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ALTERNATIVE DISPUTE RESOLUTION

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AUGUST 2010

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STAY OF ARBITRATION: ONE STRIKE AND YOU'RE OUT?

BY P. DAVID MCCUTCHEON AND MARINA SAMPSON

Harlan F. Stone, the former Chief Justice of the United States Supreme Court, famously stated, "the law itself is on trial quite as much as the cause which is to be decided."

In a recent Alberta Court of Appeal decision, it can equally be said that the Alberta *Arbitration Act* (the "Alberta Act") itself was on trial along with questions surrounding whether to stay legal proceedings in the face of an arbitration agreement. Given the common genesis and language of both the Alberta and Ontario Arbitration Acts, the decision may have implications that extend beyond Alberta.

Lamb v. *AlanRidge Homes Ltd.* [1]

The Lamb family and AlanRidge entered into a construction agreement wherein AlanRidge was to build a house. The parties' agreement contained a mandatory binding arbitration agreement.

As a result of alleged defects in the house, the Lambs commenced an arbitration but failed to progress the arbitration. Approximately 18 months after they commenced the arbitration, the Lambs issued a Statement of Claim, commencing an Alberta court action against AlanRidge and certain subcontractors. AlanRidge brought an application to stay the action under section 7 of the *Alberta Act*.

The Alberta Court of Queen's Bench Decision

Justice Macleod concluded that while all of the claims made against AlanRidge in the Lambs' action fell under the arbitration agreement, the action nonetheless included non-arbitrable claims against third party subcontractors and other defendants. The arbitration agreement did not therefore encompass all of the claims in the court action.

Justice Macleod declined to grant a partial stay under section 7(5) of the *Alberta Act*, finding that the arbitrable and non-arbitrable claims were "inextricably linked to one another" and could not be separated. Justice MacLeod determined that the application should be dismissed and that the arbitration, as opposed to the court action, should be stayed to avoid a multiplicity of proceedings. (however, it should be noted that the chambers judge did vary his decision, orally, and stayed the arbitration only in part).

The Outcome at the Court of Appeal

Very briefly, the appeal failed because, pursuant to the *Alberta Act,* Justice Macleod's decision was not appealable. Once the Court determined that Justice Macleod's decision was made under section 7 of the Alberta Act, its decision that an appeal was precluded was swift and unequivocal.

While on the one hand the Court indicated that it would not make a determination on the lower court decision's correctness, it nevertheless pointed out that in giving priority to litigation in order to avoid a multiplicity of proceedings, the decision went against the Alberta Court of Appeal's reasoning in *Kaverit Steel and Crane Ltd.* v. *Kone Corp,* 87 D.L.R. (4th) 129(which was decided under the *International Commercial Arbitration Act* (S.A. 1986, c.I-6.6 [now R.S.A. 2000, c. I-5] and not the *Alberta Act*). The Court further recognized that two recent decisions of the British Columbia Court of Appeal — *Seidel* v. *Telus Communications Inc.* and *MacKinnon* v. *Money Mart* — were seemingly at odds with the lower court's decision.

The Court concluded that the appeal demonstrated a lack of clarity in the *Alberta Act*; more particularly, given the inability to appeal decisions under section 7, the Court found that legislative review and amendment may be appropriate.

Comment

The complicated interplay between holding parties to their arbitration agreement and avoiding multiple proceedings is not a new dilemma. The dilemma is made thornier still where the decision is exempt from appellate review and the statute is vague. The policy behind section 7(6) (no appeal) is sound. If parties are mired in appeals, expedience and efficiency, arguably the hallmarks of arbitration, will surely be lost. Still, a sound policy does not make living with an incorrect decision, perceived or otherwise, any easier.

This is not quite the end of the road for similar cases where a stay of an arbitration is sought. While an application for leave to appeal to the Supreme Court of Canada in the instant case has just been dismissed with costs, the British Columbia Court of Appeal case cited by the Alberta Court of Appeal, *Seidel v. Telus*, is pending before the Supreme Court of Canada. Perhaps provincial legislatures will take some direction from decisions of the Supreme Court of Canada.

In the meantime, what about Ontario? Ontario courts have previously interpreted section 7(5) of the *Ontario Act* in similar circumstances. *Radewych* v. *Brookfield Homes (Ontario) Ltd.*, a decision of the Ontario Court of Appeal, cited with approval by the Alberta Court of Appeal in support of its interpretation of section 7(6), is an example. In *Radewych*, the Ontario Court of Appeal did not call for amendment to an unclear statute, but cited the lower court's decision supportively:

That subsection (section 7(5)) reposes a discretion in the court to stay a proceeding with respect to matters dealt with in an arbitration agreement where some matters arise under the agreement and some do not.. . .

