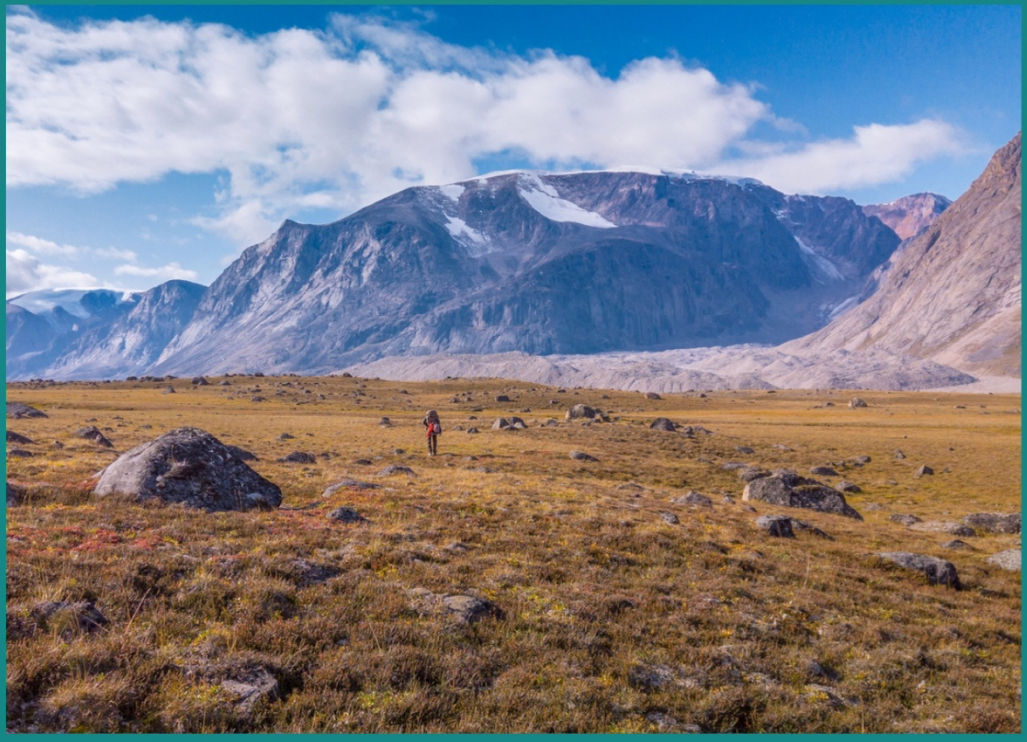
2023 • Vol. 3, No.2

The Canadian Journal of Commercial Arbitration



Queen's | LAW

THE CANADIAN JOURNAL OF COMMERCIAL ARBITRATION

2023 VOL. 3 NO. 2

TABLE OF CONTENTS

Articles

Features

THE CANADIAN JOURNAL OF COMMERCIAL ARBITRATION

2023 VOL. 3 NO. 2

MASTHEAD

EDITORIAL ADVISORY BOARD

Henri Alvarez QC	*Vancouver Arbitration Chambers, Vancouver*
Michelle Awad QC	*McInnes Cooper, Halifax*
Louise Barrington	*Arbitration Place, Little Chambers; Toronto, Hong Kong, London*
Associate Professor Gary F Bell	*National University of Singapore Faculty of Law, Singapore*
Pierre Bienvenu Ad. E.	IMK LLP, *Montreal*
J. Brian Casey	*Bay Street Chambers, Toronto*
Earl A. Cherniak QC	*Lerners LLP, Toronto*
Tina Cicchetti	*Vancouver Arbitration Chambers, Vancouver; Arbitration Place, Toronto*
Mary Comeau	*Calgary Energy & Commercial Arbitrators, Calgary*
Stephen L. Drymer	*Woods LLP, Montreal*
Raëd Fathallah	*Bredin Prat, Paris*
Yves Fortier PC, CC, OQ, QC, AD. E.	*Cabinet Yves Fortier, Montreal; Arbitration Place, Toronto; Twenty Essex, London*
Angus M. Gunn QC	*Eyford Partners LLP, Vancouver*
William G. Horton	*William G. Horton Commercial Arbitration, Toronto*
Professor Céline Lévesque	*University of Ottawa Faculty of Law - Civil Law Section, Ottawa*
John Lorn McDougall QC	*Arbitration Place, Toronto*
Rt Hon Beverley McLachlin PC, CC, CSTJ	*Arbitration Place, Toronto; Hong Kong Ct. of Final Appeal; Singapore Int'l Comm Ct.*
Sophie Nappert	*3 Verulam Buildings, London*
J. Christopher Thomas QC	*J.C. Thomas Law Corporation, Vancouver and Singapore*
Martin J. Valasek	*Norton Rose Fulbright, Montreal*

EDITORS' NOTE

The *CJCA* editors are proud to present this special issue on commercial arbitration legislation reform in Canada. It is *CJCA*'s first special issue on any topic, an indication of the importance the editors place on further improving our arbitration laws. While Canada is justifiably known for its robust legislative and judicial support for commercial arbitration, a number of achievable reforms exist that would improve our legislative framework and help launch Canada's arbitration laws to the global forefront. The bulk of this issue is taken up with a symposium on that theme, collecting diverse perspectives on different ways that arbitration legislation in Canada might—and might not—be improved.

The symposium was inspired by the Toronto Commercial Arbitration Society's Arbitration Act Reform Committee (AARC), which has published an ambitious and comprehensive set of proposals for reforming Ontario's arbitration laws. The AARC's Final Report, along with a summary and appendices, can be found at: https://torontocommercialarbitrationsociety.com/arbitration-act-reform-committee/. We note that several contributors to this symposium were members of the AARC, and that some journal editors have endorsed its proposals as self-designated "Champions for a Unified Commercial Arbitration Act".

Since *CJCA* is a national publication, this issue showcases perspectives from various Canadian and foreign jurisdictions. The symposium comprises ten essays, each by a leader of Canada's commercial arbitration community, and each dealing with a specific aspect of the law or surveying lessons learned from a recent legislative reform initiative in a particular jurisdiction.

