have an entrepreneur with the means, energy, and audacity to make the kind of investment in arbitration that is exemplified by Arbitration Place.

INVESTOR-STATE DISPUTE SETTLEMENT AND MINEXPO 2012

Heather Bray, SJD Candidate, University of Arizona
Devin Bray, SJD Candidate, University of Arizona

Investment treaty arbitration has bourgeoned over the last twenty years. It should come as no surprise that the Canadian mining industry is quickly familiarizing itself with investor-state arbitration process.

Under NAFTA, Chapter 11, there have been two mining-related claims. The *Glamis Gold v United States* decision involved a Canadian metallic mining company unsuccessfully asserting that certain regulatory and legislative actions of the US adversely impacted its mining rights. Similarly, in *Gallo v Canada*, Ontario's *Adams Mine Lake Act*, which prohibited the use of a mine as a waste disposal site, came under scrutiny.

Canadian mining companies abroad have also sought remedy through international arbitration; notable cases include *Vanessa Ventures v Venezuela*, which involves a $US 1 billion claim of expropriation and unfair and inequitable conduct by the Venezuelan government towards Vanessa's gold and copper project, and, more recently, *Rusoro Mining v Venezuela*, which involves a 2012 claim of uncompensated nationalization of the Canadian-Russian company's gold mining assets.

Given the growing relationship between Canada's mining industry and international arbitration, we thought reporting on MINExpo 2012 would serve as an excellent, behind-the-scenes look at the mining industry worldwide and see what the industry experts are saying about international arbitration (if anything).

I. General Information:

MINExpo International is the world's largest mining show. The 2012 edition took place from September 24-26 at the Las Vegas Convention Center in Las Vegas, Nevada. Sponsored by the Washington DC-based National Mining Association, the MINExpo included more than 1800 exhibitors from more than 100 countries and covered more than 850,000 square feet of indoor and outdoor exhibit space. Held every four years, the MINExpo displays a wide variety of exhibits for the mining and mineral processing industry, including the latest technology, equipment, components, parts and services for exploration, extraction, safety and remediation and preparation of coal and metallic ores.

II. Agenda:

1. Opening Session
On Monday, September 24 at 10am the MINExpo kicked off its opening session with a panel discussion between representatives of four major mining companies: (1) Gregory H Boyce, Chairman and Chief Executive Officer of Peabody Energy; (2) Red Conger, President of Freeport-McMoRan Americas; (3) Richard T O'Brien, Chief Executive Officer of Newmont Mining Corporation; and (4) Michael W Sutherlin, President, Chief Executive Officer and Director of Joy Global Inc.

The discussion was very broad and spoke to the future of the mining industry and the effects of globalization. Specifically, the panel discussed the general

movement of mining operations to set up shop in areas with less political stability.

The discussion also focused on the rise in State-owned companies and the increase in collaborative partnerships. On this point, Conger regarded global expansion as an opportunity to tap into foreign talent by hiring a domestically trained workforce. O'Brien, however, warned that the competition between State-owned and foreign companies can lead to sacrifice in human and environmental standards but also recognized that collaboration between these two groups could help unify standards on corporate social responsibility. Boyce further highlighted that the most competitive and efficient, and therefore most attractive, companies to partner with are those that maintain high labour and safety standards through superior management techniques. The result of these types of working relationships, he concluded, is responsible mineral development.

When asked about the future of mining in Africa, Sutherlin appeared indifferent on the topic when he noted a general lack of internal policies available to attract foreign direct investment. The other panel members similarly raised concerns about Africa's fragile economy, government instability, lack of infrastructure, failure to implement international investment and tax policies, and non-transparent regulations. In fact, whether to mine or not in Africa was summed up by O'Brien concluding remarks, when he surmised that court cases instead of cooperation would result until there is transparent regulation.

