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Arbitration for the Quick and Final Resolution of Disputes? Hardly.

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Cases Considered:

Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2010 ABQB 172
Flock v. Beattie, 2010 ABQB 193

At first glance, these two cases have almost nothing in common. One concerns a multimillion dollar Indonesian geothermal energy project dispute. The other involves a matrimonial property dispute following a marriage breakdown in Alberta. What they have in common is that both of them are cautionary tales for arbitration — tales of slow, expensive processes that include numerous court applications. The dispute in the former case arose in 1998 and notice of arbitration was given that same year. The dispute in the latter case arose in 1999, and the parties agreed to arbitrate in 2002. Yet we have two 2010 court decisions arising out of those arbitrations. What went wrong?

Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara

I have written about *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (*KBC*) before, in a post entitled Moot Case Continues to Wind its Way Through Alberta Courts, which is a comment on *Karaha Bodas Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 ABQB 616. The facts are summarized in narrative form in my earlier post and in outline form in the five-page Schedule A to Justice Terrance D. Clackson's 2010 decision. Nevertheless, a brief recounting is necessary in this post in order to substantiate my "slow, expensive process" point.

The *KBC* case has been litigated extensively since an award under the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) was handed down in December 2000. That award found that Pertamina (an oil and gas company owned and controlled by the Republic of Indonesia) and PLN (the Indonesian state electric utility) had breached their agreements with KBC (a Cayman Islands limited liability company owned by American power companies and other investors) to explore and develop certain Indonesian geothermal energy sites and buy the electricity generated. The two state companies were required to pay more than US$261 million in total. The problem has been collecting the award. KBC sought to confirm and enforce the award in the United States, Hong Kong, Singapore, and Alberta and, as Justice Clackson put it (at para. 2), "the parties have been battling around the world."

In these various jurisdictions and over the past ten years, Pertamina and PLN have been seeking to have the award and any court judgments based upon it set aside or annulled on the basis of fraud. The alleged fraud has been said to involve exaggerating geothermal potential, failing to disclose a political risk insurance policy, and covering up information that a prospective purchaser of KBC's interest had discounted KBC's estimates of the extent and nature of the resource. Fraud has to be alleged by Pertamina and PLN because enforcement of an award obtained by fraud is one of only seven defenses to the enforcement of foreign arbitral awards in Article V of the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention"), namely, that "recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought" (Article V.2.(b)).

KBC's Statement of Claim seeking to confirm and enforce the arbitral award in Alberta was filed in August 2002. Master Breitkreuz granted summary judgment for the recognition and enforcement of the award in December 2004, a judgment Pertamina appealed. That appeal lay dormant until 2006. By December 2006, Pertamina and PLN had exhausted all avenues of appeal in the United States and the arbitral award was paid in full by money which had been seized from bank accounts in the United States.

As a result of the arbitral award being paid in full, KBC applied to have the appeal of Pertamina and PLN of Master Breitkreuz's 2004 judgment dismissed on the basis of moot-ness. However, despite having "paid" the full amount of the award, Pertamina and PLN wanted to proceed with their appeal and posted approximately $70,000 as security for costs for the appeal. In January 2007, then Chief Justice Allan Wachowich directed that the issue of whether Pertamina's appeal was moot should be heard first, before the merits of the case were scheduled for hearing. The October 2007 decision by Justice Graesser — the decision which is the basis of my earlier post — dealt only with the issue of moot-ness. Justice Graesser held that, with the exception of the issue of costs, there were no live issues, legal or practical, which might be affected by the appeal. Nevertheless, he decided that the appeal should proceed because success by Pertamina and PLN on the appeal would reverse the orders for costs made in the courts below.

KBC then filed a Discontinuance of Action and Satisfaction Piece in Alberta in July 2008, undoubtedly hoping to put an end to things. A "Satisfaction Piece" is a document contemplated by Rule 333 of the *Alberta Rules of Court*, Alta. Reg. 390/1968, which provides that a "memorandum of satisfaction of judgment can be filed by those entitled to the benefit of a judgment. It says "we have been paid." A Discontinuance of Action, on the other hand, is a withdrawal of a claim and one may easily be filed before a matter is entered for trial (Rule 225) and after entry for trial with leave of the court or consent of all parties. An appeal may be discontinued by the appellant (Rule 525). A combined Discontinuance of Action and Satisfaction Piece is commonly used to end an action but the combination document is not provided for in the *Rules of Court*.

