Court of Queen's Bench of Alberta sheds light on an arbitrator's discretion to voluntarily resign

August 08, 2022

The recent decision of the Court of Queen's Bench of Alberta in *SZ v JZ*, 2022 ABQB 493 provides guidance on the principles and factors an arbitrator should consider before voluntarily resigning from a domestic arbitration. Although decided in the context of a family law arbitration, the decision could have implications for the commercial arbitration community more generally.

Case overview and background facts

- SZ and JZ agreed to resolve a dispute regarding custody and parenting time pursuant to an arbitration presided over by a sole arbitrator. Among other things, the parties' arbitration agreement appointed a specific arbitrator by name and gave him discretion to "remove himself" pursuant to the *Arbitration Act,* RSA 2000, c A-43 (the *Arbitration Act*).
- The arbitration went on longer than initially anticipated and, during the arbitration, the arbitrator unilaterally resigned, citing a busy workload.
- Following the resignation of the arbitrator, the applicant, SZ, brought a special application before the Court of Queen's Bench of Alberta seeking the relief sought in the arbitration, which was no longer proceeding due to the resignation of the arbitrator. The respondent, JZ, argued the Court did not have jurisdiction to deal with SZ's application because the parties agreed to resolve their dispute through the arbitration.
- One of the central issues before the Court was whether the dispute was still subject to arbitration or whether the arbitration had been terminated due to the resignation of the arbitrator.

Decision summary

What you need to know

Justice Michael Marion of the Court of Queen's Bench of Alberta ultimately concluded that the arbitration had been terminated once the arbitrator resigned. As such, the Court had jurisdiction to consider the merits of SZ's application.

In reaching his decision, Justice Marion emphasized that since voluntary arbitrator resignations can disrupt the dispute resolution process by causing delay, thrown-away costs and jurisdictional confusion, the arbitrator had to exercise his contractually bestowed discretion to resign reasonably and in good faith, in accordance with the principles set out in *Wastech Services Ltd v Greater Vancouver Sewage and Drainage District*, 2021 SCC 7.

Justice Marion went on to reason that when deciding whether to resign, an arbitrator should consider the following factors:

i. whether resignation will cause unfairness, prejudice, or harm to the parties;
ii. whether there are any matters that have arisen since the arbitrator's appointment such as emerging conflict of interest or lack of necessary qualifications that would preclude the arbitrator from continuing on;
iii. whether resignation would undermine the underpinning purposes of arbitration agreements, which are to provide for expeditious, private and economical dispute resolution with allowance for more specialized expertise; and
iv. whether the arbitration agreement includes any language curtailing an arbitrator's discretion to resign.

Applying those principles and factors to the facts of *SZ v JZ*, Justice Marion found there was no evidence the arbitrator was not acting in good faith when he resigned. Moreover, Justice Marion found that although the arbitrator's resignation disrupted a complex family dispute, the arbitrator contemplated potential prejudice to the parties and ultimately resigned because he did not want to get in the way of the matter proceeding in a timely fashion, which was essential due to the subject matter of the arbitration. Justice Marion further found that because the arbitrator was specifically named in the arbitration agreement, the arbitration terminated upon the arbitrator's resignation.

Implications

Although it was decided in the context of a family law dispute, *SZ v JZ* could have implications for any commercial arbitration subject to the *Arbitration Act*. In addition to setting out general principles regarding arbitrator resignations, *SZ v JV* exemplifies several factors parties should consider when negotiating an arbitration agreement after a dispute arises, such as whether to:

i. specifically name an arbitrator in the arbitration agreement;
ii. include language in the arbitration agreement limiting the arbitrator's discretion to resign from the arbitration; and/or
iii. specify that the arbitration ends when the arbitrator resigns or that an alternate arbitrator may be appointed.

The outcome of *SZ v JZ* suggests that in some circumstances parties should consider addressing the prospect of an arbitrator resigning in their arbitration agreement to avoid the increased costs, delay and jurisdictional confusion that can arise after an arbitrator resigns.

By

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