

British Columbia Supreme Court on Court Applications Rendering Arbitration Agreements Inoperable

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In the recent case **Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society, 2024 BCSC 1465**, the Supreme Court of British Columbia examined the interaction between court applications and the enforceability of arbitration agreements. The court's findings provide significant insights into how actions taken in court can potentially render an arbitration agreement inoperative.

Context and Overview

The case centered around a Joint Venture Agreement (JVA) between Montaigne Group Ltd. (Montaigne) and St. Alcuin College for the Liberal Arts Society (St. Alcuin). The JVA included a dispute resolution clause that emphasized self-settlement, mediation, and ultimately arbitration as mechanisms for resolving disputes between the parties. When disputes arose, Montaigne initiated litigation, which led to a legal examination of whether the arbitration clause in the JVA remained enforceable.

St. Alcuin applied to stay the court proceedings, arguing that the matter should be resolved through arbitration as stipulated in the JVA. Montaigne opposed the stay, contending that St. Alcuin had waived its right to arbitration by taking substantive steps in the litigation process.

Court's Analysis

The court's analysis was focused on whether St. Alcuin's actions constituted a waiver of its right to arbitrate, thereby rendering the arbitration agreement inoperative under the **Arbitration Act**. Section 7(2) of the Act mandates that a court must stay proceedings unless the arbitration agreement is found to be void, inoperative, or incapable of being performed.

The central issue was whether St. Alcuin's motion to strike Montaigne's amended notice of civil claim amounted to a "step in the proceedings," which would preclude a mandatory stay under section 7(1) of the Act. The court noted that while St. Alcuin had initially filed its notice of application to stay the proceedings before taking any other steps, the subsequent decision to bring a motion to strike was significant.

The court found that the motion to strike sought substantive relief from the court and addressed the core issues of the dispute. This action, according to the court, demonstrated an implicit affirmation of the court's jurisdiction over the matter, which was inconsistent with the intent to arbitrate. The court concluded that by bringing the motion to strike, St. Alcuin had taken a substantive step in the proceedings that precluded it from later seeking to enforce the arbitration agreement.

Key Legal Principles

The court referenced the **Supreme Court of Canada's decision in Peace River Hydro Partners v. Petrowest Corp.**, which established a framework for determining when court proceedings should be stayed in favor of arbitration. The framework includes technical prerequisites that must be met, such as whether an arbitration agreement exists and whether the court proceedings concern a matter agreed to be submitted to arbitration. The fourth prerequisite is particularly relevant

in this case: whether the party seeking a stay has taken any steps in the court proceedings.

The court also drew comparisons with the Ontario Court of Appeal's decision in **RH20 North America Inc. v. Bergmann**, where the defendant's participation in a motion to strike was found to constitute a waiver of the arbitration agreement. The Ontario court held that by seeking to strike out substantive claims, the defendant had elected to have the dispute resolved by the court, thereby rendering the arbitration agreement inoperative.

In applying these principles, the court determined that St. Alcuin's motion to strike constituted a substantive step in the litigation process. This action was found to be inconsistent with the arbitration agreement, leading to the conclusion that the agreement was rendered inoperative.

Impact on Arbitration Agreements

The court's findings highlight the importance of adherence to the dispute resolution mechanisms outlined in contracts. When a party takes a step in the court proceedings that seeks substantive relief, such as a motion to strike, this can be viewed as a waiver of the right to arbitrate. This case reinforces the principle that arbitration agreements must be respected, and parties should be cautious in how they engage with the court system when an arbitration agreement is in place.

Conclusion

In **Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society**, the Supreme Court of British Columbia provided clear guidance on the interplay between court applications and arbitration agreements. The court concluded that St. Alcuin's decision to pursue a motion to strike amounted to a step in the proceedings that rendered the arbitration agreement

inoperative. This decision underscores the need for parties to carefully consider their actions in court when an arbitration agreement governs their dispute.

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Landmark Ontario Superior Court of Justice Ruling on Arbitration Agreements and Unforeseeable Ground Conditions in Construction (CCDC)

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The recent decision in **The Trustees of the Knox Presbyterian Church Manotick v. Oakwood Designers & Builders Inc.** issued by the Ontario Superior Court of Justice on 10 June 2024 provides a compelling examination of **arbitration agreements** and the **interpretation of construction contracts**. Justice Corthorn's ruling addressed critical issues related to **dispute resolution methods**, the potential **joinder of Hydro One**, and **unforeseeable ground conditions in construction claims**. This article highlights the key aspects of the judgment, focusing on the arbitration agreement within the CCDC contract and the construction portion related to unforeseeable ground

conditions.

The Arbitration Agreement

The heart of the dispute between Knox Presbyterian Church and Oakwood Designers & Builders Inc. revolved around which dispute resolution method applied to their disagreements. The applicant argued that the CCDC14 Design-Build Stipulated Price Contract (CCDC Contract) governed the resolution process, which mandated **negotiation, mediation, and arbitration** as outlined in GC 8.1. Conversely, the respondent contended that the disputes should be resolved under Section 36 of the Oakwood General Construction Contract (Construction Contract), which required court adjudication.

Justice Corthorn sided with the applicant, emphasizing that:

“Resolution of the existing disputes between the parties falls within the scope of the CCDC Contract. The parties must therefore follow the dispute resolution process prescribed in GC 8.1 of the CCDC Contract.”

This decision underscored the priority of the CCDC Contract’s broader terms over the more specific, day-to-day operational terms of the Construction Contract. The judge noted that the CCDC Contract, developed by the Canadian Construction Documents Committee, provided a comprehensive framework intended to cover general and broad disputes, including the unforeseen discovery of a buried Hydro One power line.

