Courts vs. Private Arbitration: Arbitrators Can Decide Who Has Jurisdiction

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Introduction

Increasingly parties are choosing to submit complex commercial disputes to arbitration. Concomitant with the growing popularity of arbitration is the development of judicial principles which help facilitate arbitration's policy goals of efficiency and certainty. The principle of competence-competence, a pillar of international arbitration, is integral to this developing body of case law. The Court of Queen's Bench of Alberta recently issued a decision in Husky Oil Operations Limited v Saipem Canada Inc ("Husky Oil") which applies the principle of competence-competence in the context of a parallel litigation and arbitration dispute resolution procedure.[1] By definition, these parallel dispute resolution procedures give rise to a complex interplay between the jurisdiction of the court and the jurisdiction of the arbitral tribunal. As a result, Husky Oil is an excellent case study for observing the practical application of the principle of competence-competence and can serve as a useful tool for both domestic and international arbitration practitioners.

The Principle of Competence-Competence and Canadian Jurisprudence

The principle of competence-competence is a well-known hallmark of arbitration. Generally speaking, the principle states that arbitrators should be given the first chance to rule on preliminary challenges to their jurisdiction.[2] The Ontario Court of Appeal has succinctly described the principle as follows: "The rationale behind the competence-competence principle is that unless it is clear as a matter of law that the arbitrator does not have jurisdiction, the issue of jurisdiction should be decided by the arbitrator."[3] The principle of competence-competence is explicitly adopted in a number of pieces of domestic[4] and international arbitration[5] legislation in different Canadian jurisdictions.

The application of the principle of competence-competence by a court seized with a preliminary challenge to an arbitrator's jurisdiction was addressed by the Supreme Court of Canada in Dell Computer Corp v Union des consommateurs ("Dell"). The issue in Dell was whether a class action lawsuit brought against a retailer by its customers should be referred to arbitration pursuant to an arbitration clause in the standard terms and conditions of the retailer's sales contracts. In order to resolve this issue, the Court in Dell articulated the "general rule" that a court seized with a preliminary challenge to an arbitrator's jurisdiction must refer the challenge to the arbitrator.[6] The only

exceptions to this “general rule” are when the jurisdictional challenge is based solely on a question of law[7] or where the challenge gives rise to a question of mixed fact and law which can be resolved on the face of the evidentiary record[8]. However, the Court added the caveat that even these exceptions to the “general rule” are subject to a court’s discretion to refer pure questions of law or questions of mixed fact and law which can be resolved on the face of the evidentiary record to the arbitrator where the court considers referral to be in the best interest of the arbitration.[9]

The Facts and Procedural Background of the Husky Oil Decision

The dispute in Husky Oil arose in the context of a large commercial construction project. In 2010, Husky Oil Operations Limited (“Husky”) entered into a contract with Saipem Canada Inc. (“Saipem”) pursuant to which Saipem agreed to provide engineering, procurement, and construction services to build certain facilities for Husky’s Sunrise Energy Project (the “Contract”).[10] The Contract included provisions which prescribed a parallel dispute resolution procedure.[11] Specifically, the dispute resolution provisions of the Contract provided that disputes concerning a small list of delineated topics would be submitted to arbitration and that any disputes not falling within that list of delineated topics would be litigated before the Alberta Courts (the “Arbitration Agreement”).[12]

Husky purported to terminate the Contract in March of 2015.[13] Shortly thereafter, Husky filed an action against Saipem in the Court of Queen’s Bench of Alberta seeking damages in excess of $1.325 billion for construction delays and increased costs (the “Husky Action”).[14] Subsequently, Saipem filed a separate action in the Court of Queen’s Bench of Alberta against Husky and its partners in the Sunrise Energy Project seeking damages in excess of $800 million for construction delays and increased costs (the “Saipem Action”).[15]

Several months after filing the Husky Action, Husky commenced arbitration proceedings against Saipem seeking a $45 million credit for changes to the scope of work under the Contract (the “Arbitration”).[16]