It is preferable, in my view, that all of the various claims, against all of the defendants, be determined in one proceeding.

Where the Alberta Court of Appeal saw a lack of clarity in the statute, the Ontario Court of Appeal saw a judge's ability to exercise discretion. It should be noted that the two decisions are consistent in their result; however, the direction from the Alberta Court of Appeal is that clearer rules should exist for the exercise of a judge's discretion.

The decisions demonstrate somewhat divergent approaches to the same problem; perhaps neither is wrong, but only time and further appeals will tell. In the meantime, under the *Ontario* and *Alberta Acts*, drawing the line on a stay of court proceedings in favour of domestic arbitration agreements, where there are additional parties, remains uncertain and unpredictable.

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[1] *Lamb v. AlanRidge Homes Ltd.*(2009) ABCA 343; application for leave to appeal to the Supreme Court of Canada, pending.

SCC: ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CANADA SUBJECT TO LOCAL LIMITATION LAWS

BY MICHAEL SCHAFLER

The Supreme Court of Canada has handed down an important decision clarifying what, if any, time limits may apply to the enforcement of a foreign arbitral award in Canada. The Court has held that, for these purposes, the imposition of a time limit is a procedural rule permitted by Article III of the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention"). Consequently, the question whether the enforcement of an arbitration award is subject to any time limit depends on the wording of any limitations legislation in the Province where the award is sought to be enforced.

Yugraneft Corporation, a Russian company in the business of developing and operating oilfields in Russia, purchased materials from Rexx Management Corporation, an Alberta company. Following a contractual dispute and an international commercial arbitration before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation on Sept. 6, 2002 the tribunal awarded just under US$1million to Yugraneft. On Jan. 27, 2006 Yugraneft applied to Alberta's Court of Queen's Bench for recognition and enforcement of the award. The application was dismissed and an appeal to Alberta's Court of Appeal was unsuccessful. Leave to appeal to the Supreme Court was granted which, following oral argument in December 2009, issued its ruling dismissing the appeal on May 20, 2010.

The principal issue was whether the enforcement proceeding was subject to any limitation period and, if so, whether it should be the two-year period applicable

to a "remedial order" (s. 3 of Alberta's *Limitations Act*, R.S.A. 2000, c. L-12) or the ten-year period applicable to a "judgment or order for the payment of money" (s. 11). Yugraneft argued that s. 11 should apply since a foreign arbitral award possesses all the hallmarks of a judgment and because there was ambiguity as to whether s. 3 was intended to apply. Rexx argued that s. 3 should apply since the Alberta legislature intended the two-year limitation period to apply to all causes of action, unless one of the exceptions enumerated in the Act expressly applied.

On the threshold issue as to whether the imposition of a local limitation period for the enforcement of a foreign award was contrary to the New York Convention, the Court held that this was a procedural – and therefore permissible – rule:

- As a Treaty, the New York Convention should be interpreted in good faith in light of its object and purpose. When it was drafted, it was well known that common law states generally treated limitation periods as procedural in nature. The permissive language in Article III (as opposed to an express prohibition) suggests that the drafters intended to permit limitation periods to be established by and in Contracting States;

- 53 Contracting States in fact have subjected the enforcement of foreign arbitral awards to some form of time limit; and

- The application of time limits "is not a controversial matter" given that leading scholars take it for granted that Article III permits local limitation periods.

In concluding that s. 3 of the *Limitations Act* applied to a foreign award, the Court held that an arbitral award is not a judgment or a court order and that in "general, arbitration is not part of the state's judicial system, although the state sometimes assigns powers or functions directly to arbitrators." The Court further pointed out that other statutes, like Alberta's *Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6 ("RESA")[1] and British Columbia's *Limitation Act*, R.S.B.C. 1996, c. 266, expressly referred to judgments and awards when prescribing limitation periods, whereas the *Limitations Act* did not. The Court further held that the two-year limitation period in s. 3 of the *Limitations Act* was subject to the discoverability rule which "makes ample allowance for the practical difficulties faced by foreign arbitral creditors, who may require some time to discover that the arbitral debtor has assets in Alberta."