The payment of the arbitral award to KBC and their filing of a Satisfaction Piece and a Discontinuance of their Alberta action did not stop a hearing before Justice Clackson. Pertamina and PLN still wanted their appeal of Master Breitkreuz's 2004 judgment set down for hearing because they still want to undermine and ultimately overturn the arbitral award on the basis of the fraud they have been alleging for years. A month after KBC filed their Discontinuance and

Satisfaction Piece, Pertamina and PLN applied to enter their appeal for hearing. Various affidavits were filed and cross-examined upon in 2009. A three day hearing took place before Justice Clackson in February 2010 and he released his judgment a month later.

The issue before Justice Clackson was the impact of the cobbled-together Discontinuance of Action and Satisfaction Piece. As he noted (at para 14), the idea of discontinuing an action after judgment appears is contrary to Rule 225. The action merges with the judgment; there is no more action. The Satisfaction Piece ends the judgment, which ended the action. (See also the judgment of the Master Funduk on the same point in *Manufacturers Life Insurance Co. v. Mehra*, [1982] A.J. No. 331. As the indomitable Master said (at para. 18 in *Mehra*), "[a] dismissal of an action is itself a judgment. It is not possible to have a judgment which 'dismisses' a previous judgment in the same action between the same parties" and, at para. 29 in *Mehra*, "any fully satisfied judgment concludes the matter between the parties.")

Did the fact the 2004 judgment of Master Breitkreuz enforcing the arbitral award was under appeal change things? Could the person entitled to the benefit of the judgment unilaterally file a Satisfaction Piece and "conclude the matter between the parties"? Justice Clackson held that they could. Indeed, he indicated (at para. 15) that KBC would have been able to unilaterally end the matter even if the Pertamina appeal had gone ahead and been successful.

However, that was not quite the end of matters. There was still the issue of Pertamina's costs – the same issue that had resulted in Justice Graesse's 2007 order allowing the matter to proceed despite its moot-ness. KBC had given up any claim it had to costs when it filed its Discontinuance of Action and Satisfaction Piece, but Pertamina had incurred costs in defending KBC's action to enforce the arbitral award and to appeal Master Breitkreuz's order. Did the Discontinuance of Action and Satisfaction Piece preclude Pertamina's claim to costs it might have been entitled to if it had been successful on its appeal?

Justice Clackson, having held (at para. 15) that KBC could unilaterally end the matter by filing its Satisfaction Piece, subject to the need to address costs, went on to hold (at para. 17) that the courts nevertheless had the discretion to allow an action to continue even after the filing of the Satisfaction Piece. (The parties had agreed the courts had such a discretion after the filing of a Discontinuance of Action.) KBC could not therefore unilaterally end the matter.

Justice Clackson went on (at para. 18) to consider the factors relevant to his exercise of discretion, all of them requiring him to consider the fairness to Pertamina and PLN of their appeal not being heard. Because Justice Graesse had already held in 2007 that the action was moot, Pertamina and PLN could not mount much of an argument. Establishing fraud in Alberta would resolve nothing. Justice Clackson therefore declined to exercise his discretion to allow the action to continue.

Is this the last the Alberta courts will hear of this discontinued, satisfied and moot matter? Somehow I doubt it. The parties' agreement to resolve their dispute through international commercial arbitration, the full cost of which would have been paid for by one or both of them, has not saved the taxpayers of Alberta substantial expense in making our public justice system available to them over the past eight years.

Flock v. Beattie

This case illustrates that it does not take a multi-million dollar dispute between Cayman Island investors and the country of Indonesia to tie up court resources for years despite the existence of an agreement to arbitrate. I have also written about the Flock dispute before, in a post entitled Private Justice Delayed, which commented on two previous decisions: *Flock v. Flock*, 2007 ABCA 287 and *Flock v. Flock*, 2007 ABQB 307. This third decision, by Justice Earl Wilson, addresses the issue of an arbitrator's immunity. Whereas the source of the delay in the *KBC* case was the parties controlled by the government of Indonesia (and states are always formidable opponents), the source of the delay in the Flock dispute was, more unusually, the arbitrator, Alan Beattie, Q.C. The issue of arbitrator immunity is worth a comment in itself and so I will focus my comments about this case in this post on issues of delay and expense in arbitration.