Eventually Saipem brought an application before the Court of Queen’s Bench of Alberta to stay the Arbitration.[17] Saipem supported this application by relying on the Court’s powers under the Arbitration Act (the “Act”)[18] and the Court’s residual powers under the Judicature Act[19]. In response to Saipem’s application to stay the Arbitration, Husky made a cross-application for a partial stay of the Saipem Action.[20] Husky supported its cross-application by arguing that some of the issues in the Saipem Action were also the subject of the Arbitration.[21]

The Court determined that the offsetting applications gave rise to six issues, several of which involved Saipem making preliminary challenges to the Arbitration’s jurisdiction. The Court listed these six issues as follows:

Has the Arbitration Agreement become invalid because Husky repudiated the Contract?
Has Husky waived its right to arbitration by attorning to the jurisdiction of the Court of Queen’s Bench of Alberta?
Are the claims contemplated in the Arbitration within the scope of the Arbitration Agreement?
Are the claims contemplated in the Arbitration limitation-barred?
Would the Arbitration result in unfair and unequal treatment of Saipem such that the Arbitration should be stayed?

Should a stay of all or part of the Saipem Action be granted?

The Decision in Husky Oil

The Court ultimately dismissed both Saipem's application to stay the Arbitration and Husky's cross-application to partially stay the Saipem Action.

Prior to addressing the first five of the six issues raised by the applications, the Court acknowledged the “general rule” articulated in Dell. In particular, the Court emphasized the exception to the “general rule” that a court only has discretion to not refer a jurisdictional challenge to the arbitrator where the challenge either involves a pure question of law or a question of mixed fact and law which can be resolved on the face of the evidentiary record.[22]

The first issue the Court addressed was whether the Arbitration Agreement survived Husky's purported termination of the Contract.[23] The corollary to this argument was that if the Arbitration Agreement was invalidated due to the termination of the Contract, there was no jurisdiction for the Arbitration to proceed. The Court found that this issue gave rise to a question of mixed fact and law which could not be resolved on the face of the limited evidentiary record before it. Accordingly, the Court referred this issue to the arbitrator pursuant to the “general rule” in Dell.

The second issue the Court addressed was whether Husky waived its right to arbitration by attorning to the jurisdiction of the Court.[24] If Husky had attorned, then it waived its right to submit any issues it consented to being resolved in the Saipem Action or the Husky Action to the Arbitration. Ultimately, the Court determined that whether Husky had attorned to the jurisdiction of the Court was a question of mixed fact and law which could not be resolved on the face of the limited evidentiary record before it.[25] As a result, the Court referred this issue to the arbitrator pursuant to the “general rule” in Dell.

The third issue the Court addressed was whether several of the claims which Husky submitted to the Arbitration were within the small list of arbitrable topics delineated in the Arbitration Agreement. The parties took contrasting positions regarding the interpretation of the delineated list of arbitrable topics, with Saipem endorsing a very narrow reading and Husky endorsing a broader reading. [26] Ultimately, the Court held that the question of whether the claims Husky submitted to the Arbitration were within the scope of the delineated list of arbitrable topics in the Arbitration Agreement constituted a preliminary jurisdictional challenge which must be resolved by the arbitrator on first instance.[27]

The fourth issue the Court addressed was whether the claims Husky submitted to the Arbitration were limitation-barred.[28] Saipem's argument was that Alberta case law dictates that the determination of a limitation period is a threshold issue which must be decided by the Court.29 Despite Saipem's argument, the Court held that an arbitrator has jurisdiction to consider limitations issues and that the limitations argument posed by Saipem gave rise to a question of mixed fact and law which could not be resolved on the face of the limited evidentiary record before it.[30] Accordingly, the Court referred the limitations issue to the arbitrator in accordance with the “general rule” in Dell.