First, William G. Horton highlights the value of ending the legislative distinction between domestic and international commercial arbitration that prevails in most Canadian

provinces. Finding that distinction unjustified, he argues for a single arbitration statute that encompasses both.

Second, Cynthia Kuehl addresses a different set of distinctions: those between commercial and non-commercial arbitrations. She finds that the differences between them justify separate statutes to regulate commercial and non-commercial arbitrations.

Third, Joel Richler reflects on appeal rights. He endorses proposals that would improve predictability and efficiency by streamlining the treatment of appeals and making them available only on an opt-in basis.

Fourth, J. Brian Casey discusses set-aside remedies, advocating a set of reforms that would rationalize the provincial arbitration acts' treatment of these remedies.

Fifth, Barry Leon argues for international standards (as exemplified by the UNCITRAL Model Law) to govern domestic commercial arbitrations, and appraises various means of incorporating the Model Law into domestic legislation.

Sixth, Matthias Heilke, Laurence Sainte-Marie, and Stephen L. Drymer present a view from Québec, offering some lessons learned based on Québec's experiences since the 2016 amendments to its Code of Civil Procedure.

Seventh, Tina Cicchetti describes some of the specifics of British Columbia's modernization of its Arbitration Act, which took effect in 2020. She shares the thinking behind those amendments, in order to help inform legislative modernizations in other provinces.

Eighth, Gerald W. Ghikas tackles procedural norms. Since procedural flexibility is a hallmark of arbitration, legislation should not touch upon many aspects of procedure. Nevertheless, he argues, Canadian practice would benefit from a soft law document setting out consensus best practices as default procedural norms.

Ninth, Alexander M. Gay examines the prospects for reform of Canada's federal commercial arbitration laws, assessing a range of options that the federal government might pursue if it goes forward with implementing legislative amendments.

And tenth, Janet Walker considers Australia's adoption of the UNCITRAL Model Law for both international and domestic commercial arbitrations. She presents a range of lessons Canadian jurisdictions could learn from the Australian experience.

In addition to the symposium essays, this issue also contains two articles and one regular feature.

Joshua Karton, Barry Leon, Joel Richler, and Lisa Munro confront a split between British Columbia and Ontario on the identification of "extricable errors of law" in contractual interpretations by arbitrators. This issue is crucial to a key aspect of the relationship between arbitration and the courts: the scope of appeals. They argue that the Supreme Court of Canada should take up the question, and should reject BC's expansive approach to extricable errors of law and endorse Ontario's narrow approach.

Stephen Armstrong updates readers on developments in the Canadian law of anti-suit injunctions since the Supreme Court of Canada's landmark decision in *Amchem*. Such injunctions can be a powerful tool for justice and mischief alike. Armstrong's article identifies an emerging line of Canadian jurisprudence that clarifies the scope of parties' rights to avoid being sued in a given forum.

This issue's content is rounded out by a review of key developments in Canadian arbitration case law in 2022, penned by Lisa Munro, doyenne of the Arbitration Matters blog, drawing from the blog's popular coverage of Canadian case law.

Finally, CJCA is pleased to support the Canadian Arbitration Survey, now underway. If you are able, please take some time to provide your (entirely voluntary and entirely anonymous)

answers to the survey questions. The data will be used to generate an accurate profile of commercial arbitration practice in Canada, information that will point the way forward to help us build the practice of arbitration across Canada and beyond. See the inside back cover of this issue for more information.

Please consider submitting your own writing to CJCA, (see https://cjca.queenslaw.ca/submission) and do not hesitate to contact us with article ideas, feedback, or suggestions.

Joshua Karton, *Managing Editor*
joshua.karton@queensu.ca

A SINGLE ARBITRATION ACT FOR COMMERCIAL ARBITRATION: THE KEY RECOMMENDATION OF THE TORONTO COMMERCIAL ARBITRATION SOCIETY'S ARBITRATION ACT REFORM COMMITTEE

William G. Horton[*]

I. INTRODUCTION

A—perhaps the—key recommendation of the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society ("AARC") for legislative reform in Ontario is that arbitration be regulated under a single piece of legislation to be known as the *Commercial Arbitration Act*. While some aspects of the AARC's recommendations are specific to Ontario, most of the observations will also be relevant to other provinces considering reform of their arbitration legislation.

The question of how many statutes should be enacted to regulate arbitration is fundamental: one, two, or possibly more. In Ontario, there are currently two statutes: the *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sched 5 ("*ICAA*")[1] which covers arbitrations that are both "commercial"

[*] William G. Horton is an independent arbitrator of Canadian and international business disputes: wgharb.com. The author would like to thank Aaron Hirschorn for his assistance with legal references and editorial review of this article.

[1] The *ICAA* is based on the *Uniform International Commercial Arbitration Act* adopted by the Uniform Law Conference of Canada in 2014. The *ICAA* adopts the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitration Awards ("New York Convention") and the Model Law on International Commercial Arbitration ("Model Law") promulgated by UNCITRAL in 1985, as amended in 2006.

and "international",[2] and the *Arbitration Act, 1991*, SO 1991, c 17 ("*Arbitration Act*") which covers all other kinds of arbitration. The application of the *Arbitration Act* is modified by various other enactments.[3]

Subsection 2(1)(b) of the *Arbitration Act* expressly states that it does not apply if the *ICAA* applies. However, section 3 of the *Arbitration Act* permits parties, by agreement, to exclude almost every provision of the legislation except for the provisions expressly set out in section 3.[4] Section 2(1)(b) is not listed in section 3. As such, there is an unresolved ambiguity as to whether parties to a dispute arising from an international agreement may choose to have the *Arbitration Act* apply to their dispute instead of the *ICAA*. An Ontario decision suggests they can.[5] However, two decisions from British Columbia suggest that parties cannot agree to have disputes that arise from international agreements arbitrated pursuant to British Columbia's *Arbitration Act*.[6] There is also a question as to whether non-international commercial parties can agree to have their dispute resolved by the *ICAA*.

