ARBITRATION LEGISLATION REFORM IN CANADA: A VIEW FROM QUÉBEC

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On January 1, 2016, Québec's new *Code of Civil Procedure*[1] went into effect, establishing a high-water mark for arbitration in Québec. The new *CCP* sought to simplify procedure and improve access to justice, in particular by encouraging what the National Assembly dubbed "private dispute prevention and resolution" ("PDPR"), primarily mediation and arbitration.[2] PDPR is so central to Québec's new *CCP* that parties now have an obligation to consider PDPR before referring a dispute to the courts, and that obligation appears in the very first article of the *CCP*.[3]

Authors described the new *CCP* as representing—perhaps somewhat optimistically—a "change of culture"[4] from "confrontation to collaboration".[5] As it pertains to arbitration, this change can be seen as part of a broad trend favouring

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[1] *Code of Civil Procedure*, CQLR c C-25.01 ["*CCP*" or "new *CCP*", as required by context]; *An Act to establish the new Code of Civil Procedure*, SQ 2014, c 1, s 830; OIC 1066-2015, (2015) GOQ II, 4709.

[2] *CCP*, *supra* note 1 at art 1.

[3] *Ibid*.

[4] Jean-François Roberge, S. Axel-Luc Hountohotegbè & Elvis Grahovic, "L'article 1er du Nouveau Code de procédure civil du Québec et l'obligation de considérer les modes de PRD : des recommandations pour réussir un changement de culture" (2015) 49 RJTUM 487 at 493 (translation: "un « changement de culture »").

[5] Michelle Thériault, "Le défi du passage vers la nouvelle culture juridique de la justice participative" (2015) 74 R du B 1 (CAIJ) at 1.

arbitration to improve the speed and flexibility of justice through partial, consensual privatization.[6]

Notably, the *CCP*'s shift toward arbitration was not accompanied by drastic changes in the applicable rules themselves, reflecting that (a) the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") had been the foundation of Québec's arbitration law since 1986 and remains so,[7] and potentially (b) that legislators took limited input from (international, at least) commercial arbitration experts.[8] Nonetheless, the new *CCP*, like its predecessor, sets out approaches to a number of issues that may resonate in other provinces, especially in Ontario as it considers its own reforms. In this article, we briefly consider the most salient of these issues:

1. the relationship between the rules governing domestic and international arbitrations;

2. appeal rights;

3. the default number of arbitrators;

4. the flexibility afforded arbitrators, especially in terms of encouraging settlement; and

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[6] Roberge et al, *supra* note 4 at 493—94; Trevor C W Farrow, "Privatizing our Public Civil Justice System" (2006) 9 News & Views on Civ Justice Reform 16 at 17; Diane Sabourin, "L'arbitrage conventionnel et le nouveau Code de Procédure civile" in Stéphane Bernatchez and Louise Lalonde, eds, *Le nouveau Code de procedure civile du Québec: « Approche différente » et « accès à la justice civile »*, (Sherbrooke: Les Éditions Revue de droit de l'Université de Sherbrooke, 2014) 439 at 439—42.

[7] Fabien Gélinas & Giacomo Marchisio, "L'arbitrage consensuel et le droit québécois: un survol" (2018) 48:2 RGD 445 at 448.

[8] Anthony Daimsis, "Quebec's Arbitration Law: Still a Unified Approach?" (2014) 23:1 Can Arb & Med J 10 at para 17 (CanLII).

5. the confidentiality of arbitral proceedings.

I. INTERNATIONAL AND DOMESTIC ARBITRATION

Uniquely in Canada, Québec's *CCP* and *Civil Code* apply a single set of default rules based on the Model Law to all consensual arbitration, whether domestic or international, commercial or non-commercial.[9]

The *CCP* provides one relevant exception. Articles 649 to 650 *CCP* distinguish domestic and international arbitration not by changing the applicable rules but by altering their interpretation: for disputes involving international (defined as including interprovincial) commercial interests, in interpreting the *CCP*, consideration "may be given" to the Model Law, the Report of UNCITRAL on its eighteenth session and the Analytical Commentary and other "documents related to [the] Model Law".[10]