2. Educational Sessions

Industry experts delivered twenty educational presentations during the mornings of the next two days. Each session was two hours long and dealt with general topics including surface and underground mining, processing, bulk material handling, new mine developments as well as developments and changes affecting the mining industry.

We attended three sessions. The first session titled, "Changing Face of a Mining Company," was interesting because it highlighted general projections and trends within industry, identified three ways to structure a mining company, and discussed tax planning strategies. In the second session, titled "Maintenance," Kay Sever, President of OPTIMIZ Consulting LLC, delivered a speech that focused on how to avoid "cultural collisions" through effective communication and reframing challenges into opportunities. Ms. Sever's presentation was interesting because it identified a number of issues that can be pre-empted before they manifest into larger (legal) problems. The third and final session titled, "Reclamation," discussed successful post-mining land-use projects and highlighted the need for strong policy frameworks (both regulatory and internal company standards) to ensure successful reclamation and ecosystem restoration.

3. Exhibits

In the afternoons we visited the exhibits, which were well represented with expertise ranging from exploration, surveying, processing, site development, equipment, service, refining, and reclamation. There were also several country-specific grouped kiosks, which included sizable representation from Australia, Canada, Chile, China, Germany, South Africa, and the United States. Most of the exhibits seemed to be showcasing new products, new technologies and new services in the mining industry.

We spoke to several Canadian exhibitors, who identified some notable Canadian resources. These include:

- Prospectors & Developers Association of Canada (PDAC)
- Mining Association Canada
- Canadian Aboriginal Minerals Association

While the Expo itself was not explicitly directed at arbitral practitioners, it is a great way to get (re)acquainted with the mining industry. For more information on MINExpo, its educational sessions (which are online), and exhibits please visit: www.minexpo.com. For those interested in a mining conference closer to home, the PDAC is hosting its annual International Convention, Trade Show & Investors Exchange – Mining Investment Show in Toronto, Canada on March 3-6, 2013.

III. Conclusion

Some 350 years ago, coal was discovered on Cape Breton Island. Since that time, Canada has become a world leading mining nation. Whether it is the potash mine in Saskatchewan, the diamond deposits in the North, the coal reserves in the west, the mineral deposits in the Ring of Fire or the metal mines on the Canadian Shield, the mining industry is a vital part of Canada's economic livelihood.

There is no doubt that Canada is resource rich. Somewhat interestingly, other resource rich countries, such as Brazil and Australia, are not participating in investment treaty negotiations. Canada, however, is plowing forward with its FIPA, FTA and regional negotiations. With the recent Canada-China FIPA coming into force on October 18, 2012 and China's ongoing desire for raw materials, it is likely that there will be an influx of Chinese investors eager to invest in Canada's rich extractive industries. Similarly, Canadian mining companies hoping to capitalize on China's gold, coal, copper, iron ore, aluminum and nickel deposits now have the security of a FIPA. What that means for the investor-state arbitral practitioner is a need to become bilingual - fluent in both the law and the mining industry.

SISTEM V. KYRGYZ REPUBLIC

Michelle Chai, Articled Clerk, Stewart McKelvey[7]

Considering the Background Facts

The Ontario Superior Court of Justice recently dealt with the recognition and enforcement of an ICSID award and the question of whether a court requires a real and substantial connection to exercise jurisdiction to recognize and enforce an arbitral award. Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi ("Sistem"), an entity incorporated under the laws of the Republic of Turkey, made an investment in Kyrgyz Republic (the "Republic") in 1992 regarding the operation of a hotel in the Republic. Sistem alleged the Republic unlawfully took over the hotel.

[7] The author thanks Daniela Bassan, Partner, Stewart McKelvey, YCAP Board of Directors, for her assistance in editing this submission.

The dispute resulted in an arbitration proceeding with both parties participating. The award dated September 9, 2009 (the "Award") was issued by an arbitration panel pursuant to the International Centre for Settlement of Investment Disputes Additional Facility Rules.

