WeirFoulds LLP

Case Law Update: Mexico v Cargill, Incorporated

November 16, 2011

By Kristi J. Collins

2011 ONCA 622 (Released October 4, 2011)

North American Free Trade Agreement International Arbitration Standard of Judicial Review

Cargill, Incorporated ("**Cargill**") is an American company that produces high fructose corn syrup, a low-cost alternative to cane sugar, for import to Mexico through its wholly-owned Mexican subsidiary distributor, Cargill de Mexico S.A. de C.V. ("CdM"). To protect its cane sugar industry, Mexico enacted a number of trade barriers that caused CdM and Cargill to sustain significant losses, including the closure of CdM's distribution centre in Mexico.

Cargill, on behalf of itself and CdM, submitted a claim to arbitration against Mexico under Chapter 11 of the *North American Free Trade Agreement* ("**NAFTA**"). In 2009, an expert panel of arbitrators in Washington D.C. found that Mexico's trade barriers constituted breaches of NAFTA and that Cargill was entitled to both "down-stream" damages (direct lost sales and associated costs suffered by CdM in Mexico) and "up-stream" damages (lost sales to CdM of products manufactured by Cargill in the United States).

Mexico did not dispute the finding that it had breached NAFTA or the award of down-stream damages to CdM. However, it challenged the jurisdiction of the panel to award up-stream damages to Cargill. Because the parties had designated Toronto, Ontario as the "place of arbitration", the Ontario Superior Court of Justice had jurisdiction to review the award under *Ontario's International Commercial Arbitration Act*, which adopted the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law").

Article 34(2)(iii) of the Model Law provides authority for a Superior Court judge to set aside a decision of an international arbitral tribunal where "the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration "

Under Chapter 11 of NAFTA the panel only had jurisdiction to award damages to Cargill for losses suffered as an "investor" "by reason of or arising out of" Mexico's trade barriers. Mexico argued that the panel exceeded this jurisdiction by awarding damages for losses suffered by Cargill in its position as producer and exporter.

The panel had directly addressed its jurisdiction on this issue and concluded that, as Cargill's business model was to produce the product in the United States for import to Mexico, losses resulting from Cargill's inability to supply its investment (CdM) with the product were just as much "investment losses" as were CdM's "down-stream" losses.

In the Superior Court, Justice Low held the proper standard of review to be "reasonableness", referring to the "powerful presumption" that international arbitral tribunal's act within their jurisdiction and that courts should interfere sparingly with such decisions out of respect for international comity and the global marketplace. She went on to consider the merits of the panel's decision, determining it to be reasonable and dismissing the appeal.

The Court of Appeal held the proper standard of review to be "correctness" in that the panel had to be correct in its determination that it had jurisdiction to make the decision it made. The Court explained that the powerful presumption that courts will rarely intervene in international arbitral decisions is because their intervention is limited to true jurisdictional errors.

The Court found that the panel had correctly identified its jurisdictional limits under Chapter 11 and the terms of the submission to arbitration, and had applied the facts within this framework. Thus, Mexico's dispute was with the merits of the decision, which the Court declined to review. As such, the Court dismissed the appeal.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035