This interpretive trick has divided authors. One describes it as adding "latitude" to international commercial arbitration,[11] while another sees the provision as somewhat misleading: these international sources are foundational to Québec's arbitration rules and ought to be considered in the domestic context, too.[12]

In practice, the *CCP*'s rules are generally applied consistently to domestic and international arbitration, and have been since

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[9] *CCP*, *supra* note 1 at arts 620—655 *CCP*; arts 2638—2643 CCQ; Babak Barin and Eva Gazurek, "Enforcement and Annulment of Arbitral Awards in Quebec – Vive la difference!" (2004) 64 R du B 431 at 431—32. The conflation of domestic and international commercial arbitration dates back to 1986; commercial and "civil" arbitration became conflated with the transition from the *Civil Code of Lower Canada* to the *Civil Code of Québec* in 1994. See Sabourin, *supra* note 6 at 448—449.

[10] *CCP*, *supra* note 1 at arts 649, 652.

[11] Gélinas & Marchisio, *supra* note 7 at 449.

[12] Daimsis, *supra* note 8 at paras *12ff.*

before the new *CCP* was enacted. Québec's courts have long been willing to rely on Model Law sources and authorities—albeit not particularly often—without any obvious consideration of whether the arbitration at issue was international.[13] Justice Wagner (then of the Court of Appeal) best explained why this is so a decade ago, in a case involving arbitrators' authority to issue injunctive orders:

> [S]ection 17 of the UN Model Law specifically allows for such measures. Seeing as this provision is incorporated to Quebec law with regards to inter-provincial or international arbitration, under article 940.6 C.C.P., why should domestic arbitration follow different rules?[14]

Some concern was initially raised that articles 649 to 651 *CCP* would lead to the domestic and international regimes splitting.[15] However, this fear has not so far been realized. Justice Bachand of the Court of Appeal recently echoed Justice Wagner's sentiment, observing that it is "usually desirable" for local arbitral law to develop consistently with the normative consensus in comparative law (if one exists).[16]

This unifying internationalist-comparativist approach is seen as reassuring parties and practitioners that Québec broadly matches a set of common expectations as to how arbitration is carried out, which encourages parties to choose

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[13] See e.g., *Bombardier Transportation c SMC Pneumatics (UK) Ltd*, 2009 QCCA 861; *Coderre v Coderre*, 2008 QCCA 888 at paras 74—88; *Rhéaume c Société d'investissements l'Excellence Inc.*, 2010 QCCA 2269 at para 53 [*Rhéaume*].

[14] *Nearctic Nickel Mines Inc c Canadian Royalties Inc*, 2012 QCCA 385 at para 53.

[15] Daimsis, *supra* note 8 at paras 17—23.

[16] *Specter Aviation c Laprade*, 2021 QCCA 1811 at para 47 (concurring judgment of Bachand J) [*Specter Aviation*].

Québec as a seat—this was the intent behind article 649's predecessor[17]—and indeed goes to the very purpose of the Model Law.[18] This can be compared to the Toronto Commercial Arbitration Society's recommendation that any new act should "[make] it clear that commercial arbitration is to be conducted in Ontario to the standards of the Model Law".[19] Such an approach also has the salutary effect of giving courts and parties access to a wide and deep pool of doctrine and judgments reflecting modern understandings of arbitration.[20]

Wagner CJC's observation holds: it is difficult to think of differences in policy preferences between the drafters of the *CCP* and the Model Law that would be so important as to render a common set of rules inapposite. While it may in principle be more difficult to share rules between commercial and non-commercial arbitration, arbitration outside the realm of commercial disputes is in many cases either curtailed or instituted by statute instead of contract in any event.[21]

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[17] *Specter Aviation*, supra note 16; Daimsis, *supra* note 8 at paras *12ff*.

[18] UN Commission on International Trade Law. Secretariat, "Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration" (4 July 1996) at paras 8—9, online(pdf): *United Nations Digital Library* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf>.

[19] Toronto Commercial Arbitration Society Arbitration Act Reform Committee, "Final Report, February 12, 2021", online: <https://torontocommercialarbitrationsociety.com/arbitration-act-reform-committee/>.