The couple embroiled in this dispute, Arlene and Doran Flock, had married in 1982, separated in 1994 and divorced in 1999. They had a considerable amount of real property. A 6-day arbitration hearing was held before Alan Beattie in Calgary in 2003 and he rendered an award 33 months later, in July 2006. Article IX of the arbitration agreement between the couple and Beattie required the arbitrator to communicate his award to the parties within 60 days of the end of the hearing.

The former husband, Doran, applied to have the arbitrator's award set aside and in May of 2007 Madam Justice K.M. Horner did so. The arbitral award had not divided the couple's property between them. Instead, it required the former wife, Arlene, to pay Doran a dollar amount based on the 2003 value of the four parcels of real property that were their major assets. As Albertans know, the price of Calgary real estate skyrocketed between 2003 and 2006. Because of the long delay in rendering the award, the windfall was exclusively Arlene's. The delay was therefore found by Justice Horner to be prejudicial to Doran and she directed that there be a new arbitration hearing before a different arbitrator. In September 2007, Mr. Justice Peter Martin denied the wife leave to appeal Justice Horner's order.

In May of 2009, the wife sued the arbitrator, as well as her ex-husband. She sued Beattie for breach of contract, breach of a duty of good faith, negligence and breach of fiduciary duty, all based on the fact that Beattie's delay in rendering an award breached article IX of the arbitration agreement. (She also sued her ex-husband for related matters, but I am not concerned about that aspect here.) Beattie applied to have Arlene's Statement of Claim struck or her action dismissed, claiming arbitral immunity from the lawsuit.

Justice Earl C. Wilson was persuaded by the reasoning and conclusions of Justice LeBel, then of the Quebec Court of Appeal, in *Sport Maska Inc. v. Zittrer*, [1985] C.A. 386 at 393, [1985] R.D.J. 520 to the effect that "[i]n the absence of fraud or bad faith, an arbitrator enjoys immunity from civil liability." Based on Justice LeBel's broad language, Justice Wilson also held (at para. 18) that arbitral immunity was available for claims in contract as well as in tort. Finally, he held (at para. 26) that failing to follow the terms of a contract could not amount to bad faith.

Arlene's allegations of bad faith on the part of the arbitrator called her own actions throughout the law suit into question. She did not complain about the delay during the relevant time. She had a right to enforce compliance with the arbitration agreement and did not do so. She argued in favour of the award — the award that allocated the windfall of rising real estate prices to her alone — when her ex-husband attacked it. Justice Wilson concluded (at para. 54-55) that Arlene simply did not object to the arbitrator's delay until far too late and that her conduct amounted to acquiescence to the delay.

Given the arbitral immunity and the acquiescence to the delay, Justice Wilson concluded that Arlene's lawsuit disclosed no reasonable cause of action against the arbitrator and there was no genuine issue for trial in her action against him. Arlene's Statement of Claim was therefore struck. (Justice Wilson reached the same conclusion with respect to her law suit against her ex-husband).

Is Justice Wilson's judgment the last we will hear of the *Flock v. Flock* matrimonial property dispute? The three-year-old order of Justice Horner still stands, the order that set aside Beattie's award and directed a new hearing before a different arbitrator. If the parties do not settle this very old dispute themselves and if they can agree on a new arbitrator and if the new hearing is conducted fairly and expeditiously and if an award is rendered within short time lines, then perhaps this matter can be resolved without further court resources being expended.

Conclusion

People often choose to use arbitration because they think they can avoid adversarial proceedings, or avoid the delays and the rigours of a court process, or reduce their costs, or preserve their privacy. However, as these two cases illustrate, arbitration can be as contentious as litigation. Arbitration can end up delaying the resolution of disputes if one or both parties resist arbitration or if the arbitrator's award becomes the source of litigation. Arbitrations that involve court applications and re-hearings increase parties' costs beyond costs which are already higher than litigation because the parties pay for their private judge and their private hearing facilities. Privacy does not exist if an award is challenged in a public courtroom.

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