REMOVING AN ARBITRATOR FOR INCAPACITY OR UNDUE DELAY

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During your arbitration hearing, you notice the chair of the tribunal looks unwell but you keep your thoughts to yourself. The chair then announces one day that he will need to adjourn the hearing for a week, for personal reasons. During this break, you learn that he is seeing an oncologist. With some trepidation, since this is an *ad hoc* arbitration, you write a letter to the tribunal saying, as discreetly as possible, that if any of its members are having health issues and need to step down from the proceeding, you and your client will do whatever is necessary to accommodate everyone. Upon reconvening the hearing, the chair begins by telling counsel that the matter will wrap up that week and they need not worry about anyone's health issues; as for himself, he will be the judge of his own condition. However, during that final week, the chair is increasingly distracted and non-communicative. After the hearing ends, you hear nothing from the panel, and the 60-day deadline set out in the arbitration agreement for the delivery of the award comes and goes. Months pass and no award is delivered. You then receive an email from a close friend of your party-appointed arbitrator, who says that no one has heard from the chair since the final day of the hearing. Now what?

The above scenario is not a hard one to imagine. It is entirely possible for an arbitrator to become incapacitated during an arbitration, or to become so overburdened with other matters that dealing with the arbitration becomes next-to-impossible for them and the arbitration becomes inordinately delayed. You hope that the arbitrator will recover to the point that they can resume their duties or that they can make your arbitration a priority. Perhaps, if need be, the arbitrator will choose to resign, or the parties will agree that the arbitrator's mandate must be terminated. A substitute arbitrator can get up to speed and the matter can

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pick up where things left off or if necessary, start afresh. However, there will be situations where the arbitrator in question will not resign and the parties cannot agree on whether to terminate his or her mandate.

While the provisions for challenging an arbitrator for bias, a failure to disclosure conflicts or a lack of qualifications are well known (and do not form part of this article), Canadian domestic and international arbitration acts also contain provisions for removing an arbitrator (or terminating their mandate) when they are unable to perform their functions as an arbitrator or when there is undue delay in the proceeding. In this paper, I canvass those laws, as well as various arbitral rules, and examine how they have been applied in practice by courts and arbitral institutions. I also examine the consequences that can flow from removing an arbitrator. Obviously, removing an arbitrator during the currency of an arbitration can create serious difficulties for all concerned. The parties and their counsel will be inconvenienced, likely to a serious degree, by delays and additional costs. For an arbitrator, removal can not only be embarrassing but it can also have a significant financial impact. If the arbitration is being administered by an institution, the removal could very well diminish the prospect of receiving future appointments from that institution. Unsurprisingly, courts and arbitral institutions have been called upon to invoke these provisions – publicly at least – only on rare occasions.

I. LEGISLATION IN CANADA PROVIDING FOR REMOVAL OF AN ARBITRATOR

1. Common Law Provinces and Territories

a. Domestic Arbitration

Under the Ontario *Arbitration Act, 1991*, a party to an arbitration may apply to the court for an order removing an arbitrator if the arbitrator "becomes unable to perform his or her functions" or if the arbitrator "delays unduly in conducting the arbitration".[1] The domestic arbitration acts in Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan contain the same provision, although instead of "unable to perform his or her functions", those acts refer

[1] See *Arbitration Act, 1991,* SO 1991, c 17, s 15(1).

to an arbitrator becoming "unable to perform the functions of an arbitrator".[2]

The current British Columbia *Arbitration Act* provides for the court to remove an arbitrator who "unduly delays in proceeding with the arbitration or in making an award".[3] There is no explicit provision for a party to ask the court to remove an arbitrator who is unable to perform his or her functions. However, as discussed below, the domestic rules of the British Columbia International Commercial Arbitration Centre, which apply to domestic commercial arbitrations in B.C. unless the parties agree otherwise, include a provision to address this issue. Meanwhile, s. 17(3) of the B.C. domestic act allows a party to ask the court to appoint an arbitrator "if an arbitrator refuses to act, is incapable of acting or dies" in circumstances where the applicable arbitration agreement either does not provide a means of "filling the vacancy" or does provide a means but "a qualified person has not filled the vacancy within the time provided for in the agreement, or if no time has been provided for, within a reasonable time."[4] Nowhere is there a

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[2] See *Arbitration Act*, RSA. 2000, c A-43, s 15(1); *The Arbitration Act*, CCSM, c A120, s 15(1); *Arbitration Act*, RSNB 2014, c 100, s 15(1); *Commercial Arbitration Act*, RNS 1999, c 5, s 17(1); *The Arbitration Act, 1992,* SS 1992, c A-24.1, s 16(1). This similarity reflects the fact that these provinces, along with BC and Ontario, have all adopted the uniform domestic arbitration act, with modifications in some cases, developed by the Uniform Law Conference of Canada.

[3] *Arbitration Act*, RSBC 1996, c. 55, s. 18(1)(b). On February 19, 2020, the B.C. Legislature gave First Reading to Bill 7, providing for a new domestic *Arbitration Act* and making a handful of changes to, *inter alia*, the B.C. *International Commercial Arbitration Act*, RSBC 1996, c 233. Under s. 19(2) of the proposed new domestic act, the court will have the power to remove an arbitrator who "becomes in law or in fact unable to perform the arbitrator's functions or for other reasons fails to act without undue delay". In addition, the Domestic Commercial Arbitration Rules of the British Columbia International Commercial Arbitration Centre (which is proposing to change its name to the Vancouver International Arbitration Centre) will no longer automatically apply to domestic arbitrations. This new Act adopts provisions similar to the B.C. *International Commercial Arbitration Act* and recommended by the Uniform Law Conference of Canada.

[4] *Ibid* at s 17(3). In *Ian MacDonald Library Services Ltd v. P.Z. Resort System Inc*, [1987] 5 WWR 427, 14 BCLR (2d) 273 (BCCA), the Chambers Judge adopted the position that an arbitrator was "incapable" of acting after his award was set aside and ordered that a new arbitrator be appointed to re-hear the matter. The Court of Appeal upheld the setting aside of the award but held that the

provision for the court to determine if or when a vacancy has occurred, and there is no explicit provision to permit the court to declare a vacancy if a party requests it. However, before filling a vacancy, the court would need to conclude that there is one to fill.[5]

The Newfoundland and Labrador *Arbitration Act* contains similar language to that in the B.C. act, but also contains a provision that provides that a party may serve the other parties or arbitrators with a notice to appoint or concur in the appointment of an arbitrator where an appointed arbitrator "refuses to act" or is "incapable of acting".[6] If a new appointment is not made within seven days of service of that notice, then the party who gave notice may apply to the court to make the appointment.[7] There is a provision that where an umpire or third arbitrator refuses to act, is incapable of acting, or dies, then that individual "is considered to have vacated the post".[8] However, there is no provision setting out when a sole arbitrator is considered to have vacated their post. Where a party asks the court to replace an arbitrator whom that party believes is incapable of acting, if the other party or the arbitrator resists the application then the party may also need to seek a declaration from the court that the arbitrator is incapacitated. Meanwhile, s. 13 provides that where an arbitrator or umpire has "misconducted himself or herself", the court may remove him or her.[9] Similar provisions exist in the domestic arbitration acts of Prince Edward

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parties were now in the position they were at the outset of the dispute. Since the first arbitration had been conducted pursuant to a submission to arbitrate rather than a pre-existing agreement to arbitrate any disputes that arose, the court determined that the parties should therefore be able to start afresh and either make a new agreement to arbitrate or litigate the matter in the court.

[5] See *Succula Ltd and Pomona Shipping Co Ltd v. Harland and Wolff Ltd*, [1980] 2 Lloyd's Rep 381 at 388 (QBD (Commercial Court)), where Mustill J (as he then was) said in reference to similar provisions of the English *Arbitration Act, 1950*, "This section … is concerned with filling vacancies, not with creating them by the removal of an arbitrator, although of course before the vacancy can be filled the Court must first recognize that it exists."

[6] See *Arbitration Act*, RSNL 1990, c A-14, ss 5(1)(b) and (d).

[7] *Ibid* at s 5(3).

[8] *Ibid* at s 5(2).

[9] *Ibid* at s 13.

Island[10], the Northwest Territories,[11] Yukon[12] and Nunavut.[13] However, in Yukon, it could be argued that a slightly lower standard exists for removing a misbehaving arbitrator, insofar as it is only necessary for the court to find that the arbitrator "has acted inappropriately in the arbitration"[14] as opposed to having "misconducted" themselves. Misconduct has commonly been associated with an arbitrator acting in a manner that demonstrates bias, failing to disclose a conflict of interest, doing something that causes the parties to lose confidence in him or her, or mishandling the arbitration in a way that causes a substantial miscarriage of justice.[15] As one Australian judge commented, misconduct by an arbitrator is "is rather like the elephant – we know it when we see it."[16] In *Succula Ltd. and Pomona Shipping Ltd. v. Harland and Wolff Ltd*., Mustill J. (as he then was) stated that in certain cases delay by an arbitrator could amount to "serious misconduct".[17]

In terms of procedure, if the arbitration is governed by the Ontario *Arbitration Act, 1991*, a party seeking to remove an arbitrator for inability to perform his or her functions or for unduly delaying the arbitration would commence an application in the Superior Court of Justice for an order removing him or her. The application would be on notice to all parties and, typically, the arbitrator, but

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[10] *Arbitration Act*, RSPEI 1988, c. A-16, ss 8(1)(c), 8(2), and 12(1).

[11] *Arbitration Act*, RSNWT (Nu) 1988, c A-5, ss 9, 11(1)(c), and 11(2).

[12] *Arbitration Act*, SY 2002, c 8, ss 6, 8, 10(1)(c), and 10(2).

[13] *Arbitration Act*, RSNWT (Nu) 1988, c A-5, ss 9, 11(1)(c), and 11(2).

[14] *Arbitration Act*, SY 2002, c 8, s 8.

[15] See *Gas and Fuel Corporation of Victoria v. Wood Hall Ltd and Leonard Pipeline Contractors Ltd*, [1978] VicRp 41, [1978] VR 385 (SC); *Ict Pty Ltd v. Sea Containers Ltd* [2002] NSWSC 77, aff'd [2002] NSWCA 84.

[16] *Stannard v. Sperway Constructions Pty Ltd*, [1990] VicRp 57, [1990] VR 673 (SC).

[17] *Succula*, *supra* note 5 at 388. In *Bremer Handelsgesllschaft mbH v. Ets Soules et Cie and Anthony G. Scott*, [1985] 1 Lloyd's Rep 160 (QBD (Commercial Court)) at 164, Mustill J stated that "the High Court has power to remove an arbitrator for 'misconduct', under s. 23 of the Arbitration Act, 1950 … (3) Where the conduct of the arbitrator is such as to show that … he is, through lack of … diligence, incapable of conducting the reference in a manner which the parties are entitled to expect." (upheld on appeal, [1985] 2 Lloyd's Rep 199 (CA)).

the arbitrator would not normally be named as a responding party.[18] There is no requirement to send the arbitrator a statement of the grounds for removal prior to commencing the application.[19] Evidence on the application would be submitted by way of affidavit, the deponents of which would be subject to cross-examination prior to the hearing of the application.[20] Evidence can also be obtained by examining other witnesses before the hearing. The Ontario domestic Act directs that if the application is based on an allegation that the arbitrator has delayed unduly in conducting the arbitration, the arbitrator is entitled to be heard by the court.[21] There is no right of appeal from the court's decision, with the exception of any order made penalizing the arbitrator financially.[22]

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[18] In *Interact v. McKay* (14 July 2003), New Zealand CP51/03 (HC Wellington) (Master, unreported), the plaintiffs commenced a proceeding in the New Zealand High Court for an order terminating the mandate of an arbitrator, a retired judge, on the basis he was unfit to continue for health reasons. (He had fallen asleep on each of the first five days of the hearing before suffering a stroke and then spent about a month in hospital. Thereafter, he advised the parties that he had made a "good recovery" and did not believe there was any problem in him continuing as arbitrator.) The arbitrator brought a motion for an order striking out the claim as against him personally (but allowing it to continue as against the defendant in the arbitration). The court granted the motion as the arbitrator was not a party to the dispute, noting that the plaintiff could apply for non-party discovery against the arbitrator or the hospital that had treated him, online (pdf): https://www.nzdrc.co.nz/wp-content/uploads/2019/11/Interact-v-Rt-Hon-Sir-Ian-McKay-ID-44878.pdf.

[19] A party seeking to challenge an arbitrator under the Ontario *Arbitration Act 1991* on the grounds of circumstances that may give rise to a reasonable apprehension of bias or because the arbitrator lacks the necessary qualifications, is required to send the tribunal a statement of the grounds for challenge within 15 days of becoming aware of them, per s 13(3). No such statement is required when a party seeks to have an arbitrator removed under s 15(1) for being unable to perform his or her functions or for delaying unduly in conducting the arbitration. See *McClintock v. Karam*, 2015 ONSC 1024 at para 86. As a matter of courtesy, regardless of what is required, counsel should warn an arbitrator that they are considering bringing an application to remove him or her.

[20] With respect to procedure and evidence on applications, see Ontario *Rules of Civil Procedure*, RRO 1990, Reg 194, rr 38 and 39.

[21] Ontario *Arbitration Act 1991*, s 15(2). See also *James Moore Earthmoving v. Miller Construction Ltd*, [2001] EWCA Civ 654 at para 7.