Analysis of the CCDC Contract

Justice Corthorn’s analysis of the CCDC Contract revealed that it was designed to handle significant project issues, such as unforeseen ground conditions, which were at the center of the dispute. The buried Hydro One power line discovered during excavation work was classified as a **“concealed or unknown condition”** under GC 6.4 of the CCDC Contract. This clause

details the procedures for addressing unexpected conditions, including potential adjustments to the contract price.

The judge noted:

“The impact, or potential impact, of the discovery of a concealed or unknown condition on the Project site is specifically addressed in the CCDC Contract. The respondent relied on GC 6.4 to issue a notice of the resulting increase in the Contract Price.”

This reliance on the CCDC Contract for issuing a notice of increased costs further solidified the contract’s applicability in resolving the disputes.

Joinder of Hydro One

The respondent’s attempt to include Hydro One as a necessary party to the arbitration was another critical aspect of the case. Oakwood Designers & Builders argued that since the Hydro One power line was a central issue, Hydro One should be involved in the arbitration process. However, the court ruled that this determination fell within the arbitrator’s jurisdiction.

Justice Corthorn stated:

“Whether Hydro One is a necessary party to the arbitration is a matter within the jurisdiction of the arbitrator. The request for a stay of the application should be dismissed.”

This decision reinforced the **competence-competence principle**, which gives precedence to the arbitration process and the arbitrator’s authority to decide on their jurisdiction and related matters.

Unforeseeable Ground Conditions in

Construction Claims

The construction portion of the judgment highlighted the challenges posed by unforeseeable ground conditions. The discovery of the buried Hydro One power line, which halted the project until its relocation and repair, exemplified such challenges. The respondent's subsequent demand for a \$180,000 increase in the contract price due to these unforeseen conditions brought to light the importance of having robust mechanisms in place to address such issues.

GC 6.4 of the CCDC Contract, titled **"Concealed or Unknown Conditions"**, played a pivotal role in this context. It outlined the procedures for notifying the owner, investigating the conditions, and making necessary adjustments to the contract. Justice Corthorn's ruling emphasized that:

"GC 6.4 sets out the rights of the parties in the event of the discovery of concealed or unknown conditions at the Project site."

This clause ensures that both parties have clear guidelines to follow, which can help mitigate disputes arising from unforeseen ground conditions.

Conclusion

The judgment in **The Trustees of the Knox Presbyterian Church Manotick v. Oakwood Designers & Builders Inc.** is a landmark case that highlights the importance of clearly defined arbitration agreements and the proper interpretation of construction contracts. By affirming the applicability of the CCDC Contract and addressing the issues surrounding the joinder of Hydro One and unforeseeable ground conditions, Justice Corthorn's decision provides valuable insights for future construction disputes. The ruling underscores the necessity of adhering to agreed-upon dispute resolution processes and the critical role of comprehensive contractual

frameworks in managing complex construction projects.

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Ontario Court of Appeal Clarifies the Bounds of 'Constructive Fraud' in Arbitration Awards

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Brief

The Ontario Court of Appeal's decision in *Campbell v. Toronto Standard Condominium Corporation No. 2600*, 2024 ONCA 218 critically examines the conceptual boundaries of "fraud" within the ambit of the Arbitration Act, 1991. At the heart of this deliberation is whether "constructive fraud" falls under the legislative framework's definition of "fraud," particularly in sections 46(1)9 and 47(2), concerning the setting aside of arbitral awards and the exceptions to the appeal time limit, respectively.

Facts

The dispute traces back to the alleged breach by the respondents, Walter Campbell and Olakemi Sobomehin, of condominium rules against short-term rentals, culminating in an arbitration award in favor of Toronto Standard Condominium

Corporation No. 2600 (the "Condo Corp."), ordering costs of \$30,641.72. The respondents sought to vacate the award, invoking "constructive fraud" due to the Condo Corp.'s expansion of arbitration issues beyond agreed terms.

Arguments

In the Superior Court (the prior level of litigation), the application judge approached the term "fraud" within the Arbitration Act, 1991, with a broader lens, concluding that it encompassed "constructive fraud."

The Condo Corp. challenged the Superior Court's inclusion of "constructive fraud" within the statutory interpretation of "fraud" in the Act, arguing for a narrower, conventional understanding that excludes such an expansive interpretation. The respondents countered, urging a broader, equitable reading of "fraud" to encompass instances of "constructive fraud," aimed at preserving fairness and justice within the arbitration process.

The appellants, Condo Corp., posited that the statutory language of the Act does not support the inclusion of "constructive fraud" within the ambit of "fraud," emphasizing the need for a strict construction that aligns with the Act's objectives of efficiency and finality in arbitration.

Court Interpretation

The Ontario Court of Appeal anchored its reasoning in the statutory language and precedent, underscoring a principle of legal interpretation that the same words within a statute are presumed to have consistent meanings across its provisions. This presumption applies directly to the usage of "fraud" in sections 46(1)9 and 47(2) of the Act, implying a need for a consistent, narrow interpretation aligned with established legal definitions.

The court observed that "fraud" possesses a well-established

meaning in common law, typically requiring an element of dishonesty or intent to deceive. The Supreme Court has clarified that statutory terms with well-understood legal meanings should be interpreted in line with those meanings unless the legislature explicitly indicates a broader or different application. The Superior Court's inclusion of "constructive fraud," a concept markedly broader and not necessitating dishonesty for its establishment, into the definition of "fraud" was found to deviate from this principle. The court reasoned that if the legislature had intended for "fraud" within the Act to include "constructive fraud," it would have explicitly done so.

