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Arbitral Jurisdiction in Canada: Recent Decisions

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Overview

Any consideration of arbitral jurisdiction in Canada must proceed within the governing legislative framework. Legislation in each Canadian province and territory, as well as federal legislation, directs how and when the parties may seek the assistance of local courts on matters of arbitral jurisdiction in both domestic and international arbitrations. The legislation governing domestic arbitrations is similar in each jurisdiction. Each province and territory has also adopted legislation for international commercial arbitrations that incorporates the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 (the Model Law). The federal government has incorporated the Model Law, with some slight modifications, for all domestic and international arbitrations under federal jurisdiction.[1] Broad adherence to the Model Law provides a significant degree of predictability to parties arbitrating disputes in Canada.

As arbitration becomes an increasingly popular means of resolving commercial disputes, Canadian Courts are often called upon to adjudicate issues of arbitral jurisdiction. This chapter will begin by providing a brief overview of the historical Canadian approach to arbitral jurisdiction, followed by a discussion of several recent court decisions from across the country that address specific aspects of arbitral jurisdiction in a commercial arbitration context. The current state of Canadian law in this respect is commented upon in the conclusion.

Arbitral jurisdiction in Canada

Provincial, territorial and federal legislation concerning both international commercial arbitration and domestic arbitration seeks to safeguard arbitral jurisdiction from inappropriate judicial intervention. Consistent with the Model Law, each statute sets out certain limited circumstances where a local court may intervene in arbitral proceedings. These provisions have generally been interpreted narrowly and reflect a strong deference to the parties' decision to arbitrate and to arbitrators acting within their jurisdiction. Defining the precise boundaries of that jurisdiction can still present challenges, as some recent cases attest.

The starting point for Canadian Courts when assessing arbitral jurisdiction is the competence-competence principle, which states that arbitrators have the competence and power, in first instance, to determine their own jurisdiction. In the *Seidel v TELUS* (*Seidel*)[2] decision – discussed at length by Fraser Milner Casgrain LLP in *The Arbitration Review of the Americas 2012*[3] – both the majority and minority decisions at the Supreme Court of Canada endorsed the competence-competence principle and an approach of deference to arbitral jurisdiction. *Seidel* provides that challenges to the jurisdiction of an arbitrator should first be determined by that arbitrator. Narrow exceptions to this rule exist only where the challenge to the arbitrator's jurisdiction involves a pure question of law or a question of mixed fact and law that requires only a 'superficial consideration of the documentary evidence in the record'.[4]

Two aspects of arbitral jurisdiction recently considered by Canadian Courts warrant specific attention. The first is the interaction between arbitral jurisdiction and the role of domestic Courts. This issue has recently arisen in both pre-arbitration and post-arbitration contexts. At the pre-arbitration stage, the question was when and on what grounds a local Court is to determine whether to stay a legal action in favour of an agreement to arbitrate. This was addressed in *Shaw Satellite GP v Pieckenhagen* (*Shaw*).[5] Post-arbitration, in *United Mexican States v Cargill Inc* (*Cargill*),[6] the Ontario Court of Appeal addressed the appropriate standard of review when a local Court is being asked to set aside a portion of an award from an international arbitral tribunal. A second aspect of arbitral jurisdiction recently considered is the extent of arbitral jurisdiction over entities not party to the arbitration agreement. This question arose where a party sought an interim injunctive remedy from an arbitrator that would apply against third parties in *Farah v Sauvageau Holdings Inc* (*Farah*),[7] and when the terms of an arbitral award would impact the legal rights of non-parties, in *MJS Recycling Inc v Shane Homes Ltd* (*MJS*).[8]