[22]See Ontario *Arbitration Act 1991*, ss 15(4)-(6). When an arbitrator is removed for undue delay, the court can order that the arbitrator (a) receive no payment for his or her services, and (b) compensate the parties for their costs incurred

The provisions of the domestic arbitration acts in the other common law provinces and territories also direct that one would commence an application for removal to that jurisdiction's superior trial court. The domestic arbitration acts of New Brunswick and Nova Scotia contain similar provisions to the Ontario domestic act with respect to the requirement of giving notice to the arbitrator and permitting them to be heard by the court on the application when the basis of seeking their removal is undue delay.[23] Under the Alberta, Manitoba and Saskatchewan domestic acts, the arbitrator is entitled to be heard by the court not only when the basis of seeking their removal is undue delay but also when the basis is that they are unable to perform the functions of an arbitrator.[24] The B.C. domestic act is silent on whether the arbitrator is entitled to be heard by the court on an application for his or her removal,[25] as are the domestic arbitration acts of Newfoundland and Labrador, the Northwest Territories, Nunavut, Prince Edward Island and Yukon.[26]

Any application for removal must be launched within a reasonable time after the issues giving rise to the request come to the applicant's attention; otherwise, the applicant will be deemed to have waived the right to seek that relief.[27]

Unlike situations where a party seeks to challenge an arbitrator for bias or lacking appropriate qualifications, the domestic acts are silent on whether an arbitrator may continue with the proceeding in the face of an application to remove him or her for an inability

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in connection with the arbitration prior to his or her removal. The arbitrator or a party may appeal such an order, within 30 days, to the Court of Appeal, with leave of that court. See below, Section III.

[23] See Nova Scotia *Commercial Arbitration Act*, s 17(2); New Brunswick *Arbitration Act*, s 15(2).

[24] See Alberta *Arbitration Act*, s 15(2); Manitoba *Arbitration Act*, s 15(2); Saskatchewan *Arbitration Act*, s 16(2).

[25] This remains the case in the proposed new B.C. *Arbitration Act*, *supra* note 3. The domestic rules of the British Columbia International Commercial Arbitration Centre (BCICAC) are also silent on the point.

[26] In all cases, there may be a provision in the local rules of court that directs whether a party affected by an order must, or can, receive notice of the proceeding.

[27] See for example, the waiver provisions of the Ontario *Arbitration Act 1991*, s 4(1).

to perform their functions or for delay.[28] However, it would be open to an applicant to seek an injunction to stay the arbitration.[29]

b. International arbitration

All of the common law provinces and territories have adopted the UNCITRAL Model Law as part of their respective international arbitration statutes, although to date only Ontario and British Columbia have adopted the 2006 amendments to the original 1985 version of the Model Law.[30]

Article 14 of the Model Law provides for the removal of an arbitrator for an inability to perform their functions or for undue delay. It states:

> (1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
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> (2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

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[28] See, for example, Ontario *Arbitration Act 1991*, s 13(7).

[29] See, for example, *Courts of Justice Act*, RSO 1990, c C.43, s 101.

[30] See *International Commercial Arbitration Act, 2017,* SO 2017, c 2, Sched 5; *International Commercial Arbitration Act*, RSBC 1996, c 233. In all other common law provinces and territories, the applicable act is called the *International Commercial Arbitration Act* ("ICAA"). Their legislative citations are (in alphabetical order by jurisdiction): RSA 2000, c I-5; CCSM c C151; RSNB 2011, c 176; RSNL 1990, c I-15; RSNWT 1988, c I-6; RSNS 1989, c 234; RSNWT (Nu) 1988, c I-6; RSPEI 1988, c I-5; SS 1988-89, c I-10.2; and RSY 2002, c 123. Unique among these acts, the BC ICAA incorporates the Model Law (with the 2006 amendments) into the body of the act rather than attaching it as a schedule.

The wording of Article 14 was unchanged by the 2006 amendments to the Model Law.[31]

A party seeking the removal of an arbitrator under Article 14 would make its request to the applicable provincial or territorial superior trial court, such as the Alberta Court of Queen's Bench, the British Columbia Supreme Court, the Trial Division of the Supreme Court in Nova Scotia or the Superior Court of Justice in Ontario. There is no "other authority specified in article 6" in any of these international acts.[32] As with a removal request in a domestic arbitration, as discussed above, the request would commonly take the form of an application (or other summary procedure), without the need to name the arbitrator as a party. The local rules of civil procedure would determine whether the arbitrator was entitled to be put on notice of the application (as opposed to the parties doing so as a matter of courtesy) or entitled to be heard by the court. As is made clear in Article 14(1) of the Model Law, there is no appeal from the court's decision on whether to terminate the arbitrator's mandate in these circumstances.[33]

While Article 14 does not include a temporal component for when a party needs to seek an arbitrator's removal, Article 4 directs that a party must act "without undue delay" if it wishes to object to non-compliance with a provision of the Model Law that is not mandatory. Failing to do so will result in a waiver of the right to object. Article 14 is not mandatory (parties are free to choose their own methods of dealing with a non-performing arbitrator), so a party seeking to remove an arbitrator should take the

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[31] Section 14 of the BC ICAA incorporates the provisions of Article 14 of the Model Law. An amendment to s 14(1)(a) of the B.C. ICAA, contained in the proposed new B.C. *Arbitration Act*, *supra* note 3, changes the term "*de jure* or *de facto*" or "in law or in fact".

[32] See, for example, s 6(2) of the Ontario ICAA, which states that a reference in the Model Law to "court" is to be read as a reference to the Superior Court of Justice unless the context requires otherwise.

[33] See United Nations Commission on International Trade Law, *Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006* (Vienna: United Nations, 2006) at 30, para 24. The prohibition on appeals was specifically included in Article 14: "[i]n view of the urgency of matters relating to the composition of the arbitral tribunal or its ability to function, and in order to reduce the risk and effect of any dilatory tactics".

necessary steps within a reasonable time after learning of the facts giving rise to the reason for seeking the removal, failing which it may be deemed to have waived its right to object.[34]

As with the domestic acts, there is no provision in the international acts addressing whether the arbitration can continue in the face of an application to terminate an arbitrator's mandate.[35]

2. Quebec

In Quebec, both domestic and international arbitrations are governed by provisions in the *Civil Code of Quebec*[36] and in the Quebec *Code of Civil Procedure*.[37]

Section 628 of the *Code of Civil Procedure* states:

> A party may ask the court to revoke an arbitrator if it is impossible for the arbitrator to carry out their mission or if the arbitrator does not discharge their functions within a reasonable time.

The court referred to in section 628 is the Superior Court of Quebec, unless the arbitration involves a dispute that would be within the competency of the Court of Quebec.[38]

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[34] See Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2019) at 239-40.

[35] In *Kailay Engineering Co (HK) Ltd v. Charles W Farrance*, [1999] HKCA 565, the Hong Kong Court of Appeal upheld a lower court's decision to backdate an order removing an arbitrator for delay, to the date of the application, after the arbitrator delivered his award during the pendency of the removal application. The judge at first instance had noted (quoted by the Court of Appeal at para. 5 of its judgment): "The question of whether or not the arbitrator is to be removed [for delay] is to be resolved with regard to the time the plaintiff makes its application, not at the time I make my order. If it were otherwise, any arbitrator could unilaterally deprive the court of its power … by simply making his award, willy-nilly, good or bad, properly considered or not properly considered, before the order is made." Arguably, issuing an order with retroactive effect can be done by any court that has the authority, inherent or otherwise, to grant an order *nunc pro tunc.* See *Canadian Imperial Bank of Commerce v. Green*, [2015] 3 SCR 801 at paras 89-90.

[36] See arts 2638-43, 2892, 2895, 3121, 3133, 3148 and 3165 CCQ.

[37] See arts 620-655 Quebec CCP.

Pursuant to section 630 of the *Code of Civil Procedure*, the decision of the court on revocation cannot be appealed.

The *Code of Civil Procedure* directs that if an arbitrator is challenged for bias or lack of qualifications then the arbitration may continue pending the outcome of that challenge, but it is silent with respect to continuing with the arbitration in the face of a request to revoke the arbitrator's mandate.[39]

3. Federal Jurisdiction

The federal *Commercial Arbitration Act* applies to both domestic and international commercial arbitrations to which one of the parties is the federal Crown, a departmental corporation or Crown corporation, or when the arbitration is in relation to maritime or admiralty matters.[40] Schedule 1 to the federal act is the Commercial Arbitration Code, which is based on the 1985 version of the UNCITRAL Model Law. Article 14 of the Commercial Arbitration Code is identical to Article 14 of the Model Law.

Pursuant to Article 6 of the Commercial Arbitration Code, an application under Article 14 to remove an arbitrator can be made to the Federal Court or "any superior, county or district court". As with the international acts, the federal act is silent on whether the arbitration can continue in the face of an application to terminate an arbitrator's mandate.

II. INSTITUTIONAL AND AD HOC RULES GOVERNING REMOVAL OF AN ARBITRATOR

If parties to an arbitration have agreed to a set of rules for their proceeding, then those rules would apply to the removal of

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[38] See *ibid* at art 33. The *Code of Civil Procedure* designates the Superior Court as the court of original general jurisdiction, with the exception that the Court of Quebec has exclusive jurisdiction to hear and determine applications relating to an arbitration insofar as it would be competent to rule on the subject matter of the dispute referred to the arbitrator. The Court of Quebec has exclusive jurisdiction over matters in which the amount claimed is less than $85,000. *Ibid* at arts 35 and 39.

[39] *Ibid* at art 627.

[40] See *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp).

an arbitrator at first instance, as the statutory provisions regarding terminating an arbitrator's mandate are not mandatory.[41]

The Arbitration Rules of the ADR Institute of Canada (ADRIC), for use in domestic arbitrations, provide in Rule 3.5.1 that the Institute can declare a vacancy if it receives "satisfactory evidence" that an arbitrator (a) refuses to act; (b) is incapable of acting; (c) withdraws; (d) is removed by court order; (e) is successfully challenged under Rule 3.6 (for lack of independence or impartiality or for not having the agreed qualifications) or (f) has died.[42] However, these rules do not set out a procedure to be used when a party seeks the removal of an arbitrator on one of these bases.

Article 15(1) of the Canadian Arbitration Rules of the International Centre for Dispute Resolution Canada (ICDR Canada) directs that if an arbitrator "resigns, is incapable of performing the duties of an arbitrator, or is removed for any reason and the office becomes vacant, a substitute arbitrator shall be appointed pursuant to the provisions of Article 12, unless the parties otherwise agree."[43] Article 12 sets out the procedures by which the parties may agree on the appointment of an arbitrator or use the services of ICDR Canada (identified as the "Administrator") for same. As with the ADRIC Rules, the ICDR Canadian Rules do not set out a procedure to bring the issue before the institution.

The B.C. International Commercial Arbitration Centre (BCICAC) has separate rules for domestic and international arbitrations. The current B.C. *Arbitration Act* directs that unless the parties otherwise agree, "the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic

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[41] See, for example, Ontario *Arbitration Act, 1991*, ss 3 and 14, which allow the parties to vary or exclude any provision of the act except for certain enumerated provisions, which do not include the provisions governing terminating an arbitrator's mandate.

[42] See Arbitration Rules of the ADR Institute of Canada, Inc, ("ADRIC Arbitration Rules") (1 December 2016), online (pdf): http://adric.ca/wp-content/uploads/2017/08/2016_ARBITRATION_RULES_Booklet_2016_Aug2017.pdf.

[43] See Canadian Arbitration Rules of the International Centre for Dispute Resolution ("ICDR Canadian Arbitration Rules") (1 January 1 2015), online (pdf): https://www.icdr.org/sites/default/files/document_repository/ICDR-Canada-Rules-English.pdf.

commercial arbitrations apply to that arbitration".[44] Rule 18(1) of those rules allows the Centre to declare a vacancy "if, on the basis of evidence thought satisfactory by the Centre, it concludes that an arbitrator is unable to perform the duties of the office."[45] As to the BCICAC's International Commercial Arbitration Rules of Procedure, Article 13(1)(a) provides that an arbitrator's mandate terminates if the arbitrator (i) "becomes *de jure* or *de facto* unable to perform the functions of arbitrator or for any reason fails to act without undue delay", and (ii) "withdraws from office or the parties agree to the termination".[46] There is no provision in these rules to address such a termination where the parties do not agree. Accordingly, if a controversy arose over the arbitrator's capability or delay, then the parties would look for assistance to the B.C. Supreme Court under the provisions of the B.C. *International Commercial Arbitration Act*.[47]

Under the General Commercial Arbitration Rules of The Canadian Commercial Arbitration Centre (CCAC),[48] the parties may "request" the Centre, under Rule 30, to make the "appropriate decision" if there is a disagreement over whether the arbitrator's mandate should terminate if he or she "becomes unable to perform his or her functions or for other reasons does not perform them in a reasonable manner". Meanwhile, Article 20(2) of the CCAC's International Arbitration Rules[49] states: "If an arbitrator fails to fulfil his functions, or for any reason is prevented from fulfilling

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[44] See BC *Arbitration Act* at s 22(1). Under the proposed new B.C. *Arbitration Act*, *supra* note 3, the Domestic Commercial Arbitration Rules of the British Columbia International Commercial Arbitration Centre (which is proposing to change its name to the Vancouver International Arbitration Centre) will no longer automatically apply to domestic arbitrations.

[45] BCICAC Revised Domestic Commercial Arbitration Rules of Procedure ("BCICAC Domestic Rules") (15 September 2016), online: http://bcicac.com/arbitration/rules-of-procedure/revised-domestic-commercial-arbitration-rules-of-procedure/.

[46] BCICAC International Commercial Arbitration Rules of Procedure ("BCICAC International Rules") (1 January 1 2000), online: http://bcicac.com/arbitration/rules-of-procedure/international-commercial-arbitration-rules-of-procedure/.

[47] See BC ICAA at s 14(2).