Moreover, the Court of Appeal considered the broader implications of interpreting "fraud" to include "constructive fraud" within the framework of arbitration disputes. It highlighted that such an interpretation would be incongruent with the overarching objectives of the Arbitration Act, 1991, namely efficiency and finality. The Act and relevant case law emphasize a narrow basis for court intervention in arbitration awards to prevent the arbitration process from becoming merely a precursor to prolonged judicial proceedings. Expanding the definition of "fraud" to include "constructive fraud" could potentially open the floodgates to strategic litigation efforts, undermining the arbitration process's efficiency and finality.

The court also pointed out that, in this particular case, the respondents attempted to utilize the broader interpretation of "fraud" to circumvent the strict 30-day time limit for contesting arbitration awards set by section 47(1) of the Act. This strategic move was criticized as it sought to exploit the judicial system to review the arbitrator's decision under the guise of "constructive fraud." The court deemed such actions as contrary to the spirit of arbitration, which relies on the finality and binding nature of arbitration awards, barring exceptional circumstances like actual fraud.

In its decision, the Court of Appeal firmly rejected the Superior Courts' interpretation that "constructive fraud" falls within the scope of "fraud" under the Arbitration Act, 1991. It concluded that such an interpretation not only lacks statutory and jurisprudential support but also poses significant risks to the arbitration framework's intended efficiency and finality. The court thereby restored the original arbitral award, reinforcing the narrow path for legal recourse against arbitration decisions, strictly confined to instances of actual fraud as traditionally understood in legal practice.

Significance

The *Campbell v. Toronto Standard Condominium Corporation No. 2600* judgment marks a pivotal moment in clarifying the distinction between "fraud" and "constructive fraud" within the Arbitration Act, 1991. By explicitly excluding "constructive fraud" from the ambit of "fraud," the Ontario Court of Appeal fortifies the arbitration process's efficiency and finality. This delineation not only restricts the avenues for challenging arbitral awards but also reinforces the paramountcy of adhering to the explicit terms of arbitration agreements. Consequently, this decision shapes future arbitration conduct, emphasizing the necessity for parties to precisely define their terms of engagement and for arbitrators to navigate disputes with a clear understanding of the boundaries set by statutory law.

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Crypto Disputes in Arbitration or Court? Impact of the Lochan v. Binance Judgment

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Introduction to the Case

In the case of Lochan v. Binance Holdings Limited, 2023 ONSC 6714, the Ontario Superior Court of Justice addressed a motion by Binance Holdings Limited to stay proceedings in favor of arbitration, as per the arbitration agreement digitally signed by the plaintiffs and potential class members. The plaintiffs, Christopher Lochan and Jeremy Leeder, initiated a proposed class action against Binance, alleging the sale of crypto derivatives products to Canadians without the necessary regulatory compliance, specifically the failure to file or deliver a prospectus as required by the Ontario Securities Act.

The Court's Deliberation

Justice E.M. Morgan presided over the matter, hearing arguments that touched upon the enforceability of the arbitration agreement under the International Commercial Arbitration Act and the UNCITRAL Model Law on International Commercial Arbitration. Binance argued for the stay based on the general principle that courts should uphold the terms of commercial contracts, including arbitration clauses. The plaintiffs countered by asserting that the arbitration agreement was void and inoperative on the grounds of being contrary to public policy and unconscionable.

Public Policy and Unconscionability Concerns

Justice Morgan's analysis focused on two main issues: whether the arbitration agreement was contrary to public policy and whether it was unconscionable. On public policy grounds, the court found that the arbitration agreement was unenforceable due to its potential to effectively immunize Binance from litigation by imposing prohibitive costs on claimants, particularly given the small average investment by Canadian crypto investors. The choice of Hong Kong as the arbitral forum, with no substantive connection to the parties or the dispute, was seen as particularly problematic.

The Court's Decision

On the issue of unconscionability, the court again found the arbitration agreement unenforceable. The agreement was part of a standard form contract, with terms non-negotiable by the plaintiffs, and contained provisions that could impose significant financial burdens on claimants seeking to resolve disputes. The court highlighted the inequality of bargaining power and the lack of transparency regarding the arbitration process's costs and logistics as factors contributing to the agreement's unconscionability.

Implications for the Crypto Industry

Ultimately, Justice Morgan dismissed Binance's motion for a stay of proceedings, allowing the class action to proceed in court. This decision underscores the judiciary's willingness to scrutinize arbitration agreements in standard form contracts, particularly in the context of consumer protection and the accessibility of legal remedies for individuals against large corporations.

Global Impact and Regulatory Considerations

The judgment in *Lochan v. Binance Holdings Limited* has implications that extend beyond the borders of Ontario or even

Canada, touching on the global landscape of litigation against cryptocurrency companies. The decision to not enforce the arbitration agreement on the grounds of it being contrary to public policy and unconscionable sets a precedent that could influence courts in other jurisdictions when faced with similar claims against cryptocurrency entities.

The Tension Between Global Operations and Local Laws

The ruling highlights the tension between the global nature of cryptocurrency operations and the local legal frameworks within which they must operate. Cryptocurrency companies, by their nature, transcend traditional geographic boundaries, often leading to complex legal questions about jurisdiction, regulatory compliance, and consumer protection. The Ontario Superior Court of Justice's decision underscores the need for such companies to carefully consider the legal environments of the countries in which they operate, particularly regarding standard form contracts and arbitration clauses.

Future Directions for Crypto Disputes

This judgment may encourage courts in other jurisdictions to take a closer look at arbitration agreements that could potentially shield cryptocurrency companies from litigation by imposing onerous conditions on claimants. It signals to these companies the importance of ensuring that their contracts, especially arbitration clauses, are not only clear and transparent but also fair and equitable in the eyes of the law.