[20] Daimsis, *supra* note 8 at paras 15—16.

[21] For instance, family matters, disputes over status and capacity of persons and "other matters of public order" are barred entirely from arbitration. See art 2639 CCQ. Arbitration clauses in consumer contracts are null, but consumers can agree to arbitrate after a dispute arises. See *Consumer Protection Act*, CQLR c P-40.1, s 11.1. Labour disputes must be subjected to arbitration under a special regime, but the parties choose the arbitrator. See *Labour Code*, CQLR c C-27, ss 74—104.

Québec is a cosmopolitan jurisdiction, where bilingualism is common and many practitioners bear dual common and civil law degrees as well as training in diverse legal systems. However, it is also a relatively small jurisdiction. There is a cost to dividing the rules applicable to domestic and international arbitration: it splits the sources, impoverishing both fields. In addition, the more the distinction between domestic and international commercial arbitration affects outcomes, the more parties' time and judicial resources must be spent determining which set of rules apply.[22] For those reasons alone, a single set of rules for domestic and international commercial arbitration is good policy.

II. APPEAL RIGHTS

While other provinces debate whether and when to allow parties to appeal arbitral awards, in Québec the question is settled: neither domestic nor international arbitral awards can be appealed. This state of affairs has been elevated to something approaching a fundamental principle of arbitration, to the benefit of public policy (if also to the chagrin of losing parties).

In Québec, a losing party can resist homologation (recognition) of an award or petition for its annulment, but only on a strictly limited set of grounds derived from the Model Law, none of which relate to the merits of the dispute:

1. one of the parties lacked capacity to enter into the arbitration agreement;

2. the arbitration agreement is invalid under the law chosen by the parties or such other law that applies;

[22] Sabourin, *supra* note 6 at 446.

3. the procedure for the appointment of an arbitrator or the applicable arbitration procedure was not followed;

4. the losing party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was unable to present its case;

5. the dispute, or one or more conclusions, fall outside the arbitration agreement; in the latter case, if the irregular conclusion(s) can be dissociated from the rest of the award, the remainder stands;

6. the subject matter of the dispute is not one that may be settled by arbitration in Québec; or

7. the award is contrary to public order.[23]

Québec courts remain vigilant to ensure that homologation and annulment do not turn into *de facto* appeals, and there is no shortage of judgments condemning losing parties' efforts in that regard.[24] The Superior Court recently reiterated that, in a homologation/annulment proceeding, the court "does not re-open the debate, nor analyze the evidence, the merits of the dispute or the reasons for the award", but only determines whether the arbitrator exceeded his or her jurisdiction.[25]

This matter becomes particularly thorny when public order is involved. In *Desputeaux v. Éditions Chouette (1987) inc*, the Supreme Court distinguished matters of public order that could

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[23] *CCP*, *supra* note 1 at arts 646, 648, 653.

[24] In addition to the cases discussed below, see e.g., *Greenkey Ltd c Trovac Industries Ltd*, 2017 QCCS 3270 at para 25 [*Greenkey*].

[25] *Balabanian c Paradis*, 2022 QCCS 959 at para 44 (translation: "ne reprend pas le débat, pas plus qu'il n'analyse la preuve, le fond du différend et les motifs de la décision Arbitrale").

and could not lead to annulment based on whether the *disposition* of the case satisfies public order, as opposed to whether the reasons are correct in regard to matters of public order.[26] Justice Kalichman of the Superior Court recently expounded on the rationale for this rule in *Perreault v. Groupe Jonathan Benoît*,[27] where a defendant opposed homologation on the basis that it relied on contractual provisions that, it argued, contravened the *Code of ethics of pharmacists*.[28] The Court rejected this argument:

> If the Defendants were correct, it would mean that every time an arbitrator is called upon to apply rules of public order to resolve a dispute, the sentence could be annulled as contrary to public order if we establish that that the rules were not properly applied. […] The legislator specifically wished that such questions [of public order] not be excluded from arbitration. It would be illogical to leave these questions to an arbitrator to the exclusion of the common law courts and then to let these decisions be annulled by these same courts on the basis of a simple appeal on the merits.[29]

As Québec courts see it, the absence of appeal rights flows naturally from the *CCP*'s treatment of arbitration through the lens of jurisdiction:

> The court seized of an application for the homologation of an arbitration award cannot review the merits of the dispute. The reason for

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[26] *Desputeaux v Éditions Chouette (1987) inc,* 2003 SCC 17 at para 54.