[48] Canadian Commercial Arbitration Centre, "General Commercial Arbitration", online: https://ccac-adr.org/en/general-commercial-arbitration.

[49] Canadian Commercial Arbitration Centre, "International Arbitration", online: https://ccac-adr.org/en/international-arbitration.

them with diligence and in accordance with the Rules, the Centre may, at the request of a party or on its own initiative, relieve the arbitrator of his duties." When the Centre "contemplates the possibility of relieving an arbitrator of his duties", it will decide the matter only after first providing the parties, the arbitrator concerned and any other members of the arbitral tribunal with an opportunity to comment in writing.[50]

Article 12(3) of the 2010 UNCITRAL Arbitration Rules, commonly employed in *ad hoc* international arbitrations, provides for the termination of an arbitrator's mandate in the event that the arbitrator "fails to act" or in the event of the *de jure* or *de facto* impossibility of the arbitrator performing his or her functions. This is the same basis as laid out in Article 14 of the Model Law, with the exception that in the UNCITRAL Rules the term "fails to act" is not modified with the additional words "without undue delay".[51] Article 14 of the Model Law was based on Article 13 of the 1976 UNCITRAL Arbitration Rules,[52] which contained the same language as the 2010 UNCITRAL Rules relating to when the termination of an arbitrator's mandate could be sought. The procedure for seeking to remove an arbitrator for failing to act or for inability to perform his or her functions is set out in Article 13 of the 2010 Rules, which also governs the procedure for challenges based on bias. The party seeking the arbitrator's removal must first send a notice to the other parties and the tribunal within 15 days after the circumstances giving rise to the request became known to the party. If the matter is not resolved to that party's satisfaction within 15 days of the notice, then it may seek a decision on the requested removal from the appointing authority (as established by the provisions of Article 6 of the 2010 Rules). The ADRIC Arbitration Rules designate that if the arbitration to which they apply is international under the law of the seat, then unless

[50] *Ibid*, at Rule 20(3).

[51] UNCITRAL Arbitration Rules, online (pdf): https://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

[52] Binder, *supra* note 34 at 236.

the parties agree otherwise, the arbitration is governed by the 2010 UNCITRAL Arbitration Rules.[53]

The rules of the major international arbitration institutions all contain provisions to allow the institution to remove an arbitrator in appropriate circumstances.

For example, under Article 15(2) of the 2017 International Chamber of Commerce (ICC) Arbitration Rules, the power to remove an arbitrator lies with the ICC's Court of International Arbitration. An arbitrator "shall … be replaced on the Court's own initiative when it decides that the arbitrator is prevented *de jure* or *de facto* from fulfilling the arbitrator's functions, or that the arbitrator is not fulfilling those functions in accordance with the Rules or within the prescribed time limits."[54] Article 15(3) suggests that to the extent the ICC Court takes action under Article 15(2), it will do so only after it is made aware of the matter by a party or counsel. The arbitrator concerned, the parties, and any other members of the arbitral tribunal are to be given an opportunity to comment in writing "within a suitable period of time" (which comments will be shared with the parties and the arbitrators) before the ICC Court decides on the matter.[55]

The 2014 Rules of the London Court of International Arbitration (LCIA) provide for the LCIA Court to revoke an arbitrator's

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[53] *Supra* note 42. See ADRIC Rule 1.3.2 and the definition of UNCITRAL Arbitration Rules in ADRIC Rule 1.2.

[54] International Chamber of Commerce Rules of Arbitration ("ICC Rules"), online: https://iccwho.org/dispute-resolution-services/arbitration/rules-of-arbitration. For an overview of the ICC Court's handling of removing and replacing arbitrators, see Thomas H Webster & Michael W Bühler, *Handbook of ICC Arbitration*, 4th ed (London, UK: Sweet & Maxwell, 2018) at paras 15-21–15-43.

[55] Seeking to remove an arbitrator in this manner can be problematic insofar as maintaining the confidentiality of the tribunal's deliberations is concerned. See Nathalie Voser, "Removal, Resignation, Dismissal and Replacement of Arbitrators" in Philipp Habegger et al, eds, *Arbitral Institutions under Scrutiny, ASA Special Series No. 40* (Huntington, NY: JurisNet LLC, 2013) at 76-77. On the issue of maintaining confidentiality of deliberations generally in the face of problems arising among the tribunal members, see Marc J. Goldstein, "Living (or not) with the partisan arbitrator: are there limits to deliberations secrecy?", (2016) 32:4 Arb Intl 589.

appointment at its own initiative, or at the request of other members of the tribunal or a party, if the arbitrator falls "seriously ill" or if the arbitrator "refuses or becomes unable or unfit to act".[56] An arbitrator may be found to be "unfit to act" if he or she "does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry." A party seeking to remove an arbitrator must deliver a written statement of reasons for its challenge to the LCIA Court, the arbitral tribunal, and all other parties within 14 days of becoming aware of the grounds for the removal. The other parties and the challenged arbitrator are given a "reasonable opportunity" to comment after which the LCIA will decide the matter, providing written reasons. A commentary on the LCIA Rules suggests that it would be "patently unfair" if an arbitrator's appointment were revoked due to illness if that illness did not give rise to "justifiable concerns" about the arbitrator's ability to perform his or her functions.[57]

Under the ICDR International Arbitration Rules, the ICDR (as "Administrator") is empowered to remove an arbitrator, on its own initiative, for "failing to perform his or her duties."[58]

Provisions for the termination of an arbitrator's mandate for incapacity, failure to act or undue delay are also found in the arbitration rules of, for example, the International Institute for Conflict Prevention and Resolution (CPR), the British Virgin Islands International Arbitration Centre, the Center for Arbitration and Mediation of the Chamber of Commerce Brazil-Canada, the Chartered Institute of Arbitrators, the Stockholm Chamber of Commerce, the Milan Chamber of Arbitration, the Vienna International Arbitration Centre, the Hong Kong International Arbitration Centre, the Singapore International Arbitration Centre, the Australian Centre for International Commercial Arbitration, and the Arbitrators' and Mediators' Institute of New Zealand, as well as the rules of specialized

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[56] See art 10, London Court of International Arbitration Rules ("LCIA Rules"), online: https://www.lcia.org/dispute_resolution_services/lcia-arbitration-rules-2014.aspx.

[57] See Shai Wade, Philip Clifford & James Clanchy, *A Commentary on the LCIA Arbitration Rules 2014* (London, UK: Thomson Reuters, 2015) at para 10-010.

[58] See art 14(4) ICDR Arbitration Rules, online (pdf): https://www.icdr.org/sites/default/files/document_repository/ICDR_Rules.pdf.

arbitration bodies such as the Court of Arbitration for Sport, the World Intellectual Property Organization and P.R.I.M.E. Finance and of industry associations such as the Grain and Feed Trade Association.[59]

For investor-state arbitrations, both the 2006 ICSID Convention Arbitration Rules and the 2006 ICSID Arbitration (Additional Facility) Rules provide that parties can seek to have an arbitrator disqualified if he or she "becomes incapacitated or unable to perform the duties of his office."[60] To so do, a party "shall promptly" file a "proposal" with the Secretary-General of ICSID, stating the reasons. The affected arbitrator is given an opportunity to respond before the other members of the tribunal vote on the proposal. If they are unable to reach agreement on whether to disqualify the arbitrator, the matter goes to the Chairman of the Administrative Council of ICSID for determination.

III. HOW COURTS AND INSTITUTIONS HAVE HANDLED REQUESTS FOR REMOVAL

Courts inside and outside Canada have consistently emphasized that removal of an arbitrator should be viewed as a remedy of last resort.[61] In some cases of delay, courts have extended statutory or other deadlines to allow arbitrators to continue with a hearing or deliver an award.

In *AOOT Kalmneft v. Glencore International AG*, Colman J. stated that the removal of an arbitrator "should be taken only if the serious irregularity is such that it may reasonably be concluded that there is a serious risk that the arbitrator's future conduct of the

[59] For a general overview of major institutions' provisions for removing an arbitrator, see Rémy Gerbay, *The Functions of Arbitral Institutions* (Alphen aan den Rijn, The Netherlands: Kluwer, 2016) at 89-92.

[60] See Rules 8-9, International Centre for the Settlement of Investment Disputes Arbitration Rules ("ICSID Arbitration Rules"), online: http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/basicdoc/partf-chap01.htm; Rules 14-15 ICSID Additional Facility Rules, online: http://icsidfiles.worldbank.org/icsid/icsid/staticfiles/facility/partd-chap03.htm. Canada ratified the ICSID Convention on 1 November 2013, after enabling legislation was passed at the provincial and territorial level. The 2019 draft amendments to the ICSID Rules do not materially change these provisions.

[61] *See*, *eg*, *Succula*, *supra* note 5 at 388.

proceedings will not be in accordance with his duties". The court referred to the general duty of the arbitral tribunal, laid out in section 33 of the English *Arbitration Act 1996,* to "adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined".[62]

In recent years, several arbitral institutions have adopted measures to reduce or avoid delays by ensuring that potential arbitrators confirm their availability before accepting an appointment, and by retaining the ability to financially penalize arbitrators who are dilatory. As well, arbitrators' codes of ethics have provisions that address availability. While these measures can help reduce complaints arising over arbitrators' sluggish performance, they provide little to no benefit in a situation of diminished capacity.[63]

In the context of international arbitrations, as noted above the Model Law has been adopted across Canada. Legislation based on the Model Law has been adopted in 80 countries in a total of 111 jurisdictions,[64] including several U.S. states.[65] Ontario and B.C. have specifically adopted the 2006 amendments to the Model Law. One of those amendments is Article 2A, which states that in interpreting the Model Law, regard is to be had to its international origin and to the need to promote uniformity in its application

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[62] See *AOOT Kalmneft v. Glencore International AG* [2001] EWHC QB 461 at paras 7, 96.

[63] See below, Section III.2.

[64] See United Nations Commission on International Trade Law, "1985 Model Arbitration Law Status", online: http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

[65] For example, California, Connecticut, Florida, Georgia, Illinois and Texas. The Model Law has not been adopted at the US federal level. There are no provisions in the United States *Federal Arbitration Act*, 9 USC § 1-14. allowing for the removal of an arbitrator while proceedings are pending. US Federal Courts have removed an arbitrator prior to the delivery of an award in only a handful of cases involving consolidation (for example, *Compania Espanola de Petroleos, S.A. v. Nereus Shipping, S.A.*, 527 F.2d 966 (2d Cir 1975)) or bias (for example, *Masthead Mac Drilling Corp. v. Fleck*, 549 F.Supp. 854 (SDNY 1982)). See American Law Institute, *Restatement of the Law, The U.S. Law of International Commercial and Investor-State Arbitration* (Proposed Final Draft) (Philadelphia, PA: The American Law Institute, 2019) at §3.2(b), and at 431, 434-435.

and the observance of good faith.[66] Accordingly, decisions of courts outside Canada are very useful for courts in Ontario and B.C., if not all Canadian jurisdictions, in interpreting the Model Law and are therefore canvassed in this article along with the *travaux préparatoires*.[67]

1. Inability to Perform the Functions of an Arbitrator

As noted above, many of the Canadian domestic arbitration acts specifically allow for the removal of an arbitrator if they become unable to perform the functions of an arbitrator, or if they are incapable of acting. In the international arbitration context, the question for a court is whether the arbitrator is *de jure* or *de facto* unable to perform his or her functions. Arbitral rules, whether for *ad hoc* or institutional arbitrations, may also use that terminology or may instead refer to an arbitrator's inability or lack of fitness to act.

To date, there do not appear to have been any decisions by a Canadian court on removing an arbitrator for reasons of legal or factual incapacity, and indeed the caselaw is sparse everywhere.

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[66] Article 2A was added to the UNCITRAL Model Law in the 2006 amendments to help "promote a more uniform understanding of the Arbitration Model Law." Similar provisions were already found in Article 7 of the United Nations Convention on Contracts for the International Sale of Goods and Article 3 of the UNCITRAL Model Law on Electronic Commerce. UNCITRAL, *Report of the United Nations Commission on International Trade Law on the work of its 39th (19 June – 7 July 2006) session*, 61st Sess, UN Doc A/61/17), at paras 174-175.

[67] To aid with interpreting the Model Law, all of the Canadian international commercial arbitration acts (including the provisions regarding international commercial arbitration in the Quebec Code of Civil Procedure) state that recourse may be had to: (a) the Reports of the United Nations Commission on International Trade Law on the work of its 18th (3 – 21 June 1985) session (U.N. Doc. A/40/17); and (b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (U.N. Doc A/CN.9/264). In the case of Ontario and B.C., as they have adopted the 2006 Amendments to the Model Law, recourse may also be had to: (a) the Report of the United Nations Commission on International Trade Law on the work of its 39th (19 June – 7 July 2006) session (U.N. Doc. A/61/17); and (b) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (U.N. Sales No. E.08.V.4). See, for example, Ontario ICAA, s 6(3).