Arbitral jurisdiction and the courts

Shaw Satellite GP v Pieckenhagen

This case involved a dispute between Shaw Satellite GP (Shaw), a licensed television broadcaster, and 23 individuals and companies who were allegedly involved in receiving encrypted television programming from Shaw under false pretences and then retransmitting that programming fraudulently, contrary to agreements and in violation of the Radiocommunciation Act.[9] The encrypted programming was allegedly received under nine standardised Residential Agreements, six of which were held by false names or aliases. It was claimed that programming was received under a Residential Agreement and then retransmitted by the defendants throughout multi-unit residential complexes through an unauthorised satellite master antennae television system (SMATV System), contrary to the Residential Agreement. The same arrangement was allegedly being used to obtain and retransmit programming from another broadcaster, Bell ExpressVu, who had commenced separate litigation against some of the same parties.[10] The Residential Agreements required that any claim or dispute 'arising out of or relating to' the Residential Agreement or services provided thereunder be referred to a sole arbitrator.[11]

Shaw commenced an action in the Ontario Superior Court of Justice against all 23 defendants claiming breaches of the Residential Agreements, fraud, fraudulent misrepresentation and contravention of the Radiocommunication Act.[12] Soon after, the 23 defendants moved under section 7(1) of Ontario's Arbitration Act[13] to stay Shaw's action based on the agreement to arbitrate in the Residential Agreement. Section 7(1) of the Ontario Arbitration Act is directory in nature and reads:

> *7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement,*

> *the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.*[14]

The defendants urged that the Residential Agreements and the competence-competence principle required an arbitrator to decide the issue of jurisdiction in the first instance, and the court should not consider the issue of arbitral jurisdiction until an arbitrator had first done so. Notably, only a few of the 23 defendants were even alleged to be proper parties to a Residential Agreement and the defendants expressly reserved the right to deny the jurisdiction of an arbitrator to determine the dispute.[15]

The defendants' application requesting that the matter be stayed was rejected. Justice Perell of the Ontario Superior Court of Justice gave three separate grounds for refusing a stay. First, the defendants applied to stay court proceedings under section 7(1) of the Arbitration Act under which only 'another party to the arbitration agreement' may apply, yet all defendants denied being bound by such an agreement. In effect, the defendants were seeking arbitration but at the same time refusing to admit they were subject to the arbitration agreement. Justice Perell held that neither section 7(1) of the Arbitration Act nor the competence-competence principle was engaged. The applicant defendants had not shown (and in fact specifically denied) they were parties to an arbitration agreement. Without that fact established, no grounds for a stay could exist under statute or otherwise.[16]

Second, if section 7(1) of the Arbitration Act and the competence-competence principle were engaged, Justice Perell held that the case fell within the specific exceptions to the competence-competence principle recognised in *Seidel*. Based on the view that the pith and substance of the dispute (fraud, fraudulent misrepresentation, conversion and breaches of the Radiocommunciation Act) did not depend on the Residential Agreements containing the arbitration clause, Justice Perell reasoned that the Residential Agreements and the arbitration clause therein were only 'factual background' to the real issues in dispute.[17] Thus only a 'superficial consideration of the evidence' was necessary in order to rule on arbitral jurisdiction and it was appropriate for the Court to determine the application according to *Seidel*.

Third, even if the *Seidel* exceptions to the competence-competence principle did not apply, efficiency favoured a continuation of the dispute through litigation rather than arbitration. Interests of efficiency underlie section 7(5) of the Arbitration Act, which provides:

> *7(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,*
>
> *(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and*
>
> *(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.*[18]

Courts have interpreted this provision to allow partial stays of proceedings or to refuse such stays altogether even where an arbitration agreement clearly applies to part of a dispute.[19] Justice Perell refused to grant a stay based on this provision. Allowing claims against those defendants who had signed the Residential Agreement or otherwise attorned to the jurisdiction of an arbitrator to proceed by way of arbitration while the remaining claims (including similar claims in litigation by Bell ExpressVu) proceeded before the Court would result in an unnecessary multiplicity of proceedings.[20]

The defendants appealed Justice Perell's decision to the Ontario Court of Appeal. The Court of Appeal upheld Justice Perell on his first and third grounds for refusing a stay. On the first ground, the Court of Appeal stated an applicant looking to invoke a stay under section 7(1) must at least indicate to the Court that they are a party to and agree to be bound by the arbitration agreement.[21] While this finding alone was sufficient to dispose of the appeal, the Court of Appeal also affirmed the alternate ground that based on section 7(5) of the Arbitration Act a stay of the Court proceedings should be refused on grounds of efficiency even if section 7(1) of that Act and the underlying competence-competence principle were engaged.[22]