On January 5, 2011, Justice Echlin of the Ontario Superior Court of Justice ("OSCJ") heard an application by Sistem to recognize and enforce the Award in Ontario (the "Application").[8] Justice Echlin's Order recognized and enforced the Award as a judgment of the OSCJ (the "Judgment").
In February 2011, based on the issued Ontario Judgment, the Registrar of the OSCJ issued a Writ of Seizure and Sale in respect of the property of the Republic.

Kyrgyzaltyn JSC ("KJSC") is an entity wholly owned by the Republic. KJSC in turn holds 77,401,766 shares in Centerra Gold Inc. ("Centerra"), a Canadian corporation with its head office in Ontario. A Writ of Seizure and Sale was served on Centerra in March 2011 concerning shares owned by the Republic (via KJSC) in the stock of Centerra. Centerra and KJSC responded by asserting that the shares in Centerra were owned by KJSC and the Republic did not own any shares in Centerra. Sistem claimed that, because KJSC was an entity wholly-owned by the Republic, KJSC held the shares in Centerra for the Republic.

Adding a party not originally named in the Award[9]

By Notice of Motion dated May 3, 2011, Sistem moved for an order declaring that the Republic beneficially owned all the shares in Centerra nominally held by KJSC. In response, Centerra argued that the Court lacked jurisdiction over KJSC and that Sistem's motion exceeded the Court's jurisdiction because KJSC is not named in the Award.

Justice Cumming referred to the *International Commercial Arbitration Act* (Ontario) as providing that an arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court, and creditors may issue writs of seizure and sale of any real property interest held by judgment debtors. Justice Cumming noted that Sistem was seeking to realize through "execution and garnishment" upon its undisputed judgment against the Republic, and granted Sistem's motion to add KJSC as a party.

Addressing Enforcement and *Forum non conveniens*[10]

On April 17, 2012, Justice Brown heard a motion by KJSC that the Judgment should be set aside because there was no real and substantial connection between the litigation and Ontario.

Justice Brown held that he did not need to determine whether the doctrine of *forum non conveniens* applied to the recognition and enforcement in Ontario of international arbitral awards; he concluded that even if the doctrine did apply, KJSC had not demonstrated that the Republic was a more appropriate forum in which to dispose fairly and efficiently of the litigation.

[8] Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Krygyz Republic, (January 5, 2011), unreported.
[9] *Ibid*, 2011 ONSC 5731.
[10] *Ibid*, 2012 ONSC 4351.

In applying the doctrine, Justice Brown noted the dispute involved personal property (securities) issued by a Canadian corporation with its head office Ontario for the purpose of satisfying an Ontario Judgment. Having determined that Ontario and Canadian corporate law and execution law were the applicable law to answer the question regarding ownership of the shares in Centerra, Justice Brown went on to consider Sistem's argument that staying the Ontario enforcement proceedings would result in a loss of juridical advantage because of its inability to obtain justice in the courts of the Republic.

Sistem filed expert evidence demonstrating "a pattern of endemic corruption and recurrent external interference in the administration of justice". Justice Brown referred to the decision of the Tribunal in its Award, noting that the abrogation of Sistem's ownership rights in the Republic hotel resulted from Republic court decisions. Justice Brown noted that while he was not making any specific finding about whether the case could be suitably tried in the Republic, the evidence concerning the past corruption of the Republic's courts "certainly did not point to the Republic as the clearly more appropriate forum" in which to litigate the ownership of the shares.

Looking Ahead

It is interesting to note that after the decision by Justice Brown, reports surfaced regarding the location of the Centerra shares alluding to the possibility of the shares being physically relocated to the Republic. As a result, Sistem moved for a Mareva injunction restricting the movement of the shares and was granted an interim injunction in August 2012 of 10 days and an additional extension of 90 days in September 2012 when Sistem informed the court that the dispute over shares had yet to be resolved.[11]

To date, the decisions in this matter have consistently upheld the enforcement power of the local court in respect of the Judgment. At the same time, there have been a number of proceedings brought to address the contrary positions of the parties in respect of jurisdictional and enforcement issues. It is expected that the procedural complexity and international layering of this matter will continue to be of interest to the arbitration community in Canada and elsewhere.