In addition to non-international commercial arbitration, the *Arbitration Act* covers a host of other types of arbitration which do not have a great deal in common with commercial arbitration. For example, family law, consumer, residential, and

---

[2] See *UNCITRAL Model Law on International Commercial Arbitration* UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006), art 1 [*Model Law*].

[3] See e.g., *Family Law Act*, RSO 1990, c F.3, s 59.1; *Consumer Protection Act, 2002*, SO 2002, c 30, Sched A, ss 7—8; *Labour Relations Act*, 1995, SO 1995, c 1, Sched A, ss 43(30), 48(20), 150.4(12), 163.3(38), 184(3).

[4] See *Jean Estate v Wires Jolley LLP*, 2010 ONSC 4835 at para 32.

[5] See *Noble China Inc v Lei* (1998), 42 OR (3d) 69 at para 60, 1998 CarswellOnt 4386 (WL Can) (ONCJ).

[6] See *Kang v Advanced Fresh Concepts Franchise Corp*, 2021 BCPC 262 at paras 26–29. See also *McHenry Software Inc v ARAS 360 Incorporated*, 2018 BCSC 586 at paras 27—28, 38—59.

employment arbitration are all governed by the *Arbitration Act*. The umbrella term "domestic arbitration" is commonly applied to all these subject matters, including non-international commercial arbitration.

One may observe that the term "domestic" has a double connotation. It may refer to disputes which have no international dimension and, on the other hand, disputes which relate to non-commercial, personal concerns. The non-commercial disputes covered by the *Arbitration Act* frequently involve issues of voluntariness and bargaining power not typically found in commercial disputes. These non-commercial disputes may also engage public policy issues such as the welfare of children, employees, and consumers, or the peaceable settlement of disputes between neighbours. As a result, ancillary legislation restricting rights available in commercial arbitration has been passed in some areas.[7]

Often, the nature of non-commercial disputes makes mixed processes, such as mediation combined with arbitration (med/arb) or online (or even algorithmic) arbitration, more effective. Such processes may relax concerns regarding the impartiality of the decision maker as the process unfolds, or accept limitations on due process in ways that are generally not acceptable in commercial arbitration, other than possibly in disputes which are not economical to process in any other way.[8]

---

[7] See e.g., subsection 2.1(2) of the *Arbitration Act* states that in the event of a conflict between the *Arbitration Act* and the *Family Law Act*, the *Family Law Act* prevails. Subsection 7(2) of the *Consumer Protection Act*, *2002*, SO 2002, c 30, Sched A, states that "any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act". See also Shelley McGill, "Family Arbitration: One Step Forward, Two Steps Back" (2007) 21 J L & Social Pol'y 49.

[8] See e.g., Feldstein Family Law Group Professional Corporation, "Mediation/Arbitration (Med/Arb)" (23 May 2017), online (blog): Feldstein

On the other hand, due process concerns in truly "domestic" non-international arbitrations may activate the protective instincts of the judiciary to a greater degree than in arbitrations relating to commercial transactions.[9]

In addition, the *Arbitration Act* applies to statutory arbitrations in which arbitration is mandated for the settlement of certain types of disputes.[10] One example is statutorily mandated arbitration as to allocation of loss between two or more insurers which covered the same loss. Such arbitrations are in contrast to commercial arbitrations which arise from a transactional or business relationship that is voluntarily entered into by the parties. Parties to statutory arbitrations may be unwilling participants in an arbitration process that is imposed upon them. They may welcome court-like procedures and expanded court review of the merits, for example by electing to have recourse to appeals on both questions of law and questions of mixed fact and law.[11]

In contrast to these other types of domestic arbitration, commercial arbitration has developed in Ontario, and elsewhere in Canada, in ever closer alignment with international commercial arbitration. Two of the leading Canadian associations of commercial arbitrators and arbitration

---

Family Law Group Professional Corporation <https://www.separation.ca/blog/2017/may/mediation-arbitration-med-arb-/>. See also ADR Institute of Canada, "Online Dispute Resolution", online: *ADR Institute of Canada* <https://adric.ca/online-dispute-resolution/>.

[9] The substantial differences both in substance and arbitral dynamics between family arbitration and commercial arbitration are well illustrated in *Kainz v Potter*, [2006] OJ No 2441 at paras 61—87, 149 ACWS (3d) 541 (SCJ).

[10] See e.g. *Condominium Act*, *1998*, SO 1998, c 19, s 132; and O Reg 283/95: *Disputes Between Insurers*, made under of the *Insurance Act*, RSO 1990, c 1.8, s 7.

[11] See *Intact Insurance Company v Allstate Insurance Company of Canada*, 2016 ONCA 609.

lawyers are affiliated with international bodies: ICC Canada and the Canadian Branch of the Chartered Institute of Arbitrators, both of which also play a large role in developing best standards and practices in the Canadian arbitration bar, through their educational programs. In addition, international arbitral institutions are active in Canada in relation to both international and purely Canadian commercial arbitrations.[12] This is a growing phenomenon globally.[13] Canadian commercial arbitrators regularly sit on tribunals with arbitrators from other countries, in both international and non-international arbitrations. There is significant interchange between Canadian and foreign arbitration practitioners at conferences in Canada and abroad and sharing of international techniques and standards. The FCIArb designation of the Chartered Institute of Arbitrators is generally acquired by leading Canadian arbitrators, including those doing primarily non-international arbitrations. Both international and non-international arbitration are taught interchangeably in the Gold Standard Course in Commercial Arbitration conducted by the Toronto Commercial Arbitration Society, which leads to the Q. Arb. designation offered by the ADR Institute of Canada ("ADRIC").

In Ontario, as in most of Canada, non-institutional ("ad hoc") arbitration is much more widespread than arbitrations administered by arbitration institutions. Nevertheless, the use

[12] See ICDR Canada, "Canadian Dispute Resolution Procedures" (2015), online (pdf): *International Centre For Dispute Resolution* <https://www.icdr.org/sites/default/files/document_repository/ICDR-Canada-Rules-English.pdf>.