Notably, the Ontario Court of Appeal did not take the opportunity to comment and provide guidance on Justice Perell's second ground for refusing a stay. The interpretation and application of the reasoning in *Seidel* will almost certainly be at issue in future cases and it is unfortunate that the appeal in *Shaw* did not yield further guidance on the point. Another important question left outstanding in *Shaw* is the impact of Shaw's claim that the Residential Agreement and the arbitration clauses therein were void as being obtained through fraud.[23] Does such a pleading effectively preclude application of the competence-competence principle as it relates to arbitral jurisdiction? How and in what forum should arbitral jurisdiction in such a case be determined? These issues remain uncertain.

We note that the defendants in the *Shaw* case have recently sought leave to appeal the Ontario Court of Appeal decision to the Supreme Court of Canada. A decision on that leave application remains pending as of September 2012.

United Mexican States v Cargill Inc

The Ontario Court of Appeal has also recently addressed the Court's ability to intervene in an award rendered by an arbitral tribunal in an international arbitration under article 34 of the Model Law. A unanimous decision of the Court of Appeal in *Cargill*[24] (leave to appeal the decision to the Supreme Court of Canada was denied)[25] held that the standard of review on a true question of arbitral jurisdiction is one of correctness while strongly endorsing a narrow approach to what constitutes such a question. The Court stressed that when reviewing an international arbitral award on a question of jurisdiction a Court should assess only whether the tribunal was correct in that the decision rendered was within the scope of the submission to arbitration; the Court should not incidentally delve into matters that go to the merits of the dispute.[26]

This case involved an arbitration initiated by Cargill Inc against Mexico under the North American Free Trade Agreement between the Government of Canada, the Government of Mexico and the Government of the United States (NAFTA).[27] Cargill alleged certain measures taken by Mexico were in breach of various provisions of NAFTA and caused damage to Cargill's investment in the Mexican high-fructose corn syrup (HFCS) industry. As a result of these measures, Cargill's wholly owned Mexican subsidiary had to close its HFCS distribution centre and several of Cargill's American HFCS production plants had to close.[28] The arbitration proceeded before the International Centre for the Settlement of Investment Disputes (Additional Facility) and addressed damages 'by reason of or arising out of' a NAFTA breach.[29] In a decision released on 18 September 2009, the tribunal awarded damages to Cargill in the amount of US$77,329,240, representing US$36,166,885 for lost sales and costs incurred in relation to Cargill's investment in its wholly-owned Mexican subsidiary and US$41,162,355 for loss suffered by Cargill's production plants in the United States due to lost sales to the Mexican subsidiary.[30] At the arbitration hearing, Mexico challenged the jurisdiction of the tribunal to award the latter set of 'upstream' damages claiming they were outside of the

tribunal's jurisdiction. The tribunal held that under the 'broad and inclusive' definition of an investment under NAFTA, and the facts of this case, it did have jurisdiction to award the 'upstream' damages.[31]

Mexico brought proceedings in Ontario to set aside the award, requesting the Court substitute the tribunal's award of damages with an award for only the first portion of Cargill's damages, the US$36,166,885.[32] As both Mexico and Cargill agreed that the 'place of arbitration' would be Toronto in the Province of Ontario,[33] the competent court for these proceedings, pursuant to Ontario's International Commercial Arbitration Act[34] (which incorporates the Model Law), was the Ontario Superior Court of Justice.

