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COMMERCIAL ARBITRATION IN CANADA

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What's New in this Update:

This release features updates to case law and commentary in Chapters 1 (Overview), 2 (Providing for Arbitration), 3 (Commencement of Arbitration and Stays of Proceedings), 4 (The Arbitral Tribunal), 5 (Arbitral Jurisdiction), 6 (Pre-Hearing Matters), 7 (Conduct of the Arbitration), 8 (Substantive Law), 9 (Termination of Arbitration), 10 (Judicial Intervention), 11 (Financial Considerations), and 12 (Recognition and Enforcement of Arbitral Awards).

- In *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, the defendants sought a stay of proceedings under s. 8(1) of British Columbia's *International Commercial Arbitration Act*. The plaintiffs

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argued that a stay was available only if the applicant for the stay "establishes each of the criteria set out in s. 8(1) on a balance of probabilities". The British Columbia Supreme Court rejected this argument, noting that no legal authority had been provided in support of it and that the approach was inconsistent with the case law. The court in *Hosting Metro* noted that an applicant for a stay "bears the onus of showing: (1) that the person (or corporate entity) against whom the stay is sought is a 'party' to the arbitration agreement; (2) that the 'matter' for which this same person has commenced legal proceedings against the applicant is one that was 'agreed to be submitted to arbitration'; and (3) that the application for a stay has been brought in a timely fashion, before taking any other steps in the action". The court noted that "[i]f there is an 'arguable' case on these points, a stay of proceedings should flow, subject to an intervening determination made under s. 8(2)". *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, 2016 CarswellBC 3607, 274 A.C.W.S. (3d) 471 (B.C. C.A.).

- Master Robertson of the Alberta Court of Queen's Bench noted that, as a practical matter, while Alberta's *Arbitration Act* "does not expressly provide for affidavits of documents and the usual disclosure process . . . a commercial arbitrator would normally provide some prehearing directions as to document production to avoid surprises, and consequential adjournments, or (worse) a miscarriage of justice at the arbitration hearing." *Nizamov v. 1861398 Alberta Ltd.*, 2016 ABQB 401 (Alta. Q.B.).

- The Ontario Superior Court of Justice has noted that some examples of when a party "might be said to have been 'unable' to present his or her case" occur when "the award is based on a theory of liability that either or both of the parties were not given an opportunity to address, or based on a theory of the case not argued for by either of the parties", "a party was not given an opportunity to respond to arguments made by an opposing party", or " the tribunal ignored or failed to take the evidence or submissions of the parties into account". The court pointed to *Sugar Australia PTY Ltd. v. MacKay Sugar Ltd.*, [2012] QSC 38 as an example of the application of these principles; the Ontario court referred to the Queensland court as having "annulled an arbitration award because the arbitrators based their reasoning on a construction of the case that had not been advocated by any of the parties, even though the tribunal's decision was based on evidence and facts called by the parties". This said, the Ontario court — which was deciding the matter in the international arbitration context — cautioned against blind application in that context of domestic authorities regarding a judge's adherence to

parties' submissions: *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2016 ONSC 7171 (Ont. S.C.J.).

- The Newfoundland and Labrador Supreme Court, Trial Division has noted that "[a]lthough courts have discretion to consider a new issue raised for the first time on review, the general rule is that courts should not consider new grounds or new issues that were not raised before the tribunal below". The court noted that "raising an issue for the first time on judicial review prejudices the opposing party and denies the Court the adequate evidentiary record to consider the issue"; further, courts "must be careful not to overlook the loss of benefit of having the specialized tribunal's views, because the reviewing court's task 'is to review the record as it is, not as it might have been'". *Newfoundland and Labrador v. ExxonMobil Canada Properties*, 2017 NLTD(G) 147, 2017 CarswellNfld 359, 283 A.C.W.S. (3d) 13 (N.L. T.D.).

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