CASE SUMMARY: *FORD MOTOR COMPANY OF CANADA LIMITED V. SHERIFF,* 2012 BCSC 891

Jeremy D'Souza, Student-at-Law

In June 2012, the British Columbia Supreme Court provided some guidance on the scope of the *functus officio*[12] doctrine in the context of arbitrations. In *Ford Motor Company of Canada Limited v Sheriff*,[13] at issue was whether an

[11] *Ibid*, 2012 ONSC 4751; and 2012 ONSC 4983
[12] The general rule of *functus officio* states that once a decision maker has done everything necessary to perfect his or her decision, he or she is then barred from revisiting that decision, other than to correct clerical or minor errors. The rationale for the rule is the desire for finality in proceedings. See *Chandler v Alberta Association of Architects* [1989] 2 SCR 848 at 862.
[13] 2012 BCSC 891 [Ford Motor].

arbitrator could reverse a final award with supplementary reasons after the introduction of new evidence. The B.C. Supreme Court ruled that the arbitrator's actions constituted an arbitral error as the arbitrator exceeded her powers and did not have continuing jurisdiction to reverse her original award.

The Arbitration

The dispute arose shortly after Robert and Rhiannon Sheriff purchased a pickup truck from Ford in August 2009. The vehicle required numerous and frequent repairs. One particular defect, an engine issue, gave rise to an arbitration between the parties pursuant to the Canadian Motor Vehicle Arbitration Plan (CAMVAP) in which the Sheriffs sought an order requiring Ford to buy back the truck.

At the time of the arbitration the vehicle was with the dealership for repairs. The arbitrator ordered an inspection, which was carried out by a B.C. Automobile Association inspector. On the basis of the inspector's report, the arbitrator released a "Final Award", which concluded that the engine issues had been resolved. However, upon the return of the truck the Sheriffs continued to experience problems with the truck's engine and reported the problems to the CAMVAP administrator.

The arbitrator then released "Supplementary Reasons" stating that she had prematurely concluded that the vehicle was repaired. She cited s. 27(1) of the B.C. *Commercial Arbitration Act*[14] as authority for her continuing jurisdiction to consider the ongoing engine troubles. Section 27(1) permits an amendment to an award to correct a clerical error, accidental error or slip, or an arithmetical error. The arbitrator considered her conclusion in her "Final Award" an "accidental slip" [15] as she did not have complete evidence at the time she issued her decision. Based on the new evidence, she ordered in her "Supplementary Reasons" that Ford buy back the truck.

British Columbia Supreme Court

Ford brought an application before the B. C. Supreme Court to have the supplementary reasons set aside under s. 30 of the *Act*. Under s. 30, the Court can set aside or remit back to the arbitrator an award if the arbitrator committed an arbitral error. Ford argued that once the "Final Award" was issued, the arbitrator was *functus officio*. As such, she had no jurisdiction to change it and, in doing so, committed an arbitral error. Ford sought to have the original "Final Award" restored.

The Sheriffs argued that the question of when the arbitrator becomes *functus officio* must be approached with a degree of flexibility, relying on *Nova Scotia Government and General Employees Union v. Capital District Health Authority*.[16] In that case, the Nova Scotia Court of Appeal stated that the principles of *functus officio* were developed in relation to court proceedings and must be applied with greater flexibility in the context of administrative tribunals.[17] The reason for this is that the opportunity to correct errors by administrative tribunals on appeal is more limited. So, the Sheriffs argued that

[14] RSBC 1996, c.55 (the "*Act*").
[15] Ford Motor, *supra note 2*, at para. 15.
[16] 2006 NSCA 85 [*Nova Scotia*].
[17] *Ibid* at para 38.

s.27 of the *Act* should enable a tribunal to express its manifest intent in the context of correcting its original award.

