Arbitration of Franchise Disputes:

A New Awakening as The Supreme Court of Canada Limits Appeals

By Frank Zaid

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Franchisors and franchisees (and their respective legal counsel) concerned about the significant costs and delays associated with the traditional judicial litigation process should consider arbitration as a means of resolving their disputes. While there is a constant debate about whether commercial arbitration is in fact advantageous over traditional litigation, this debate for the most part has centered on arbitration in the United States where different considerations apply. With careful attention to the drafting of arbitration agreements, arbitration can have significant benefits over conventional litigation. In August, 2014 the Supreme Court of Canada significantly limited the right to appeal a commercial arbitral decision on issues of contract interpretation, making arbitration a desirable method of dispute resolution in franchise cases where a decision in most cases can be final and not subject to appeal.

Advantages of Arbitration in Franchise Disputes

What are the advantages of arbitration as a means of resolving franchise disputes?

First, arbitration proceedings can be made private and confidential. No documents are available for public review, and the public cannot attend the proceedings. Consequently, the media cannot access the proceedings and adverse publicity can be avoided for the franchise system at large.

Conventional litigation trials are heard by a judge who will likely have no experience or expertise in franchise matters. The arbitration agreement can require that the arbitrator have specialized knowledge of franchising, resulting in a more efficient and predictable hearing.

The arbitration agreement can streamline the procedure by dealing with such matters as the number of hearing days, motions, admissibility of evidence, discovery, rights of appeal, the form of decision, and timelines for the proceeding. It can limit the types of damages that may be awarded or provide for the right of the arbitrator to make preliminary findings or grant injunctions. As a result, the process can be much less costly and quicker than an ordinary judicial proceeding.

Another advantage of arbitration, if the franchise has not been terminated and is still operating, is the ability to preserve the relationship if the proceeding moves quickly and results in a final decision.

Under provincial franchise disclosure legislation in force in Alberta, Manitoba, Ontario, New Brunswick and Prince Edward Island, and soon in British Columbia, a franchisor must include in its disclosure document details of whether the franchisor has been found liable in a civil action of misrepresentation, unfair or deceptive practices or violating a law that regulates franchises, including a failure to provide proper disclosure to a franchisee, or if a civil action involving such allegations is pending against the franchisor. The legislation does not specifically mandate disclosure of arbitration proceedings or decisions.

Finally, the arbitration agreement may specify the grounds of appeal or limit the grounds of appeal.

Grounds of Appeal

Now to the recent Supreme Court of Canada case limiting appeals of arbitration decisions. Under provincial arbitration legislation, appeals of arbitration decisions are limited to questions of law, and leave to appeal is required if the parties do not consent to an appeal. If the arbitration agreement does not deal with grounds of appeal, an appeal will be generally limited to matters of law.

In ***Sattva Capital Corporation v. Creston Moly Corp., 2014 SCC 53*** the parties entered into a finder's fee agreement, but disagreed about the date when the amount should be determined. The arbitrator found in favour of the plaintiff on his interpretation of the agreement. After a series of decisions in the British Columbia courts, the Supreme Court of Canada granted leave to appeal. The court stated that the principal goal of contract interpretation is to give effect to the

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intentions of the parties and their scope of understanding at the time of entering into the agreement. The contract must be read as a whole and the words in the contract must be given their plain and ordinary meaning, consistent with the surrounding circumstances at the time of the agreement. The surrounding circumstances combine to aid the decision-maker in ascertaining intention. However, the surrounding circumstances cannot be allowed to overwhelm the words of the agreement. Because contract interpretation requires a consideration of the surrounding circumstances and the intention of the parties, the court held that interpreting a contract is fact-specific. Accordingly, the historical approach of the courts "according to which the legal rights and obligations of the parties under a written contract was considered a question of law should be abandoned. Contractual interpretation involves issues of mixed fact and law…".

As a result, courts should be reluctant to grant leave to appeal from arbitration decisions interpreting contracts, which of course includes decisions interpreting franchise agreements. The two exceptions – (i) where the case may have precedential value and an impact beyond the parties, and (ii) where the case may involve an inextricable question of law (e.g., application of an incorrect principle or a relevant factor) will be rare, but may exist if the interpretation of an important industry standard or franchise legislation is involved.

Finally, the Supreme Court of Canada stated that appeals of commercial arbitration decisions should take place under "highly defined regimes specifically tailored to the objectives of commercial arbitration."

As a result of this critical decision, a decision under an arbitration agreement that does not alter the general rule that appeals are limited to questions of law, will likely be final, binding and non-appealable if the decision involves interpretation of a franchise agreement. As well, arbitrators are more likely to have the final say on validity of the franchise agreement.

As for franchising in general, franchisors, franchisees and their legal counsel should give careful and renewed consideration to utilizing arbitration as a means of resolving disputes under their franchise agreements in order to expedite a proceeding which will be less costly, which can be tailored to the written directions of the parties and which will result in a final decision not likely being subject to appeal.

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