[13] See International Chamber of Commerce, "ICC Dispute Resolution 2020 Statistics" (2021) at 11, online (pdf): International Chamber of Commerce <https://nyiac.org/wp-content/uploads/2021/09/ICC-Dispute-Resolution-2020-Statistics.pdf> ("Over the years, parties have increasingly selected ICC for their international disputes as well as for the resolution of their regional and domestic disputes. In 2020, disputes between parties of same nationality represented 31% of all cases registered (compared to 25% in 2019).").

of UNCITRAL Arbitration Rules, as well as international practices such as the use of the IBA Rules for the Taking of Evidence in Arbitration, Redfern Schedules, and Procedural Order No. 1 are increasingly widespread for ad hoc non-international arbitrations. Equally, the expertise of Canadian arbitrators with respect to conducting ad hoc arbitrations makes a pragmatic contribution to international arbitration procedures, whether the arbitrations are conducted in Canada or elsewhere. Canadian associations such as the Toronto Commercial Arbitration Society, the Vancouver International Arbitration Centre, and the Western Canadian Commercial Arbitration society address both international and non-international arbitration, as do the recently established Canadian Journal of Commercial Arbitration and the McGill Journal of Dispute Resolution.

None of the above activities involve or engage with the several non-commercial types of arbitration covered by the *Arbitration Act*. Commercial Arbitration has effectively become a separate, highly specialized, and increasingly unified form of arbitration, distinct and apart from other forms of domestic, non-commercial arbitration.

II. A BRIEF HISTORY OF COMMERCIAL ARBITRATION

To understand the choice between one act or two for commercial arbitration, a bit of historical perspective is helpful.

Prior to the current *Arbitration Act*, which was enacted in 1991, arbitration statutes in Ontario and most of common law Canada were based on the English arbitration legislation, which was consolidated in the English *Arbitration Act of 1950*. The English legislation dealt with the subject of arbitration in a unitary manner, encompassing all forms of arbitration and focusing primarily on the relationship between the courts and arbitrators and delineating the powers of the latter. The English

legislation provided for considerable intervention of the courts with respect to the arbitral process.[14]

Two crucial developments occurred after the last major consolidation of the English arbitration legislation in 1950. The first was the promulgation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") in 1958. The second was the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") which was adopted in 1985.

1. The New York Convention

The main objective of the New York Convention was to obtain the commitment of adhering states to enforce arbitration agreements and foreign arbitration awards without the need for any court approval of the award in the jurisdiction where it was issued, or any more onerous conditions than for the enforcement of local arbitration awards. It emphasized the basic principles of: respecting party autonomy with reference to arbitration agreements; priority of arbitration over court proceedings; the direct enforcement of awards in jurisdictions other than where they were made; and strictly limited grounds for non-enforcement. Its application was not limited by the subject matter of the dispute. However, adopting states were given the option of limiting its application only to commercial cases and/or only to foreign awards. Canada adopted the Convention in 1985 with the commercial limitation[15] and all of the provinces followed suit.

---

[14] See Gary B Born, *International Commercial Arbitration*, 3rd ed (Alphen aan den Rijn, The Netherlands: Wolters Kluwer Law International, 2021) at 153.

[15] See United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp).

The Convention was based on the fundamental premise that the main obstacle to commercial arbitration fulfilling its proper role in international trade was intervention and interference by the courts. However, the Convention was never intended as a comprehensive arbitration statute and does not address matters relating to: the qualifications or powers of arbitrators; the role of the courts with respect to arbitrations in progress; or the content of local laws relating to such matters as the arbitrability of disputes and the standards for declaring an arbitration agreement "null and void, inoperative or incapable of being performed."[16]

2. The Model Law

In 1985, the United Nations Commission on Trade and Arbitration Law adopted the Model Law "to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration."[17] It was intended to provide a "pattern", or template, for "domestic legislation" that conformed generally with the New York Convention.[18]

Compliance with the New York Convention is an international obligation of all contracting states, currently numbering over 160. Compliance with the principles of the

---

[16] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38 at art 2(3) (entered into force 7 June 1959) [*New York Convention*].

[17] United Nations Commission on International Trade Law, "UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations Commission On International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.

[18] See United Nations Commission on International Trade Law, "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations Commission On International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

Model Law, while not mandatory, is highly desirable for any major trading jurisdiction seeking to establish a reputation for the modern and effective resolution of business disputes. Legislation based on the Model Law has been adopted by over 111 jurisdictions.

Two points about the Model Law are relevant to the present discussion:

- the Model Law is not a complete or definitive law for international commercial arbitration in any given jurisdiction; and
- the Model Law can be, and has been, adopted as the law governing non-international arbitrations, often in the context of unified arbitration acts.

On the first point, the Model Law restricts itself to matters pertinent to international arbitration and on which there is an international consensus. It does not, for example, contain any provisions with respect to interest or costs, as the practice internationally on both of these issues is varied and contentious. It does not address certain powers which would be useful for tribunals to have and which some jurisdictions confer upon them, such as: the ability to summon witnesses at the seat of the arbitration without using the courts; the power to administer oaths to witnesses; or the power to determine how to proceed in the event that an arbitrator must be replaced. It lacks some provisions that may be relevant based on prior case law or legislation in a particular jurisdiction, such as revocability of arbitral appointments or the immunity of arbitrators. In some instances, it leaves open questions on which clarity would be useful, such as whether preliminary jurisdictional rulings in the negative are subject to the same court review process as positive jurisdictional rulings.[19] It contains provisions which

[19] Born, *supra* note 14 at pp 1193—1196.

may not fit with local legal culture or practice, such as allowing a tribunal to delegate the power to make procedural decisions to the chair without the agreement of the parties. In yet other instances, the wording of the Model Law itself may have become qualified by subsequent court decisions. For example, on the issue of whether a party is entitled to a "full" opportunity to present its case, or merely a "reasonable" opportunity, the Model Law literally says the former but the consensus of international jurisprudence supports the latter.[20]

