79441 USA v Mondofix Confirms that the Confidentiality of the Arbitral Process in Québec Extends to Arbitral Awards

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In 79411 USA Inc. v Mondofix Inc.*, the Superior Court of Québec confirmed for the first time that the general principle of confidentiality of the arbitration process extends to arbitral awards. Though the Court acknowledged that there are exceptions to confidentiality for the arbitration process and awards, and that courts must conduct a case-by case analysis, the decision reaffirms the importance of maintaining confidentiality as a general principle of the arbitration process, including awards.*

In *79411 USA Inc. v Mondofix Inc.*,[1] the Superior Court of Québec had to determine whether the general principle of confidentiality of the arbitral process is limited to the arbitral proceedings, or whether it also extends to awards.

The Petitioner presented an Application for Homologation of an Arbitration Award (the "Application") concerning an award that had been rendered on a dispute concerning the renewal of a licensing agreement (the "Award"). Though the Respondent did not contest the homologation of the Award, it contested the Petitioner's request to file the Award with the court, which would make it public. The Respondent argued that because arbitration proceedings are confidential, the Award too should remain confidential, and that it should therefore be filed under seal. In addition, the Respondent requested that the other

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[1] 2020 QCCS 1104 ("*79411 USA Inc.*").

exhibits filed in support of the Application, including various arbitral proceedings and exhibits related thereto, be withdrawn from the Court record.[2]

In a first decision to be rendered by the Superior Court on the extent of confidentiality of the arbitral process, the Court held that confidentiality covers not only the arbitration proceedings, but also arbitration awards. The Court therefore restricted the disclosure to the dispositive conclusions of the Award. It did, however, leave open the possibility of disclosure of arbitration awards to the extent that the party requesting disclosure can demonstrate that disclosure is reasonably necessary to protect the legitimate interests of a party.

The arbitration was conducted in accordance with the rules of the Canadian Commercial Arbitration Center (the "CCAC") and was governed by the laws of the Province of Québec. The Court thus had to consider the principle of confidentiality according to those two sources.

Other than a passing mention in its preambulatory clauses regarding the confidential nature of arbitration ("takes place out of court, behind closed doors"; "confidentiality of the case"),[3] the General Commercial Arbitration Rules of the CCAC provide no further guidance as to the extent of the confidentiality afforded.

Article 4 of the Québec Code of Civil Procedure ("CCP") provides:

> **4.** Parties who opt for a private dispute prevention and resolution process and the third person assisting them **undertake to preserve**

[2] This debate became moot as the Petitioner ultimately conceded that the exhibits submitted in support of the Application were not necessary for the enforcement or recognition of the Award (see *79411 USA Inc.* at para 25).

[3] General Commercial Arbitration Rules of the CCAC, online <https://ccac-adr.org/en/general-commercial-arbitration>.

> **the confidentiality of anything said, written or done during the process**, subject to any agreement between them on the matter or to any special provisions of the law.[4]

The Superior Court thus had to determine whether the general rule of confidentiality of the arbitration process applied to the proceedings alone, as the Petitioner was alleging, or whether it extended to the Award as well. This issue came down to the meaning of the word "process" as it appears in article 4 of the CCP.[5]

The Court held that any interpretation of confidentiality that does not extend to arbitration awards would render the overall principle of confidentiality meaningless, given that arbitration awards necessarily include references to the arbitration process and the information exchanged during that process:

> 9. In most if not all cases, arbitration awards thoroughly address what has been said, written and done during the arbitration. The confidentiality protection expressed in article 4 above would be eviscerated from any effect or meaning if the application for the homologation of an arbitration award systematically turned the award (and all the information it includes on the evidence and the process itself) into publicly available information.

The Court acknowledged that there could be exceptions to the rule of confidentiality. For example, in accordance with

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[4] Emphasis added.

