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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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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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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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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Five years on: developments and dispute resolution under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA)

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Overview

The Canada-European Union Comprehensive Economic and Trade Agreement (CETA) is a free trade agreement between Canada and the European Union, which came into effect in 2017. The agreement aims to deepen the economic relationship between the two regions and facilitate the flow of goods, services, and

investments.

One of the significant implications of CETA for European businesses is increased market access to Canada and vice-versa. With CETA, European businesses have gained access to a market of over 37 million consumers, providing them with a unique opportunity to expand their operations and increase their exports to Canada. Moreover, CETA eliminates tariffs on a vast majority of goods traded between Canada and the EU, making it easier and more cost-effective for investors.

CETA includes provisions for the protection of foreign investment and the resolution of investment disputes, providing European and Canadian businesses with greater legal certainty and protection in Canada and Europe. Additionally, CETA includes provisions to protect intellectual property rights, which is crucial for businesses involved in the development and commercialization of innovative products and services.

The agreement also includes provisions for the mutual recognition of professional qualifications, which allows professionals from the EU to provide services in Canada and vice versa without the need for additional certifications. This makes it easier for European businesses to transfer employees to Canada and for Canadian businesses to hire European professionals.

CETA also includes provisions for the facilitation of trade in services, including financial services, telecommunications, and e-commerce. This makes it easier for European businesses to offer their services in Canada and access Canadian customers, while also facilitating cross-border trade in services.

However, there are still some challenges that European businesses face when doing business in Canada. The regulatory environment in Canada can be complex, and businesses must

navigate a range of federal, provincial, and territorial regulations. Moreover, Canadian labor laws and environmental regulations can be more stringent than those in the EU, and businesses must be aware of these differences when entering the Canadian market.

Despite these challenges, CETA provides European businesses with a valuable opportunity to expand their operations in Canada and access a large and growing market. As the Canadian economy continues to grow and diversify, the opportunities for European businesses in Canada are likely to increase.

CETA represents a significant step forward in the relationship between Canada and the European Union and provides European businesses with increased market access and greater legal certainty in Canada. As the agreement continues to be implemented and its benefits become more apparent, it is likely to have a positive impact on European businesses and their ability to do business in Canada.

Dispute resolution under CETA

CETA establishes a permanent Tribunal of fifteen Members to hear claims for violations of investment protection standards established in the agreement. The EU and Canada will appoint Members of the Tribunal who are highly qualified and beyond reproach in terms of ethics. This has been dubbed the 'Investment Court System'.

Divisions of the Tribunal, consisting of three Members, will hear each particular case. This structure ensures that each case is thoroughly reviewed and evaluated by a group of experts.

The CETA text now follows the EU's new approach, as set out in the recently concluded EU-Vietnam FTA and the EU's TTIP proposal. This approach emphasizes the importance of a competent and impartial tribunal to resolve investment disputes and protect the interests of both investors and

states.

Decisions of the Tribunal are appealable before an Appellate Tribunal.

Decision No. 001/2021 of the CETA Joint Committee, dated 29 January 2021, sets out the administrative and organizational matters regarding the functioning of the Appellate Tribunal established under CETA.

The Decision sets out the procedures for the appointment of members of the Appellate Tribunal, including their terms of office, eligibility criteria, and conditions for removal. It also establishes the rules for the functioning of the Appellate Tribunal, including the procedures for the initiation of appeals, the conduct of appeal proceedings, and the rules for the dissemination of information to the public.

The Decision is an important step in ensuring the effective functioning of the appellate mechanism established under CETA. By establishing clear and detailed administrative and organizational rules, the decision contributes to the predictability, consistency, and transparency of the dispute resolution process under CETA.

Utility of the Investment Court System

The dispute resolution mechanism under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) provides European and Canadian investors with a means to protect their investments in Canada and Europe respectively.

It is not possible to determine definitively whether the Investment Court System under CETA is faster or more cost-efficient than other investment dispute resolution mechanisms such as ICSID or PCA arbitration procedures, as this can vary on a case-by-case basis and depends on a number of factors.