The Court then established the following rules as to determining when a limitation period, such as the one set out in s. 3 of the *Limitations Act*, begins to run in respect of enforcing a foreign award:

- The limitation period will not be triggered until the possibility that the award might be set aside by the local courts in the country where the award was rendered has been foreclosed;

- Even then, the time limit will not be engaged until the creditor knew or ought to have known that the bringing of an enforcement proceeding was warranted;

- An enforcement proceeding will be warranted only once the creditor has learned, exercising reasonable diligence, that the debtor possesses assets in the relevant jurisdiction; and

- When the underlying contract identifies the jurisdiction in which the debtor is registered (or has an office), it is presumed that the creditor knows or ought to know that a proceeding is warranted.

Comment

The Supreme Court has – at least for the time being – resisted the opportunity to pronounce that arbitral awards are at least functionally equivalent to judgments. This is perhaps somewhat surprising given that the Court has in the past decade consistently held that arbitral proceedings are "autonomous" and are to be afforded judicial deference (see, for example, *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; and *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35). On the other hand, the Court has clarified what until now had been an arguably ambiguous issue and promulgated clear rules. Certainty has thus been established and, for users of commercial arbitration, this is a good thing.

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[1] The RESA has a six-year limitation period for the enforcement of judgments and arbitral awards rendered in reciprocating jurisdictions, which Russia is not; hence, Yugraneft's application was brought under the Model Law, as enacted in Alberta pursuant to the ICAA.

SETTLEMENT COUNSEL: A NEW APPROACH TO THE RESOLUTION OF DIFFERENT DISPUTES IN COMMERCIAL LITIGATION

BY MICHAEL SCHAFLER

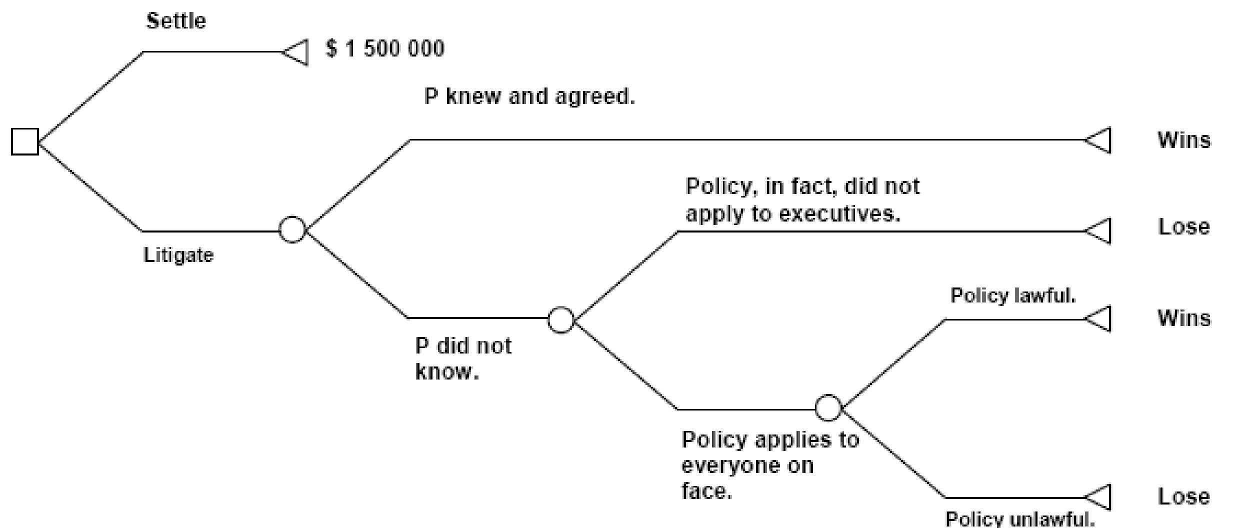
On Jan. 26, 2010, Michael Schafler and Gordon Tarnowsky, both partners in the Dispute Resolution Group at Fraser Milner Casgrain LLP, presented a 90-minute webinar entitled "The Emerging Role of Settlement Counsel in Commercial Litigation". The webinar was part of a CBA Professional Development program. Approximately 100 registrants from across Canada participated in the webinar, which included live polling. The two principal topics discussed in the webinar included the role of settlement counsel and facilitating settlement by the use of risk analysis in the context of ADR.

The role of settlement counsel is a growing phenomenon in Canada that emanated from the United States. As the polling showed, many people in the ADR field are aware of the concept. The role of settlement counsel is to assess, develop and implement a settlement strategy for the case. The objective of settlement counsel is to engage in a problem solving approach focused on the interests of the parties, typically through negotiation or mediation. Two different approaches can be applied to the relationship between settlement and litigation counsel (which can include lawyers from the same firm, subject to ethical screens, or lawyers from different law firms). The first approach entails litigation and settlement counsel working side by side, but a more common approach is when there is an open one-way flow of information from litigation counsel to settlement counsel. Settlement counsel uses and relies upon litigation counsel's opinions and risk analysis to assist in understanding and weighing the "litigation option" in pursuing and assessing potential alternative resolutions.