The notion of an arbitrator being *de jure* unable to perform his or her functions is understood to refer to a legal inability to act as an arbitrator under the law of the seat of the arbitration. For example, there may be a legal bar against an arbitrator who is bankrupt, has been convicted of a criminal offence, is of an ineligible nationality, or lacks legal capacity due to minority, senility, or mental illness.[68] Another basis for *de jure* inability to act arises where an arbitrator is enjoined by a court from proceeding with an arbitration.[69]

An arbitrator who is *de facto* unable to perform his or her functions is one who is factually incapable, physically or mentally. While this would certainly include someone who is unable to act as an arbitrator because of illness or injury, it could also include someone who is simply indisposed or unavailable, such as someone who is unable to travel to the place of arbitration, perhaps because

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[68] Binder, *supra* note 34 at 236; Robert Merkin & Louis Flannery, *Arbitration Law* (loose-leaf) (London, UK: Informa Law, 2017) at para 10.18; Doug Jones, *Commercial Arbitration in Australia* (Sydney: Thomson Reuters, 2013) at 156. Article 11 of the Model Law permits the parties to agree that individuals of a particular nationality cannot act as their arbitrator. On the ineligibility of arbitrators on account of their nationality under the requirements of the ICSID Convention, see Karel Daele, *Challenge and Disqualification of Arbitrators in International Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer, 2012), at 89-92, 440-441. In the second edition of *Russell on Arbitration*, published in 1856, the author said, at 107-108, that it had been "laid down as law in works to which great respect is due, that idiots, lunatics, infants, married women, persons attainted and excommunicated, are disqualified for the office [of arbitrator]", although he thought this was incorrect "for every person is at liberty to choose whom he likes best for his judge, and he cannot afterwards object to the manifest deficiencies of those whom he has himself selected." In *Rex v. Famous Players*, [1932] OR 307 (SC), Garrow J, citing the first edition of Halsbury's, wrote, "Parties to arbitration are free to appoint whomever they choose to arbitrate … [including] an incompetent or unfit person …".

[69] See Jason Fry, Simon Greenberg & Francesca Mazza, *The Secretariat's Guide to ICC Arbitration* (Paris: International Chamber of Commerce, 2012) at para 3-614. See also Michael Kerr, "Concord and Conflict in International Arbitration" (1997) 13:2 Arb Intl 121, in which the author noted a number of instances in which arbitrators, including himself, were subject to injunctions issued by courts in India and Pakistan.

they cannot obtain a visa[70] or because they have been placed in detention.

In *Noble Resources Pte Limited v. China Sea Grains and Oils Industry Co. Ltd*,[71] the arrest of the tribunal chair in China created uncertainty over the continuation of an arbitration hearing in Hong Kong. Following his arrest, the chair informed his two co-arbitrators on March 20, 2006, that he wanted to resign as an arbitrator in the matter due to a "sudden personal problem". Apart from this expression of intention, nothing further was heard from him. On March 28, 2006, the parties came before the court on a motion to address the situation, as there was clearly a controversy remaining (the language used in Article 14(1)) over whether the chair was *de facto* unable to perform his functions and whether he had withdrawn. The defendant suggested to the court that they should all wait a few weeks to find out more about the circumstances of the chair's arrest. However, with the hearing set to resume on April 3, 2006, and in the absence of any information as to why the chair had been arrested or how long he would remain in custody, Burrell J of the Hong Kong High Court found that the chair had resigned, and declared that, pursuant to Article 14 of the Model Law, his mandate had been terminated.[72]

It has also been suggested that an arbitrator whose past conduct shows them to be unfit to serve on a tribunal would be *de facto* incapable of performing their functions as an arbitrator. In September 1984, the United States challenged two Iranian judges at the Iran-United States Claims Tribunal (the Rules of which were, essentially, the 1976 UNCITRAL Arbitration Rules) after the pair had physically attacked their co-arbitrator, Judge Nils Mangård of Sweden, in the entry hall of the Tribunal before the start of a scheduled meeting of the Full Tribunal. In a letter to the Appointing Authority in support

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[70] See Sir David AR Williams & Amokura Kawharu, *Williams & Kawharu on Arbitration* (Wellington: LexisNexis, 2017) at 161.

[71] [2006] HKCFI 334 (HK Ct First Inst).

[72] See Ming Wu, "The Strange Case of Wang Shengchang" (2007) 24 J Intl Arb 63; "Wang Shengchang free – but retains criminal record", *Global Arbitration Review* (12 October 2009), online: https://globalarbitrationreview.com/article/1028664/wang-shengchang-free-but-retains-criminal-record.

of the challenge, the US Agent argued that the Iranian arbitrators' conduct demonstrated:

> "their incapacity and unfitness to perform – and hence the *de facto* impossibility of performing – their functions as arbitrators. Arbitrators who physically attack their colleagues and make violent threats against them show a fundamental, irremediable incapacity and unfitness to function as arbitrators. … Article 13(2) [of the 1976 UNCITRAL Rules] was drafted to cover all circumstances that make it impossible for an arbitrator to perform his functions. … The conduct displayed here shows such a fundamental defect in temperament and character, that it is impossible, *de facto*, for them to perform their functions as arbitrators."

Before a decision on the challenge could be made by the Appointing Authority, the Iranian judges were withdrawn by their government.[73]

In 2003, a German state court found that a judge had been wrongly granted a special administrative authorization to serve as an arbitrator. However, the court concluded that this did not render the judge unable to perform his functions as an arbitrator.[74] The impugned authorization did not render his appointment void but merely voidable, and the party seeking his removal had failed to make the request for termination within the permitted time.

Incapacity for health reasons has seldom been considered by courts. This is not surprising, as an arbitrator who found themselves in that position would usually resign if they knew they were no

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[73] See David D Caron & John R Crook, *The Iran-United States Claims Tribunal and the Process of International Claims Resolution* (Ardsley, NY: Transnational Publishers, 2000) at 194, 198.

[74] Judgment of 18 September 2003, 17 SchH 07/03 (Oberlandesgricht Hamm), online (in German): http://www.disarb.org/de/47/datenbanken/rspr/olg-hamm-az-17-schh-07-03-datum-2003-09-18-id237.

longer up to the task, or the parties would reach an agreement that the arbitrator's mandate should be terminated on consent.[75]

In *Succula Ltd. and Pomona Shipping Co. Ltd. v. Harland and Wolff Ltd*.,[76] Mustill J. (as he then was) wrote that an arbitrator who is "incapable of acting" (the term used in ss. 7 and 10 of the English *Arbitration Act, 1950*)[77] could but need not necessarily be someone suffering from a life-long physical or mental incapacity. In his view, the incapacity need only put the arbitrator "out of the action" for the arbitration proceeding in question.[78] In other words, it would apply to an arbitrator who would not be able to perform their normal working duties for the anticipated length of the arbitration, which could be as short as a few weeks in the case of an emergency arbitration but as long as several years in a complex commercial or investor-state arbitration. In *Succula*, the court found no such evidence and in fact, none was proffered – Mustill J. was simply reviewing the sections of the Act that empowered the court to remove an arbitrator and noting that these provisions were of no use to the applicant in this case.

An application to remove an arbitrator on account of poor health was made to the Supreme Court of Victoria in 1989. In *Korin v.*

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[75] See "Stern steps down from case against Tunisia", *Global Arbitration Review* (August 22, 2018), online: https://globalarbitrationreview.com/article/1173434/stern-steps-down-from-case-against-tunisia, in which it is noted that two arbitrators had resigned from an ICSID tribunal due to "ill health".

[76] *Supra* note 5.

[77] See *Arbitration Act* (UK), 1950 14 Geo VI, c 27.

[78] See also Sir Michael J Mustill & Stewart C Boyd, *The Law and Practice of Commercial Arbitration in England*, 2nd ed (London, UK: Butterworths, 1989) at 533. In *Burkett Sharp & Co. v. Eastcheap Dried Fruit Co and Perera*, [1962] 1 Lloyd's Rep 267 (CA), the court equated incapacity with the arbitrator being "completely out of the action". The English *Arbitration Act 1996*, c 23, s 24(1)(c) permits the court to remove an arbitrator not only when he or she "becomes physically or mentally incapable of conducting the proceedings" but also when there are "justifiable doubts as to his capacity to do so". Even being "out of the action" for portions of a hearing could give rise to a challenge against an arbitrator or their award. See *Science Museum Group v. Weiss*, [2019] UKEAT 0260_18_0404, where a decision by an Employment Judge was set aside on appeal, in part because the judge had fallen fully asleep twice during the hearing, including during the cross-examination of one of the parties.

McInnes,[79] Brooking J. stated that this case appeared to be "the first recorded attempt to get rid of an arbitrator or his award on the ground that, physically or mentally, he was not up to it."[80] A dispute over costs arose between a building contractor and his clients and the matter was referred to arbitration pursuant to their agreement. A sole arbitrator, Mr. Eilenberg, was appointed in accordance with the agreement by The Institute of Arbitrators, Australia. After a preliminary conference on April 7, 1989, the hearing began on June 19. That same day, the Korins dismissed their lawyers and the matter was adjourned to July 3, when it was adjourned again at the Korins' request. On July 13, there was a full day's hearing, at the end of which the matter was adjourned to a date to be fixed. The hearing then resumed on September 7. Mr. Eilenberg, who was 73, told the parties that day that he felt unwell and that he had had major surgery three weeks earlier. He said this because he wanted the parties to know that he might have to interrupt the hearing from time to time in order to go to the washroom. The court was told that Mr. Eilenberg said he probably should have adjourned the hearing again, but he wanted to finish it that day given the costs involved. Counsel for the Korins asked Mr. Eilenberg to resign on the ground of ill health. The builder's counsel opposed this request. Mr. Eilenberg said he had "no doubt" that he was fit enough to continue to hear the case as he had seen and been given a "clean bill of health" by both his surgeon and his physician in the previous two days. Nevertheless, he adjourned the hearing in order that the Korins could apply for his removal.

Section 44(c) of the Victoria *Commercial Arbitration Act 1984* empowered the court to remove an arbitrator if it was satisfied that the arbitrator was "incompetent or unsuitable to deal with the particular dispute".[81] Brooking J. held that the test to be applied in determining whether an arbitrator should be removed under this provision was, "Can the arbitrator properly perform his functions, so that a satisfactory arbitration can be held?"[82] He

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[79] [1990] VR 723 (SC).

[80] *Ibid* at para 728.

[81] *Commercial Arbitration Act* (Vic) 1984/10167, since repealed and replaced by the *Commercial Arbitration Act* (Vic), *2011/50*.

[82] *Korin* v. *McInness*, *supra* note 79 at para 727.

also found that the onus was on the applicant seeking the arbitrator's removal to prove to the court that the arbitrator could not properly perform his functions.[83]

After reviewing the evidence of Mr. Eilenberg's medical condition (he had cancer), Brooking J. said,[84]

> No doubt Mr. Eilenberg was not feeling very well on 7 September; he said as much himself. If judges, magistrates and arbitrators are obliged to take the day off whenever they feel indisposed, I do not know what will become of the administration of justice. Mr. Eilenberg was on 7 September recovering from a recent and major operation. He decided that he was well enough to sit on that day and I see no reason for thinking he was wrong. And of course the question for me is not what his condition was on 7 September, although that is a relevant fact. It is now about two months since the operation. I must be satisfied that the arbitrator is incompetent or unsuitable now.

Brooking J. held that in order to demonstrate that the arbitrator is "incompetent" under s. 44(c) of the Act, the plaintiffs "must … show that the state of the arbitrator's health is now such that he is not able properly to perform the functions of an arbitrator". He added that, in determining whether an arbitrator is "unsuitable to deal with the particular dispute", it would be appropriate to take into account "how long and difficult and rigorous" the arbitration is likely to be. In this case, however, Brooking J. said it made no difference which branch of s. 44(c) was applied, as the Korins had "signally failed to prove that Mr. Eilenberg's health is now such that he is unable properly to perform the functions of an arbitrator, either generally or in relation to this dispute."[85] He also rejected the suggestion of the Korins' counsel that it was open to him to

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[83] *Ibid*.

[84] *Ibid* at para 729.

[85] *Ibid*.

remove the arbitrator if the applicants demonstrated "a reasonable apprehension" that the arbitrator was incompetent.[86]

An arbitrator's mental health was the focus of an application made to a German state court in 2003 under Article 14 of the Model Law.[87] While the tribunal was in the midst of hearing oral evidence from witnesses, one of the three arbitrators on the tribunal was hospitalized in June 2001 after a suicide attempt. He subsequently received psychiatric treatment for many months. In August 2002, the claimant in the arbitration initiated court proceedings to terminate the mandate of the arbitrator, who was the claimant's party-appointed arbitrator on the tribunal, on the basis that it was impossible for the arbitrator to perform his duties. The responding party, however, did not want him replaced as they felt that would cause unacceptable delay. After considering both parties' expert evidence concerning the arbitrator's condition, the court determined the arbitrator had recovered from his illness and was capable of carrying on with his work; there was no evidence that he was unable to perform his functions as arbitrator. In addition, the risk of a relapse was found by the court to be low and therefore did not justify terminating his mandate, especially in light of the inconvenience that would result from having to replace him with a new arbitrator.

Documented instances of arbitral institutions removing an arbitrator for *de facto* or *de jure* incapacity are extremely rare—not surprisingly, given the general confidentiality of such proceedings and the fact removals are usually handled quietly by way of a voluntary resignation by the arbitrator before a formal request from a party has to be considered.[88] In 2014, 60 challenges of arbitrators were filed with the ICC Court. In only one of those cases was the challenge accepted on the basis that the arbitrator was *de jure* or *de facto* unable to perform his functions.[89] In 2011,

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[86] *Ibid*.

[87] Judgment of 11 April 2003, 9 SchH 27/02 (Oberlandesgricht Koln), online: http://www.disarb.org/de/47/datenbanken/rspr/olg-koln-az-9-schh-27-02-datum-2003-04-11-id323. Article 14 of the Model Law is incorporated into section 1038 of the Tenth Book of the German Code of Civil Procedure (Zivilprozessordnung).

[88] See Gerbay, *supra* note 59 at 89-92.