Mexico's submission for setting aside this portion of the damages award was grounded in article 34(2)(a)(iii) of the Model Law, which reads in relevant part:

> *(2) An arbitral award may be set aside by the court specified in article 6 only if:*
>
> *(a) the party making the application furnishes proof that:*
>
> *…*
>
> *(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside…*

The Ontario Superior Court of Justice considered the proper standard of review to determine whether the tribunal exceeded its jurisdiction was reasonableness.[35] In assessing whether the tribunal reasonably considered it had jurisdiction to make the impugned award, the Court embarked on a review of certain NAFTA provisions along with the tribunal's reasoning and interpretation of other NAFTA tribunal decisions.[36] Ultimately the Court found that the tribunal's decision to award the 'upstream' damages was reasonable, and dismissed the application.[37]

Mexico appealed to the Ontario Court of Appeal. That court dismissed Mexico's appeal, but offered strikingly different reasons from the court below. The Court of Appeal framed the issue before it as 'whether, and on what standard of review' the award should be set aside 'on the basis that it deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration'.[38] The Court of Appeal held that the proper standard of review for such questions of pure arbitral jurisdiction was correctness and not reasonableness as had been suggested by the court below. The Court of Appeal was careful, however, to communicate that such a finding does not give the courts a broad scope of intervention in international arbitrations. Instead, courts are expected to intervene only in rare circumstances. Noting the tendency for matters of true substantive challenge to be cloaked as jurisdictional issues, and for substantive considerations to influence considerations of jurisdiction, the Court added the following important commentary:

> *…Courts are warned to limit themselves in the strictest terms to intervene only rarely in decisions made by consensual, expert, international arbitration tribunals, including on issues of jurisdiction. In my view, the principle underlying the concept of a 'powerful presumption' is that courts will intervene rarely because their intervention is limited to true jurisdiction errors.*
>
> *…courts are to be circumspect in their approach to determining whether an error alleged under Article 34(2)(a)(iii) properly falls within that provision and is a true question of jurisdiction. They are obliged to take a narrow view of the extent of any such question. And when they do identify such an issue, they are to carefully limit the issue they address to ensure that they do not, advertently or inadvertently, stray into the merits of the question that was decided by the tribunal.*[39]

The Court of Appeal stated that the first purpose of the reviewing court is to identify and narrowly define any true question of jurisdiction. The proper approach is to ask the following three questions:

- What was the issue that the tribunal decided?
- Was that issue within the submission to arbitration?
- Is there anything in NAFTA that precluded the tribunal from making the award?[40]

In *Cargill*, the submission to arbitration was for 'loss or damage by reason of, or arising out of' the NAFTA breach.[41] The Court of Appeal recognised that the tribunal had to find facts, apply those facts to the definitions and determine whether the 'upstream' damages met that criteria.[42] The narrow issue for the Court of Appeal was 'whether the tribunal was correct in its determination that it had jurisdiction to decide the scope of damages suffered by Cargill by applying the criteria set out in the relevant articles of Chapter 11'.[43] Whether Cargill's 'upstream' damages actually met the NAFTA criteria was seen as 'a quintessential question for the expertise of the tribunal, rather than an issue of jurisdiction'.[44] In other words, the tribunal clearly had jurisdiction to consider the scope of damages suffered by Cargill by applying the relevant NAFTA criteria and did so. Having properly assumed that jurisdiction, the reasonableness of the tribunal's decision is not subject to Court review.

As *Cargill* concerned the application of a Model Law provision defining when Courts may intervene on jurisdictional grounds, the Court of Appeal's assessment is of significance in all Canadian jurisdictions. In light of *Cargill*, those seeking a Canadian place of arbitration for an international dispute should have confidence the Courts will allow substantial deference to the arbitrator or arbitrators and will take a very narrow view as to what comprises a jurisdictional issue. In any challenge to a decision of an international arbitral tribunal on jurisdictional grounds under article 34 of the Model Law, the Court will only look at whether the consideration of the issue was properly within the jurisdiction of the tribunal and will not under that guise seek to assess or evaluate the reasonableness or correctness of the decision.