Advantages of using settlement counsel include: counsel not being invested in the analysis of the underlying rights; a focus on achieving a fair and durable settlement early in the process; minimizing the escalation of conflict; possibly reducing the need for formal discovery; the opportunity for a significant reduction of overall costs; and the development of a risk analysis or decision tree. The perceived disadvantages and responses to the use of settlement counsel include increased legal costs by having a second set of counsel and increased dedication of client internal resources. A poll revealed that those who had been exposed to settlement counsel in their practice (including as mediators) thought positively of the experience.

Facilitating settlement by the use of risk analysis in the context of ADR involves the application of a "decision tree analysis", which is a method of systematically quantifying the risks and uncertainties inherent in the litigation process. A decision tree analysis involves a five-step process, which includes the following: (1) identify uncertainties; (2) define outcomes; (3) assign probabilities; (4) do the math; and (5) interpret the results. An example of a decision tree is illustrated below, courtesy of the Honourable George W. Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian Limited, 2003). In the hypothetical case referred to by Adams, the plaintiff has sued the employer for wrongful dismissal, seeking damages of $4 million. The plaintiff has offered to settle for $1.5 million and the defendant wishes to evaluate its reasonableness. The initial decision tree (Figure 1) refers to the legal issues engaged by litigation, namely, whether the plaintiff knew about an alleged mandatory retirement policy and, if so, whether it applied to the employee and, if it applied, whether it was lawful. Once the various scenarios and outcomes are identified, the employer can assess whether they "win" or "lose".

Figure 1- Assessment of Legal/Factual Issues **Employer**



The next step is to assign probabilities to these outcomes and then to do the same analysis as to damages (the plaintiff's salary was $1 million and a notice period of 24 months is in issue. In addition, $2 million in damages with respect to stock options are in issue). The resulting trees look like this:

Figure 2- Probabilities (Liability) **Employer**

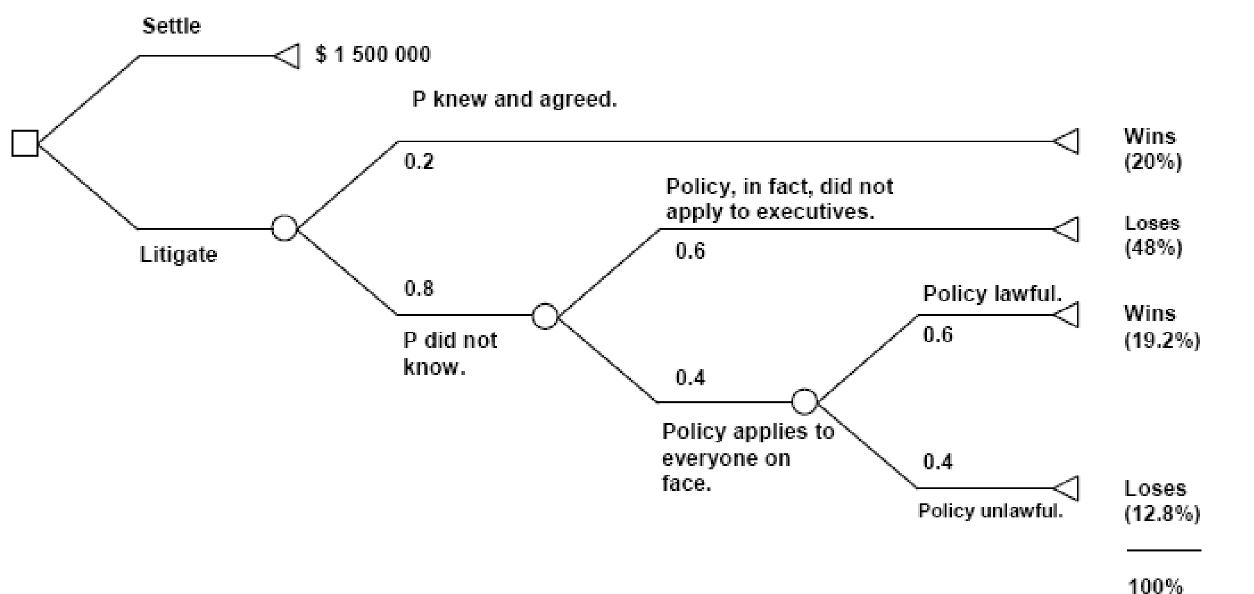
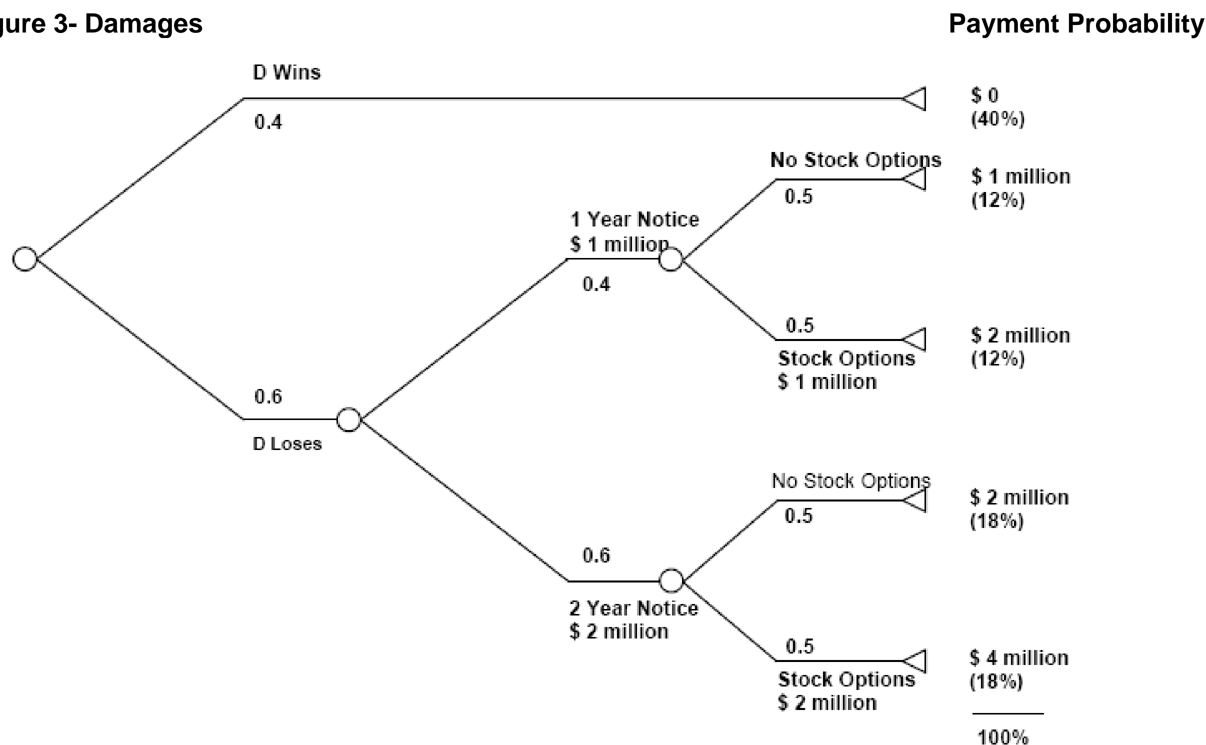


Figure 3- Damages **Payment Probability**



The liability analysis (Figure 2) shows that the employer is more likely to lose (60%) than win (40%). As to damages (Figure 3), this means there is a 40% chance that the employer will have to pay nothing and a 60% chance that the employer will have to pay at least $1 million. When all of the information is aggregated, the risk analysis suggests that the expected value on liability and damages is $1.44 million or roughly equal to the offer to settle:

($0 x 40%) + ($1M x 12%) + ($2M x 12%) + ($2M x 18%) + ($4M x 18%) = $1.44 M

A decision tree is a risk assessment tool which enables parties to think carefully about where the points of disagreement lie. Thus, risk analysis of this nature can be a useful tool for counsel on both sides. And, it may also assist the mediator in framing a principled approach to the negotiation. Advantages of risk analysis include: enhancing counsel's professional judgment, enabling strategic settlement offers by taking advantage of Rule 49.10 of Ontario's *Civil Rules of Procedure*[1] (or equivalent Rules) and better equipping counsel and clients to objectively see and understand the issues in the case by arriving at an informed settlement position.

During this section of the webinar, a poll was conducted with the registrants asking them if they use litigation risk analysis tools in their practice. The majority of registrants responded that they did use these tools in practice. For those that did not, most of them stated that they would begin to use this tool in their practice.

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For further information, please contact a member of our National Alternative Dispute Resolution Group

[1] Rules of Civil Procedure, R.R.O. 1990. 194