As a result of these considerations, most jurisdictions that have adopted the Model Law have modified it in some way to fill the gaps with provisions based on local arbitration practices. The Ontario *ICAA* does so in several ways.[21] Such modifications are in no way a criticism of the Model Law, nor do they diminish its prime importance. The Model Law assumes the existence of a compatible law of arbitration in the place where the arbitration is seated ("*lex arbitri*"). Such modifications have often been made in jurisdictions that have adopted the Model Law, either in the Act adopting the Model Law, or in separate legislation. In Ontario some such modifications have been made in *ICCA,* as has been done in other provinces which have adopted the *Uniform International Commercial Arbitration Act* put forward by the ULCC. In Ontario and other Canadian provinces much of the *lex arbitri* that could potentially be supportive of the international arbitration regime prescribed by the Model Law may be found in the *Arbitration Act* or equivalent statutes (e.g., with respect to interest and costs). However, as discussed above, the *Arbitration Act* does not apply if the *ICAA* applies.[22]

---

[20] Born, *supra* note 14 at 2339.

[21] See e.g., *Model Law*, *supra* note 2 at ss 8, 10, 11.

[22] Many of these gaps (but not all) can be covered by institutional rules adopted by the parties. However, most arbitrations conducted in Ontario and in most of Canada (international and non-international) are *ad hoc* arbitrations, not administered by an institution.

On the second point, while the Model Law was written with international arbitration in mind, many of its main features have come to be identified with fundamental features of any modern commercial arbitration regime, principally rigorous respect for party autonomy and strictly limited court intervention. This is very much in contrast with the animating principles of the English arbitration legislation, which provided considerable opportunities for the courts to "supervise" arbitration and in some instances limit access to it. The Model Law affirms foundational principles relating to modern commercial arbitration in general—international and domestic alike—and provides a common language in which those principles are expressed and discussed. As discussed below, the Model Law has been widely adopted as the basis for both international and non-international commercial arbitration.

III. ARBITRATION LEGISLATION IN OTHER JURISDICTIONS

Of the 111 jurisdictions that have adopted the Model Law as of 2019, no less than 54 have adopted it in a single statute applicable to both international and non-international arbitration. These include: New Zealand, Germany, Belgium, Norway, Austria, China (Hong Kong), India, Japan, Spain, and the British Virgin Islands.[23]

In Australia, international commercial arbitration is the subject of federal legislation. The federal statute adopts the Model Law.[24] As State legislation only applies to non-international arbitration, unified Acts are not an option.

---

[23] See Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions*, 4th ed (Alphen aan den Rijn, The Netherlands: Wolters Kluwer, 2019) at 674—681.

[24] See *International Arbitration Act 1974* (Cth), 1974/136, s 16(1) [*IAA*]. The *IAA* governs international commercial arbitrations in Australia. Section 16(1) of the *IAA* provides that the UNCITRAL Model Law has force in Australia.

However, all six Australian States have adopted arbitration statutes based on the Model Law for non-international arbitration. The process which was followed in Australia to replace State legislation for "domestic" arbitration based on the English arbitration legislation with new statutes based on the Model Law is exemplary and inspiring.[25]

In Canada, both the federal government and Québec have legislation, based on the Model Law, which applies to both international and non-international arbitration. No distinction between the two forms of commercial arbitration are made in the federal *Commercial Arbitration Act*, RSC 1985, c 17, but only commercial arbitration is covered.[26] The arbitration provisions of Québec's *Code of Civil Procedure* apply to both international and non-international arbitration with the qualification that, for international arbitrations, the provisions are to be interpreted in light of international legal authorities and practices.[27] The arbitration provisions of the *Code of Civil Procedure* do not differentiate between commercial and non-commercial disputes.[28]

Two other unitary Acts require special mention: England's *Arbitration Act*, *1996* (UK), 1996 (hereinafter "England's *Arbitration Act*"); and the *United States Arbitration Act*, 9 USC, c 1, more commonly referred to as the *Federal Arbitration Act* (hereinafter the "*FAA*"). Both acts apply to all arbitration, commercial or otherwise, and international or non-

[25] See Doug Jones, *Commercial Arbitration in Australia,* 2nd ed (Pyrmont, NSW: Thomson Reuters (Professional) Australia, 2013) at 1—20. See also Janet Walker, "Domestic Commercial Arbitration Reform In Canada: Lessons From Downunder" (2023) 3:2 Canadian Journal of Commercial Arbitration.

[26] It should be borne in mind that non-commercial arbitration at the federal level encompasses different subject matter than at the federal level. For example, family, residential and consumer disputes would not be covered.

[27] See arts 649—653 *CCP*.

[28] *Ibid* at arts 620—655.

international. Separate sections of each Act address and comply with specific requirements of the New York Convention.[29] However, neither Act is based upon the Model Law, although England's *Arbitration Act* has been described as "a compromise of some of the Model Law's provisions with other provisions adjusted to suit the English position."[30]

A major revision of English arbitration legislation took place when England enacted the current *Arbitration Act* in 1996. Like its predecessors, England's *Arbitration Act 1996* applies to all forms of arbitration (domestic and international) seated in England, Wales, or Northern Ireland. It is a comprehensive piece of legislation to which all persons conducting arbitration in those jurisdictions can have reference. England's *Arbitration Act* substantially reduced the control English courts could exercise over arbitration proceedings by eliminating the "stated case" procedure, which allowed for parties or the tribunals to call for the opinion of the court on points of law while the arbitration was in progress. However, there remains a default right to seek leave of the court to appeal an award on a point of law.[31]

In the United States, the *FAA* was enacted in 1925 and, except for the addition of a section incorporating the New York Convention, there have been no significant changes since then. Two features of the *FAA* are relevant.

---

[29] Both the United Kingdom and the United States are signatories to the New York Convention.

[30] Hilary Heilbron, *A Practical Guide to International Arbitration in London*, 1st ed (London: Informa Law, 2008) at 4.

[31] See *Arbitration Act*, 1996 (UK), 1996, s 69. The right to seek leave to appeal on a point of law may be contracted out of, and selection of institutional rules that describe the award as "final and binding" are sufficient to contract out of s 69. Additionally, the test for obtaining leave to appeal is stringent and leave is rarely granted.

