Court Consolidates Arbitration Proceedings Without Consent of Parties

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Introduction

The Court of Queen's Bench of Alberta recently ordered the consolidation of arbitration proceedings without the consent of all parties. In *Japan Canada Oil Sands Limited v Toyo Engineering Canada Ltd,* 2018 ABQB 844, Madam Justice Romaine considered whether to consolidate or stay either of two arbitrations, one domestic and the other international, related to the redevelopment and expansion of an oil sands project. In finding that the Court has jurisdiction to consolidate arbitration proceedings on terms it considers just, Madam Justice Romaine made a distinction between the consent to arbitrate and procedural issues that arise from that consent. Further, it is now clear that Alberta's international arbitration statute, the *International Commercial Arbitration Act,* RSA 2000, c I-5 (the "***ICAA***"), provides jurisdiction for a court to consolidate proceedings in the absence of consent from the parties.

Background

Japan Canada Oil Sands Limited ("**JACOS**") entered into an engineering, procurement and construction agreement with Toyo Engineering Canada Ltd. ("**Toyo Canada**") for the expansion and redevelopment of the Hangingstone oil sands project. By way of a guarantee and indemnity agreement, Toyo Canada's parent, Toyo Engineering Construction Ltd. ("**Toyo Japan**"), agreed to indemnify JACOS for losses arising from Toyo Canada's failure to perform its obligations under the EPC agreement.

Numerous disputes under the EPC agreement led the parties to separately initiate arbitration: Toyo Canada commenced a domestic arbitration against JACOS, whilst JACOS commenced an international arbitration against both Toyo Canada and Toyo Japan. JACOS subsequently applied to the Court of Queen's Bench of Alberta to consolidate the domestic arbitration into the international arbitration or, alternatively, for a stay of the domestic arbitration. Toyo Canada and Toyo Japan cross-applied to Court to consolidate the international arbitration into the domestic arbitration.

The Court considered a number of issues, including whether the parties have consented to arbitration and whether the Court had jurisdiction to consolidate a domestic and an international arbitration.

Decision

The parties agreed that the disputes in both arbitrations were related. The preliminary issue was whether Toyo Japan was required to be a party to a proceeding between JACOS and Toyo Canada. Toyo Canada and Toyo Japan argued that the international arbitration was improperly commenced and that Toyo Japan could not be a party because JACOS unilaterally decided to join Toyo Canada and Toyo Japan as respondents without requesting that Toyo Japan be a party to an existing arbitration.

In reference to a provision in the guarantee that provided for Toyo Japan's agreement that it would participate as a direct party to an arbitration related to the EPC agreement, the Court found that the guarantee was "plainly linked" to the EPC agreement and that Toyo Japan's liability under the guarantee was co-extensive with Toyo Canada's liability under the EPC agreement. Further, Toyo Japan had waived any right to require JACOS to commence a proceeding against Toyo Canada as a condition to recovery under the guarantee. Accordingly, Toyo Japan was properly a party to an arbitration related to the EPC agreement.

In determining whether the Court had jurisdiction to consolidate a domestic and international arbitration, Madam Justice Romaine rejected a narrow interpretation of the *ICAA.*

Section 8(1) of the *ICAA* provided that the Court may, on application of the parties to "2 or more arbitration proceedings, order the arbitration proceedings be consolidated "on terms it considers just". Toyo submitted that "arbitration proceedings" under the *ICAA* meant only international arbitration proceedings, and that the Court could not rely on the *ICAA* to consolidate domestic and international arbitrations. The Court rejected Toyo's interpretation because the *ICAA* did not contain the carve-out language found in another piece of legislation, the *Arbitration Act*, RSA 2000, c A-43, which expressly excludes from its scope arbitrations commenced under Part 2 of the *ICAA,* and a narrow interpretation of the term "arbitration proceedings" would create a legislative gap.

Although the relevant provision of the EPC agreement provided for the consolidation of disputes thereunder into a single arbitration, Madam Justice Romaine found that the arbitration provision under the guarantee did not constitute Toyo Japan's consent for consolidation. The next issue was therefore whether the Court had jurisdiction under the *ICAA* to consolidate the arbitration proceedings in the absence of consent from all parties.

In finding that the Court has jurisdiction to consolidate the two arbitration proceedings under section 8(1) of the *ICAA,* Madame Justice Romaine was persuaded by the decision of Chief Justice Wittmann in *Pricaspian Development Corporation v BG International Ltd,* 2016 ABQB 611 ("Pricaspian"). Pricaspian concerned an application to consolidate two international arbitrations. In that case, Chief Justice Wittmann engaged in an exercise of statutory interpretation in determining whether the phrase "on application of the parties" in section 8(1) required the consent of both parties. Chief Justice Wittmann ultimately determined that consent was not required under section 8(1) because, among other things:

- Interpreting section 8(1) as requiring the consent of the parties would preclude the recourse to the court to resolve a dispute as to whether consolidation should occur;
- Alberta's *Rules of Court* generally contemplate an application being brought by one party and consent applications are uncommon;
- the Court's discretion under section 8(1) would be superfluous if all the parties consented to consolidation; and
- section 8(3) already provides for a situation in which the parties agree to consolidate, so section 8(1) must necessarily deal with the parties' disagreement.

As the domestic and international arbitrations were related, involving related parties, similar questions of law and facts arising out of the same transaction, the Court found that the arbitrations should be consolidated in the interest of efficiency. The Court further found that JACOS and Toyo Canada had already anticipated the issue of consolidation under the arbitration provisions of the EPC agreement. Ultimately, it was held that the domestic arbitration would be consolidated into the international arbitration, with the consolidated arbitration proceeding as an international arbitration governed by the UNCITRAL arbitration rules.

Implications

This decision makes clear that the Court has the jurisdiction under the *ICAA* to consolidate domestic and international arbitration proceedings without the consent of all parties. *Pricaspian's* interpretation of section 8(1) and relevant factors in the Court's assessment of an application for consolidation remain relevant in the context of consolidating domestic and international arbitral proceedings. In deciding whether to consolidate, the Court will consider the efficacy of consolidation in light of how closely related the arbitrations are, as well as the terms of the agreement between the parties.

This decision turns primarily on the interpretation of Alberta's *ICAA*, which does not include express language of consent that is found in analogous statutes from other provinces. However, the Court's distinction between agreement to arbitrate and procedural questions arising out of such agreement also suggests that, in general, the principle of consent may be of limited assistance to parties once an arbitral process has commenced.

By

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