Arbitral jurisdiction over third parties

Farah v Sauvageau Holdings Inc

In *Farah v Sauvageau Holdings Inc* (*Farah*)[45] the Ontario Superior Court of Justice held that the Ontario Arbitration Act[46] did not confer jurisdiction upon an arbitrator to grant an injunction enjoining non-parties from dealing with property owned by or obtained from the parties. This dispute involved the sale of a collection agency, Collection Systems Canada Corp (CSC), from Mr Farah to Sauvageau Holdings Inc (Sauvageau). A dispute arose shortly after the sale when Sauvageau alleged the share purchase agreement contained several false representations about, inter alia, the nature of CSC's clients, value of assets, liabilities and profitability.[47] After legal action was commenced, the parties agreed to proceed through arbitration and appointed an arbitrator.[48] Suspicious of further property sales and financial transfers, Sauvageau appeared before the arbitrator, ex-parte and without notice to Mr Farah, and obtained a *Mareva*-type injunction to restrain any

dealings involving the property of Mr Farah and his wife. The injunction purported to apply to servants and agents of Mr Farah and his wife as well as to banks, financial institutions and all persons with notice of the injunction.[49] The arbitrator denied the application by Mr Farah and his wife to set aside the injunction.[50]

Mr Farah and his wife then applied to the Ontario Superior Court of Justice, under the Ontario Arbitration Act, for an order setting aside the arbitrator's injunction claiming the injunction exceeded arbitral jurisdiction by binding non-parties. The Court first emphasised that an arbitrator, unlike a Court, has no inherent jurisdiction, and obtains jurisdiction and authority only from the contractual or statutory provisions appointing it.[51] Thus arbitral jurisdiction on a particular subject matter must be found within that agreement or applicable statutory provision. The Court rejected the Sauvageau argument that the Ontario Arbitration Act granted the arbitrator the powers of a Superior Court to issue a *Mareva* injunction binding non-parties to the arbitration. Legislation does not empower arbitrators to 'grant *Mareva* injunctions or for that matter to appoint receivers, grant *Anton Pillar* orders, or grant *Norwich* orders' which may require third parties to act.[52] Further, it was explained that arbitrators do not require powers to issue orders binding third parties because the Arbitration Act incorporates a process whereby the Court's jurisdiction may aid arbitration in this respect when necessary. In particular, section 6 of the Arbitration Act permits the Court to assist in the conduct of arbitrations for the purpose of preventing unequal or unfair treatment, and section 8 specifically recognises the Court's jurisdiction to make injunctive orders in arbitrations for the detention, inspection or preservation of property.

The Court similarly rejected Sauvageau's contention that the agreement to arbitrate, which directed the arbitration proceed in accordance with the ADR Chambers Arbitration Rules,[53] provided for such orders over third parties. ADR Chambers is a Canadian organisation of dispute resolution professionals, comprised of experienced lawyers and retired judges, that offers dispute resolution services for both national disputes in Canada and international disputes.[54] It has published its own set of rules to assist parties in planning for arbitration. Rule 11 of the ADR Chambers Rules states that the arbitrator 'may order whatever interim measures it deems necessary, including injunctive relief'.[55] The Court held the ADR Chambers Rules adopted by the parties to govern the arbitration process represented nothing more than a private agreement between the parties to follow a specific process. Such a private contractual arrangement did not and could not confer on the arbitrator jurisdiction over third parties.[56] The arbitrator was found to have exceeded his jurisdiction in granting the Mareva injunction.[57]

The *Farah* decision is consistent with the bulk of other Canadian authorities in strongly rejecting any type of arbitral jurisdiction over non-parties. It is important to note, however, that parties are not categorically barred from obtaining relief against non-parties by choosing to pursue arbitration. In order to ensure that parties achieve effective justice through arbitration, Canadian legislation generally provides that the parties to an arbitration can seek the court's assistance in obtaining interim injunctive relief or other preservation orders notwithstanding that these might affect non-parties to the arbitration. Canadian Courts have been and should continue to be willing to exercise their inherent and statutory jurisdiction to assist the arbitration process in these respects where a need for such is demonstrated.