First, while states within the United States are not constitutionally permitted to pass legislation that is inconsistent with the *FAA*, they may, and have, passed arbitration statutes that supplement the *FAA*. Such statutes deal with issues not dealt with by the *FAA*, including: the qualifications of arbitrators vis-à-vis impartiality and independence, the powers of arbitrators, and interest and costs. Some of the states have adopted legislation based on the Model Law.[32]

Second, the stringent provisions of the *FAA* in terms of mandatory referral to arbitration are applied to all forms of arbitration, including consumer and employment disputes. This has created a situation in which states are unable to provide relief to vulnerable classes of disputants, such as consumers and employees, from onerous arbitration agreements designed to create obstacles to claims and coordinated actions against corporate defendants. Whatever the systemic difficulties might be in addressing the issue within the United States, the need to differentiate commercial arbitration from other forms of arbitration is well illustrated by this on-going controversy.[33]

From the foregoing brief comparative review, the following conclusions can be drawn:

the Model Law is the standard against which all legislation relating to commercial arbitration should now be judged;

the Model Law implements key provisions of the New York Convention that are essential to commercial arbitration, but which may not apply with equal force to other types of arbitration, including: party autonomy, strictly constrained

[32] California, Connecticut, Florida, Georgia, Illinois and Louisiana. See Binder, *supra* note 23 at 674—681.

[33] For the history of this issue in the US and Canada, see William G Horton & David Campbell, "Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration" (2019) at 93, online (pdf): *William G Horton Commercial Arbitration* <https://www.wgharb.com //wp-content/uploads/The-Mirage-of-Mandatory-Arbitration.pdf>.

judicial involvement, and limited grounds for non-enforcement of arbitration agreements and awards; and

the Model Law may be applied to both international and non-international arbitration, including as a single legislative enactment.

The question then becomes whether Canadian provinces should adopt the Model Law as a single statute governing all commercial arbitrations.

IV. REASONS FOR A SINGLE COMMERCIAL ARBITRATION STATUTE

There are several reasons that a single commercial arbitration statute should be adopted in Ontario including, but not limited to:

1. the distinction between international and non-international arbitration is increasingly meaningless in the business context;
2. there are downsides to having two acts for commercial arbitration; and
3. international standards should be applied to all commercial arbitrations.

These will be discussed in turn.

1. The distinction between international and non-international arbitration is increasingly meaningless in the business context

Multinational companies and their subsidiaries now regularly do business in Ontario and Ontario companies regularly do business abroad. The past few decades have witnessed the rapid development of cross-border sales, franchising, licensing, intellectual property, and M&A activity, and the expansion of web-based channels for transacting business. Businesses often operate in a virtual environment in

which physical location is secondary and sometimes can be hard to determine. Domestic transactions may be fulfilled internationally, and vice versa. The choice of which business entities to involve in a particular transaction may be dictated by international tax or investment treaty considerations and may be determined after the core business deal is struck. In these circumstances, it may be a challenging (and a somewhat esoteric) exercise to determine which of two arbitration Acts will apply if, and when, there is ultimately a dispute.

Many arbitrations that are technically non-international are effectively international due to the fact that one or both parties are subsidiaries of international conglomerates with significant involvement of head-office executives and legal staff from outside Canada. Equally, a case which is technically international may be conducted wholly by Canadian counsel on both sides before an all-Canadian tribunal, with no involvement of any international organization or rules. The question of whether an arbitration that is taking place in Ontario is "international" may not arise until late in the arbitration, usually in relation to a specific issue such as the availability of an appeal.

In short, the business market is a national, cross-border, and international market. It makes little sense to serve that market with two separate and mutually exclusive pieces of arbitration legislation differentiated by a highly complex legal definition as to what constitutes an "international" and "commercial" arbitration.[34]

2. *There are many downsides to having two Acts for commercial arbitration*

All commercial arbitrations begin with an agreement to arbitrate. These agreements are frequently embedded in a commercial contract drafted by lawyers who are not specialists in commercial arbitration. It is not uncommon for arbitration

[34] *Model Law*, *supra* note 4 at art 1(3).

clauses in international contracts to be drafted to refer to the *Arbitration Act* and (less commonly) for arbitration clauses in non-international contracts to refer to the *ICAA*. One may attribute this to lack of expertise on the part of the drafter, but that is not entirely fair. For reasons already mentioned, a high degree of expertise may in fact be required to determine which Act applies. Such expertise may not always be available to a transactional lawyer. It is not reasonable to have legislation which requires specialized legal advice in order to draft an arbitration clause.

In addition, whatever the expertise of the drafter, the choice of statute may require information that is not immediately available, is speculative or debatable, or has not yet been determined with respect to the structure of the transaction. For example:[35] Are the parties to the transaction fixed or does the agreement provide that they may be substituted or expanded to include others registered in different jurisdictions? Where do the parties have their places of business? Which place of business will have the closest connection to the arbitration agreement? What is the "habitual residence" of a party that has no fixed place of business? Will a substantial part of the obligations be performed outside of Ontario? Will any dispute that subsequently arises have its closest connection to a place other than Ontario?

There is little or no utility in having to undergo this type of analysis merely to provide for the arbitration of any disputes that may arise under a commercial contract. Nor is it realistic to expect this kind of analysis to be done by businesspeople or contract lawyers in the context of negotiating a commercial agreement.

At the opposite end of the scale, in some cases a deliberate choice may have been made by the drafter of a dispute

[35] All examples are based on definition of "international" in the Model Law.

resolution clause to refer to the *Arbitration Act* with the intention of allowing for the possibility of an appeal pursuant to section 45 of the *Act*.[36] However, as previously mentioned, the legal ability of parties to agree to apply the *Arbitration Act* to an international arbitration, while arguable, is not clear and may lead to disputes.

The problem of not applying one's mind to the question of "which Act" is not limited to corporate lawyers. Counsel arguing cases, and courts at all levels, may find themselves in the embarrassing position of not having considered the correct Act.

