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United Mexican States v. Burr reinforces hesitance of Canadian courts to overturn decisions of international tribunals

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In our last international trade brief, we discussed what parties engaging in Canada-UK trade should expect now that Brexit has officially come into force. In this international trade brief, we discuss the implications of *United Mexican States v. Burr*, 2020 ONSC 2376, a recent decision regarding an appeal from the decision of an international tribunal in which the Ontario Superior Court once again declined to overturn the decision of such a tribunal.

Canadian courts have historically been reticent to overturn the decisions of international tribunals, including those constituted under Canada's bilateral and multilateral trade agreements. Recent decisions show this trend is unlikely to change. In its most recent decision regarding an appeal from the decision of an international tribunal, the Ontario Superior Court has once again declined to overturn the decision of such a tribunal. In *United Mexican States v. Burr*, 2020 ONSC 2376, the Ontario Superior Court upheld the decision of a NAFTA arbitral tribunal that it had jurisdiction to hear a Chapter 11 dispute brought by U.S. nationals, U.S. enterprises, and Mexican enterprises against the United Mexican States. In doing so, the Court rejected arguments from Mexico, the U.S. and Canada that their historical treatment of specific NAFTA provisions amounted to "subsequent practice" and that, as such, the Tribunal was bound to interpret these provisions in line with this historical practice.

Although the *Canada-U.S.-Mexico Agreement* (CUSMA) – the successor treaty to NAFTA – phases out investor-state arbitrations similar to those under NAFTA Chapter 11, the case reinforces that procedural rules under international trade agreements are to be interpreted in accordance with the overall purpose, context and ordinary meaning of the treaty, and that the threshold for review remains high, with courts unlikely to overturn such decisions on appeal.

The dispute

The dispute arose from Mexico's decisions between 2011 and 2013 to close down a number of casinos in Mexico. These casinos included those operated by the original claimants – three U.S. nationals and five U.S. enterprises. The original claimants initiated proceedings against Mexico under Chapter 11[1], and subsequently filed a request for arbitration with the International Centre for Settlement of Investment Disputes (ICSID) pursuant to NAFTA Article 1117. The original claimants sought $100 million in damages. The seat of arbitration was Toronto, Ontario.

When the request was filed with ICSID, the original claimants added 31 new U.S. investors, 16 of whom were minority shareholders in certain Mexican enterprises controlled by the original claimants.

Mexico objected to the claims being registered with ICSID, arguing that:

- the additional claimants failed to provide a notice of intent at least 90 days prior to submission of the request, as required by NAFTA Article 1119;
- the claimants before the Tribunal failed to consent to arbitration and to provide waivers in accordance with NAFTA Article 1121; and
- the original claimants did not have standing to bring claims on behalf of Mexican enterprises that they did not own or control.

The U.S. and Canada also made submissions in support of Mexico's position, arguing the principles of "subsequent agreement" and "subsequent practice" – under which a common and consistent sequence of acts or pronouncements is sufficient to imply the agreement of the parties regarding a law's interpretation – required strict adherence to the procedural requirements of Articles 1119 and 1121.

On July 19, 2019, the Tribunal issued a Partial Award dismissing all three of Mexico's jurisdictional objections. The majority held that the Tribunal had jurisdiction over all claims made by the claimants, and over those submitted on behalf of all but one of the Mexican enterprises. In the dissenting opinion, one arbitrator held that the Tribunal lacked jurisdiction over the claims made by the 31 additional claimants and on behalf of certain Mexican enterprises for failure to comply with Article 1119.

Appeal to the Ontario Superior Court

Mexico brought an application to set aside the Tribunal's award on appeal to the Ontario Superior Court under s. 11(1) of the *International Commercial Arbitration Act*. In its application, Mexico argued the Tribunal had erred in finding it had jurisdiction, including in respect of the U.S. and Canada's submissions over "subsequent agreement" and "subsequent practice." On a standard of correctness,[2] the appeal was dismissed with costs, with the Court holding the Tribunal had correctly established its jurisdiction on all issues:

Articles 1119: Jurisdiction over the "additional claimants"

The Court held that there was no error in the Tribunal's decision to assert jurisdiction over the claims advanced by the additional claimants, finding it was not required to strictly adhere to Article 1119. In particular:

- The drafters of NAFTA used the interpretive language of "shall" in Article 1119. Thus, there is no requirement to strictly adhere to Article 1119.
- Applying its "ordinary meaning," the failure to include all of the required information in the notice does not vitiate a party's consent.
- When read in the context of the rest of NAFTA, the notice of intent is the basis for negotiations between the parties. The information is not essential to arbitration proceedings.
- The purposes and objects of NAFTA cannot be furthered by barring access to arbitration on the basis of names having been omitted from the notice of intent.