[27] 2021 QCCS 1350 [*Perreault*].

[28] CQLR c P-10, r 7, s 49.

[29] *Perreault*, *supra* note 27 at paras 23—24 [translated by author].

> this provision is simple: the parties chose to submit their dispute to arbitration to the exclusion of the courts. The courts therefore have no jurisdiction to rule on the merits of the dispute and must avoid retrying the process during an application for homologation.[30]

This reasoning is persuasive as far as it goes. Other provinces define the respective spheres of courts and arbitral tribunals in terms of jurisdiction without eliminating appeal rights,[31] and the carveout for public order discussed above is itself difficult to reconcile with a purely jurisdictional approach.

Nonetheless, since the *CCP* emphasises private arbitration as a means to improve access to justice, public policy calls for reducing recourse against arbitral awards to the essential. While a lack of appeal rights could be seen as trading quality of justice for speed,[32] that is not a fatal critique of a system founded on party autonomy, especially in a province that restricts or regulates arbitration in areas of law where imbalances of power are most common (as discussed in the previous section). Parties who agree to arbitrate have chosen to remove their dispute

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[30] *Ibid* at para 12 [translated by author]; see also *Government of The Dominican Republic c Geci Española*, 2017 QCCS 2619 at para 14; see also David Ferland, *Précis de procédure civile du Québec*, 5th ed, vol 2, (Cowansville: Éditions Yvon Blais, 2015) (*Droit civil en ligne,* EYB2015PPC165, no 2-2024 and 2-2026), as cited in *Greenkey*, *supra* note 24.

[31] Ontario itself does this in domestic arbitration; see the *Arbitration Act, 1991*, SO 1991, c 17, ss 17, 45.

[32] This trade-off is not a new question in PDPR, both specifically regarding appeal rights and in general; see *e.g.* Howard R Sacks, "The Alternate Dispute Resolution Movement: Wave of the Future or Flash in the Pan" (1988) 26:2 Alta L Rev 233 at 236-239; *AT&T Mobility LLC v Concepcion*, 563 US 333 at 350; more broadly, Ben Giaretta, "Project Management in International Arbitration" (2016-2017) 3 *McGill J of Dispute Resolution* 66 at 68—71.

from the courts. It simply behooves counsel to ensure that their clients are aware of the trade-offs before signing any agreement to arbitrate. This is equally true in a domestic and an international context.

III. PROCEDURAL FLEXIBILITY AND CONCILIATION

Arbitral parties in Québec have long had, and still retain, wide control over the conduct of their arbitrations; subject to peremptory law, arbitration procedure is set by the arbitration agreement and only reverts to the *CCP* as a default.[33] Indeed, flexibility is an important benefit of arbitration.[34]

The new *CCP*'s biggest change regards conciliation. Hybrid practices like med-arb raise well-worn questions of whether it is legitimate for an arbitrator to act as mediator in the same case, potentially putting arbitral awards at risk.[35] The second paragraph of article 620 *CCP* ends any question:

> The arbitrator's mission also includes attempting to reconcile the parties, if they so request and circumstances permit.[36]

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[33] Article 2643 CCQ.

[34] Oliver F Kott & Rachel Bendayan, "L'Arbitrage international et interne: toujours la meilleure solution pour résoudre les litiges dans le domaine de la construction?: considérations pratiques et juridiques." (2011) 336 Développements récents en droit de la construction 27 at 33.

[35] Catherine Dagenais, "Les différents modes de prévention et de règlement de différends pouvant être intégrés dans les clauses escalatoires" (Nov 2015) at 3, online (pdf): *Dentons* <https://www.dentons.com/en/catherine-dagenais>. See also Sabourin, *supra* note 6, at 469.