[89] Loretta Malintoppi & Andrea Carlevaris, "Challenges of Arbitrators, Lessons from the ICC", in Chiara Giorgetti, ed, *Challenges and Recusals of Judges and*

the LCIA Court's 28 challenge decisions from 1996 to 2010 were published and not a single one involved a challenge on the basis of legal or factual incapacity.[90] This is also the case with the 32 subsequent challenge decisions of the LCIA Court from 2010 to 2017.[91] A survey of the 84 challenges received by ICSID from 1982 to 2014 noted that there was not a single instance of an arbitrator being disqualified for incapacity or inability to perform the duties of office.[92] There have, however, been a handful resignations of arbitrators from ICSID panels for health reasons.[93] In 2006, in *Victor Pey v. Chile*, Chile challenged the president of the tribunal, in part on his alleged weak health (he had had heart problems in the past). The Chairman of the Administrative Council of ICSID, upon the recommendation of the Secretary-General of the Permanent Court of Arbitration, dismissed the challenge.[94]

In 2018, the respondent in an ICC arbitration challenged 76-year-old Swedish arbitrator Sigvard Jarvin on the basis that his age was "incompatible with the proper conduct of a complex arbitration."[95] The ICC Court had directly appointed Mr. Jarvin on July 12, 2018, as president of the tribunal in a billion-dollar construction dispute. On July 23, 2018, the respondent filed its challenge, submitting that there was a risk that Mr. Jarvin might

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Arbitrators in International Courts and Tribunals (Leiden, The Netherlands: Koninklijke Brill NV, 2015) at 141. The circumstances of this challenge were not identified by the authors.

[90] Thomas W Walsh & Ruth Teitelbaum, "The LCIA Court Decisions on Challenges to Arbitrators: An Introduction" (2011) 27:3 Arb Intl 283; see also the Challenge Digests in the same volume, beginning at 315).

[91] The LCIA Court's challenge decisions from October 2010 to present are available online: https://www.lcia.org/challenge-decision-database.aspx.

[92] See Meg Kinnear & Frauke Nitschke, "Disqualification of Arbitrators under the ICSID Convention and Rules", in Giorgetti, ed, *supra* note 89, at 51.

[93] Judith Levine, "Late-in-the-Day Arbitrator Challenges and Resignations: Anecdotes and Antidotes", in Georgetti, ed, *supra* note 89 at 283-84. See also *supra* note 75.

[94] See Daele, *supra* note 68 at 443. The documents in the case including Professor Lalive's letters to ICSID in response to Chile's challenge, can be found online: https://www.italaw.com/cases/829.

[95] See Global Arbitration Review, "ICC rejects challenge based on arbitrator's age" (October 15, 2018), online: https://globalarbitrationreview.com/article/1175658/icc-rejects-challenge-based-on-arbitrator%E2%80%99s-age.

"suffer from health issues (however minor)" or otherwise become incapacitated, which created "potentially serious consequences" for the parties. The ICC Court sought comments from the parties and the tribunal, following which it rejected the challenge on August 9, 2018, without reasons. The respondent then asked the Court to reconsider its decision, in part because it had learned that the cost of insurance on Mr. Jarvin was prohibitively expensive, but also based on the fact Mr. Jarvin had initially resigned but then withdrew this resignation. The Court decided it would reconsider the matter "exceptionally, in view of the importance of the policy issues at stake". It subsequently released its reasons in early October 2018.

On the issue of age, the ICC Court observed that while the age of a prospective arbitrator is "certainly" an element that is and should be taken into account by it when appointing an arbitrator, it cannot be a sole consideration and it "cannot in and of itself be a discriminating circumstance." The Court noted that the respondent had specifically said it wanted the president to be a retired judge or senior Queen's Counsel. The Court said that any arbitrator meeting that criterion "would in all likelihood be at least 70". In appointing Mr. Jarvin, the ICC Court had reviewed his past performance as an arbitrator, which had been efficient and timely, and noted that there was no indication that his health should be a cause for concern. As for the respondent's emphasis on the anticipated lengthy character of the arbitration, the Court said this argument was ill-conceived and there was no evidence that this case should necessarily be different from other similar cases. As noted above, when the challenge first arose, Mr. Jarvin resigned his appointment but then almost immediately withdrew his resignation. The Court found that despite the respondent's submissions to the contrary, this was not something that demonstrated Mr. Jarvin's unfitness to chair a case such as this one. It also found that the respondent's submission regarding the possible cost of insuring Mr. Jarvin was misconceived:

> There is in fact no requirement under the Rules that an arbitrator's health conditions be '*insurable*'. In addition, Respondent does not provide any indication as to how '*insurability*' can be a consideration in the context of a challenge of an arbitrator under Article 14 of the Rules.

Accordingly, the ICC Court rejected the respondent's request to decide on Mr. Jarvin's resignation (since it was inconsistent with also challenging him) and decided not to reconsider its August 9, 2018 decision on the challenge, confirming its rejection of that challenge.

The authors of *Redfern & Hunter* note that at one time it was not unusual in large international commercial arbitrations for life or disability insurance to be taken out on the tribunal members, to help cover the costs that would be expended if any of the hearings had to be repeated. However, this practice (at least in the UK) "appears to have virtually disappeared",[96] perhaps because of the prohibitive cost, as noted in the Jarvin matter above.

2. Undue Delay

While the question of what constitutes a *de jure* or *de facto* inability to perform the functions of an arbitrator has rarely been considered, the question of what constitutes undue delay by an arbitrator has been the subject of more commentary and consideration.[97] However, there have been few successful applications to remove an arbitrator for delay. As noted by Mustill and Boyd, since an arbitrator will usually have notice that a party is considering such a move, most "will readily take the hint",[98] and either promptly get on with the matter or tender their resignation.

As noted above, Canadian domestic arbitration acts in the common law jurisdictions permit a court to remove an arbitrator if he or she "delays unduly in conducting the arbitration" or "unduly delays in proceeding with the arbitration or in making an award".

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[96] See Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration*, 6th ed (Oxford, UK: Oxford University Press, 2015) at paras 4-167–4-168. The author understands that Formal Proceedings Rehearing Insurance (aka spoiled costs insurance), which covers the costs of having to re-do a proceeding in the event of a judge's or arbitrator's death or disability, is still available in the Lloyd's market.

[97] For example, in 1990, a substantial portion of the Congress of the International Council for Commercial Arbitration was devoted to "Preventing Delay and Disruption of Arbitration". See Albert Jan van den Berg, ed, *ICCA Congress Series No. 5: Xth International Arbitration Congress, Stockholm, 28-31 May 1990* (Deventer, The Netherlands: Kluwer, 1991).

[98] See Mustill & Boyd, *supra* note 78 at 531, fn 8.

The international acts, along with the Québec and federal arbitration legislation, permit a court to remove an arbitrator for "failing to act without undue delay".

The meaning of "undue delay" was considered by the British Columbia Supreme Court in *Ben 102 Enterprises Ltd. v. Ben 105 Enterprises*,[99] a case arising under s. 18(1)(b) of the B.C. *Arbitration Act*. The arbitrator sought to have his fees paid before issuing an interim award. The petitioner refused to pay his share and instead sought to remove the arbitrator on the basis that he had unduly delayed in issuing his award. Rogers J., after referring to Black's Law Dictionary and Merriam-Webster, concluded that in order for an arbitrator to "unduly delay" an award, the delay "must be excessive and in violation of propriety or fitness."[100] In this instance, there was no such delay, as the arbitrator was entitled to withhold his decision until his fees were paid in accordance with the provisions of the BCICAC domestic rules.

Canadian courts have consistently held that undue delay is relative—what amounts to undue delay will vary with the nature of the case and its particular facts.[101] An arbitration based on documents only would be expected to take far less time to conclude than a complicated commercial matter with numerous witnesses and extensive expert evidence presented at a hearing.[102] There may

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[99] See *Ben 102 Enterprises Ltd v. Ben 105 Enterprises Ltd*, 2014 BCSC 64.

[100] *Ibid* at paras 18-19.

[101] See *Lebon Construction Ltd v. Wiebe*, [1995] 10 BCLR (3d) 102 at para 40 (BCCA). See also Salmon LJ in *Allen v. Sir Alfred McAlpine & Sons Ltd*, [1968] 2 QB 229 (CA) at 268, 1 All ER 543 (CA): "It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend on the facts of each particular case. These vary infinitely from case to case …"

[102] See David St John Sutton, Judith Gill & Matthew Gearing, *Russell on Arbitration*, 4th ed (London, UK: Sweet & Maxwell, 2015) at para 7-127. The authors there cite as an example of "serious and inexcusable delay" a 1998 decision of the High Court of Hong Kong, *A Ltd v. B*, where the court removed an arbitrator who had delayed 16 months in delivering an award, without good reason. Unreported but available online: https://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=22209. The decision was upheld on appeal: *Kailay Engineering Co (HK) Ltd v. Charles W Farrance*, *supra* note 35.

also need to be a lack of a reasonable explanation for the delay.[103] Of course there are many instances when one party to an arbitration is quite happy to have it be delayed. However, as the Ontario Court of Appeal said in the context of dismissing a claim for contractual damages for want of prosecution, "There comes a time, in short, when enough is enough, and the civil justice system will no longer tolerate inordinate and inexplicable delay."[104]

As noted above, Article 14(1) of the UNCITRAL Model Law uses the phrase "failing to act without undue delay". The Report of UNCITRAL's 18th (June 1985) session[105] and the UN Analytical Commentary on the draft Model Law[106] explain that Article 14 of the Model Law was based on Article 13(2) of the 1976 UNCITRAL Arbitration Rules,[107] which did not include a temporal element to the arbitrator's failure to act. Debate ensued at the 18th session over whether a more detailed formula could be developed, one that would still be flexible enough to cover all situations that parties might encounter when the prospect of continuing with a "non-performing" arbitrator on a tribunal became "intolerable".[108] A suggestion was made that to better describe what was meant by the words "fails to act" (as used in Article 13(2) of the 1976 UNCITRAL Rules) the phrase "with due dispatch and efficiency" or "with appropriate speed" should be added. The US and UK delegations, however, felt that adding such language would "invite any party dissatisfied with the way the proceedings were going to apply to a court on the grounds that there had been inefficiency".[109] The Report relates that during discussions it was pointed out that efficiency on its own was a "particularly inappropriate" benchmark

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[103] See *Bellefeuille v. Commercial Transport (Northern) Ltd*, [1995] 1 FC 237, 1994 CarswellNat 862 (FC).

[104] See *Wallace v. Crate's Marine Sales Ltd*, 2014 ONCA 671 at para 22.

[105] UNCITRALOR, 14th Sess, UN Doc A/40/17.

[106] UNICTRALOR, 18th Sess, UN Doc A/CN.9/264.

[107] *Supra* note 105 at para 139.

[108] *Supra* note 106, at Commentary to Article 14 para 3.

[109] UN Doc A/CN.9/SR.314, para. 59, quoted in Binder, *supra* note 34 at 237.

for Article 14 since it could "open the door to court review and assessment of the substantive work of the tribunal".[110]

When the Model Law was published in final form, the words "fails to act" were followed by "without undue delay". This wording was proposed by the American delegate, Howard Holtzmann (who at the time was an arbitrator at the Iran-United States Claims Tribunal), in part because it was already used in Article 4 of the Model Law with respect to the timeliness of parties' objections to non-compliance with non-mandatory provisions of the Model Law or the arbitration agreement in question.[111] In subsequent commentary, Holtzmann wrote that Article 14, even with the additional words not present in the comparable provision of the UNCITRAL Rules, was not meant to allow courts to police alleged inefficiencies in arbitrations. Courts can review "whether the arbitration is moving along, not whether the conduct of the proceedings is wise and efficacious".[112]

The authors of the UN Analytical Commentary list some considerations that may be relevant when determining whether an arbitrator has failed to act:

- What action was expected or required of the arbitrator considering the arbitration agreement and the specific procedural situation?
- If the arbitrator has done what was expected or required, has the delay been "so inordinate" that it is "unacceptable" in light of the circumstances, including "technical difficulties" and the "complexity" of the case?
- If the arbitrator has done what was expected or required, did his or her conduct "fall clearly below" the standard of

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[110] *Ibid* at 237. See also U.N. Doc. A/40/17, *supra* note 105 at para 138.

[111] Binder, *supra* note 34 at 237.

[112] See Howard M Holtzmann & Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (The Hague: Kluwer, 1989), cited by Williams & Kawharu, *supra* note 70 at 162, fn 132. A Singapore High Court judge cautioned that "an arbitrator who moves the proceedings along at a breakneck speed may well be accused of misconduct in subordinating fairness to speed." See *Anwar Siraj v. Ting Kang Chung*, [2003] 2 SLR(R) 287.

> what "may reasonably be expected" from an arbitrator? Determinations of what may reasonably be expected from an arbitrator in a particular arbitration turn on (i) the arbitrator's ability to "function efficiently and expeditiously" and (ii) any specific competence or qualifications that the parties have agreed are required for the arbitrator.[113]

In *Sino Dragon Trading Ltd. v. Noble Resources International Pte Ltd*.,[114] Edelman J. of the Federal Court of Australia considered whether an arbitrator failed to act without undue delay under Article 14 of the Model Law, which was incorporated into Australian federal law by the *International Arbitration Act 1974*.[115] Sino Dragon Trading, a Hong Kong company, contracted with Noble Resources, a Singaporean subsidiary of a Bermudian conglomerate, to purchase 170,000 tonnes of iron ore. The contract, which was governed by the law of Western Australia, contained a clause that directed the parties to arbitrate any disputes in Australia, under the UNCITRAL Arbitration Rules, before a panel of three arbitrators. Noble Resources commenced an arbitration against Sino Dragon for failing to perform the contract, including failing to open a letter of credit. Shortly before the date set for the hearing, Sino Dragon brought an application for, among other things, an order removing two of the arbitrators for undue delay. Sino Dragon submitted that a decision by the tribunal to defer consideration of jurisdictional issues until the hearing of the arbitration involved a failure to act without undue delay. The court rejected this submission, on three grounds:

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[113] *Supra* note 106 at Commentary to Article 14 para 4. The Iran-United States Claims Tribunal largely adopted the 1976 UNCITRAL Arbitration Rules for its procedure. In August 1991, Iran challenged one of the arbitrators, Judge Arangio-Ruiz, alleging failure to act on his part. Iran did not argue that he was totally inactive, but that his overall neglect of his duties constituted a failure to act. Judge Moons, who was the designated Appointing Authority to handle challenges at the time, dismissed the challenge, concluding that Judge Arangio-Ruiz had not "consciously neglected his arbitral duties in such a way that his overall conduct fell clearly below the standard of what may be reasonably expected of an arbitrator and chairman" See Caron & Crook, *supra* note 73 at 170-71.