Thus, in asserting jurisdiction over the additional claimants, the Tribunal's interpretation of Article 1119 was aligned with the overall purpose, context and ordinary meaning of NAFTA. Such an approach to treaty interpretation is appropriate and well-established in Ontario

jurisprudence.

Articles 1121: Issues of consent

The Court found it did not have jurisdiction to review the manner in which consent was provided under Article 1121 since, under established Ontario jurisprudence, issues related to admissibility (e.g., the manner in which consent was required) are not reviewable by Ontario courts on any standard.[3]

"Subsequent agreement" and "subsequent practice"

The Court rejected arguments by Mexico, Canada and the U.S. that, notwithstanding the interpretive principles above, their common and established practice that NAFTA parties' consent to arbitration is conditional upon the relevant procedural requirements constituted a "subsequent practice" and "subsequent agreement" dictating strict adherence to those procedural requirements.

As codified under Article 31(3)(b) of the *Vienna Convention on the Law of Treaties*, "subsequent practice" and "subsequent agreement" refer to consistent, treaty-related actions and omissions of the parties to organs established by international treaties. These actions and omissions must be interpreted in a way that reflects the common ideas of all the parties about the interpretation of the treaty. Where submissions amount to "subsequent practice," they are to be adhered to as customary international law. In Ontario, the courts have defined "subsequent practice" as "a clear, well-understood, agreed common position in accordance with Article 31(3)(b)."[4] Courts have affirmed that it is a jurisdictional error for a NAFTA tribunal to ignore Article 31(3) submissions by NAFTA parties in rendering a decision if those submissions demonstrate a subsequent practice agreed upon by the parties.

Although the court agreed the "common, concordant, and consistent" interpretation of Articles 1119 and 1121 by Mexico and Canada – each of which submitted it is required and established practice for parties under the treaty to adhere to Articles 1119 and 1121 to establish jurisdiction – the Court found the practice was not "clearly identifiable" and the points of consensus "clearly discernable" as required to amount to subsequent practice under Ontario law. In particular, given this was the first case in which the NAFTA parties have offered unanimous submissions on the interpretation of Articles 1119 and 1121, and a strict technical approach to NAFTA's interpretation has been rejected under Ontario law, the Court found the facts fell short of meeting the standard for "subsequent practice."

Key takeaways

Canadian businesses should be aware that this is an ever-changing area of law. As of July 1, 2020, NAFTA has been replaced by CUSMA. As Canada has withdrawn itself from investor-state dispute settlement under CUSMA, Canadian investors have three years (until 2023) to bring "legacy" claims against Mexico or the U.S. – if claims are not brought within three years, they are likely to face significant jurisdictional challenges.

Regardless, the Court's decision in *United Mexican States v. Burr* reaffirms the position of Ontario courts with regard to the decisions of international tribunals, whether constituted under NAFTA or another trade agreement: the threshold for review is high, and courts are unlikely to overturn such decisions on appeal. While the Court has affirmed its intention to comply with international law, this law will be applied in a manner consistent with Ontario precedent.

Canadian investors should consider this in the context of foreign investments, including when deciding whether and how to appeal decisions by international tribunals. Given the deference shown by Canadian courts toward arbitration awards from international tribunals and the courts' reticence to interfere with decisions of such tribunals, it is important that litigants under international law, including relevant trade agreements, put their best foot forward at first instance. Similarly, litigants will need to advance strong arguments before the courts when appealing arbitral awards.

Osler has extensive experience in all stages of both domestic and international arbitration that affords our clients a clear strategic advantage. Osler's International Trade and Investment Law team acts in trade and investment disputes including customs disputes, anti-dumping and countervailing proceedings, safeguard proceedings, economic inquiries and government procurement challenges before the Canadian Institute of Traffic and Transportation (CITT), as well as matters relating to international trade regulations, government measures, and actions and policies that impede access to the Canadian and foreign markets.

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[1] *B-Mex, LLC and Others v. United Mexican States*, ICSID Case No. ARB (AF)/16/3.

[2] *The United Mexican States v. Cargill, Incorporated*, 2011 ONCA 622, at para. 50.

[3] *Ibid*.

[4] *The United Mexican States v. Cargill, Incorporated*, 2011 ONCA 622.