Conclusion: Balancing Consumer Interests and Industry Innovation

Furthermore, the decision may prompt regulatory bodies and legislators around the world to scrutinize the practices of cryptocurrency companies more closely, potentially leading to more stringent regulations and oversight to protect investors. This could result in a more standardized approach to the

regulation of crypto assets and a clearer framework for resolving disputes between consumers and cryptocurrency companies.

The *Lochan v. Binance Holdings Limited* judgment could have significant ramifications for the global cryptocurrency industry, potentially affecting how companies structure their user agreements and how disputes are resolved across jurisdictions. It serves as a reminder of the legal complexities and challenges that arise in the rapidly evolving world of digital assets and the need for a balanced approach that protects both the interests of consumers and the innovation that drives the cryptocurrency sector.

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Designer / Architect Delay Claims: Insights from the Ontario Superior Court of Justice

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In the realm of construction, project delays are inevitable yet potentially costly occurrences. The ability to accurately identify and claim these delays is a crucial skill for any

party involved in a construction project. A recent case from the Ontario Superior Court of Justice in *Onespace Unlimited Inc. v. Plus Development Group Corp.* sheds light on the evidentiary standards required to substantiate claims of project delays, particularly for claims related to design errors and omissions.

Overview

In this case, the owner/developer claimed a sum of about \$760,000 for a 100-day extended duration delay allegedly caused by the architect due to various design errors and omissions. The alleged errors encompassed a wide range of issues including missing gas lines, incorrect details for a windowsill, inadequate personnel, and poor work review, among others.

However, the court found several shortcomings in the owner/developer's claim. Firstly, there was a lack of clarity in defining the alleged design errors and omissions. The owner/developer failed to identify the specific drawings containing these errors, which is a fundamental step in substantiating a claim of design-related delays. Without pinpointing the exact source of the errors, it becomes a herculean task to prove the alleged delays.

Furthermore, the court noted a significant lack of evidence supporting the claim that the architect was responsible for these errors and omissions. The days of delay claimed were merely unsubstantiated estimates provided by an individual from the owner/developer's side, which were reviewed but not corroborated with concrete evidence demonstrating the impact on the overall project duration.

The court also highlighted an essential distinction between a delay event and an overall project delay. A delay in a particular activity does not necessarily translate to an extended project duration. For a claim of extended duration to

hold water, a causal link between the alleged delays and the extended project duration is imperative. The owner/developer's failure to provide evidence corroborating the delay from the alleged errors and omissions was a significant blow to their claim.

Moreover, the court found that the owner/developer did not meet the evidentiary onus of demonstrating any breach of contract or the standard of care by the architect, which would support liability for the alleged project delays. This underlines the necessity of a well-documented and evidence-backed claim when alleging project delays.

This case serves as a stark reminder of the rigorous evidentiary standards required to successfully claim project delays. It emphasizes the importance of clear documentation, precise identification of errors, and the provision of cogent evidence to support claims of project delays in the complex landscape of construction disputes.

Takeaway

Evidencing delay caused or not caused by design errors and omissions generally requires a delay claim methodology, which in most cases is a schedule analysis. In a schedule analysis aimed at identifying delays due to design errors and omissions, the process begins with a thorough review of the project's baseline schedule and the as-built schedule. The baseline schedule represents the initial plan, while the as-built schedule reflects what actually transpired on the ground.

The crux of the analysis lies in identifying the design errors and omissions through a careful examination of the design drawings and other related documentation. Once these errors are identified, they are mapped to the specific activities in the schedule they affected. This mapping is crucial as it establishes the link between the design discrepancies and the

activities that were delayed as a result.

The next step involves quantifying the delay caused by each design error or omission. This is achieved by comparing the planned and actual completion dates of the affected activities. The difference in completion dates illustrates the extent of delay attributable to the design errors.

Furthermore, the analysis delves into how these delays impacted the overall project timeline. It is not just about identifying the days of delay, but also understanding how these delays affected the sequence of activities, especially those on the critical path which directly impact the project's completion date.

The data extracted from this analysis provides a clear illustration of the delay days caused by design errors and omissions. It evidences the direct and indirect impacts of these errors on the project schedule, thereby providing a solid foundation for any claims or discussions related to project delays.

In essence, the schedule analysis serves as a practical tool to not only identify and quantify the delays but also to provide a clear, evidence-backed narrative of how design errors and omissions contributed to these delays.

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Supreme Court of British Columbia Weighs In: Arbitrator Discretion in Evidence Review

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Introduction

In a recent judgment issued on 28 August 2023, the Supreme Court of British Columbia in the case of *Ball v Bedwell Bay Construction Ltd.* has provided invaluable insights into the complex interplay between procedural fairness and substantive review in arbitration proceedings. This article aims to dissect these critical elements by closely examining this landmark ruling. Drawing upon key passages and principles outlined in the judgment, we will explore the tests and criteria that both arbitrators and courts employ to ensure procedural fairness and conduct substantive review. This novel discussion serves as a comprehensive guide to understanding the current legal landscape of arbitration in Canada, particularly in light of the court's nuanced approach to the arbitrator's discretion in evidence review.

Procedural Fairness in Arbitration

Arbitrators are tasked with ensuring a fair process. As stated in "*Ball v Bedwell Bay*," the arbitrator took "exceptional care to ensure the proceedings before him were fair" by setting clear deadlines for evidence submission and extending the hearing time from one hour to four hours (*Ball v Bedwell Bay Construction Ltd.*, 2023 BCSC 1470, paras. 32-34).

