Goodmans LLP Update

Court of Appeal Finds English Arbitration Statute Applies Even Though Seat of Arbitration is in Ontario

A recent ruling from the Ontario Court of Appeal suggests that the place or "seat" of arbitration does not necessarily determine the procedural laws that will apply where the parties have referenced other arbitration legislation in their agreement. The decision in The *Walt Disney Company v. American International Reinsurance Company, Ltd.* may be only seven short paragraphs, but it raises interesting questions and has practical implications for parties drafting arbitration clauses.

Background and Arbitration Agreement

The underlying dispute in this case relates to The Walt Disney Company seeking insurance coverage for sums it paid in 2017 to settle a defamation case after its subsidiary, American Broadcasting Company, referred to Beef Products Inc.'s signature product as "pink slime".

The arbitration agreement in the insurance contract called for *ad hoc* arbitration and included an appointment procedure whereby each party would appoint one arbitrator. It provided that, in the event of arbitration, Disney could select the venue and procedural laws of Bermuda or any one of London, Toronto or Vancouver under the English *Arbitration Act of 1996* (the "**English Act**").

Typically, the place of the arbitration determines which local laws govern the arbitral procedure. For example, Ontario's *International Commercial Arbitration Act, 2017* (the "**Ontario Act**") applies to international disputes where the place of arbitration is Ontario. Similarly, other than supporting foreign arbitrations through matters like stays of actions and the enforcement of arbitral awards, the English Act explicitly applies only where the seat of the arbitration is in England and Wales or Northern Ireland. Like most arbitration statutes, the Ontario Act and the English Act provide for default rules where the parties' agreement is silent.

Disney's Court Application

Disney applied to the Ontario Superior Court of Justice for an order that the arbitration be conducted in Toronto at JAMS (an American-based arbitral institution), in accordance with the JAMS Rules.[1] Disney relied on the Ontario Act, which allows the court to take necessary measures where the parties are unable to reach an agreement expected of them under the governing appointment procedure.

American International argued that there had been no failure to reach agreement, and thus no jurisdiction under the Ontario Act for the Court to step in. It claimed Disney's appointment of JAMS did not comply with the requirement for an *ad hoc* arbitration and, therefore, Disney had not yet properly appointed an arbitrator. It also argued that the procedure contemplated by the JAMS Rules conflicted with the English Act.

The Court dismissed Disney's application. It held Disney had not complied with the appointment procedure set out in the arbitration agreement, and therefore declined "to appoint JAMS or otherwise interfere in the appointment procedure set out in the [English Act] which was agreed to by the parties."

Disney appealed to the Court of Appeal.

Ontario Court of Appeal Upholds Lower Court Ruling

In the appeal, Disney argued that although the English Act was incorporated by reference, the procedural provisions were, by its express terms, inapplicable to arbitrations held outside the United Kingdom. It argued that the Ontario Act's rules regarding the commencement of the arbitration applied.

The Court of Appeal upheld the lower court ruling. It held:

> … the plain wording of the [insurance] contract required that where Toronto was the seat chosen for arbitration, the arbitration was to be conducted in accordance with the procedural laws set out in [the English Act]. The interpretation advanced by the appellant does not make commercial sense because it would mean that different procedural laws would apply depending on whether the arbitration took place in Toronto or Vancouver.

The Court of Appeal gave no explanation for why it would not make commercial sense for different procedural laws to apply depending on where the arbitration took place. Indeed, this situation is not uncommon, and happens anytime there is a choice of locations in an arbitration agreement.

The Court of Appeal could have instead found that although the Ontario Act governed, the parties' agreement to conduct the arbitration under the English Act meant the default rules in the English Act were to apply as if they had been specifically written into the arbitration agreement (and thus override the default rules in the Ontario Act). This would make sense of the agreement's reference to the English Act while maintaining the norm that the seat of the arbitration determines the governing arbitration legislation.

Practical Implications

Perhaps contrary to expectations, the Court of Appeal's ruling suggests that the procedural laws that apply to the conduct of an arbitration may not always correspond with the seat chosen for arbitration. The case is a reminder to parties to ensure arbitration agreements are drafted in an internally consistent manner. An arbitration agreement does not need to incorporate by reference an arbitration statute (the domestic or international statute associated with the seat will automatically apply) but, if it does, parties should ensure the legislation they reference is appropriate for the potential places of arbitration.

For further information relating to this Update, please contact any member of our Litigation Group.

[1] Disney has a related dispute against AIG Speciality Insurance Company in the United States. Disney sought and obtained a reference to arbitration by JAMS' Los Angeles office under a different arbitration agreement than the one at issue in this case.

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