Arbitration

"Arbitration clauses can extend to non-signatories if there is a real nexus with the parties and rights in the underlying contract."

What was the most interesting development of 2023, and why?

After the Supreme Court's decision in *Uber v Heller*, arbitration clauses between unequal parties in standard-form contracts were at real risk of being declared unconscionable and therefore unenforceable. In *Davis v Amazon Canada Fulfillment Services*, the Ontario Court confirmed that there was nothing *per se* unconscionable about requiring disputes to be arbitrated, provided that there was no onerous cost or complexity to the process. Interestingly, while the Court considered that stand-alone clauses prohibiting class proceedings may be void for illegality, such a provision may be permissible if contained within an arbitration clause.

The reasoning in this case is the subject of a pending appeal — despite the fact that section 7(6) of the *Arbitration Act* provides that there is no appeal from a decision to stay a proceeding in favour of an arbitration agreement. If the Court of Appeal takes up the appellant's offer to review this stay decision, transferring a dispute out of the courts and into arbitration may become a much lengthier process.

What's the primary takeaway for businesses from the past year?

Arbitration clauses can compel non-signatories to submit to, and be bound by, arbitration if there is a real nexus with the parties and rights in the underlying contract. In 2022, the Supreme Court in *Peace River Hydro Partners v Petrowest*, held that an otherwise valid arbitration clause could be rendered inoperative in the context of an insolvency proceeding. Although the circumstances of that case were quite specific, the Court's commentary on the reach of arbitration clauses to third parties — including subsidiaries, assignees, trustees, and receivers — has wider application. In *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc*, the Alberta Court confirmed that third party beneficiaries can be bound by arbitration clauses when seeking to enforce contractual rights, even if they are non-signatories to the underlying contract.

What's one trend you are expecting in 2024?

Arbitral awards are notoriously difficult to overturn, especially if there is a "final" clause in the arbitration agreement. Appeal rights, if any, will be determined by the terms of the agreement to arbitrate and any applicable statutory law. Unsuccessful parties often have two options: an application to set aside the award (usually on procedural or fairness grounds), or an appeal on a question of law, or some other prescribed or limited grounds.

For set-aside applications, watch for the Court of Appeal's pending decision in *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*. This case is about whether an award should be set aside because of the failure of an arbitrator to disclose that they were retained by counsel in a second, unrelated arbitration proceeding. Justice Steele, in the Superior Court, held that concurrent appointments by the same firm gave rise to a reasonable apprehension of bias on the specific facts of this case. The Court of Appeal for Ontario heard the appeal in December 2023. If the lower court decision is upheld, expect more complete and detailed disclosures from arbitrators and a general refusal to take on concurrent mandates for the same firm.

For appeals, the question of whether the *Vavilov* standard applies to appeals of arbitral awards remains an unsettled question. Pre-*Vavilov*, the reasonableness standard applied. Since this landmark SCC decision, however, some courts hearing appeals from arbitral awards have moved towards the general appellate standard of correctness for questions of law, and palpable and overriding error for facts and mixed fact and law. Since arbitral appeals are typically limited to questions of law, this is an area of considerable importance. We expect to see appellate courts start weighing in on this question in 2024.

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Clients sometimes choose arbitration for cases involving complex or confidential matters that can be resolved more efficiently, expeditiously and predictably behind closed doors. In other cases, clients turn to arbitration for cross-border disputes or cases involving multiple jurisdictions, where the legal issues are typically complex and often involve competing jurisdictions and conflicting substantive law. In either case, the unrivalled trial experience that makes Lenczner Slaght a litigation leader serves our clients equally well in arbitration.