Courts employ specific criteria for evaluating procedural fairness. In “Ganitano v. Yeung,” the court noted that procedural fairness requires that reasons “allow the parties to know why, how, and on what evidence a decision-maker reached his or her decision” (Ganitano v. Yeung, 2016 BCSC 2227, para. 35).

Substantive Review in Arbitration

Arbitrators are responsible for making decisions that are substantively sound. They must consider the facts and apply the relevant laws. In “Speckling v. British Columbia,” the court stated that it may intervene only if the arbitrator’s findings are “openly, clearly, evidently unreasonable” (Speckling v. British Columbia (Workers’ Compensation Board), 2005 BCCA 80, para. 39). The focus is not on re-weighing the evidence but on assessing whether the conclusions are supported by the facts and the law.

“Simply put, a decision-maker is not required to address every piece of evidence or to make findings on every element or claim put before them” as noted in “Ball v Bedwell Bay” (Ball v Bedwell Bay Construction Ltd., 2023 BCSC 1470, para. 36). This principle is rooted in the understanding that arbitrators are best positioned to determine what evidence is most pertinent to the case at hand.

Distinguishing Between Procedural Fairness and Substantive Review

While procedural fairness focuses on the manner in which the arbitration was conducted, substantive review is concerned with the correctness of the decision. Courts are generally more willing to intervene on grounds of procedural unfairness than substantive errors, given the deference accorded to the arbitrator’s expertise.

The arbitration process is a delicate balance of procedural fairness and substantive review, each with its own set of

tests and criteria. Courts serve as the guardians of this process, ensuring that it adheres to the principles of justice and equity. While the tests for procedural fairness and substantive review may evolve, the core principles remain constant: a commitment to a fair process and a just outcome.

The Role of Guidelines and Statutory Provisions

Arbitrators often rely on guidelines and statutory provisions to navigate the complex terrain of procedural fairness and substantive review. For instance, the MHPTA served as a crucial framework in the “Ball v Bedwell Bay” case, providing the arbitrator with criteria for evaluating tenancy agreements¹.

Courts also use these guidelines as a benchmark for their own review. In “Ball v Bedwell Bay,” the court found the arbitrator’s interpretation of the MHPTA to be reasonable, stating that the definition of a tenancy agreement “clearly captures the connection between an individual and a specific site” (Ball v Bedwell Bay Construction Ltd., 2023 BCSC 1470, para. 42).

The Arbitrator’s Discretion: A Balancing Act

Arbitrators must weigh various factors to arrive at a decision that is both procedurally fair and substantively sound. In “Ball v Bedwell Bay,” the arbitrator considered factors such as the nature of the home, the type of rent, and the park rules, among others (Ball v Bedwell Bay Construction Ltd., 2023 BCSC 1470, paras. 46-52). The court found this weighing of factors to be reasonable, stating that the arbitrator reached his conclusion “on a principled, well-reasoned basis” (Ball v Bedwell Bay Construction Ltd., 2023 BCSC 1470, para. 54).

The arbitration process is a symbiotic relationship between procedural fairness and substantive review. Arbitrators are tasked with the challenging role of balancing these elements,

and courts serve as the final arbiters, ensuring that the principles of justice and equity are upheld.

In conclusion, the arbitration process is a complex but necessary mechanism for resolving disputes outside the traditional court system. It relies on a delicate balance of procedural fairness and substantive review, guided by established tests and criteria. While arbitrators have the discretion to focus on the most relevant evidence, this discretion is not unlimited and is subject to judicial review to ensure that it is exercised in a manner that is both fair and legally sound.

This comprehensive analysis underscores the intricate balance that must be maintained to ensure a fair and equitable arbitration process. It also highlights the critical role of judicial oversight in preserving the integrity of this alternative dispute-resolution mechanism.

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Actual Acceleration and Constructive Acceleration in Canadian Construction Claims

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When one treads the intricate path of construction claims, a

keen understanding of concepts such as 'actual acceleration' and 'constructive acceleration' becomes crucial. While these terms may appear to be mere technical jargon at first glance, they in fact encapsulate distinct scenarios that arise from deviations in schedule and unforeseen delays, which can profoundly impact the complex machinery of a construction project. A construction contract, much like an orchestra, requires all its elements to work harmoniously towards the culmination of a performance—in this case, the successful completion of a project. An irregularity or delay can disrupt this harmony, necessitating adjustments or, in our terms of interest, 'acceleration'.

The principles of 'actual' and 'constructive' acceleration are not only elucidated in textbooks or legal dictionaries but have also been tested and refined in the crucible of the courtroom. One such illuminating case that explicates these concepts in the Canadian legal milieu is the 2002 British Columbia Supreme Court (BCSC) case, *Golden Hill Ventures Ltd. v. Kemess Mines Inc.*

Actual Acceleration: An Examination and its Implications

In the construction world, 'actual acceleration' describes an environment where the project owner, in response to unforeseen and excusable delays, directs the contractor to hasten the pace of work, with the aim of completing the project before the extended deadline. As the term 'actual' suggests, this acceleration arises from a concrete instruction by the owner, making it a tangible aspect of project management.

The BCSC decision in *Golden Hill Ventures Ltd. v. Kemess Mines Inc.* succinctly summarizes this concept. However, to truly grasp the implications and nuances of 'actual acceleration', one must delve into the precedents from which it emerged. A particularly informative case in this regard is *Morrison-Knudsen Company v. British Columbia Hydro & Power Authority*, in which the concept of 'acceleration' was elaborated by

Justice Macdonald. He defined acceleration in a construction contract as the act of 'speeding up the work' or 'increasing the rate of performance' to surmount the challenges of delays and to ensure the work is completed within the stipulated contract dates.