The final issue the Court considered in Husky Oil was whether allowing the Arbitration to proceed would result in the unfair or unequal treatment of Saipem. This issue invoked

subsection 6(c) of the Act, which permits a Court to intervene in an Arbitration to prevent the "[m]anifestly unfair or unequal treatment of a party to an arbitration agreement."[31] Saipem essentially argued that allowing the Arbitration to proceed would render it unfairly or unequally treated in two ways. First, Saipem argued that the Arbitration considered the same issues as the Husky Action and that allowing the Arbitration to proceed risked creating a multiplicity of proceedings.[32] Second, Saipem argued that Husky's partners in the Sunrise Energy Project were not parties to the Arbitration and that this created a danger of inconsistent findings.[33] Despite Saipem's arguments, the Court found that Saipem failed to demonstrate the prospect of any manifestly unfair or unequal treatment necessary for the Court to stay the Arbitration.[34] On this point, the Court stated: "[t]here is nothing inherently unfair in allowing parallel arbitration and litigation proceedings where that is what was agreed to by the parties to the contract."[35] Ultimately, the Court referred the issues of multiplicity of proceedings and inconsistent findings to the arbitrator on the basis that they gave rise to issues of mixed fact and law which could not be resolved on the face of the evidentiary record before the Court.[36]

Implications

The judgment in Husky Oil has implications for practitioners of both domestic and international arbitration. The reasoning employed in Husky Oil demonstrates a strong adherence to the principle of competence-competence and a commitment to the policy of non-interference with arbitration. Moreover, because Husky Oil arose in the context of a parallel dispute resolution procedure, the decision provides a number of clear examples of questions of mixed fact and law which will be referred to an arbitrator on first instance. As a result, the judgement in Husky Oil should become a useful tool in the toolbox of any arbitration practitioner who is faced with a preliminary challenge to an arbitrator's jurisdiction.

1 *Husky Oil Operations Limited v Saipem Canada Inc*, 2017 ABQB 489 ("***Husky Oil***").
2 *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 70 ("***Dell***").
3 *Ontario Medical Association v Willis Canada Inc*, 2013 ONCA 745 at para 47.
4 See for example *Arbitration Act*, RSA 2000, c A-43 at s 17(1) (the "***Act***") [Alberta]; *Arbitration Act, 1991*, SO 1991, c 17 at s 17(1) [Ontario]; *The Arbitration Act*, CCSM, c A120 at s 17(1) [Manitoba].
5 See for example *International Commercial Arbitration Act*, RSA 2000, c I-5 at schedule 2, article 16 [Alberta]; *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5 at schedule 2, article 16 [Ontario]; *International Commercial Arbitration Act*, RSBC 1996, c 233 at s. 16(1) [British Columbia].
6 *Dell*, ***supra*** note 2 at para 84.
7 *Ibid*.
8 *Ibid* at para 85.
9 *Ibid* at para 86.
10 *Husky Oil*, ***supra*** note 1 at para 1.
11 *Ibid* at paras 6-7.
12 *Ibid.*
13 *Ibid* at para 2.
14 *Ibid* at para 3.
15 *Ibid*.
16 *Ibid* at para 4.
17 *Ibid* at para 5.

18 *Act*, ***supra*** note 4 at ss 6(c), s 7, s 47.
19 *Judicature Act*, RSA 2000, c J-2 at ss 5(3), s 8.
20 *Husky Oil*, ***supra*** note 1 at para 5.
21 *Ibid* at para 5.
22 *Ibid* at para 24.
23 *Ibid* at para 20.
24 *Ibid* at para 25.
25 *Ibid* at para 29.
26 *Ibid* at paras 30-31.
27 *Ibid* at para 32.
28 *Ibid* at para 33.
29 *Ibid*.
30 *Ibid* at para 37.
31 *Act*, ***supra*** note 4 at ss 6(c).
32 *Ibid* at para 39.
33 *Ibid*.
34 *Ibid* at para 43.
35 *Ibid*.
36 *Ibid*.

By

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