[36] *CCP*, *supra* note 1 at art 620.

This provision, new to the *CCP*,[37] is consistent with the new *CCP*'s pro-PDPR stance. As drafted, it serves to empower arbitrators to adopt alternative approaches to resolving disputes where expressly requested by the parties.

It would be hard for the legislator to provide more. An arbitrator is not a judge. Arbitrators are principally servants of the parties, not of the public. While they must act "impartially and diligently and in accordance with the requirements of good faith" and must "ensure that any steps they take are proportionate,"[38] arbitrators do not have the same duties, the same incentives, or the same institutional authority or leverage that lead judges to nudge parties to settle.[39]

IV. NUMBER OF ARBITRATORS

The new *CCP* significantly differs from the Model Law in one way: the default number of arbitrators is one.[40] The Minister's commentary specifically notes that this rule diverges from the Model Law but justifies that divergence on the basis of cost and efficiency.[41]

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[37] Québec, Ministère de la Justice, *Commentaires de la ministre de la Justice: Code de procédure civile, chapitre C-25.01* (Montréal: Wilson & Lafleur, 2015).

[38] *CCP*, *supra* note 1 at arts 2—3.

[39] The new *CCP* makes it part of the courts' mission to "facilitat[e] conciliation whenever […] circumstances permit": see art 9 para 2 *CCP*. More broadly, compare the duties of arbitrators described by the government of Québec (see Gouvernement du Québec, "Arbitration" (last modified 31 January 2022), online: *Québec* <quebec.ca/en/justice-and-civil-status/dispute-prevention-resolution-processes/arbitration>) with those of judges in the *Judicial code of ethics*, CQLR c T-16, r 1, including to "uphold the integrity and defend the independence of the judiciary, in the best interest of justice and society".

[40] New *CCP*, *supra* note 1 at art 624; *CCP*, *supra* note 1 at art 941 *CCP* (1965).

[41] Ministère de la Justice, *supra* note 36; Québec, National Assembly, Committee of Institutions, *Étude détaillée du projet de loi no 28 – Loi*

There is no doubt that a three-member tribunal has certain advantages, especially in a regime intended to hew relatively closely to international practice and to attract international users. Tripartite tribunals have their "fervent partisans".[42] That said, three arbitrators inevitably cost more than a sole arbitrator, act less quickly, and take more effort to coordinate.[43] Since parties can vary the number of arbitrators by consent, the important point for counsel is to be aware of this change and to ensure that clients understand the pros and cons before making their choice.

V. CONFIDENTIALITY

Confidentiality is a key characteristic of arbitration in Québec. In our experience, commercial parties tend to place enormous importance on confidentiality.[44] Oddly then, the extent to which arbitral proceedings are confidential—especially in the absence of an express agreement—was only codified in the new *CCP*, and the precise boundaries of confidentiality remain uncertain in practice.[45]

For a long time, Québec practitioners assumed that arbitration was generally confidential because it was private.[46] In 2010, the Québec Court of Appeal rejected this notion, ruling

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instituant le nouveau Code de procedure civile (22), 40-1, vol 43 No 108 (10 January 2014) at 44 (Luc Ferland); Québec, National Assembly, Committee of Institutions, *Étude détaillée du projet de loi no 28 – Loi instituant le nouveau Code de procedure civile (23)*, 40-1, vol 43 No 113 (17 January 2014) at 27.

[42] Sabourin, *supra* note 6 at 469.

[43] *Ibid*.

[44] See also Kott & Bendayan, *supra* note 34 at 36.

[45] Daniel R. Bennett, QC & Madeleine A. Hodgson, "Confidentiality in Arbitration: A Principled Approach", (2016-2017) 3 McGill J of Dispute Resolution 98 at 111.