[5] It is worth noting that, although this case dealt with an international arbitration, because the CCP provisions dealing with arbitration do not distinguish to domestic and international commercial arbitrations, this precedent applies equally to domestic and international arbitration awards.

article 4 of the CCP, the parties may agree to waive confidentiality, in whole or in part, or an exception to confidentiality may be provided by law. In addition, the Court observed that courts have recognized that disclosure might be "reasonably necessary for the establishment or protection of the legitimate interests of an arbitrating party".[6]

The burden to show that an exception should be made to the principle of confidentiality lies with the party seeking disclosure.[7] This is because, under Québec law, the confidentiality of the arbitral process is often an important incentive for encouraging private dispute resolution, so the public interest favours confidentiality:

> 22. In the case of arbitration, particularly under Québec Law, cases and specific legal provisions already aim at protecting the confidentiality of the arbitration process. As highlighted in the above analysis, and as stipulated in Québec Law, there is a legitimate public policy interest in encouraging private dispute resolution through arbitration by protecting the autonomy of arbitral process. The use of arbitration as a dispute resolution mechanism is encouraged and public interest favors confidentiality orders to promote arbitrations and protect the expectations of privacy and confidentiality of the parties to the arbitration.[8]

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[6] See *79411 USA Inc.*, *supra* note 1 at para 12, citing *Hassneh Insurance co of Israel v Mew*, [1993] 2 Lloyd's Rep 250, 252; *Tate & Lyle North American Sugars v Somavrac inc.*, 2005 QCCA 458, EYB 2005-89826 at para 2; *SNC-Lavalin inc. v ArcelorMittal Exploitation minière Canada*, 2018 QCCS 3024 at paras 13, 34.

[7] *79411 USA Inc.*, *supra* note 1 at para 14.

[8] *Ibid* at para 22.

The Petitioner had argued that disclosure of the Award before the Superior Court of Québec was necessary for protection of a legitimate interest: the enforcement of the Award in another jurisdiction. The Court disagreed.[9] In coming to its decision, the Court held that none of the criteria found in article 646 of the CCP would allow the Court to refuse to homologate an arbitration award required the Court to address the merits of the Award.[10] When deciding whether to homologate an arbitration award, the Court does not re-examine the merits of the dispute.[11] Consequently, in homologation proceedings where the purpose is to ensure the enforcement of an award, the enforcement decision need not refer to the arbitrator's reasons, only to their conclusions.[12]

The Court therefore held that the Petitioner had not demonstrated that disclosure of the Award in full was necessary "to avoid a denial of justice or is reasonably necessary to any other end".[13]

In addition to the exceptions described above, the Court also stressed that Canadian courts have reacted differently to requests for confidentiality orders arising from different arbitration awards or proceedings, and that a case-by-case analysis is required. Courts must apply a two-part test: whether disclosure is necessary in order to prevent a serious risk to an

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[9] *Ibid* at para 15.

[10] *Ibid* at para 16.

[11] *Ibid*.

[12] *Ibid* at para 17.

[13] *Ibid* at para 18.

important party interest, and also whether the salutary effects of the confidentiality order outweigh its deleterious effects.[14]

The Court ultimately held that the Respondent had not demonstrated the necessity of disclosing the Award, and that it should thus remain confidential. The Court therefore homologated the Award, but ordered that it be filed under seal, except for the conclusions.

This case sets an important precedent in Québec with respect to the importance of the confidentiality of the arbitration process. While the Court acknowledged that there are exceptions to the principle of confidentiality for arbitral proceedings and awards, and that courts must conduct a case-by case analysis, it underlined the importance of maintaining the general principle of confidentiality of the arbitration process, including awards. Furthermore, the Court held that in homologation proceedings, only the conclusions and orders of the award are necessary for enforcement.[15]

However, since the Court placed substantial emphasis on the exceptions that could apply to the general rule of confidentiality, as well as the need for courts to analyse applications for the confidentiality of arbitration proceedings and awards on a case-by-case basis, this decision cannot be construed as a blanket rule of confidentiality for all arbitration proceedings and awards. It will be interesting to see how Québec courts will address future requests for disclosure of arbitration proceedings and awards. In particular, additional case law is needed to establish with greater certainty the circumstances under which courts will find that disclosure is "reasonably necessary".

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[14] *Ibid* at para 19, citing *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.

[15] *Ibid* at paras 17, 18.