In this expansive understanding, actual acceleration isn't just a one-dimensional response to delays; it covers a spectrum of situations where delays can be attributed either to the contractor, the owner, or a combination of the two. It serves as a mechanism to foster equitable treatment of the parties involved. In instances where the delays are squarely within the owner's sphere of responsibility, and despite these delays, the contractor is compelled to accelerate, the additional costs borne by the contractor become the owner's liability. This principle of actual acceleration underscores the importance of fairness in contract execution and enshrines the idea that the financial burdens arising from owner-induced delays should not be shouldered by the contractor.

The realm of actual acceleration, therefore, is not merely about catching up with lost time. It is about understanding the root causes of the delays, attributing responsibility appropriately, and ensuring that the eventual financial implications are justly addressed. It forms a cornerstone of construction contract management by emphasizing fair treatment and the sharing of risks and responsibilities between the contractor and the owner.

Constructive Acceleration: An Explication and its Ramifications

The concept of 'constructive acceleration' introduces an additional layer of complexity to our understanding of acceleration within construction contracts. The term 'constructive' implies a scenario where an acceleration is inferred rather than being explicitly ordered, illustrating the nuanced interplay between contract management and legal

interpretation.

In this vein, constructive acceleration is born out of circumstances where there has been an excusable delay which, for whatever reason, the owner refuses to accept, thus pressing for adherence to the original completion date. This may occur even when an extension to the project schedule could have been a reasonable and feasible solution. Consequently, the contractor is forced to operate within a compressed timeline, effectively 'accelerating' the work pace without explicit instructions to do so.

This somewhat abstract concept is more easily understood through concrete legal precedents. A prominent case that serves to elucidate the essence of constructive acceleration is *W.A. Stevenson Construction (Western) Ltd. v. Metro Canada Ltd.* Here, the contractor was bound to the original milestone dates, despite facing a range of external challenges such as adverse weather conditions and a delay in the removal of buildings by the owner. In this context, the insistence of the owner on meeting the original deadline obligated the contractor to expend additional resources, leading to a clear-cut instance of constructive acceleration.

The case illustrates that a strict adherence to original contract timelines, even in the face of external delays or hindrances, can inadvertently lead to a situation where the contractor is essentially running a race against time, striving to maintain pace with the project schedule. Here, the constructive acceleration becomes a byproduct of a rigid contract enforcement approach, which fails to account for the evolving dynamics of a construction project.

In conclusion, constructive acceleration represents a delicate balancing act between contractual obligations and the practical realities of project execution. It showcases the need for flexibility and mutual understanding between the owner and the contractor, with an emphasis on accommodating

unforeseen changes in project dynamics.

Judicial Interpretation and Practical Implications

The concepts of actual and constructive acceleration aren't just theoretical constructs. They carry profound implications for project management, financial risk, and dispute resolution within the sphere of construction contracts. A meticulous analysis of judicial decisions is essential to discern the practical significance of these concepts.

The principles derived from the cases of Morrison-Knudsen and W.A. Stevenson Construction underline the importance of equitable treatment and reasonable adjustment of timelines. In these cases, the owners imposed a rigid completion date despite their own delays, which under usual circumstances, would have warranted extensions for the contractors. As a result, the contractors had to apply more resources, such as equipment and personnel, to speed up project completion. The owners, therefore, were obliged to indemnify the contractors for these additional costs.

Interestingly, the courts' understanding of acceleration was not confined to the whole project but extended to 'parts of the work'. The ruling in Golden Hill Ventures Ltd. v. Kemess Mines Inc. emphasized that acceleration of certain sections of the work, triggered by the necessity to adhere to an updated schedule, was sufficient to establish an obligation to compensate. In essence, this ruling extends the scope of acceleration, placing it not just at the macro-level of the entire project but also at the micro-level of individual work components.

In conclusion, it is essential to approach actual and constructive acceleration not merely as theoretical constructs, but as practical tools for managing and resolving construction disputes. They require owners to balance their desire for swift project completion with the realities of

excusable delays and the financial burdens they impose on contractors. These principles promote fair treatment and risk-sharing, holding owners accountable for delays within their control and preventing them from enforcing inflexible deadlines. By doing so, they ensure that the wheels of the construction industry keep turning, even in the face of unexpected roadblocks.

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Dubai Court finds Canadian company and its owner liable in USD 7M cryptocurrency dispute

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Background

The plaintiff, a Canadian businessman, filed a suit before the Dubai Primary Court against the first defendant, an individual who owned the second defendant, a company established according to the laws of British Columbia, Canada. The company operated in the cryptocurrency market, facilitating the buying and selling of various currencies using fiat currencies such as Canadian and US dollars.

In early 2018, the first defendant traveled from Canada to the United Arab Emirates and met the plaintiff at a hotel in Dubai. Following their discussion, an agreement was reached wherein the company owned by the plaintiff, would use the services of the Canadian company (second defendant) to facilitate electronic transfer payments. It was agreed that the second defendant would act as a third-party payment processor for both the plaintiff personally and his company for payments and wire transfers.

As a part of the agreement, the plaintiff opened a trading account with the second defendant. The plaintiff would transfer Bitcoin or any other currency to the second defendant using his personal account. The terms and conditions allowed the plaintiff to cancel the account and withdraw all his balances at any time.

By the end of 2018, the second defendant delayed several transfers and claimed to have sent electronic transfer confirmation forms to the plaintiff, but the plaintiff received none of these transfers. In early 2019, the plaintiff emailed the first defendant, pointing out the pending transfers that lacked tracking codes. He asked the first defendant to provide the tracking numbers for these transfers. The first defendant promised to send them to the plaintiff, but the plaintiff received neither the tracking numbers nor the transfers that the first defendant claimed to have sent.