In *Novatrax International Inc. v Hägele Landtechnik GmbH* the parties' sales agreement provided that any disputes would be settled by binding arbitration under German law through the Chamber of Commerce in Frankfurt.[37] The court action commenced by the plaintiff included defendants who were not parties to the sales agreement. The defendants moved to stay the action. The motion judge granted a stay, and that stay was upheld at the Court of Appeal. The embarrassing fact was that neither counsel nor any of the judges who considered the matter realized that the issues in the case were governed by the *ICAA* and not by the *Arbitration Act*.

In *Haas v Gunasekaram*, the plaintiff, an overseas resident, had entered into a shareholders' agreement with the defendants with respect to a restaurant.[38] The restaurant failed. The plaintiff lost his investment and launched an action alleging that he was induced to enter into the shareholders' agreement by fraudulent misrepresentations. Again, on a motion to stay the

---

[36] This was the case in one dispute arbitrated by the author and, anecdotally, that is not the only instance in which this has occurred. It is a sufficiently well-known phenomenon that, as mentioned above, in Singapore choosing the "wrong Act" is specifically allowed and the 2016 Uniform Arbitration Act would also specifically allow that choice.

[37] 2016 ONCA 771.

[38] 2016 ONCA 744.

action in favour of arbitration, no consideration was given to the fact that given the foreign residence of the plaintiff, the issue of whether or not to stay was likely governed by the *ICAA* and not the *Arbitration Act*.

If all commercial arbitration were governed by a single statute, all parties involved in drafting, invoking, implementing and adjudicating upon commercial arbitrations agreements would, at all stages, have their attention directed to a single Act and to any differentiations of treatment highlighted within the Act itself[39] (although hopefully such differences would be few).

It is important to note that the definitional issues surrounding the terms "commercial" would not be avoided in any single Act which applies only to commercial arbitration. Similarly, definitional issues are not avoided by a single Act that differentiates internally between international and non-international arbitrations. Such differentiation may involve issues such as the default rule as to the number of arbitrators or the ability to opt into a right of appeal. However, a single Act would bring the attention of all users to the points of differentiation and support reasoned decisions as to those choices. For a case involving the meaning of "commercial" see: Uber Technologies Inc v Heller, 2020 SCC 16.

[39] A key point of possible differentiation is whether any appeals from awards would be allowed and, if so, on what basis would they be allowed, and would the same rights exist with respect to an international commercial arbitration. This issue is addressed in a separate article in this issue. See also William G Horton, "Reforming Arbitration Appeals: The New ULCC Uniform Arbitration Act" (2017) 75:1 Advocate 37. See also Joel Richler, "The Reform of Appeals Provisions in Canadian Commercial Arbitration Statutes" (2003) 3:2 Canadian Journal For Commercial Arbitration.

3. Courts should apply international standards to all commercial arbitrations

An important benefit of a single Act is that it would mandate the courts to apply international standards to all commercial arbitrations. This should result in more consistent application of the New York Convention principles of party autonomy and limited judicial intervention to all commercial arbitrations. It would also fulfill the goal of having legislation for all commercial arbitration that conforms to the Model Law, and which indicates a legislative intent to move decisively away from the legacy of the English arbitration legislation. This approach would be supported by the application of article 2A of the Model Law to all commercial arbitration, which requires the courts to consider the international origin of the Act. Hopefully, this will provide the courts with a basis to draw a line under prior Canadian jurisprudence that expressed a more paternalistic attitude towards arbitration and make a fresh start.

4. Additional benefits from a single commercial arbitration Act

Non-international arbitration in Ontario could benefit greatly from application of certain provisions of the *ICAA*. To name a few, the *ICAA* contains much more comprehensive provisions relating to interim measures,[40] clearer and less discretionary rules with respect to stays of court proceedings,[41] and a clearer prohibition on judicial interference.[42] A unified Act could also include provisions recommended for non-international commercial arbitration in the 2016 *Uniform Arbitration Act*.

---

[40] *Model Law*, *supra* note 2 at art 17.

[41] *Model Law*, *supra* note 2 at art 8.

[42] *Ibid* at art 5.

In addition, as mentioned above, a unified Act could provide much needed support for international arbitrations conducted in Ontario under the *ICAA*.

A further important benefit of this approach is that the uniform use of Model Law terminology for all commercial arbitrations would provide greater clarity and consistency both in the practice of commercial arbitration and in the jurisprudence relating to commercial arbitration. Familiarity with, and consistent use of, such terminology would also be of assistance to Ontario lawyers dealing with lawyers from other parts of the world when discussing commercial arbitration in Ontario.

More generally, a single Act would train the Ontario bar and bench to become familiar with international standards, legal instruments, and "soft laws", and with an international arbitration vocabulary, thereby making the expertise of Ontario lawyers more readily exportable to international markets.

V. CONCLUSIONS

The foregoing objectives of a single Act mirror the objectives of the highly successful efforts in Australia to enact modern Commercial Arbitration Acts based on the Model Law for non-international commercial arbitration in all Australian States. These aspirations are aptly summarized by Professor Doug Jones as follows:

> …By adopting a new paradigm for domestic arbitration, and by aligning it to the internal arbitration regime, the opportunity has been provided to users and lawyers alike to devise new and more effective ways to resolve domestic commercial disputes. This has occurred at a time when there is a momentum in encouraging international parties to choose

> Australian seats for international commercial arbitration. The restoration of domestic arbitration as the preferred form of binding non-curial dispute resolution within a legislative regime reflecting international best practice will provide the opportunity for Australian dispute practitioners, both counsel and arbitrators, to more effectively compete for international arbitration work locally and internationally.[43]

By adopting a unified commercial arbitration Act, Ontario would lead the way among common law provinces in Canada towards achieving these same goals.

Finally, there is evidence to suggest that the adoption of international standards would serve to bolster Ontario in general, as well as leading arbitration centres in Ontario such as Toronto, Ottawa, and Windsor, as pre-eminent jurisdictions to host international commercial arbitration, and would thereby bring more business to the local economy.[44]

---

[43] Jones, *supra* note 25 at 1.