However, proponents of the Investment Court System argue that

it offers a more streamlined and efficient process compared to other investment dispute resolution mechanisms. For example, the system is designed to have a smaller pool of highly qualified arbitrators, which could result in faster decision-making and a more consistent body of case law. Additionally, the system incorporates measures aimed at reducing the costs of arbitration, such as provisions for the consolidation of claims and a streamlined procedure for document production.

Ultimately, the speed and cost-efficiency of the Investment Court System will depend on a number of factors, including the complexity of the dispute, the legal issues at stake, and the parties involved.

Moreover, by providing a transparent and predictable framework for the resolution of investment disputes, the mechanism can contribute to a more stable investment environment and increase investor confidence, which in turn could make financing and insurance more readily available to investors.

By creating a fair and impartial forum for the resolution of disputes, the mechanism can also reduce the risks associated with investing for European investors in Canada and vice-versa, which could make it more attractive to potential investors.

Top developments since CETA was signed in 2017

Since the Canada-European Union Comprehensive Economic and Trade Agreement (CETA) was signed in 2017, several significant developments have taken place that have impacted the implementation and benefits of the agreement. Some of the top developments include:

Expansion of Trade: Since CETA came into effect, trade between Canada and the EU has increased significantly. European businesses have gained access to a market of over 37 million consumers, providing them with a unique opportunity to expand their operations and increase their exports to Canada.

Regulatory Cooperation: CETA includes provisions for regulatory cooperation between Canada and the EU, aimed at reducing the burden of red tape and making it easier for businesses to access each other's markets. Since the agreement was signed, regulatory cooperation has increased, leading to greater efficiency and cost savings for businesses.

Expansion of Services: CETA includes provisions for the facilitation of trade in services, including financial services, telecommunications, and e-commerce. This has led to increased opportunities for European businesses to offer their services in Canada and access Canadian customers, while also facilitating cross-border trade in services.

Mutual Recognition of Qualifications: CETA includes provisions for the mutual recognition of professional qualifications, which allows professionals from the EU to provide services in Canada and vice versa without the need for additional certifications. This has made it easier for European businesses to transfer employees to Canada and for Canadian businesses to hire European professionals.

Implementation Challenges: While CETA has had many positive developments, there have also been some challenges in its implementation. Some businesses have struggled with navigating the complex regulatory environment in Canada, and there have been concerns about the impact of the agreement on certain sectors, such as agriculture and fisheries.

Updates and Review: To address these challenges, Canada and the EU have agreed to periodically review the implementation of CETA and make any necessary updates to the agreement. This will ensure that CETA continues to provide benefits to both Canada and the EU and remains relevant in a rapidly changing global economic environment.

While there have been some challenges, CETA remains a crucial agreement that provides increased market access and greater

legal certainty for European businesses doing business in Canada.

Disputes under CETA

There have not been any significant or widely reported disputes under the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). The agreement has been in force since September 2017, and its dispute resolution mechanisms, including the Tribunal and the Appellate Tribunal, have not been called upon to resolve any investment disputes according to public data.

It is important to note that the resolution of investment disputes through international investment agreements can be a time-consuming process, and the outcome of disputes may not be publicly available. It is possible that disputes have been resolved through alternative means, such as negotiation or mediation, without resorting to the formal dispute resolution mechanisms established under CETA.

There are no public cases that involve European investors taking action against Canada via an investor-State dispute mechanism. However, there have been a number of Canadian investors that have triggered bilateral investment treaty dispute resolution mechanisms against European jurisdictions such as:

- 2022: Coropi and others v. Serbia (ICSID Case No. ARB/22/14) under the Canada – Serbia BIT (2014) and the Cyprus – Serbia BIT (2005) in relation to real estate activities.
- 2020: Sukyas v. Romania (II) (PCA Case No. 2020-54) under the Canada – Romania BIT (2009) for claims amounting to USD 100 million arising out of the Romanian Government’s alleged failure to restitute assets in Cinegrafia Română (CIRO Films), a film company held by the claimants’ family members before its seizure by the

communist regime in 1948.

