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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

When Is An International Arbitration Award Enforceable Against A Non-Signatory To The Arbitration Agreement?

An important issue relating to enforcement of an arbitral award is whether the award can be enforced against a party who did not sign the arbitration agreement. If the arbitral tribunal sitting outside Canada finds that party to be a party to the arbitration agreement, even if that person did not sign the agreement, what should a Canadian court do when the award is sought to be enforced? Is the finding binding on the court where enforcement is sought? Or is it to be given deference? Or must the court itself decide the jurisdictional issue?

Those are the issues which the British Columbia Supreme Court recently addressed in ***CE International Resources LLC v. Yeap Soon Sit*****,** 2013 BCSC 1804. The decision raises interesting questions when compared to a recent decision of the UK Supreme Court regarding the law about "piercing the corporate veil" and the effect to be given to the arbitral tribunal's decision about whether a non-signatory is a party to the agreement.

Background

CE International Resources (CEIR) applied to the BC court for an order enforcing an international commercial arbitration award made in New York. The award arose from two contracts. Under the first contract, S.A. Minerals Ltd. Partnership (SAM) sold to CEIR a quantity of rare minerals at a certain price. Under the second contract,Tantalam Technology Inc. (TTI) bought about the same quantity of the same rare mineral from CEIR at a higher price. CEIR paid 90 percent of the purchase price for the mineral, but the mineral was never delivered by SAM and TTI never paid the purchase price to CEIR.

CEIR commenced an arbitration in New York under the arbitration clause in the two contracts. CEIR joined a Mr. Yeap as a party to the arbitration, and asserted that Mr. Yeap was a party to the contracts. Mr. Yeap appeared at the arbitration and asserted that he was not a party to the contracts. The arbitrator found that he had jurisdiction over Mr Yeap under the arbitration clauses in the two contracts. He made that finding on the basis that Mr. Yeap was a party to the contracts because, so he found, TTI had acted as Mr. Yeap's alter ego. Accordingly, the arbitrator found that he had authority to the pierce the corporate veil of SAM and TTI and hold Mr. Yeap to be party to and liable upon the contracts. The arbitrator also found that Mr. Yeap was estopped from denying that he was a party to the contracts because he "knowingly accepts the benefit of an agreement with an arbitration clause." The arbitrator said that, had he been required to do so, he would have found Mr. Yeap guilty of fraud for having transferred more than half of the monies paid by CEIR to SAM out of SAM's bank account and into his own bank account shortly after the monies were received by SAM.

The arbitrator ordered SAM, TTI and Mr. Yeap to deliver the mineral to CEIR or make payment of about $8 million to CEIR. The deliveries and payments referred to in the award were not made. The final arbitration award was confirmed by the New York court and judgment was entered in New York against SAM, TTI and Mr. Yeap. Mr. Yeap did not take any steps in the New York courts to contest his liability under the arbitral awards.

The BC Decision

The British Columbia court enforced the award against Mr. Yeap. In doing so it held:

1. The issue of the arbitrator's jurisdiction over Mr. Yeap and Mr. Yeap's status as a party to the contracts were matters for the arbitrator to determine. In the court's view, "it is not the role of this Court on such an application to consider the merits of a substantive issue that was the arbitrator's to decide."

2. If Mr. Yeap was to challenge his status as a party to the contracts, he could have done so in a court of law. Instead, he chose to challenge that status in the arbitration, and had taken no steps in New York to overturn the arbitrator's finding on that issue.

3. While section 36 of the **BC *International Commercial Arbitration Act*** precludes the enforcement of awards when "the subject matter of the arbitration is not capable of settlement by arbitration under the laws of British Columbia" or if such enforcement would be contrary to the public policy of British Columbia, the enforcement of an award against a non-signatory to an arbitration agreement is not contrary to either of those provisions if the arbitrator has found that the non-signatory is in fact and law a party to the arbitration agreement.

Discussion

This decision deals with two issues which have recently been dealt with by the UK Supreme Court (formerly known as the House of Lords). While the decisions of English courts are not, of course, binding in Canada, it usually thought that decisions in the Anglo-Canadian world should be consistent. Consistency is desirable in the field of international commercial arbitration since comity and the consistency of enforcement are two of the hallmarks of the New York Treaty and the UNCITRAL Model Law under which international commercial arbitration awards are made and enforced.

Is The Jurisdictional Decision Of The Arbitral Tribunal Binding In Enforcement Proceedings?

The first issue concerns the decision of the arbitrator that Mr. Yeap was a party to the commercial contracts and therefore a party over whom the arbitrator had jurisdiction under the arbitration agreements in those contracts. The BC court held that this issue was finally determined by the arbitrator and could not be re-considered in the enforcement application.

The UK Supreme Court has taken a different view. In ***Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan*** [2010] UKSC 46, Dallah sought to enforce an arbitration award against a non-signatory to the commercial agreement, the government of Pakistan. The arbitral tribunal found that, while the Government of Pakistan had not signed the agreement, it was a party to it because the party that had signed the agreement, a Pakistani trust, was an instrument of the government of Pakistan. When Dallah sought to enforce the arbitral award in the United Kingdom, the English courts found that the government of Pakistan was not a party to the commercial agreement or the arbitration clause contained in that agreement. The English courts refused to show any deference to the arbitral decision and made their own independent decision.