[46] Sabourin, *supra* note 6 at 462.

that materials from arbitration are not confidential unless the parties so stipulate by contract.[47]

The new *CCP* enshrines confidentiality. Arbitral confidentiality appears in article 4 of the CCP, sharing that provision with mediation confidentiality (*i.e.*, settlement privilege):

> Parties who opt for a private dispute prevention and resolution process and the third person assisting them undertake to preserve the confidentiality of anything said, written or done during the process, subject to any agreement between them on the matter or to any special provisions of the law.[48]

In *79411 USA Inc c Mondofix Inc*, the Superior Court found that arbitral awards are themselves confidential, such that the court should place the award under seal when homologating them, such that only the conclusions (not the reasons) would become public during the homologation process.[49] The Court interpreted arbitral confidentiality broadly as an incentive to arbitrate:

> Encouraging the parties to resort to Private Dispute Prevention and Resolution Processes (PDPR) (mediation or private arbitration) is one of the goals which the 2014 remastering of the *Code of Civil Procedure* sought to achieve. The confidentiality of such processes is often a major incentive when a party weighs the benefits of PDPR, against those of the traditional

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[47] *Rhéaume*, *supra* note 13 at para 80.

[48] *CCP*, *supra* note 1 at art 4 [emphasis added].

[49] 2020 QCCS 1104 at paras 17, 27 [*Mondofix*].

> judicial streamline. Such confidentiality is often key to the success of a mediation or of a private arbitration, as it favours an open approach.[50]

Of course, through a court proceeding the existence of a dispute still becomes public knowledge, so there is no complete confidentiality.

Nonetheless, the boundaries of confidentiality remain unclear. The Court acknowledged that disclosure would be decided on a "case-by-case basis" largely resting on "the actual necessity of the disclosure sought"—including such cases as "if justice cannot be done without the disclosure of the award, if such disclosure is necessary to avoid a denial of justice, if such disclosure is reasonably necessary for the establishment or protection of the legitimate interests of an arbitrating party".[51] This is hardly firm guidance.

Further, the interplay between arbitral and judicial proceedings matters, either because a court is called on to supervise or assist with certain aspects of arbitral proceedings or because disputes end up divided between arbitration and litigation. In a world of complex contractual relationships, some division is inevitable.[52] Several issues—*res judicata* being the most obvious—can and do arise between courts and tribunals to ensure the orderly, good-faith conduct of proceedings.[53]

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[50] *Mondofix, supra* note 49 at para 7; see also at para 22.

[51] *Ibid* at paras 12, 20.

[52] See e.g., *AXC Construction inc c Bioénergie AE Côte-Nord Canada inc*, 2019 QCCS 3890 (claims by end-client against contractor referred to arbitration; calls in warranty remain in court).

[53] *Raymond Chabot Administrateur provisoire inc du plan le garantie La Garantie Abritat inc c 7053428 Canada inc*, 2021 QCCS 1039; *Papadakis c 10069841 Canada inc,* 2020 QCCS 32. For an inspirational rather than direct example, see *Landy c Chélin*, 2020 QCCA 1570 (regarding suspension of proceedings in light of judicial review of an administrative decision).

When *any* such issues are addressed, the extent to which confidentiality applies becomes a central concern.

The policy arguments regarding confidentiality—typically, incentivizing arbitration versus public accountability and confidence[54]—need not be rehashed here. It would be helpful to have clearer and more comprehensive rules on such an important matter. That being said, the issue has received little attention (at least, little reported attention) since the new *CCP* was enacted, suggesting that it is not a daily or pressing problem. Parties are still free to make arrangements regarding confidentiality, either in advance or during the course of an arbitration, and they should, as ever, remain alive to the issue.

VI. CONCLUSION

Québec has carved a unique path in Canada, with a unified procedure across all consensual arbitration, based closely on the Model Law but not perfectly replicating it. The new *CCP* conceives of that path as a means of access to justice. For the Québec legislator, this choice entails a number of effects, such as curtailing appeal rights, limiting the default number of arbitrators and enhancing confidentiality, all while continuing to encourage a flexible procedure adaptable by parties to their specific case. These choices they have helped to foster a healthy arbitral environment that is nourished by international experience. They also demonstrate what would be possible in other Canadian jurisdictions.

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[54] *Mondofix*, *supra* note 49 at paras 22—23; Bennett, *supra* note 45 at 106, referring to *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41, [2002] 2 SCR 522 (outside of an arbitral context, see paras 31, 36); Farrow, *supra* note 6 at 16.