- 2018: Korsgaard v. Croatia under the Canada – Croatia BIT (1997) for claims amounting to USD 200 million arising out of the Croatian Government's alleged measures to prevent the claimant from obtaining ownership over several formerly socially-owned real estate properties in Croatia.

Thales DIS Canada Inc. v. Ontario (2022)

In 2022, the Ontario Superior Court of Justice in Canada ruled on the first dispute triggering protections under CETA in a dispute between Thales DIS Canada Inc. versus the Province of Ontario in Canada.

The case concerned the procurement of the blank cards used as, among other things, drivers' licenses and health cards in Ontario. Obviously, for these forms of identification security is a key consideration. The request for bids required that the cards be produced in Canada. Thales wished to manufacture them at a plant in Poland and considered the requirement to be discriminatory and, on that basis, contrary to CETA. The Ontario government considered the complaint. It was dismissed in a decision made by the Minister of Transportation. An application for judicial review was brought before the Ontario Courts.

The Ontario Ministry of Transport (MTO) argued that the requirement for domestic production was necessary to protect public safety under Article 19.3(2) of CETA.

The Court found this to be unreasonable and "to the extent that the domestic production requirement contravenes the non-discrimination provision of CETA and is not justified under the public safety exception".

The Court also found that there was no evidence that the MTO "even considered the application of the CETA" and had conducted the request for bids process "without any

consideration of the requirements of the CETA, and whether the domestic production requirement would violate the non-discrimination provision" rendering the tendering / request for bids process unreasonable.

However – importantly was a concurring opinion by The Honourable David L. Corbett where Justice Corbett took the position that "Ontario has failed to implement a CETA-compliant dispute resolution process".

And that "Ontario's choice to resort to an internal bid dispute process to decide a claim under CETA was a breach of CETA".

In determining the jurisdiction of the Court, Justice Corbett noted Articles 19.17.4 and 19.17.5 that require Canada to "establish or designate at least one impartial administrative or judicial authority that is independent of its procuring entities to receive and review a challenge by a supplier arising in the context of a covered procurement" and "the supplier may appeal the initial decision to an impartial administrative or judicial authority that is independent of the procuring entity whose procurement is the subject of the challenge".

Justice Corbett found that Ontario is in breach of these provisions in failing "to designate at least one impartial administrative or judicial authority that is independent of its procuring entities' (Art. 19.17.4) and by failing "to ensure the supplier may appeal" a decision of the decisionmaker below (Art. 19.7.5).

Justice Corbett concluded:

"My colleague characterizes this non-compliance with CETA as a failure to "strictly comply" with CETA. I do not see it so favourably. In my view it is a flagrant and inexplicable failure to implement Ontario's obligations under CETA. The result was an unsatisfactory process, based on a dubious

record, which led to a failure to understand and apply applicable international law, followed an unsatisfactory reasoning process, and approached the dispute showing deference to Ontario's policy choices on an issue for which Ontario bore the onus of proof. If this decision had been rendered by a tribunal legally entrusted to adjudicate CETA disputes, my criticism would be properly levelled at the tribunal itself. Here, I think that would be unfair. This criticism should be levelled, not at the decision-makers below, who surely did their best to address a problem they were not qualified to decide institutionally. This criticism is instead levied against the Government of Ontario, for its failure to implement CETA in accordance with its terms."

The crux of the Thales v. Ontario decision that the MTO had breached obligations under CETA is reaffirming to the expectations of investors under CETA.

However, the concurring opinion by Justice Corbett highlights the difficulties that investors may face in jurisdictions across Canada and Europe in applying and following the appropriate dispute resolution procedure under CETA, and the different applications of the CETA dispute resolution process that may be found through the various jurisdictions.