[114] [2015] FCA 1028.

[115] *International Commercial Arbitration Act (Austl)* 1974/136, online: https://www.legislation.gov.au/Details/C2018C00439.

- The question of a failure to act without undue delay had to be considered in the context of the arbitration as a whole. After a thorough review of the chronology of the arbitration, the court found that nothing suggested undue delay; the true situation was "rather the contrary", especially in light of the fact that the applicant was also arguing that the tribunal had acted with undue haste in making certain procedural decisions.
- A decision to defer considering a jurisdictional issue until the hearing does not involve undue delay within Article 14. The intention of Article 14 was not to have a court second-guess a tribunal on what amounts to a case management decision.
- The decision the tribunal made in this instance was within the bounds of appropriate discretion and was the most appropriate decision to make as it was an "efficient and effective" way of getting the matter to a hearing.

In *K/S Norjari A/S v. Hyundai Heavy Industries Co. Ltd*., the English Court of Appeal held that an arbitrator's duty to proceed "diligently" does not entail a duty to make themselves available for specific hearing dates, only that they be available at such times as may reasonably be necessary "having regard to all the circumstances including the exigencies of their own practices".[116]

Challenges to arbitrators for failing to act have been submitted to the Secretary-General of the Permanent Court of Arbitration in cases where the Secretary-General has been designated as the Appointing Authority under the UNCITRAL Arbitration Rules. In one case, a tribunal was challenged on the basis that it had "persistently failed to devote the necessary time to rule on the important issues" in the arbitration. The arbitrators' conduct was alleged to amount to an impermissible failure to act under Article 13(2) of the 1976 UNICTRAL Arbitration Rules, as they were alleged to have "taken several years" to deal with certain procedural matters including a decision regarding the taking of evidence. In considering the matter, the Secretary-General decided that in order to remove the arbitrators, he must (a) be satisfied that they had continuously neglected their duties, (b) take into account

[116] [1991] 3 All ER 211 at 223 (CA).

their overall conduct, and (c) find, on an objective basis, that their conduct fell clearly below the standard of what may reasonably be expected from an arbitrator. In ultimately rejecting the challenge, the Secretary-General said that the third ground can be made out only in "exceptional and serious circumstances". In reaching this decision, the Secretary-General also referred to Dutch law (cited by the parties, presumably because the arbitration was seated in the Netherlands), which directed that in order to dismiss a tribunal for delay it would be necessary to show a case of "serious indifference" and that delays due to a proceeding being complicated or arising from matters beyond the arbitrators' control would not suffice.[117]

In their 1989 text, Mustill and Boyd considered the provision in the English *Arbitration Act, 1950*, which provided that an arbitrator could be removed if he or she failed to act "with reasonable dispatch". They note that what constitutes "reasonable dispatch" depends upon the type of arbitration and the interests of the parties, not just the arbitrator's circumstances.[118] They suggest the following factors should be considered by a court when asked to remove an arbitrator for delay:

- The extent to which time and costs will have been wasted if it is necessary to re-commence the arbitration;
- The amount of information about the likely complexity and duration of the arbitration that was given to the arbitrator before he or she accepted the appointment;
- The extent to which the complexity or duration have exceeded the parties' initial expectations;

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[117] See Sarah Grimmer, "The Determination of Arbitrator Challenges by the Secretary-General of the Permanent Court of Arbitration", and Judith Levine, "Late in the Day Challenges and Resignations", in Chiara Giorgetti, ed, *supra* note 89 at 112-113; 277-278, respectively. Levine states, at her footnote 102, this decision of the Secretary-General and the parties' submissions are confidential but are on file with the Permanent Court of Arbitration in The Hague. The Court of Appeal in California (a state that has adopted the Model Law in its arbitration act) has also held that delays that are not attributable to the arbitrator cannot amount to failure on the arbitrator's part. See *Bosworth v. Whitmore*, 135 Cal App 4th 536 (Cali Ct App 2006).

[118] Mustill & Boyd, *supra* note 78, at 531.

- Any warnings the arbitrator gave about his or her availability, or that the parties knew; and
- Who nominated the arbitrator.[119]

Notably, the English *Arbitration Act 1996* added a caveat to the provision concerning the removal of an arbitrator for failing to use all reasonable dispatch: the court must be satisfied that "substantial injustice has been or will be caused to the applicant".[120] In its report on the final draft of this legislation, the Departmental Advisory Committee stated that "this ground only exists to cover what we hope will be the very rare case where an arbitrator so conducts the proceedings that it can fairly be said that instead of carrying through the object of arbitration as stated in this Bill ['to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense', per s. 1(a)], he is in effect frustrating that object."[121] In the context of delay in delivery of the award following the end of the arbitration hearing, the English High Court has held that in order to satisfy the test of serious injustice, the applicant must show that but for the inordinate delay, the arbitrator "might well have reached a different conclusion more favourable to [the applicant]."[122]

Related to removing arbitrators for delay is the issue of what to do when arbitrators fail to abide by deadlines that are established by statute or agreement. Provisions exist in the Canadian domestic arbitration acts that allow courts to extend the time periods for the conduct of the arbitration. The Ontario *Arbitration Act 1991*, for example, permits the court to extend the time within which the tribunal is required to make an award, even if the time has expired.[123] The Model Law is silent on this issue.

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[119] *Ibid* at 531-32.

[120] *Arbitration Act* (UK), 1996, c 23, s 24(1)(d).

[121] See Lord Justice Saville, "Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill", (1997) 13:3 Arb Intl 275 at para 106.

[122] See *B.V. Scheepswerf Damen Gorinchem v. The Marine Institute*, [2015] EWHC 1810 (Comm) at para 34; *K v. P*, [2019] EWHC 589 (Comm) at paras 3-5.

[123] Ontario *Arbitration Act 1991*, s 39. See also art 642 Quebec CCP.

In *Metcalfe v. Metcalfe*,[124] the Alberta Court of Queen's Bench extended the time for an arbitrator to deliver his award pursuant to the provision in the Alberta domestic act permitting the court to extend the time for an award.[125] The arbitration agreement called for the award to be made within 30 days from the end of the hearing, subject to "reasonable delays in unforeseen circumstances". The award was delivered six months after the hearing. In extending the time, Nation J. found there was "no evidence of significant harm to the parties resulting from the delay nor did either protest the length of time the decision was taking."[126] She also noted that given the complexities of this family law case, which involved custody, support, and valuation of property, the length of time it took the arbitrator to deliver his award was not inordinate. In another matrimonial case, however, the Alberta court did not extend the time for the delivery of the award where the arbitrator delivered it nearly three years after the hearing, rather than within the agreed 60-day time limit. In that case, Horner J. found that the applicant had suffered significant financial prejudice as a result of the delay and ordered that the matter be heard again before a new arbitrator.[127]

In *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al*,[128] the Alberta Court of Appeal upheld the decision of Lomas J. of the Alberta Court of Queen's Bench that a tribunal's mandate had been terminated prior to its issuance of an award, in accordance with the terms of the parties' arbitration agreement. Pursuant to Article 14 of the Model Law, the court found that the tribunal was *de jure* or *de facto* unable to perform its functions since it lacked jurisdiction to deliver a valid award as its mandate had terminated.[129] In their arbitration agreement, the parties directed the tribunal to

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[124] *Metcalfe v. Metcalfe,* 2006 ABQB 798.

[125] Alberta *Arbitration Act*, s 39.

[126] *Metcalfe*, *supra* note 124 at para 16.

[127] *Flock v. Flock*, 2007 ABQB 307 at paras 39, 70, leave to appeal refused, 2007 ABCA 287.

[128] *Petro-Canada et al. v. Alberta Gas Ethylene Co. Ltd. et al*, [1991] 121 AR 199, 28 ACWS (3d) 423 (ABQB), aff'd [1992] 127 AR 128, 32 ACWS (3d) 10 (ABCA).

[129] The parties had agreed to arbitrate a dispute under an ethane supply agreement, pursuant to the provisions of the federal *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp), which adopts the Model Law as the Commercial Arbitration Code.

deliver its award no later than 30 days after the close of the hearings, subject to any reasonable delay due to unforeseen circumstances. In addition, the agreement provided that if no award was delivered within 60 days after the close of the hearings, then either party could elect to have a new arbitral tribunal chosen and that new tribunal would proceed immediately to determine the dispute.

Following the close of the hearings on December 19, 1990, the parties consented to the tribunal having additional time, beyond the 60-day time limit, to deliver its award. While there was some dispute over the exact day, the award was due no later than March 8, 1991. On March 13, 1991, with the award still undelivered, Petro-Canada and Pan Canadian Gas Products, the sellers in the underlying gas contract, elected to have a new tribunal chosen, and requested that the tribunal issue an order terminating the proceedings under Article 32 of the Model Law. Following a hearing on March 22, 1991, the tribunal dismissed the sellers' request for an order for termination on April 12, 1991, and proceeded to finalize its award, which it deposited with an escrow agent.

The sellers then launched an application to the court, seeking to have the tribunal's mandate terminated under Article 14 and to have the tribunal's dismissal of the request for termination set aside under Article 34. In concluding that the tribunal's mandate had been terminated, Lomas J. of the Court of Queen's Bench relied on the parties' arbitration agreement, which allowed a party to elect termination of the arbitrators' mandate if the agreed time limit for delivery of the award was not met. He found that in electing to terminate the mandate, the sellers were simply abiding by a pre-existing agreement that provided a mechanism that enabled any party to trigger termination in accordance with an agreed-upon procedure. Once that election was made by the sellers, the tribunal no longer had the right or ability to render a valid award. As a result, the tribunal became *de jure* or *de facto* unable to perform its functions as of March 13, 1991, before it made an award.

The court also set aside the tribunal's April 12, 1991, decision not to terminate the proceedings, on the basis that it had failed to provide due process insofar as the majority of the tribunal had based its decision on matters the parties had not argued or had not had an opportunity to address.

The Court of Appeal dismissed Alberta Gas Ethylene's appeal, finding no basis upon which to interfere with the decision of the lower court. Noting that a decision made under Article 14 is not appealable, the court declined to consider whether it had jurisdiction to entertain an appeal of a decision made under Article 34. In the appellate court's view, Lomas J. had not made any error in concluding that once the tribunal failed to deliver an award by March 8, 1991, the sellers were free to terminate its mandate.

The B.C. Court of Appeal also confirmed a lower court's decision to set aside an award delivered after the parties' agreed deadline in *Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc.*[130]

Similar reasoning was applied by the Supreme Court of India, which held that an arbitrator's mandate was terminated under Article 14 of the Model Law for failing to act without undue delay when he failed to deliver an award within the time period agreed by the parties (and which they did not consent to extend).[131] The Singapore High Court has also terminated an arbitrator's mandate for delivering an award beyond the agreed time, favourably citing the *Petro-Canada* and *Ian MacDonald Library Services* decisions noted above, and stating:

> The Arbitrator's error in overlooking a time limit within which to issue his award was a very serious error. Party autonomy, which is a cornerstone of arbitration, has been emphasized time and again by our highest Court. If the parties have chosen to agree to a time limit within which an arbitrator has to render his award and that contract or arbitration clause contains no provision to extend time, other than by mutual agreement, then no court is in a position

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[130] *Supra* note 4. The Court of Appeal upheld the Chambers Judge's decision to set aside the award for being late. However, the judge's reasons were not available apart from the notes of counsel that indicated the judge had determined that by delivering the award late, the arbitrator was "incapable" under s 17 of the BC *Arbitration Act*. The Court of Appeal did not revisit the Chambers Judge's decision on this issue.

[131] *N.B.C.C. Ltd v. J.G. Engineering Pvt Ltd*, [2010] INSC 5 at paras 10-12.

> to re-write the contract for the parties, (unless there is a statutory provision conferring such a power).[132]

Examples of arbitral institutions removing arbitrators for delay are rare. In 2014, the ICC handled two cases in which the arbitrator was challenged for undue delay. In one instance, the ICC Court opted to extend the applicable time limits. In the other, the chair of the tribunal was replaced for excessive delay in preparing Terms of Reference and in responding to the parties and the Secretariat. The ICC Court justified his removal on the basis that "his management of the case was unlikely to improve in the future."[133] According to the ICC's annual statistical reports, three arbitrators were replaced at the initiative of the ICC Court in 2017.[134] The Secretariat of the ICC Court considers the removal of an arbitrator for delay to be "a very delicate matter", and the ICC Court will look ahead rather than backwards when considering what is in the parties' best interests. Its preference is always to "continue exerting pressure on the existing arbitrator" rather than replace them.[135]

The LCIA Court rejected a 1998 challenge of an arbitrator for lack of diligence on the basis that the complaint amounted to a criticism of the arbitrator's third interim award.[136] In 2011, the LCIA Court rejected two challenges for lack of diligence and in 2016 it rejected one, finding either that the complaint was unsustainable because in fact the tribunal had acted with "complete diligence",[137]

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[132] *Ting Kang Chung John v. Teo Hee Lai Building Constructions Pte Ltd*, [2010] SGHC 20 at para 32.