MJS Recycling Inc v Shane Homes Ltd

In *MJS Recycling Inc v Shane Homes Ltd*,[58] the Alberta Court of Appeal also recently considered arbitral jurisdiction in relation to third parties. In this case, MJS Recycling Inc (MJS), a waste-management company, entered into a Purchase Agreement to buy-out the shares of several entities in MJS, including Shane Homes Limited (Shane), and two other home builders (collectively, the Builders Group). Under the Purchase Agreement, the members of the Builders Group promised they would continue to provide MJS with a certain amount of waste for removal and pay MJS fees for such. The Purchase Agreement also directed that any disputes be resolved by way of arbitration under Alberta's Arbitration Act.[59]

A dispute eventually arose as to whether one of the members of the Builders Group, Shane, was meeting its ongoing waste-removal obligations to MJS. In light of the dispute, MJS paid the balance it owed to the Builders Group on the Purchase Agreement into a trust account. MJS then initiated arbitration proceedings against Shane for failing to provide the specified volume of waste under the Purchase Agreement. Shane counterclaimed for its share of the balance owing for shares under the Purchase Agreement, which comprised roughly 25 per cent of the funds MJS paid into trust.[60]

The arbitrator found that Shane had breached the Purchase Agreement and MJS was entitled to damages 'in an amount to be assessed'.[61] The parties were unable to agree on damages, and a Supplementary Award from the arbitrator on the matter limited MJS's remedy to a release from all of its further payment obligations to all of the Builder Group under the Purchase Agreement, and also directed a return to MJS of all share purchase funds in trust.[62] It is important to note that roughly 75 per cent of the share purchase funds paid into trust by MJS were to pay the other two members of the Builders Group: non-parties to the arbitration that had not breached the Purchase Agreement.

MJS applied to the Alberta Court of Queen's Bench under section 45(1) of the Arbitration Act to set aside the award, inter alia, on the basis that it contained a decision on a matter (the entitlement of the other members of the Builders Group to funds in trust) beyond the scope of the agreement to arbitrate. The Court held that while the arbitrator may have exceeded his jurisdiction in this respect, such excess of jurisdiction was of no ultimate impact as the arbitral award was not binding on the other members of the Builders Group.[63] The other members of the Builders Group could presumably claim separately against MJS for amounts owed under the Purchase Agreement. The Court dismissed the MJS application because the agreement to arbitrate between MJS and Shane expressly stated any arbitral decision would be 'final and binding' and there was 'no right of appeal'.[64]

MJS applied for leave to appeal this decision to the Court of Appeal. Granting leave, Justice O'Brien noted that while deference is ordinarily owed to an arbitrator it does not follow that such deference is owed where the arbitrator has exceeded their jurisdiction, particularly in purporting to affect the rights of a non-party by an award.[65]

The Alberta Court of Appeal granted MJS's appeal, finding that the arbitrator exceeded his jurisdiction in releasing MJS from making any share purchase payments to the Builders Group even though only Shane was a party to the arbitration. The entitlements of the other members of the Builders Group to be paid for their shares was not submitted for determination and the decision that MJS did not have to provide further payment to these other parties went beyond the scope of the arbitration agreement.[66]

The Court of Appeal's treatment of the attempted prohibition against appeals from arbitration in the Purchase Agreement also deserves mention. The Court of Appeal confirmed that it is not possible under Alberta legislation for an arbitration agreement to exclude residual Court jurisdiction to set aside an arbitral award

for want of jurisdiction under the Arbitration Act. Section 3 of the Arbitration Act specifically prevents the parties from contracting out of the Court's jurisdiction in this regard. In any event, the Court stated the 'no appeals' clause in the arbitration agreement should not be interpreted as an agreement to accept an award beyond the scope of the agreement to arbitrate.[67]

The Court of Appeal considered that the situation in MJS was one where the jurisdictional errors within the award could be corrected by the arbitrator with appropriate direction from the Court.[68] The matter was remitted to the arbitrator to render an award in accordance with the Court's directions on the scope of his jurisdiction.[69]

Conclusion

There continues to be a clear and strong commitment by Canadian legislatures and courts to ensure that, absent exceptional circumstances, agreements to arbitrate are honoured and that arbitral jurisdiction is maintained without judicial intrusion. While the general approach of deference and respect for the competence-competence principle are well established, the precise limits of arbitral jurisdiction continue to be the subject of dispute and judicial commentary as the cases reviewed above attest.