The B.C. Supreme Court nonetheless ruled that the arbitrator committed an arbitral error in issuing her "Supplementary Reasons". *Westnav Container Services v. Freeport Properties Ltd.*[18] was instructive on this point. There, the B.C. Court of Appeal stated that the jurisdiction to correct final awards afforded by s. 27 contemplates only expressions and reformulations of the arbitrator's original thought process.[19] A distinction must be drawn between clarification of first thoughts, which are permitted, and corrections which represent second thoughts, which are barred by the *functus officio* doctrine. To the extent that an alteration to an award strays from the arbitrator's original thought process, it goes beyond correction of an accidental slip.

Applied to the facts at hand, the Court reasoned that in her "Supplementary Reasons", the arbitrator was not correcting an error in how she originally expressed her manifest intent. Although, the arbitrator specifically mentioned that the inclusion of the new evidence was the continuation of the same thought process and not second thoughts, the Court found that her original intent was to dismiss the claim based on the available evidence. The new evidence reversed her original intent. With regards to the Sheriffs' argument regarding the flexibility of the doctrine, the Court stated that the arbitrator's actions could not come within those contemplated in *Nova Scotia* or under s.27. Section 27 affords arbitrators limited powers to correct awards, and this particular arbitrator's actions went well beyond, no matter how flexibly the doctrine operates in administrative proceedings.

According to the Court, the "Supplementary Reasons" thus constituted an arbitral error. The Court also refused to restore the "Final Award" because it was issued before the additional inspection evidence was received and the Sheriffs had therefore not had the full opportunity to present their case and respond to all the evidence. The Court noted that this in itself may have also amounted to an arbitral error and a failure to observe the rules of natural justice. As a result, and in accordance with s. 30 of the Act, the matter was remitted back to the arbitrator for reconsideration based on all the available evidence.

Conclusion

The *functus officio* doctrine has traditionally contained an exception for correction of accidental errors. What *Ford Motors* appears to say is that where new evidence arises post-award, the previously-issued award does not thereby become issued "in error", and arbitrators cannot invoke s. 27 of the *Act* to correct such awards. In this respect, s. 27 does not confer continuing jurisdiction for arbitrators to alter their reasoning and that the amendments envisioned under the *Act* are meant to correct technical errors.

Although this case dealt with B.C.'s domestic act, a similar provision is found in B.C.'s *International Commercial Arbitration Act* as well as international arbitration legislation across Canada, and may thus have further reaching application.

---

[18] 2010 BCCA 33 [*Westnav*].
[19] *Ibid* at para 28.

CAN GOVERNMENTS REQUIRE FOREIGN INVESTORS TO INVEST A SPECIFIC AMOUNT IN RESEARCH AND DEVELOPMENT ON AN ANNUAL BASIS? A FIRST LOOK AT *MOBIL V. CANADA*

Rachel Bendayan,[20] Norton Rose Canada LLP

Mandatory local research and development investment requirements (hereinafter "**R&D Requirements**") may be prohibited under Chapter 11 of the North American Free Trade Agreement ("**NAFTA**"). A decision in *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Government of Canada* ("***Mobil v Canada**")* is highly anticipated after a U.S. website leaked the fact that Canada had lost this arbitration against the two U.S. based oil companies on June 1st 2012.[21] On the same day, a spokeswoman for the Canadian Department of International Trade confirmed that the Tribunal had found, by a 2-1 majority, that Canada had breached the performance requirements in Article 1106 of NAFTA by issuing provincial guidelines providing R&D Requirements.[22] The Tribunal reportedly rejected a second claim put forward by the Claimants regarding Canada's alleged breach of NAFTA's minimum standard of treatment clause. The oil companies had requested compensation in the order of $50 million – the Tribunal, however, requested additional information and is expected to issue a subsequent award on damages. The NAFTA proceedings were administered under ICSID's Additional Facility rules, with a Tribunal composed of Prof. Hans van Houtte (President), Prof. Merit Janow (Claimants' nominee) and Prof. Philippe Sands (Canada's nominee). In dissent, Professor Sands found that Canada had not violated NAFTA's performance requirements while agreeing with the majority that there had been no breach of the minimum standard of treatment. While we await publication of the Tribunal's award,[23] this piece will analyse the parties' principal submissions on the issue of the legality of R&D Requirements under NAFTA.