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Supreme Court of Canada rules

inoperability of arbitration agreement in insolvency proceedings (Peace River v Petrowest)

July 27, 2023

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On 10 November 2022, in a unanimous decision, the Supreme Court of Canada rendered its ruling in the matter of Peace River Hydro Partners v Petrowest Corp. The decision provides clarification on when insolvency proceedings will render an arbitration agreement inoperative in the context of a court-ordered receivership. The Supreme Court of Canada refused to stay the civil lawsuit of a receiver despite the existence of numerous arbitration agreements. This is significant as (in the current economic climate) a commercial party may find itself subject to a dispute vis-à-vis an insolvent or bankrupt counterparty with an arbitration agreement governing the debt claim.

Peace River Hydro Partners v Petrowest Corp, 2022 SCC 41

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Landmark Ontario Appeals

judgment in construction dispute permits rescission of surety bond

July 27, 2023

There has been a recent change in the way surety bonds will be treated in the construction industry as a result of the Ontario Court of Appeal decision in *Urban Mechanical Contracting Ltd. et al v. Zurich Insurance Company Ltd., 2022 ONCA 589 ("Urban")*. The decision makes it possible for a surety to rescind a bond agreement that was based on fraud or misrepresentation and collusion, even if the result would harm innocent third parties making claims against the bonds. The ruling stated that the issue of rescission should be decided by considering all the facts and circumstances of a particular matter.

Surety bonds are used primarily in the construction industry to protect an owner from the failure of a contractor to meet their mutually agreed upon result in a mutually agreed upon time frame. It is not uncommon for a general contractor to hire multiple sub-contractors to complete one large job. Problems often arise when a sub-contractor has difficulties performing their part of the work causing delays all the way down the chain of production and ultimately resulting in a job that is not completely satisfactory or timely. A construction surety bond redistributes the risk so that the immediate burden of a failure of one party to perform falls on the surety. However, unlike when a claim is made against an insurance policy, a loss that is paid for by the surety bond is fully recoverable from the principal (or the person whose obligation is guaranteed).

Rescission is an equitable remedy that is sometimes used in contract matters. It is provided to a party to a contract that has been wrongfully induced into entering the contract and will void the contract and treat it as if it was never made. The idea is that the parties will be restored to the position they were in prior to entering the contract. It is available to parties to a contract that was made because of a misrepresentation of a material fact. In essence, a false statement about a material fact was made by one party to the other to induce them to enter into the contract.

Urban was an Ontario Court of Appeals decision involving the development of a patient care tower for St. Michael's Hospital in which Bondfield Construction Company Limited ("Bondfield") was hired as the construction contractor. The appellants in the matter are a group of subcontractors (the "Trades") hired by Bondfield and the project's lender Bank of Montreal. Zurich Insurance Company Ltd. ("Zurich"), the surety that issued the bonds in connection with the project, was the respondent in the matter.

Zurich alleged that prior to issuing the bonds in question, it found evidence that fraud was utilized to allow Bondfield to secure the contract for the construction project and therefore stopped payment to the Trades under the payment bond and sought an action for rescission due to fraud. In turn, the Trades sought a declaration that the payment bond could not be rescinded as it would interfere with their rights as innocent third parties. Bank of Montreal also sought a declaration that the performance bond could not be rescinded.

The Trades argued that their statutory rights under the Construction Lien Act could not be undermined by equitable remedies such as rescission, but Zurich argued that the Trades were potentially parties to the fraud thereby spoiling their rights under the Construction Lien Act. The appellants further argued that rescission is not available when the rights of innocent parties could be negatively impacted.

The Court of Appeal ruled that the impossibility of restoring parties to their pre-contract position when third-parties have an interest in the property surrounding the contract and the adverse effect on third parties when rescission is grated are not an absolute bar to rescission and whether a court may order a rescission remedy depends on the facts and circumstances of the particular case and more specifically, a court should be more likely to do so when there has been fraud rather than innocent misrepresentation. Zurich was allowed to continue seeking rescission as a remedy and its issuance will be determined by the trial judge.

The result of *Urban* is something that those in the construction industry should pay close attention to. It has cleared the way for sureties to pursue the rescission of bonds by alleging there was a material misrepresentation in the bonded contractor's disclosures.