Recent Canadian case law reinforces the historical approach of deference to arbitration and demonstrates that Canadian Courts will strive to ensure only true issues of arbitral jurisdiction attract judicial scrutiny. The *Cargill* case seems to be a particularly good example of this narrow approach to defining reviewable issues of arbitral jurisdiction. The *Shaw* case presents an example of the type of exceptional or unusual circumstances that may oust an apparent agreement by the parties to arbitrate a dispute in favour of judicial jurisdiction.

One limiting principle of arbitral jurisdiction that Canadian Courts have strongly endorsed is the absence of arbitral jurisdiction over non-parties to the arbitration. In both the *Farah* and *MJS* cases, Canadian Courts set aside arbitral awards on this basis. While Courts have been strict on protecting the rights and interests of non-parties, it is notable that Canadian arbitration legislation generally provides for the Courts with inherent jurisdiction over non-parties to affect interim relief in arbitrations. Given the above, parties to arbitration in Canada are well advised to carefully consider the potential interests of non-parties when choosing to seek arbitration as well as when seeking specific awards and remedies within the arbitration process.

Notes

1 J Brian Casey, *Arbitration Law of Canada: Practice and Procedure* (Huntington, NY: Juris Publishing Inc, 2005) at p21 and p23.

2 *Seidel v TELUS Communications Inc*, 2011 SCC 15 [Seidel].

3 Michael D Schafler, Tamela J Coates and Chloe Snider, 'Commercial Arbitration and the Canadian Justice System: Recent Decision of the Supreme Court of Canada,' (2011) *The Arbitration Review of the Americas 2012*, p38.

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4 *Seidel*, supra note 2 at paras 29 and 114.
5 2011 ONSC 4360, aff'd 2012 ONCA 192.
6 2010 ONSC 4656, rev'd 2011 ONCA 622, leave appeal to SCC refused, 34559 (10 May 2012).
7 2011 ONSC 1819.
8 2011 ABCA 221.
9 RSC 1985, c R-2. *Shaw Satellite G P v Pieckenhagen*, 2011 ONSC 4360 at paras 22-24 [Shaw, ONSC].
10 Ibid at paras 10, 13-20.
11 Ibid at para 11.
12 Ibid at paras 21-23.
13 SO 1991, c17.
14 In Alberta, under the Arbitration Act, RSA 2000, c A-43, section 7(1) reads: If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the application of another party to the arbitration agreement, stay the proceeding.
15 *Shaw*, ONSC, supra note 9 at paras 30 and 45. At the hearing of the application, one of the defendants attorned to the arbitrator's jurisdiction. See *Shaw Satellite G P v Pieckenhagen*, 2012 ONCA 192 at para 11 [Shaw, ONCA].
16 *Shaw*, ONSC, supra note 9 at paras 34-36.
17 Ibid at paras 38, pp40-41.
18 Other provincial, territorial and federal legislation governing domestic arbitrations contains similar provisions. See, for example, section 7(5) under the Alberta Arbitration Act, RSA 2000, c A-43.
19 *Shaw*, ONSC, supra note 9 at para 43.
20 Ibid at paras 45-46.
21 *Shaw*, ONCA, supra note 15 at para 10.
22 Ibid at para 16.
23 *Shaw*, ONSC, supra note 9 at paras 17 and 48-51.
24 *United Mexican States v Cargill Inc*, 2011 ONCA 622 [Cargill, ONCA].
25 34559 (May 10, 2012).
26 *Cargill*, ONCA, supra note 24 paras 42 and 66.
27 17 December 1992, Can TS 1994 No 2.
28 *Cargill, Incorporated v United Mexican States, Award* (18 September 2009), ICSID Case No ARB(AF)/05/2 (NAFTA), online: ITA Law, http://italaw.com/documents/CargillAwardRedacted.pdf at paras 1-5 [Cargill]. See also *Cargill*, ONCA, supra note 24 at paras 5-6.
29 Ibid.
30 *Cargill*, ONCA, supra note 24 at para 10.
31 *Cargill*, supra note 28 at paras 522-526.
32 *United Mexican States v Cargill Inc*, 2010 ONSC 4656 at paras 5, 45 [Cargill, ONSC].
33 Ibid at para 3.
34 RSO 1990, cl-9.
35 *Cargill*, ONSC, supra note 32 at para 55.
36 Ibid at paras 56-73.
37 Ibid at para 80.
38 *Cargill*, ONCA, supra note 24 at para 3.
39 Ibid at paras 46-47.
40 Ibid at para 52.
41 Ibid at para 63.
42 Ibid at paras 69-70.
43 Ibid at para 74.
44 Ibid at para 72.
45 2011 ONSC 1819 [Farah].
46 RSO 1991, c17.
47 *Farah*, supra note 45 at para 22.
48 Ibid at paras 27-28.
49 Ibid at para 34.
50 Ibid at paras 40-41.
51 Ibid at para 54.
52 Ibid at para 63 (emphasis removed).
53 The ADR Chambers Arbitration Rules, in a current version effective as of 16 April 2012, are available online at: http://adrchambers.com/ca/arbitration/regular-arbitration/arbitration-rules/ [ADR Rules].
54 See The ADR Chambers' website for further information: http://adrchambers.com/ca/ .
55 ADR Rules, supra note 53. The language of Rule 11 discussed in *Farah* has been revised and is now found within Rule 12 of the current ADR Chambers Arbitration Rules.
56 *Farah*, supra note 45 at para 70.
57 Ibid at para 73.
58 2011 ABCA 221 [MJS, ABCA].
59 *MJS Recycling Inc v Shane Homes Ltd*, 2010 ABCA 376 at paras 2-5 [MJS, Application for Leave].
60 Ibid at paras 6-7.
61 Ibid at para 9.
62 Ibid at para 11.
63 *MJS*, ABCA, supra note 58 at para 19.
64 Ibid at paras 19-20.
65 *MJS*, Application for Leave, supra note 59 at para 18.
66 *MJS*, ABCA, supra note 58 at para 29.
67 Ibid at paras 22 and 35.
68 Ibid at paras 37-38.
69 Ibid at para 39.