At the origin of the conflict is the Canada-Newfoundland Offshore Petroleum Board's adoption of new guidelines in 2004 that required investors in offshore petroleum projects to, *inter alia*, invest minimum amounts in research and development in Newfoundland on an annual basis. This annual investment or R&D Requirement was necessary in order to obtain and maintain the required authorizations for oil production operations. At the time that these new guidelines where enacted, the Claimants already operated the Hibernia and Terra Nova oil fields in Newfoundland and Labrador, the two largest oil fields off Canada's east coast. The Claimants had also already collectively invested 163.7 million dollars in research and development in the province in order to

[20] Rachel Bendayan specialises in international arbitrational, mediation and commercial litigation out of the Montreal office of Norton Rose Canada LLP. The author would like to thank Simon St-Georges, student at law at Norton Rose Canada LLP, whose assistance in putting together this article was indispensable.

[21] See "Canada Loses NAFTA Claim; Provincial R&D Obligations Imposed on US Oil Companies Held to Constitute Prohibited Performance Requirements", *Investment Arbitration Reporter* (1 June 2012) online: IAReporter <http://www.iareporter.com/articles/20120601>.

[22] See "Oil companies win NAFTA fight over local investment", *CBC News* (1 June 2012) online: CBC News <http://www.cbc.ca/news/business/story/2012/06/01/pol-nafta-ruling-offshore-oil.html>.

[23] On the date of submission of this article for publication, 25 September 2012, the award has not yet been published.

address the projects' many environmental and technological challenges in the absence of any formal R&D Requirements. In 2001, the Claimants reduced their investment by 50% because less research and development was needed at the production stage of their operations. According to the Respondent, the province's Petroleum Board had the right to require minimum levels of annual R&D investment, not considered necessary until then because the Claimants' reported levels of expenditures had been satisfactory.[24]

The principal question was whether the R&D Requirements constituted prohibited "performance requirements" under NAFTA and if they were covered by the definition of "goods produced or services provided" under Article 1106(1)(c). No NAFTA tribunal had had the occasion to consider this problem before. On its face, Article 1106(1) prevents the distortion of free trade by limiting the conditions for allowing foreign investment into a country. According to the Claimants, it also prevents the entrepreneurship of foreign investors from being subjugated to the development goals of the host State. NAFTA Article 1106(1)(c) provides as follows:

> 1106 (1). No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:
>
> (c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;[25]

Although not the only contentious issue between the parties, the interpretation of NAFTA Article 1106(1) was the subject of much debate. The Claimants argued that R&D Requirements of "expenditures in the Province in excess of what investors would otherwise spend" clearly constituted a prohibited performance requirement within the meaning of Article 1106(1).[26] This argument was supported by reports from the United Nation Conference on Trade and Development ("**UNCTAD**") which had classified R&D Requirements as performance requirements.[27]

---

[24] See *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID), Counter Memorial of December 1, 2009 at paras 71-73, online: Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/mobil_archive.aspx?lang=en&view=d> [Respondent's Counter Memorial].

[25] *North American Free Trade Agreement Between The Government of Canada, the Government of Mexico and the Government of the United States*, 17 December 1992, Can TS 1994 No 2, 32 ILM 289, Article 1106(1)(c), online: NAFTA Secretariat <http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtpiID=142#A1106>.