In mid-2019, the plaintiff attempted to withdraw his cryptocurrency assets from his account with the second defendant. However, the first and second defendants refused to hand over the cryptocurrency assets and wrongfully retained them. The value of the cryptocurrencies in the account of the plaintiff with the second defendant amounted to USD 6,782,459.96, representing the average price of the cryptocurrencies in said account during the period from February 2021 to March 2021 according to details in an expert report submitted by the plaintiff.

Procedures

The court deliberated the submissions and issued an interim order to appoint a financial expert to report on the technical submissions of the plaintiff.

The court-appointed expert relied on details of the digital currency wallet of the plaintiff, extracted from the website of the Canadian company (the second defendant). The details contained the balance of the digital currencies and their value at the dates of transfer and claim proceedings. The total value of the digital currency balance as of the date of transfer to the second defendant was found to be USD 2,711,570.98 and as of the date of the preliminary court-appointed expert report was USD 7,460,838.38.

Analysis

The court found a definite relationship between the parties, evidenced by the email correspondence exchanged between the plaintiff and the first defendant. Furthermore, the cryptocurrency wallet details, obtained from the website of the Canadian company (second defendant), including the cryptocurrency balance and its value, played a crucial role in the proceedings.

The court accepted the values of USD 2,711,570.98 and USD 7,460,838.38 as points for formulating the quantum of the amount claimed.

The plaintiff had snapshots of his trading account with the second defendant, which confirmed the balance demanded in the lawsuit. As pointed out by the court-appointed expert in his report, this balance was owed to the plaintiff by both defendants, based on an email sent by the first defendant to the plaintiff in early 2019. This correspondence acknowledged the outstanding balance in the account of the plaintiff, including the existence of cryptocurrencies in the crypto wallet.

Moreover, the plaintiff presented extracts from the accounting software used by both defendants, showing the balances of the crypto wallet belonging to the plaintiff and the deposited cryptocurrencies. The court found that this electronic correspondence and documents pointed to the liability of the first and second defendants for the crypto wallet belonging to the plaintiff.

Disposition

Based on these findings, the court deduced that the first defendant, as the owner of the second defendant, controlled the tracking numbers of the transfers and the cryptocurrencies in the crypto wallet of the plaintiff.

The court found the first and second defendants jointly liable to pay the plaintiff an amount of USD 6,782,459.96 or its equivalent in Emirati Dirham, along with legal interest at an annual rate of 5% from the date of judgment until the full payment.

Takeaway

This recent judgment by the Dubai Primary Court marked a significant precedent, displaying the ability of the Dubai Courts to pierce the corporate veil of foreign companies, in this case, a Canadian company, holding its owner personally liable. This judgment highlights the universal reach of Dubai Courts, effectively adjudicating multi-jurisdictional disputes, irrespective of the place of incorporation or domicile of the entities involved.

In this case, the decision by the Dubai Primary Court to hold the owner of the Canadian company personally responsible signifies a significant expansion of Court authority over international entities in cryptocurrency disputes, demonstrating the commitment by the Dubai Courts to ensuring justice and enforcing liability.

This decision also highlights the acceptance of the Dubai Courts of sophisticated evidence regarding crypto transactions and crypto wallets. This development can be regarded as progressive in the rapidly evolving digital world of today.

The reliance by the Court on digital currency balances, the examination of email correspondences, and data from accounting software indicate a keen understanding and acceptance of digital and cryptographic evidence.

As the world continues to grapple with the legal implications and complications of cryptocurrencies, the judgment by the Dubai Courts represents a significant step towards developing an effective judicial framework that can handle cases involving international crypto transactions. The ruling sends a clear message that the Dubai Courts are capable of providing justice in cases involving cryptocurrencies, despite their inherent complexity and the international jurisdictional issues involved.

The progressive stance and competent handling of such complex cases by the Dubai Courts are likely to attract more international crypto-related cases, thereby further establishing Dubai as a global hub for resolving disputes in the realm of digital currencies, and reaffirming the commitment by Dubai to innovation, technological advancement, and its position as a pioneering legal jurisdiction in the age of digital finance.

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Korean Investment in Canada: The Gateway to the U.S. EV Market

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Investing in Canada: A Strategic Move for Korean Companies

Recent developments in international agreements and U.S. legislation present unique opportunities for Korean companies investing in Canada's clean energy sector. The Memorandum of Understanding (MOU) between Canada and Korea announced in May 2023 has laid a firm foundation for Korean companies to establish secure and resilient supply chains in the critical minerals sector, which is central to clean energy technologies, including electric vehicles (EVs).

Investing in Canada not only provides Korean companies with access to rich mineral resources but also allows them to navigate within a country known for its robust legal frameworks, political stability, and transparent business practices. Moreover, it places them at a vantage point to leverage the provisions of the U.S. Inflation Reduction Act (IRA) and the United States-Mexico-Canada Agreement (USMCA).

Accessing the U.S. Market through USMCA

The USMCA, a trilateral agreement between the United States, Mexico, and Canada, provides a seamless pathway for goods produced in Canada to enter the U.S. market. Through the implementation of USMCA, Korean companies investing in Canada can tap into the U.S. market, the world's second-largest for EVs, without facing prohibitive trade barriers. This strategic positioning opens the gateway to a burgeoning EV market with

the potential for exponential growth.

Capitalizing on the U.S. Inflation Reduction Act

The IRA is another substantial development favoring Korean companies in Canada. The act extends the EV tax credit of \$7,500 through 2032 for eligible consumers, offering a major incentive for EV adoption. However, a critical aspect of this act revolves around the specifications for availing of the credit.