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Canada orders divestment of Chinese foreign investors in Canadian critical mineral companies

July 27, 2023

Decision

On 02 November 2022, the Honorable François-Philippe Champagne, Minister of Innovation, Science and Industry, confirmed the decision by the Government of Canada ordering the divestiture of investments by three Chinese foreign investors as follows:

- Sinomine (Hong Kong) Rare Metals Resources Co., Limited is required to divest itself of its investment in Power Metals Corp.
- Chengze Lithium International Limited is required to divest itself of its investment in Lithium Chile Inc.
- Zangge Mining Investment (Chengdu) Co., Ltd. is required to divest itself of its investment in Ultra Lithium Inc.

The statement by the Minister confirms that the divestiture order is in relation to investments that threaten national security and critical minerals supply chains in accordance with the Investment Canada Act.

A number of investments in Canadian companies engaged in the critical minerals sector, including lithium, are under review.

The decision was made in support of advice of critical minerals subject matter experts, Canada's security and intelligence community, and other government partners.

The divestiture order was made in accordance with section 25.4(1) of the Investment Canada Act which states:

"…the Governor in Council may, by order, within the prescribed period, take any measures in respect of the investment that he or she considers advisable to protect national security, including

(a) directing the non-Canadian not to implement the investment;

(b) authorizing the investment on condition that the non-

Canadian

(i) give any written undertakings to Her Majesty in right of Canada relating to the investment that the Governor in Council considers necessary in the circumstances, or

(ii) implement the investment on the terms and conditions contained in the order; or

(c) requiring the non-Canadian to divest themselves of control of the Canadian business or of their investment in the entity."

Investment protections

The Government of Canada has investment protection treaties with both the Hong Kong Special Administrative Region and the People's Republic of China.

Both treaties with Hong Kong and the PRC provide substantive, although modifications in scope and language may be seen in the different instruments. However, most of the standard principal protections available include:

- national treatment and most-favored-nation treatment whereby Canada cannot discriminate against foreign investors in favor of domestic investors or investors from another country;
- the requirement that Canada provides the minimum standard of treatment in accordance with customary international law for foreign investments;
- fair and equitable treatment provisions, which (as guided by findings of tribunals) include requirements for full protection and security; due process and access to justice; adherence to investors' legitimate expectations; no coercion or harassment by the organs of the state; offering a stable and predictable legal framework; transparency of the legal framework; and no arbitrary or discriminatory treatment; and

- no direct or indirect expropriation that prevents Canada from taking property belonging to a foreign investor directly through mandatory transfer or physical seizure, or indirectly through regulatory measures, prevention of contractual rights, or other actions – including methods of 'creeping' expropriation where the expropriation occurs gradually.

Both treaties provision for general compensation for foreign investors in breach of the treaties.

Actions over security concerns in the Canada – Hong Kong investment treaty

The Canada – Hong Kong investment treaty provides exceptions for matters of security but is generally limited to the Government of Canada "…taking an action that it considers necessary to protect its essential security interests:

(i) relating to the traffic in arms, ammunition and implements of war and to such traffic and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment,

(ii) taken in time of war or other emergency in international relations,

(iii) relating to the implementation of policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices;"

A special annexure was made to the Canada – Hong Kong investment treaty to expand exceptions on future matters to account for social services, rights of aboriginal peoples, economically disadvantaged minorities, government securities, maritime cabotage, fishing, telecommunications services, and the services sector.

The maritime-related exceptions consider mineral resources of the continental shelf of Canada, worded within the ambit of the right to operate sea, air, or other transport services within a particular territory as follows:

“maritime cabotage, which means (a) the transportation of either goods or passengers by ship between points in the area of Canada or above the continental shelf of Canada, either directly or by way of a place outside Canada; but with respect to waters above the continental shelf of Canada, the transportation of either goods or passengers only in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada; and (b) the engaging by ship in any other marine activity of a commercial nature in the area of Canada and, with respect to waters above the continental shelf, in such other marine activities of a commercial nature that are in relation to the exploration, exploitation or transportation of the mineral or non-living natural resources of the continental shelf of Canada…”