[26] See *Mobil Investments Canada Inc. and Murphy Oil Corporation v. Canada* (ICSID), Claimant's Memorial of August 3, 2009 at para. 151, online: Foreign Affairs and International Trade <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/mobil_archive.aspx?lang=en&view=d> [Claimant's Memorial].

[27] UNICTAD, Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries, (UNCTAD/ITE/IIA/2003/7) at pp 28-29: online: UNCTAD <http://unctad.org/en/docs/iteiia20037_en.pdf>.

The Respondent, relying on decisions such as *S.D. Myers*[28] and *Pope & Talbot*[29], argued that Article 1106(1) should be interpreted restrictively and that a performance requirement not falling squarely within the listed examples must not be read into the agreement.[30] Canada further alleged that any prohibition of R&D Requirements would have to be declared explicitly, as in many bilateral investment treaties signed by the U.S.[31] The Respondent also submitted reports, notably, from the UNCTAD and from the Agreement on Trade Related Investment Measures, which explained that R&D Requirements were not prohibited by most trade agreements, including NAFTA. In interpreting a 2001 UNCTAD report on Host Country Operational Measures, Canada underlined the importance of distinguishing between sourcing/local content performance requirements, which are aimed at protecting a domestic market, and R&D Requirements or training requirements, which are aimed at strengthening the knowledge capacity of the host State and promoting sustainable development.[32] Canada argued that the R&D Requirements in question did not breach Article 1106(1)(c) because they did not "necessarily compel the purchase, use or accordance of a preference to local goods or services" like a sourcing/local content performance requirement normally would.[33]

Submissions were also made on the interpretation of Canada's reservation at Annex I to NAFTA. When Canada signed onto NAFTA, it had carved out certain R&D Requirements in a reservation to Article 1106. The Claimants alleged that this reservation demonstrated that Canada recognized that R&D Requirement constitute a breach of Article 1106.[34] Canada argued that the reservation concerned other non-conforming legislative measures. For example, Canada alleged that the reservation was necessary in order for it to require foreign investors to give "first consideration" to local goods/services where they are competitive, claiming that any reference to R&D Requirements in the description of the reservation was made "out of an abundance of caution".[35]

The validity of R&D Requirements is obviously politically sensitive and highly controversial. Certain stakeholders, like the Council of Canadians, have taken this opportunity to again question the reasonableness of NAFTA Chapter 11. According to the press release issued by the Council of Canadians at the end of June, judicial review of the decision in *Mobil v. Canada* (once published) should be sought by the province's premier.[36]

---

[28] *S.D. Myers Inc. v. Government of Canada* (UNICTRAL), Partial Award of November 13, 2000 at para. 275.
[29] *Pope & Talbot Inc. v. Government of Canada* (UNICTRAL), Interim Award of June 26, 2000 at para. 70.
[30] See Respondent's Counter Memorial, *supra* note 5 at paras 144-154.
[31] See Respondent's Counter Memorial, *supra* note 5 at paras 172-176; see e.g. *Treaty Between the Government of the United States of America and the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment*, United States and Kingdom of Bahrain, 29 September,1999 (entered into force May 31, 2001) at Article 6 (a) and (f).
[32] See Respondent's Counter Memorial, *supra* note 5 at paras 168-178.
[33] *Ibid* at para. 183.
[34] See Claimant's Memorial, *supra* note 7 at paras 154-155.
[35] See Respondent's Counter Memorial, *supra* note 5 at paras 203-213; *Canada-Newfoundland Atlantic Accord Implementation Act*, SC,1987,c 3 s 45(3)(b); *Canada-Newfoundland and Labrador Atlantic Accord Implementation Newfoundland and Labrador Act*, RSNL 1990, c C-2 s 45(3)(b).
[36] The Council of Canadians, Media Release, "Dunderdale urged to challenge NAFTA ruling in Exxon-Murphy dispute; companies can afford R&D payments, says Council of