In the ***Dallah*** case, the government of Pakistan did not appear before the arbitral tribunal, so in that respect the circumstances were different in the ***CE International Resources*** case. But in

Dallah, the UK Supreme Court made it clear that, in its view, the effectiveness of the jurisdictional decision of the arbitral tribunal depends upon it being established that the non-signatory consented to the arbitral tribunal having jurisdiction to decide the jurisdictional issue, or waived or was estopped from asserting any jurisdictional objection. In other words, the competence-competence principle allows the tribunal to make a decision for the internal purposes of conducting the arbitral proceedings, but it has no effect outside those proceedings unless a non-signatory consents to the arbitral tribunal deciding the issue, or waives or is estopped from asserting the objection.

Lord Mance in the UK Supreme Court put it this way:

> …absent specific authority to do this, [the arbitrators] cannot by their own decision on such matters create or extend the authority conferred upon them. Of course, it is *possible* for parties to agree to submit to arbitrators (as it is possible for them to agree to submit to a court) the very question of arbitrability - that is a question arising as to whether they had previously agreed to submit to arbitration (before a different or even the same arbitrators) a substantive issue arising between them. But such an agreement is not simply rare, it involves specific agreement (indeed "clear and unmistakable evidence" in the view of the United States Supreme Court in ***First Options of Chicago, Inc. v Kaplan*** 514 US 938, 944 (1995) per Breyer J), and, absent any agreement to submit the question of arbitrability itself to arbitration, "the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely, independently": ibid, per Breyer J, p.943.
>
> Leaving aside the rare case of an agreement to submit the question of arbitrability itself to arbitration, the concept of competence-competence is "applied in slightly different ways around the world", but it "says nothing about judicial review" and "it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision ….. : as Devlin J explained in ***Christopher Brown Ltd v Genossenschaft Osterreichischer*** [1954] 1 QB 8, 12-13,…: [arbitrators] are entitled to inquire into the merits of the issue whether they have jurisdiction or not, not for the purpose of reaching any conclusion which will be binding upon the parties – because that they cannot do – but for the purpose of satisfying themselves as a preliminary matter whether they ought to go on with the arbitration or not. If it became abundantly clear to them, on looking into the matter, that they obviously had no jurisdiction as, for example, it would be if the submission which was produced was not signed, or not properly executed, or something of that sort, then they might well take the view that they were not going to go on with the hearing at all. They are entitled, in short, to make their own inquiries in order to determine their own course of action, and the result of that inquiry has no effect whatsoever upon the rights of the parties." (Underlining added)

Moreover, the failure to take court proceedings to object to the jurisdiction, accordingly Lord Mance of the UK Supreme Court, does not amount to consent or waiver:

> "the argument based on issue estoppel was always doomed to fail. A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant denying the existence of any valid award to resist enforcement."

This does not appear to have been the approach taken by the BC court. Rather, the court held that the arbitrator had jurisdiction to decide the jurisdictional issue which, if exercised, was binding on Mr. Yeap. It may well be that Mr. Yeap did consent or waive any objections to the jurisdiction of the arbitrator to make the jurisdictional decision, either expressly or by implication (by continuing, if he did, to participate in the arbitration after the jurisdictional decision was made). But the BC judge did not expressly determine this issue. As the UK Supreme Court noted in the ***Dallah*** case, it usually requires clear and unmistakeable evidence before a non-signatory will be found to have consented to the jurisdiction of an arbitral tribunal. Which is the right or correct approach?

When can "piercing the corporate veil" make a non-signatory a party to an agreement?

This issue was addressed in my last blog entitled Can a Company be made Liable on a Contract by "Piercing the Corporate Veil"? In that blog I reviewed an article which Brandon Kain and I recently wrote about two recent decisions of the UK Supreme Court: ***VTB Capital Inc. v. Nutritek International Corp.,*** [2013] UKSC 5 and ***Prest v. Petrodel Resources Limited*** [2013] UKSC 34. In those decisions, the UK Supreme Court basically held that when a company actually enters into a contract, the controlling shareholder cannot be made a party to it by "piercing the corporate veil." Otherwise, the laws of contract and corporate liability would be over-ruled. If, however, the shareholder has used the corporation to avoid an original obligation of the shareholder (by, say, using a corporation to avoid a restrictive covenant binding on the shareholder), or to disguise the shareholder's original obligation (by, say, secretly using a corporation to earn money when the shareholder is a trustee and not entitled to earn that money), then the shareholder can be held liable on its obligation, not because the corporation's veil is pierced but because the shareholder remains responsible for its obligations.

Canadian law is not so clear on the circumstances in which the corporate veil may be pierced. Furthermore, in *CE International Resources* case the decision to pierce the corporate veil was made by an arbitrator sitting in New York where the law on piercing the corporate veil may be very different. The question in the present case was whether the arbitrator's decision to pierce the corporate veil entitled or obliged the BC court to refuse to enforce the award.

If the court had found that the law in BC was as stated in *VTB Capital* and *Prest*, then it appears to have been arguable that the corporate veil of SAM and TTI could not be pierced since those companies were the ones that in fact entered into the two contracts, and the obligations which CEIR was seeking to enforce against Mr. Yeap do not appear to have been pre-existing obligations which Mr. Yeap was trying to avoid or conceal by using a corporation. If this is so, should the arbitration award have been recognized in BC if the legal basis of it was not recognized in BC? Those are two "ifs" but both of them raise interesting issues for the enforcement of foreign awards.

***CE International Resources LLC v. Yeap Soon Sit*, 2013 BCSC 1804**

Arbitration – Recognition and Enforcement – Contract Liability - Piercing the Corporate Veil

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