Half of this credit—\$3,750—is tied to vehicles with batteries manufactured or assembled in North America. By investing in battery manufacturing facilities in Canada, Korean companies can fulfill this stipulation and ensure that the EVs they contribute to will be eligible for this attractive tax credit.

Further, the IRA demands an increase in the percentage of the value of components over time, starting with 50% in 2023 to 100% by 2029. Investing in Canadian manufacturing allows Korean companies to meet these increasing requirements, thereby ensuring their continuous eligibility for the tax credit.

Riding the Wave of Clean Energy Transition

The clean energy transition, strengthened by the Canada-Korea MOU and the U.S. Inflation Reduction Act, presents a golden opportunity for Korean companies. By investing in Canada, they can participate in a growing market, align their operations with the shift towards sustainability, and gain a strategic advantage in the expanding North American EV market.

Crafting a Sustainable Supply Chain

One of the significant benefits that the Canada-Korea MOU offers Korean companies is its emphasis on cooperation across critical mineral supply chains. Canada, blessed with an abundance of critical minerals essential for EV batteries,

becomes an attractive destination for Korean battery manufacturers and suppliers.

By setting up operations in Canada, Korean companies can secure a resilient supply chain that ensures a steady flow of these critical minerals. It not only aids in streamlining their operations but also contributes to sustainability goals by minimizing the environmental footprint associated with long-distance transportation of raw materials.

Driving Innovation through Cooperation

The MOU outlines areas of cooperation between Canada and Korea in trade, investment, and information exchange related to critical mineral processing and recycling. This means that Korean companies can gain access to innovative Canadian technologies and research in these areas, fostering a climate of mutual growth and learning.

Collaborative ventures could spur the development of new, more efficient battery technologies, recycling methods, and advanced manufacturing practices. This shared knowledge can enhance competitiveness and accelerate the transition to cleaner energy sources.

Making the Most of the North American Free Trade Zone

The comprehensive provisions of USMCA make it a linchpin in the expansion strategy of Korean companies. USMCA has effectively created a massive free-trade zone in North America, opening new avenues for Korean businesses to enhance their market reach.

By setting up manufacturing facilities in Canada, Korean companies can benefit from the USMCA provisions, ensuring seamless access to the American and Mexican markets. The geographical proximity to these markets could result in lower logistics costs and quicker response times, ultimately bolstering their competitiveness.

Encouraging EV Adoption through Financial Incentives

The IRA provisions offer substantial financial incentives for EV buyers, thereby encouraging widespread EV adoption. By manufacturing batteries in Canada, Korean companies can ensure their products qualify for these tax credits, making them more affordable and appealing to consumers.

Furthermore, the IRA's emphasis on locally sourced and manufactured components is set to spur demand for North American-made batteries. Korean companies with manufacturing units in Canada stand to gain immensely from this growing demand.

Conclusion: A Future-Proof Investment Strategy

By investing in Canada, Korean companies can strategically position themselves to benefit from the lucrative North American EV market, bolstered by supportive legislative frameworks and international agreements. In the grand scheme, it's not merely an investment in a country; it's an investment in a sustainable and prosperous future in the global clean energy sector. By harnessing these opportunities, Korean companies are poised to become leading players in the worldwide EV revolution, proving that smart, strategic investments can drive both economic growth and environmental sustainability.

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Disruption and prolongation construction claims between Canada and the UK

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In the construction industry, disputes often arise due to delays and disruptions, leading to claims for additional time or costs. This article discusses the distinction between disruption and prolongation claims in the United Kingdom (UK) and Canada, with a focus on the application of formulas considering the basis of production, productivity, and efficiency in the pricing of construction work.

Disruption Claims

Disruption claims arise when a contractor experiences disturbances or hindrances in the construction process, leading to a loss of productivity and efficiency. These claims focus on the additional costs incurred due to the need for extra resources or altered work methods resulting from the disruption.

In both the UK and Canada, disruption claims often rely on the "Measured Mile" approach to quantify losses. This approach compares the contractor's productivity during an unaffected period (the "measured mile") to the productivity during the disrupted period. By doing so, it calculates the loss of efficiency and translates it into financial terms.

In the UK, the Hudson Formula is sometimes used as an alternative or supplement to the Measured Mile approach. The Hudson Formula calculates the loss of productivity by comparing the planned output to the actual output and

multiplying the difference by the agreed rate per unit of output.

Canadian courts may consider the concept of “cumulative impact,” where multiple disruptions accumulate and cause a more significant overall effect on the project. This approach recognizes that individual disruptions may not be significant in isolation, but their combined effect can have a substantial impact on the efficiency of the project.

Prolongation Claims

Prolongation claims pertain to the extension of time required to complete the project and the additional costs incurred by the contractor due to the delay. These claims focus on the financial consequences of the extended project duration, such as increased overheads and financing costs.

In both the UK and Canada, prolongation claims often rely on the Emden Formula or the Eichleay Formula to calculate the additional costs incurred.

The Emden Formula calculates the additional overhead costs by dividing the total overhead costs by the original contract period and multiplying the result by the number of days of delay.

The Eichleay Formula, a more complex method, allocates the contractor’s overhead costs to the project on a pro-rata basis, considering the project’s share of the contractor’s total business during the delay period.

Key Distinctions

While the approaches in the UK and Canada treat both claims similarly, the formulas used to calculate losses may vary. The Measured Mile approach is common for disruption claims in both jurisdictions, while the Hudson Formula is more prevalent in the UK. For prolongation claims, the Emden and Eichleay

formulas are commonly used in both jurisdictions.

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