[133] Malintoppi & Carlevaris, *supra* note 89 at 157-59.

[134] See International Chamber of Commerce, "2017 ICC Dispute Resolution Statistics" in (2018) 28:2 ICC Dispute Resolution Bulletin at 57.

[135] Fry, Greenberg & Mazza, *supra* note 69 at para 3-619.

[136] LCIA Reference No. 96/X22, decision rendered 22 July 1998, published in (2011) 27:3 Arb Intl 325.

[137] LCIA Reference No. 91431-91442 (the First Challenge Decision) at para 62, decision rendered 5 April 2011. LCIA challenge decisions made since mid-2010 are available on the LCIA Challenged Decision Database on its website: www.lcia.org/challenge-decision-database.aspx.

that the challenge amounted to little more than a vague allegation of dilatoriness,[138] or that the challenge was untimely.[139]

Arbitral delay can be avoided in part if arbitrators do not overextend themselves by taking on too many matters. Jan Paulsson has written that it is "dishonest to accept appointment without … a considered commitment to give the matter full and timely attention."[140] As mentioned above, in an attempt to head off undue delays, many arbitral institutions have implemented measures in recent years to ensure arbitrators will be available to deal with the cases they take on, or to ensure that they meet the required deadlines to move the case along toward an award.

For example, under the 2017 ICC Arbitration Rules, at the time of acceptance of a mandate, an arbitrator must positively confirm, on the basis of the information presently available to them, that they can "devote the time necessary to conduct this arbitration throughout the entire duration of the case as diligently, efficiently and expeditiously as possible in accordance with the time limits in the Rules, subject to any extensions granted by the Court".[141] The arbitrator must also disclose the number of arbitrations in which they are currently involved either as arbitrator or counsel, and the number of litigation matters in which they are involved as counsel. Among other things, this permits parties to raise objections to the appointment of a particular arbitrator on account of a perceived lack of availability.[142] In addition, to help keep arbitrators on track with the delivery of their awards, since 2016 the ICC has had the discretion to reduce arbitrators' fees when draft awards are not submitted for scrutiny within the required three months after the last substantive hearing or the filing of the parties' last

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[138] LCIA Reference No. 101735 at para 75, decision rendered 7 October 2011.

[139] LCIA Reference No. 142603 at paras 44-45, decision rendered 16 February 2016.

[140] Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2018) at 149.

[141] International Chamber of Commerce, "ICC Arbitrator Statement Acceptance, Availability, Impartiality and Independence form", online: https://iccwbo.org/publication/icc-arbitrator-statement-acceptance-availability-impartiality-independence-form/.

[142] Blackaby & Partasides, *supra* note 96 at para 4.60.

written submissions, whichever is later. Fees may be reduced 5 to 10 per cent for draft awards submitted up to seven months late; 10 to 20 per cent for draft awards submitted up to 10 months late; and 20 per cent or more for draft awards submitted more than 10 months late.[143]

Article 5.4 of the 2014 LCIA Rules requires that candidates for arbitral appointments sign a written declaration stating whether they are "ready, willing and able to devote sufficient time, diligence and industry to ensure the expeditious and efficient conduct of the arbitration" and promptly provide same to the Registrar.[144] An arbitrator who later fails to abide by the declaration presumably risks having their appointment revoked by the LCIA Court on the basis that they had become "unable or unfit to act" under Rule 10.1(ii).[145] In addition, Rule 15.10 requires the tribunal, once it establishes a

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[143] International Chamber of Commerce, News, "ICC Court Announces New Policies to Foster Transparency and Ensure Greater Efficiency" (1 May 2016), online: https://iccwbo.org/media-wall/news-speeches/icc-court-announces-new-policies-to-foster-transparency-and-ensure-greater-efficiency/. In June 2019, the ICC reported that the number of awards rendered three to six months late decreased from 52 in 2016 to 33 in 2018, and that awards delayed by seven months or more decreased from 18 in 2016 to 6 in 2018. See International Chamber of Commerce, News, "ICC Arbitration figures reveal new record for awards in 2018" (11 June 2019), online: https://iccwbo.org/media-wall/news-speeches/icc-arbitration-figures-reveal-new-record-cases-awards-2018/.

[144] The LCIA's Notes for Arbitrators state, at para 12 that: "In order to support this statement [required by Art 5.4 of the LCIA Rules], the LCIA also asks all arbitrators to complete a form of availability, providing details of the number of hearings, the number of outstanding Awards, and all pre-existing commitments that might impact the arbitrator's ability to devote sufficient time to this arbitration. Completion of this form provides comfort to the LCIA that, in confirming that he/she has availability, an arbitrator has turned his/her mind to such commitments, and allows us confidently to confirm to parties that the selected tribunal has the necessary availability (although we do not at present provide a copy of this form to the parties)." LCIA Notes for Arbitrators, online: https://www.lcia.org//adr-services/lcia-notes-for-arbitrators.aspx.

[145] See r 10.1 of the LCIA Rules: "The LCIA Court may revoke any arbitrator's appointment upon its own initiative, at the written request of all other members of the Arbitral Tribunal or upon a written challenge by any party if: … (ii) that arbitrator … becomes unable or unfit to act; …" Under rule 10.2, the LCIA Court "may determine that an arbitrator is unfit to act under Article 10.1 if that arbitrator: … (iii) does not conduct or participate in the arbitration with reasonable efficiency, diligence and industry." LCIA Rules, *supra* note 56.

time for the parties' last submissions, to notify the parties of the time it has set aside to make the final award.

ICDR does not ask arbitrators to positively confirm their availability for a particular matter. However, arbitrators who are members of the ICDR panels commit to uphold the American Arbitration Association's Code of Ethics for Arbitrators (2004). This Code states that a potential arbitrator should accept an appointment only if "fully satisfied" that "he or she can be available to commence the arbitration in accordance with the requirements of the proceeding and thereafter to devote the time and attention to its completion that the parties are reasonably entitled to expect."[146]

Article 11 of the 2010 UNCITRAL Rules sets out a Model Statement that any party can consider requesting from a potential arbitrator, whereby the candidate confirms that they "can devote the time necessary to conduct this arbitration diligently, efficiently and in accordance with the time limits in the Rules." Paulsson and Petrochilos note that by having an arbitrator provide this statement, the parties gain "additional leverage in encouraging arbitrators to act in a timely manner, where necessary."[147] Such a statement could also form the basis of sanctions against an arbitrator who thereafter failed to perform.

The International Bar Association's 1987 Rules of Ethics for International Arbitrators state that a "prospective arbitrator should accept an appointment only if he is able to give to the arbitration

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[146] American Arbitration Association, "The Code of Ethics for Arbitrators in Commercial Disputes" online (pdf): https://www.adr.org/sites/default/files/document_repository/Commercial_Code_of_Ethics_for_Arbitrators_2010_10_14.pdf.

[147] Jan Paulsson & Georgios Petrochilos, *UNCITRAL Arbitration* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2018) at 86. In 2010, the Secretary-General of the Permanent Court of Arbitration dealt with a challenge at the outset of a proceeding under the UNCITRAL Arbitration Rules, in which a party raised concerns that an arbitrator would not be able to devote sufficient time to the matter due to her busy schedule. The challenge was rejected in part due to the arbitrator's written confirmation that she understood the "deontological requirements for an arbitrator" and that she was a "dedicated and scrupulous arbitrator." *See* Award on Jurisdiction (22 October 2012), *European American Investment Bank AG (Austria) v. The Slovak Republic*, P.C.A. Case No. 2010-17, at paras. 4-6, available at: https://www.italaw.com/sites/default/files/case-documents/italaw4226.pdf.

the time and attention which the parties are reasonably entitled to expect."[148] The Code of Professional and Ethical Conduct of the Chartered Institute of Arbitrators does not address availability at the time of appointment but states that a member "shall not unduly delay the completion of the dispute resolution process.[149] The Chartered Institute reserves the right to discipline members whose conduct amounts to "misconduct", which can include a "significant breach of … the Code of Professional and Ethical Conduct".[150] Regardless whether the administering institution has a formal disciplinary process, an arbitrator who commits to devoting sufficient time and resources to a proceeding overseen by an institution and then fails to do so will likely be jeopardizing their prospects of receiving any future appointments from that institution or from the parties involved in that particular proceeding (as would also be the case with respect to the parties in an *ad hoc* arbitration).

In addition, to help parties and institutions gauge arbitrators' availability for appointments, ICSID publishes on its website the names of tribunal members who are sitting on its pending cases,[151] as do the ICC,[152] the Milan Chamber of Arbitration[153] and the Vienna International Arbitration Centre.[154]

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[148] "IBA Rules of Ethics for International Arbitrators", Rule 2.3, online: https://www.trans-lex.org/701100/_/iba-rules-of-ethics-for-international-arbitrators-1987/.

[149] Chartered Institute of Arbitrators, "The Chartered Institute of Arbitrators Code of Professional and Ethical Conduct for Members (October 2009)" at Part 2, Rule 7, online (pdf): https://www.ciarb.org/media/1367/code-of-professional-and-ethical-conduct-october-2009.pdf.

[150] Chartered Institute of Arbitrators, "Royal Charter Bye-Laws and Schedule to the Bye-Laws" (August 2013) at s 15.2, online (pdf): https://www.ciarb.org/media/1558/ciarb_bye-laws_a-pdf-jan14.pdf. See also Chartered Institute of Arbitrators, "How CIArb Investigates Complaints of Misconduct Against its Members", online (pdf): https://www.ciarb.org/media/4155/complaints-handling-booklet.pdf.

[151] Pending ICSID cases with details including the names of tribunal members are available online: https://icsid.worldbank.org/en/pages/cases/pendingCases.aspx?status=p.

[152] The ICC maintains a chart, which it updates monthly, listing arbitrators in cases that were registered as of (and since) January 1, 2016 and where Terms of Reference have been established, online:

IV. STEPS FOLLOWING AN ORDER REMOVING AN ARBITRATOR

If the court or an institution terminates an arbitrator's mandate, questions arise over what impact that decision should have, if any, on that arbitrator's fees, and how the arbitration should proceed.

1. Financial Consequences for the Terminated Arbitrator

Under the Alberta, British Columbia, and Ontario domestic arbitration acts, for example, if an arbitrator is removed for undue delay, the court may order that the arbitrator receive no payment for his or her services, and may also order that the arbitrator compensate the parties for all or part of the costs that they incurred in connection with the arbitration before the arbitrator's removal.[155] In Alberta and Ontario, an arbitrator may appeal such an order, with leave from the applicable appellate court.[156]

The international acts, as well as the federal act and the Quebec legislation, are silent on the issue of the arbitrator's fees in the case of removal, and on the issue of whether the arbitrator may be liable for any part of the party's costs. Provisions similar to those in the Canadian domestic acts regarding arbitrators' exposure to

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https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/.

[153] Since 2016, the Milan Chamber of Arbitration has published a chart with the names of arbitrators hearing cases, online: https://www.camera-arbitrale.it/en/arbitration/cam-arbitral-tribunals.php?id=566.

[154] The Vienna International Arbitration Centre maintains a list on its website of the names of arbitrators acting in current proceedings (beginning from January 2017), online: https://www.viac.eu/en/arbitration/viac-arbitral-tribunals.

[155] See Alberta *Arbitration Act*, s 15(4); BC *Arbitration Act*, s 18(2); Ontario *Arbitration Act 1991*, s 15(4). The proposed new B.C. *Arbitration Act*, *supra* note 3, does not include such a provision. In *Rayman v. Association of Architects (Ontario)*, (1998), 39 OR (3d) 711, 78 AWCS (3d) 613 (ON Ct J (Gen Div)), the Ontario Divisional Court ordered an architect's insurer to cover the cost of his defence against a claim for compensation for losses said to arise from his conduct as an arbitrator (one of the parties in the arbitration had moved to remove him as the arbitrator and sought to have him pay their costs incurred in the arbitration as a result of his conduct).

[156] Alberta *Arbitration Act*, s 15(5); Ontario *Arbitration Act 1991*, s 15(5).

losing their fees and to costs are found in the English *Arbitration Act, 1996.*[157]

Beyond issues of remuneration and costs, arbitrators in Canada, England, and other common law jurisdictions enjoy a broad degree of immunity for their actions unless there is fraud or bad faith.[158] Similarly, arbitral institutions commonly include a provision in their rules that excludes liability other than in cases of wilful wrongful acts.[159] Article 16 of the UNCITRAL Rules provides that, "Save for intentional wrongdoing, the parties waive, to the fullest extent permitted under the applicable law, any claim against the arbitrators, the appointing authority and any person appointed by the arbitral tribunal based on any act or omission in connection with the arbitration."

Where the LCIA Court revokes an arbitrator's appointment, the court determines what fees and expenses "if any" are to be paid for the former's arbitrator's services "as it may consider appropriate in the circumstances".[160] The ICC Court, meanwhile, has a more general power to fix an arbitrator's fees at a lower amount than

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[157] *Arbitration Act, 1996*, s. 24(4). In *Wirketts & Sterndale v. Brine Builders*, [2001] ArbLR 62 (QBD (TCC)), an arbitrator who was removed by the court for misconduct in his handling of the proceeding was permitted to keep half of his fees and expenses incurred to date. See Merkin & Flannery, *supra* note 68 at para 10.57. The English *Arbitration Act, 1950* gave the court no discretion in this regard. Section 13(3) stated that if an arbitrator was removed by the court for failure to use "reasonable dispatch" in conducting the arbitration or making an award then the arbitrator "shall not be entitled to receive any remuneration in respect of his services." See Mustill & Boyd, *supra* note 78 at p 532, fn 14.