Actions over security concerns in the Canada – PRC investment treaty

The Canada – Hong Kong investment treaty provides exceptions for matters of security that the Government of Canada can trigger in cases of:

“(i) any existing non-conforming measures maintained within the territory of a Contracting Party; and

(ii) any measure maintained or adopted after the date of entry into force of this Agreement that, at the time of sale or other disposition of a government’s equity interests in, or the assets of, an existing state enterprise or an existing governmental entity, prohibits or imposes limitations on the ownership or control of equity interests or assets or imposes nationality requirements relating to senior management or

members of the board of directors;”

The schedule to the Canada – Hong Kong investment treaty applies exceptions as those applied in the Canada – Peru investment treaty, requiring specific reservations in certain sectors including telecommunications, government finance, fishing, social services, and transportation.

Recent dispute with the Government of Canada on security issues

In Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, triggered under the Canada – Egypt bilateral investment treaty, the tribunal addressed the effects of national security on foreign investment:

“Without it affecting the findings of the Tribunal set out above, [REDACTED] it is understandable that a prudent investor may well decide that it is time to put an end to the significant sums that it was compelled to pour into the investment given the cash-intensive requirements of this economic field. Harsh as it might be, such is the reality of business with its potential for windfall profit or for abysmal loss. In any event, it cannot turn into a ground to rule that Canada has breached the BIT by its conduct of the national security review of GTH’s application to take control of Wind Mobile.”

Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, 27 March 2020, para. 618

On 28 October 2022 the Government of Canada announced its policy on foreign investment by State-owned enterprises or foreign-influenced private investors in the ‘critical minerals’ with a recommendation that “all non-Canadian investors and Canadian businesses carefully review their investment plans to identify any potential connections to [State-owned enterprises] or entities linked to or subject to influence by hostile or non-likeminded regimes or states”.

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Canada trade arbitration disputes arising from the European energy crisis

July 27, 2023

In 2020, Canada was the tenth largest partner of the EU for goods exports and the 16th largest partner for EU goods imports.

The EU-Canada Comprehensive Economic and Trade Agreement (CETA) entered into force provisionally on 21 September 2017. As a modern and progressive EU trade agreement, CETA provides EU firms with more and better business opportunities in Canada, supports employment in Europe, and protects consumers and the environment, allowing businesses and entrepreneurs of all sizes to benefit from its improved market access.

Recently, Europe’s energy-intensive companies have begun to close their doors in response to high energy prices. As a result of high gas and power prices, dozens of plants across a wide range of industries, including steel, aluminum, fertilisers, and the power industry, have had to close up shop.

A factory in Europe has been closed by the world’s second-

largest steel producer, due to rising gas and energy prices in the region. The energy crisis has led to the closure of several European stainless steel mills, glass manufacturers, and other industrial operations.

Europe – UNIDROIT

As a non-binding codification of international contract law, the European rooted Unidroit Principles of International Commercial Contracts serve as a basis for international contract law as a whole. The Principles provide a balanced set of rules tailored to the special requirements of modern international commercial practice, and they are designed to be utilized throughout the world regardless of the legal traditions and economic and political conditions of the countries in which they are to be applied.

When unforeseeable events "fundamentally alter[r] the equilibrium of the contract," a party may request a renegotiation of the contract under the hardship provisions in the Unidroit Principles of International Commercial Contracts. Arbitral tribunals applying Unidroit Principles may terminate or adjust the contract in order to restore equilibrium if renegotiation fails.

Similar hardship provisions are found in other soft law instruments, most notably the Principles of European Contract Law, which includes a provision on change of circumstances.

Parties to an international commercial arbitration may also agree on the UNIDROIT Principles as the applicable law, rather than a specific domestic law or the CISG.

Canada – doctrine of frustration

Common law legal principles have long emphasized the doctrine of frustration. A party to a contract may not be obligated to meet their contractual obligations if circumstances change – without their own fault – that prevent them from performing

the contract. It is possible that frustration could be applied to any contract, in contrast to force majeure clauses.