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Tom is a partner in the Calgary office of Fraser Milner Casgrain LLP, a member of the firm's energy litigation practice group and co-head of the firm's national ADR practice group. Tom's diverse advocacy practice includes energy litigation, regulatory hearings and a broad spectrum of commercial disputes. Tom has represented clients at all levels of court in Alberta, at the Federal Court of Canada and numerous administrative tribunals. He has also acted as counsel in over 100 mediations and numerous arbitrations. Tom has authored papers and articles on a variety of ADR topics and other subjects including the regulations and risks associated with hydraulic fracturing, force majeure and coal bed methane development. He is active in community affairs and is currently a member of the Board of Directors of the Calgary Stampede.

Michael D Schafler
Fraser Milner Casgrain LLP

Mike is the co-head of FMC's national ADR practice group and the department manager of the FMC Toronto litigation practice group. Mike focuses on the resolution of complex commercial disputes in the financial and resource industries. Mike has appeared at all levels of Ontario courts and the Supreme Court of Canada. He has acted as arbitration counsel on many ad hoc and institutional arbitrations, both domestic and international. Mike has taught and written extensively about ADR. He is an executive member of the national ADR sction of the Canadian Bar Association, as well as a member of the Toronto Commercial Arbitration Society. Mike was ranked in 2012 by *Chambers Global* as a leading lawyer in the areas of dispute resolution – arbitration and dispute resolution – Ontario. He was also recognised in 2012 by *Lexpert* as a leader in securities litigation.

Rachel Howie
Fraser Milner Casgrain LLP

Rachel joined FMC's Calgary office as an articling student in 2008. She is currently an associate in the firm's Energy Litigation group and is also a member of FMC's National ADR Practice Group. Rachel has a growing practice in energy and environmental litigation, and experience in a variety of corporate and commercial litigation. She has acted as co-counsel and counsel in private arbitrations and mediations and has appeared before the Provincial Court and the Court of Queen's Bench of Alberta. Rachel obtained her LLB from the University of Ottawa and her LLM specialising in natural resources, energy and environmental law from the University of Calgary. She is a member of the Law Society of Alberta, the Law Society of Upper Canada and is also a member of the Young Canadian Arbitration Practitioners.

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