[158] See *Zittrer c Sport Maska Inc,* [1988] 1 SCR 564; *Sutcliffe v. Thackrah*, [1974] 1 All ER 859, 1 Lloyd's Rep 318 (HL); *Flock v. Beattie*, 2010 ABQB 193. See the English *Arbitration Act, 1996*, s 29(1). Arbitrators in civil law jurisdictions are not accorded such broad immunity. See Asif Salahuddin, "Should arbitrators be immune from liability" (2017) 33:4 Arb Int'l 571.

[159] For example, the Arbitration Rules of the ADR Institute of Canada provide that: "Neither the Institute nor the Tribunal is liable to any party for any act or omission in connection with any arbitration under the Rules." (Art. 6.1.1); and that: "The Tribunal and the Institute have the same protections and immunity as a Judge of the superior courts of Canada." (Art 6.1.2.). See also article 31 of the 2014 LCIA Rules and article 41 of the 2017 ICC Rules.

[160] LCIA Rules, r 10.7, *supra* note 56.

would normally be set by the relevant scale if "deemed necessary due to the exceptional circumstances of the case."[161]

2. The Continuation of the Arbitration

The Ontario domestic act provides that when an arbitrator's mandate terminates, a substitute arbitrator shall be appointed, following the procedure that was used in the appointment of the previous arbitrator.[162] The court may appoint the substitute arbitrator, on a party's application, if the arbitration agreement does not provide a procedure for appointing the substitute arbitrator or if the person with power to appoint the substitute arbitrator has not done so seven days after being given notice.[163] However, if the arbitration agreement states that a particular individual (and only that individual) is to be appointed as arbitrator, then the court cannot appoint a substitute.[164] There is no appeal from the court's decision to appoint a substitute arbitrator.[165]

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[161] ICC Rules, art 38(2), *supra* note 54. Art 2(2) of Appendix III of the ICC Rules states that in setting an arbitrator's fees, the ICC Court "shall take into consideration the diligence and efficiency of the arbitrator, the time spent, the rapidity of the proceedings, the complexity of the dispute and the timeliness of the submission of the draft award".

[162] Ontario *Arbitration Act 1991*, s 16(1). Notably, s 16 is not mandatory pursuant to s 3 of the Act. Accordingly, the parties would arguably be free to continue their arbitration with a truncated tribunal, without a substitute arbitrator. In *Mudjatik Enterprises Inc v. North Pacific Roadbuilders Ltd*, 1999 SKQB 220, aff'd 2000 SKCA 59, Wimmer J of the Court of Queen's Bench held that the equivalent section of the Saskatchewan *Arbitration Act* required the appointment of a substitute arbitrator where the parties had not agreed otherwise.

[163] Ontario *Arbitration Act 1991*, s 16(3).

[164] *Ibid* at s 16(5). See *Kaplan v. Kaplan*, 2015 ONSC 1277 at paras 87-90. In *Murphy v. Wise*, 2010 ONSC 5185, aff'd 2011 ONCA 293, Newbould J stated, at para 38 (ONSC), it was open to parties to "put a provision in the arbitration agreement that if the named arbitrator were for some reason incapable of acting, the submission to arbitration would no longer be in effect as only the named arbitrator could be the arbitrator."

[165] Ontario *Arbitration Act 1991*, s 16(4).

Similar provisions are found in the domestic arbitration statutes of the other common law jurisdictions in Canada.[166] However, in B.C. the domestic act simply states that the court "may" appoint a substitute arbitrator unless the parties have agreed on an appointment.[167]

The domestic acts also provide that the court may give directions about the conduct of the arbitration when it removes an arbitrator or, on a party's application, when an arbitrator's mandate terminates (by court order or otherwise).[168] There is no appeal from such directions.[169] Directions could relate, for example, to how the parties are to appoint a substitute arbitrator or how future steps in the proceeding are to be taken.[170] The Québec Code of Civil Procedure simply provides that if the procedure provided for in the arbitration agreement for the revocation of an arbitrator "proves difficult to implement", then the court may, on a party's request, rule on the matter.[171]

Directions given by a Canadian court will depend in large part on what the parties are requesting from it. However, the court will be concerned with ensuring that all parties receive a fair and equal hearing in the arbitration, without any denial of natural justice. An important principle of Canadian jurisprudence is that tribunals

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[166] See, for example, Alberta *Arbitration Act*, ss 15 and 16; Manitoba *Arbitration Act*, ss 15 and 16; New Brunswick *Arbitration Act*, ss 15 and 16; Nova Scotia *Commercial Arbitration Act*, ss 17 and 18; Saskatchewan *Arbitration Act*, ss 16 and 17.

[167] BC *Arbitration Act*, s 18(3). The proposed new B.C. *Arbitration Act*, *supra* note 3, directs, in s 20(2), that if the mandate of an arbitrator terminates, a substitute arbitrator must be appointed according to the rules that applied to the appointment of the arbitrator being replaced.

[168] See, for example, Ontario *Arbitration Act 1991*, ss 15(3) and 16(2); Alberta *Arbitration Act*, ss 15(3) and 16(2); Manitoba *Arbitration Act*, ss 15(3) and 16(2); New Brunswick *Arbitration Act*, ss 15(3) and 16(2); Nova Scotia *Commercial Arbitration Act*, ss 17(3) and 18(2); Saskatchewan *Arbitration Act*, ss 16(3) and 17(2).

[169] See, for example, Ontario *Arbitration Act 1991*, s 16(4).

[170] In *Waterloo (Regional Municipality) v. Elgin Construction*, 2001 CarswellOnt 3965, 13 CLR (3d) 24, [2001] OJ No 4368 (ON SCJ), the court, after removing an arbitrator for bias, gave the parties directions on how to communicate with potential substitute arbitrators and on the required schedule for appointing a new tribunal. See also Alexander Gay & Alexandre Kaufman, *Annotated Arbitration Legislation* 2nd ed (Toronto: Thomson Reuters, 2017) at 167.

[171] See art 629 Quebec CCP.

must ensure not only that justice is done but also that it is be seen to be done.[172]

The Canadian international acts and the federal act, by virtue of Article 15 of the Model Law, provide that if the mandate of an arbitrator terminates, then a substitute arbitrator shall be appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced."[173] These acts do not specifically provide that the court may give directions.

Under Article 14 of the 2010 UNCITRAL Rules, if an arbitrator is replaced during a proceeding, then a substitute "shall" be appointed or chosen by whatever procedure was used to appoint the original arbitrator. However, a party may be deprived of its right to appoint a substitute arbitrator in "exceptional circumstances", the concern being to sanction a party whose party-appointed arbitrator has resigned in bad faith, or perhaps at the request of the party, in an attempt to derail the arbitration. The rules of the ICC and the LCIA do not contain a similar provision – the ICC and LCIA courts simply reserve to themselves the right to determine how a substitute arbitrator shall be appointed (see 2017 ICC Rule 15.4 and 2014 LCIA Rule 11.1, respectively). In at least two ICSID proceedings, a party has been denied the right to appoint a substitute arbitrator after its appointee has resigned.[174]

As for the proceeding itself, after a substitute arbitrator is appointed, the Ontario domestic act does not specifically say whether any part of the proceeding must be repeated. The tribunal may determine the procedure to be used in the matter but would of course need to ensure that the parties are treated equally and fairly, and have an opportunity to present their case and respond to the other parties' case.[175] In *Mudjatik Enterprises Inc. v. North*

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[172] See *Szilard v. Szasz*, [1955] SCR 3, 1 DLR 370; *Newfoundland Telephone Co v. Newfoundland (Public Utilities Board)*, [1992] 1 SCR 623, 89 DLR (4th) 289.

[173] Instead of "shall", s 15(2) of the BC ICAA states that a substitute arbitrator "must" be appointed.

[174] Sarah Grimmer, "Three Scenarios That Raise Due Process Issues" in Andrea Menaker, ed, *International Arbitration and the Rule of Law: Contribution and Conformity* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2017) at 165.

[175] Ontario *Arbitration Act 1991*, ss 19 and 20.

Pacific Roadbuilders Ltd., the Saskatchewan court held that a substitute arbitrator had a mandate to complete the arbitration begun by the initial arbitrator (who had been appointed to the bench), but whether the substitute arbitrator would need to revisit evidence and re-hear arguments previously made was a decision for that arbitrator to make.[176] In BC, under the domestic rules of the BCICAC, if an arbitrator is replaced and the matter is before a sole arbitrator, any previous hearing must be repeated. Otherwise, the tribunal has discretion whether to repeat previous hearings.[177]

The Model Law does not state whether any part of a proceeding must be repeated if a substitute arbitrator is appointed. However, the international acts in the common law provinces and territories other than Ontario and B.C. include a provision stating that unless the parties otherwise agree, if an arbitrator is replaced or removed, then any hearing held prior to the replacement or removal shall be repeated.[178] The BC international act requires hearings to be repeated when a sole arbitrator or a presiding arbitrator is replaced but if an arbitrator is replaced who is not a sole arbitrator or the presiding arbitrator, then any previous hearings may be repeated at the discretion of the tribunal.[179] The Ontario international act is silent on the point, as is the case federally and in Quebec.

Provisions permitting truncated tribunals to continue after the hearing has closed and the arbitrators are in deliberations are found in the current rules of the ICC (Article 15(5)) and the LCIA (Article 12), among other institutions. Article 14.2 of the 2010 UNCITRAL Rules also provides that the appointing authority, having decided that a party should not be allowed to appoint a substitute arbitrator, may permit the remaining arbitrators to continue with the proceeding after the close of hearings and deliver an award.[180]

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[176] *Mudjatik*, *supra* note 162 at paras 3-5 (Sask QB).

[177] *Supra* note 45 at Rule 18(2). The proposed new B.C. *Arbitration Act*, *supra* note 3, adopts this same scheme, at s 20(3).

[178] Alberta ICAA, s 6(1); Manitoba ICAA, s 6(1); New Brunswick ICAA, s 7(1); Newfoundland and Labrador ICAA, s 7(1); Nova Scotia ICAA, s 7(1); PEI ICAA, s 6(1); Saskatchewan ICAA, s 5(1); Northwest Territories ICAA, s 8(1); Yukon ICAA, s 4(1); Nunavut ICAA, s 8(1).

[179] BC ICAA, s 15(3).

[180] Grimmer, *supra* note 174 at 167.

Article 15 of the 2010 UNCITRAL Rules states that "the proceedings shall resume at the stage where the arbitrator who was replaced ceased to perform his or her functions, unless the arbitral tribunal decides otherwise." Paulsson and Petrochilos suggest that it may be necessary to consult with the parties on the question of repeating part of the proceedings, to safeguard each party's right to be given a reasonable opportunity to present its case (per Article 17(1)).[181]

According to the authors of a guide to the 2014 LCIA Rules, in respect of awards coming from tribunals operating under institutional rules, "no national court has refused enforcement of an award where a truncated Tribunal has made an award".[182] Gary Born notes that with respect to awards made by truncated tribunals in *ad hoc* arbitrations, courts are divided on whether awards by such tribunals should be recognized and enforced.[183]

The applicable legislation or arbitral rules will dictate how parties and the tribunal are to move forward if an arbitrator's mandate is terminated. But while party autonomy is said to be the foundation of arbitration, a party seeking termination of an arbitrator's mandate must be careful what it wishes for, given the wide scope for the exercise of a tribunal's discretion in these scenarios, along with the powers reserved for courts and arbitral institutions, and possible risks of compromising any ultimate award.

V. CONCLUSION

While Canadian arbitral legislation and various arbitral rules permit the removal an arbitrator during an arbitration for incapacity or delay, it is rare that a party will seek that relief. Deciding to attempt to remove an arbitrator is not a decision that a party would take lightly. The disruption to the arbitration is potentially severe. Costs are increased for all parties. It may very well be

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[181] Paulsson & Petrochilos, *supra* note 147 at 107.

[182] Maxi Scherer, Lisa Richman & Rémy Gerbay, *Arbitrating Under the 2014 LCIA Rules: A User's Guide* (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2015), at 245, quoted in Grimmer, *supra* note 174 at 168.

[183] Gary B Born, *International Commercial Arbitration*, 2nd ed (Alphen aan den Rijn, The Netherlands: Kluwer Law International, 2014) at 1958-61, citing awards from truncated tribunals that were annulled in France and Switzerland and others that were recognized and enforced in the United States.

embarrassing for the arbitrator. And if the request for removal is unsuccessful, then the continuation of the proceeding may be uncomfortable for some participants—to say the least. Not to mention that a party who has failed in an attempt to remove an arbitrator may have less confidence in the process.

When a request for removal is made, it is even more rarely granted by courts and or arbitral institutions. As courts have held, it is not appropriate to remove an arbitrator simply because one party has a reasonable apprehension that the arbitrator is not up to the job, or that the arbitrator was indisposed and risks a possible relapse. An inordinate delay in an arbitration is a less problematic reason for terminating an arbitrator's mandate, but that delay still needs to be excessive and improper, unless the parties agreed in advance to termination after a certain point. Courts and institutions will prefer to save the proceeding rather than ending it or ordering an arbitrator to step aside – an intervention of that nature requires exceptional circumstances. But in deciding whether to allow an arbitrator to continue with a particular case, it is likely that a Canadian court will be concerned with ensuring that all of the parties can be confident that they will receive a fair hearing. Fortunately, mechanisms are increasingly in place to prevent these issues from manifesting themselves during an arbitration, or to minimize delays and disruptions when these occur.

Ultimately, an arbitration must deliver a just result. It lies to the courts and arbitral institutions not only to ensure that arbitrations are properly conducted but also to maintain the integrity of arbitration as a viable and effective way of resolving commercial disputes.