As a result of common law doctrine of frustration, parties can terminate contracts when an event occurs which prevents the performance of a contractual obligation from being performed due to the fact that its performance would result in a thing radically different from the contract's expectations. In the absence of unforeseen circumstances, any party would be unjustly held responsible for their obligations under the contract, based on the doctrine. In the case of a contract to supply raw materials, the suspension of businesses due to exponential energy prices may frustrate the contract.

In *Naylor Group Inc. v Ellis-Don Construction Ltd*, the Supreme Court of Canada provided guidance on what may constitute frustration describing it as "when a situation has arisen for which the parties made no provision in the contract and performance of the contract becomes 'a thing radically different from that which was undertaken by the contract'".

Arbitration to resolve disputes

For Canadian businesses engaged in transactions with European counterparts, being able to resolve a dispute via arbitration provides the advantage of potentially more reliable enforcement and collection procedures.

This is particularly advantageous when the debtor does not have assets in Canada.

The first step would be to review contracts and purchase orders (or any other instruments) to see if there is an arbitration dispute resolution clause.

An arbitration tribunal generally applies the doctrine of frustration narrowly, but in summary, frustration would require substantiation of the following elements:

- It is necessary for the frustrating circumstances or events to arise or occur after the contract has been entered into;
- As a result of the frustrating circumstances or events, the performance of the contract is impossible, illegal, or radically different from what was anticipated when the contract was signed;
- If the applicable frustrating circumstances or events were caused by the actions or omissions of the party seeking to rely on the doctrine, the doctrine will not apply, or if the relevant risks have already been addressed and allocated by the contract terms.

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Canada-EU Trade Agreement discussions on expropriation and treatment (FET) of investors

July 27, 2023

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the 28 European Union countries has been ratified by 15 member states as of February 2022 and is expected to conclude ratification in due course.

The CETA will establish a permanent tribunal of fifteen members to hear investor claims.

Each particular case would be heard by three of the fifteen members.

This new dispute resolution forum is a divergence from the standard investor-State arbitration dispute settlement mechanism.

On 29 August 2022, the European Commission issued a statement on clarifications discussed with Germany regarding investment protection in the context of the CETA agreement as follows:

"The EU and Canada are trusted and like-minded partners that share the same goals when it comes to promoting open, sustainable and fair trade. Our EU-Canada Comprehensive Economic and Trade Agreement (CETA) aims to support our common objective of climate protection. In this context, the European Commission has engaged in constructive discussions with the German Federal Government to prepare a text that clarifies certain provisions in CETA. The result of these technical discussions is a more precise definition of the concepts of 'indirect expropriation' and 'fair and equitable treatment' of investors. The aim is to ensure that the parties can regulate in the framework of climate, energy and health policies, inter alia, to achieve legitimate public objectives, while at the same time preventing the misuse of the investor to State dispute settlement mechanism by investors.

The new draft text agreed by the Commission and the Federal Government provides legal certainty and it now needs to be supported by all other EU Member States. Once this is the case, we will consult our Canadian partners so that the new definitions can be adopted by the CETA Joint Committee as soon as possible."

The current consolidated CETA text addresses expropriation in Article 8.12(1) prohibits expropriation unless such

expropriation is (a) for a public purpose, (b) under due process of law, (c) is a non-discriminatory manner, and (d) on payment of prompt, adequate and effective compensation.

Article 8.10(1) of the current consolidated CETA text obligates member states to accord to investors fair and equitable treatment and full protection and security covering general requirements as is generally seen in investment treaties including access to justice, due process, transparency, no manifest arbitrariness, no targeted discrimination, no abusive treatment of investors, and so on.

The outcome of the discussions between the European Commission and Germany will provide more precise definitions of the concepts of ‘indirect expropriation’ and ‘fair and equitable treatment’ of investors to ensure that the parties can regulate in the framework of climate, energy and health policies, inter alia, to achieve legitimate public objectives, while at the same time preventing the misuse of the investor to State dispute settlement mechanism by investors.

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