Interestingly, this decision also comes at a time when a Comprehensive Economic and Trade Agreement ("**CETA**") between Canada and the EU is being negotiated. In June 2012, the Canadian Union of Public Employees issued a legal opinion stating that "while CETA rules are similar to those of NAFTA and the General Agreement on Trade in Services, they will have far broader application because Canada proposes to abandon most of the reservations that have until now sheltered sub-national governments from the full application of such international rules".[37] It also wrote an open letter to all provincial premiers in Canada, warning of the potential effects CETA would have on exclusive provincial powers, especially with respect to natural resources, citing the decision of *Mobil v. Canada* as a prime example of how investment agreements can limit legitimate areas of government regulation.[38] Both Canada and the EU are committed to maintaining the momentum of the negotiations thus far with the aim of concluding CETA in 2012.[39]

We will have to await the final publication of the Tribunal's ruling as well as Prof. Sands' dissent. Redactions of confidential information still have to be approved by the parties. The eventual publication will shed further light on the Tribunal's findings and reasoning about these important issues.

Canadians" (28 June 2012) online: <http://canadians.org/media/trade/2012/28-Jun-12.html>.

[37] *Ibid.*

[38] See Canadian Union of Public Employees, Media Release, "Legal opinion urges provinces to put brakes on secret CETA talks" (10 July 2012) online: http://cupe.ca/ceta/legal-opinion-urges-provinces-brakes.

[39] See Foreign Affairs and International Trade Canada, Status of Negotiations, "Canada-European Union: Comprehensive Economic and Trade Agreement (CETA) Negotiations" online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/eu-ue/negotiations-negociations.aspx?lang=eng&view=d>.

International Arbitration Calendar 2012

As of October 2012

Date	Place	Organization	Topic	Web Address
21-22 Oct 2012	Bahrain	ICC	Training on 2012 ICC Rules of Arbitration	http://www.iccwbo.org/Training-and-Events/All-events/Events/Arbitration-and-ADR/ICC-conference-and-training-in-Bahrain-on-the-2012-ICC-Rules-of-Arbitration/
22 Oct 2012	Boston	ICC Young Arbitrators Forum	Building an International Arbitration Practice	http://www.iccwbo.org/Training-and-Events/All-events/Events/ICC-YAF-Event-in-Boston-on-Building-an-International-Arbitration-Practice/
23 Oct 2012	Bogota, Columbia	ICDR/AAA	International Arbitration Conference	https://www.aaau.org/courses/icdr aaa-and-chamber-of-commerce-of-bogota,-colombia-joint-international-arbitration-conference/ed5012003o/
24 Oct 2012	Montreal	YCAP	Fall Symposium	www.ycap.ca
25 Oct 2012	Montreal	ICC Canada	Annual Conference	http://www.chamber.ca/index.php/en/icc-arbitration/
25-26 Oct 2012	Halifax	ADR Institute of Canada	Annual National Conference	http://www.amic.org/
1 Nov 2012	Toronto	Toronto Commercial Arbitration Society	Annual Conference	http://www.internationalarbitrators.org/
2 Nov 2012	Washington, DC	AA-ICDR ICC ICSID	29th Joint Colloquium: The Frontiers of Arbitration	http://www.iccwbo.org/Training-and-Events/All-events/Events/29th-AA-ICDR-ICC-ICSID-Joint-Colloquium,-the-Frontiers-of-Arbitration/
2-4 Nov 2012	Toronto	Chartered Institute of Arbitrators	Training	http://www.internationalarbitrators.org/
11-13 Nov 2012	Miami	ICC	International Arbitration in Latin America	http://www.iccwbo.org/events/registrationrol.aspx?CodeICMS=S1217
26 Nov 2012	Paris	ICC	Third-Party Funding in International Arbitration	http://www.iccwbo.org/events/registrationrol.aspx?CodeICMS=S1211
3-6 Dec 2012	Paris	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