

DISPUTE RESOLUTION IN THE ENERGY SECTOR: WITHER THOU GOEST?

Ann Ryan Robertson C.Arb (Locke Lord LLP)

Dr. Elizabeth Whitsitt (University of Calgary)

CELF Online Research Seminar

October 7, 2020

Presentation Overview

- Private international arbitration developments
 - Canada
 - USA
- Public international arbitration developments
 - NAFTA to CUSMA
- Concluding remarks

Private International Arbitration Developments – Canada

- Harmonization
 - history of trying to ensure uniformity of international rules across Canada
 - provincial differences (e.g. limitations)
 - 2014 ULCC renewed harmonization efforts
 - amendments for electronic agreements, interim & ex parte orders, limitations
 - Quebec, Ontario and BC – amended legislation

Private International Arbitration Developments – Canada (con't)

- **Unconscionability** – *Uber v. Heller* 2020 SCC 16
 - Class action by Uber drivers
 - Declaration that drivers = employees = benefits under *Employment Standards Act*
 - Uber relies on arbitration clause in services agreement
 - Two-part test for unconscionability
 1. power imbalance between the parties
 - party can't protect their interests
 2. whether power imbalance leads to improvident bargain
 - undue advantages to stronger party, or
 - undue disadvantage to vulnerable party

Private International Arbitration Developments – Canada (con't)

- **Third party interests** – *Toyota Tshusho Wheatland v. Encana* 2016 ABQB 209
 - Courts have limited authority under AB ICCA to interfere in arbitration
 - Respect arbitration agreements & stay litigation proceedings
 - Third parties insert complexity into this general rule
 - Requires balancing of interests
 - Similarity of issues
 - Continuance = injustice
 - Stay = injustice

Private International Arbitration Developments – Canada (con't)

- **Consolidation**

- AB courts disagree about consolidation where some but not all parties agree
- No authority to consolidate (*Western Canada Oil Sands Inc.*)
- Authority to consolidate (*Pricaspian, JACOS*)
- Factors to consider
 - similar parties
 - similar facts
 - parties' contemplation of arbitration
 - efficiency/justice

Private International Arbitration Developments – USA

- **Arbitrability** – *Henry Schein, Inc. v. Archer & White Sales, Inc.*
 - A matter of contract
 - Delegation must be clear & unmistakable
 - Agreement to arbitrate pursuant to institutional rules = clear & unmistakable
 - Cannot bypass arbitrability for wholly groundless claims
 - Clause exempting some disputes from arbitration does not negate otherwise clear & unmistakable evidence of arbitrability

Private International Arbitration Developments – USA (con't)

- **Nonsignatories** – *GE Energy Power Conversions France SAS v. Outokumpu Stainless USA, LLC*
 - Can nonsignatories compel arbitration?
 - Split decisions (NY district vs. 11th Circuit)
 - USSC found that nonsignatories may enforce arbitration agts but depends on relevant state law

Private International Arbitration Developments – USA (con't)

- **28 U.S.C. § 1782**
 - Section 1782 permits courts to order a person “to give [] testimony . . . or to produce a document . . . for use in a proceeding in a foreign or international tribunal...”
 - Key interpretive issue = meaning of “international tribunal”
 - Courts disagree on whether private int’l arbitration tribunals fit definition
 - *Hanwei Guo versus Servotronics, Inc.*

Public International Arbitration Developments

- **NAFTA to CUSMA (USMCA)**
 - NAFTA Chapter 11 includes ISDS
 - means by which to enforce treaty obligations (e.g. non-discrimination, expropriation prohibition)
 - Chapter 11 jurisprudence criticized as favouring investors
 - CUSMA Chapter 14 response to concerns
 - US-Mexico – ISDS remains but circumscribed
 - Preference for domestic courts
 - Canada-US – no ISDS; preference for courts

Concluding Remarks

- Canada & US are arbitration friendly jurisdictions
- Courts on both sides of 49th parallel address similar themes
 - consent
 - deference
 - fairness
- ISDS vis-à-vis Canada and US in the USMCA (CUSMA) is a loss

**Questions?
Comments?**

Arobertson@lockelord.com
eawhitsi@ucalgary.ca