[44] A 2012 study found that arbitrations in Toronto brought $256 million into the city's economy, as compared with the impact of the 2010 Toronto International Film Festival which generated an economic impact of $170 million. See Arbitration Place, "Arbitration worth over a quarter-billion dollars a year to Toronto economy" (12 September 2012), online: *Cision* <https://www.newswire.ca/news-releases/arbitration-worth-over-a-quarter-billion-dollars-a-year-to-toronto-economy-510733681.html>.

ONE ACT TO RULE THEM ALL – MOVING TOWARDS A SINGLE COMMERCIAL ARBITRATION ACT

*Cynthia Kuehl, Lerners LLP**

As a foundational issue, any legislative reform initiative must consider the reach of the statute. Should the statute continue its existing scope or is there a more effective means to accomplish the objectives of the legislature? Given the increasing reliance on arbitration for the determination of commercial disputes, this paper explores the reasons why legislative reform of the Ontario *Arbitration Act*[1] (the "*Act*") should include a transition to a single commercial arbitration act in Ontario for international and non-international commercial arbitration. Reform legislation would advance the interests of parties, counsel, the larger arbitration community, and the courts. Such was the conclusion of the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society (the "AARC"), and serves as a foundation for its proposal for legislative reform.

Commercial arbitration is largely responsible for the acceptance of arbitration as a parallel and equivalent means of dispute resolution. In Justice Côté's dissenting opinion in *Uber Technologies Inc v Heller ("Uber")*,[2] she observed that only in the last four decades has Canada moved from what she characterizes as "hostility to arbitration"[3] to its current position

* Cynthia is a partner in the Toronto office of Lerners LLP, and the Chair of the firm. She practices commercial litigation and arbitration and is a member of the AARC, looking at legislative reform of the current Ontario domestic act. Special thanks to Miranda Brar, Articling Student, for her invaluable research assistance.

[1] *Arbitration Act, 1991*, SO 1991, c 17.

[2] 2020 SCC 16 [*Uber*].

[3] *Ibid* at para 205.

as an international leader in arbitration jurisprudence.[4] Though she did not attribute this attitudinal shift to the unique features of commercial arbitration, it is noteworthy that she supported her observation with reference to two decisions, *Seidel*[5] and *Wellman*,[6] in which the Supreme Court of Canada recognized the legitimacy of arbitration while emphasizing the importance of parties' contractual agreement to an alternative dispute resolution process. This is particularly evident in the selected quote from *Seidel*, in which the Court stated that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a *commercial contract* freely entered into, even a contract of adhesion, including an arbitration clause" (emphasis added).[7] Justice Côté notes that the Court then went on to recognize and embrace *commercial* arbitration.[8] In this historical context, it makes eminent sense that an analysis of areas for legislative reform would include consideration of a single act for commercial arbitration.

I. THE UNJUSTIFIABLE DIVISION OF INTERNATIONAL AND DOMESTIC COMMERCIAL DISPUTES[9]

In Ontario, separate arbitration acts govern domestic[10] and *some* international disputes. The Ontario *Act* governs domestic

[4] *Uber, supra* note 2 at para 208.

[5] *Seidel v TELUS Communications Inc*, 2011 SCC 15 [*Seidel*].

[6] *TELUS Communications Inc* v *Wellman*, 2019 SCC 19.

[7] *Uber*, *supra* note 2 at para 207, citing *Seidel* at para 2.

[8] *Ibid* at para 207.

[9] For a more complete review of this issue, please see the AARC Final Report dated February 12, 2021, Appendix B "Reasons to Consolidate Commercial Arbitration in a Single Act in Ontario". This section of the paper is a summary of that review and the work of the AARC.

[10] I use the word "domestic" to refer to any dispute that does not meet the definition of "international" in the *Model Law*. See United Nations Commission on International Trade Law, *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc A/40/17, Ann I, June 21, 1985 [*Model Law*].

arbitration matters whether commercial or not. The *International Commercial Arbitration Act*[11] (the "*ICAA*") only applies to international disputes *if* they are "commercial" in nature.[12] This bifurcated statutory scheme has resulted in the oddity of one statute applying to all disputes, except those with the dual characteristics of being both "international" and "commercial."[13] As discussed below, while there may be some question about the rationale for severing commercial disputes from non-commercial disputes in the existing *Act,* the real question is whether it is appropriate to divide commercial disputes into separate "domestic" and "international" regimes. There are a number of reasons why this division should end in Ontario.

First, other jurisdictions have already recognized that the distinction is properly drawn between commercial and non-commercial disputes rather than international and domestic disputes. In Canada, the federal *Commercial Arbitration Act*[14] applies equally to international and non-international arbitrations, as does the Quebec *Code of Civil Procedure, "Principles of Procedure Applicable to Private Dispute Prevention and Resolution Processes"*.[15] Likewise, the *Federal Arbitration Act, USA*[16] and the United Kingdom's *Arbitration Act 1996*[17] do not draw this distinction. The AARC's conclusion was that these statutes are the appropriate comparators to the *Act*, given the

---

[11] *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5 [*ICAA*].

[12] *Uber*, *supra* note 2 at para 14, citing *ICAA* and the domestic Act.

[13] See *Uber*, *supra* note 2 at para 23, citing n 2 to *Model Law*, art 1(1).

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

[15] *Code of Civil Procedure* (Book I, Title I – Principles of Procedure Applicable to Private Dispute Prevention and Resolution Processes), CQLR, c C-25.01, ss 1—7.

[16] *Federal Arbitration Act*, 9 USC 1. Note that one exception is for issues relating to the New York Convention.

[17] *Arbitration Act*, *1996* (UK), c 23.

nature and volume of commercial arbitrations in those jurisdictions.

Second, today's economy makes it more likely that a commercial dispute will have some international element, even if the dispute does not meet the specific definition of "international" set out in the *ICAA.* Under the *ICAA,* "international" is defined with reference to Article 1 of the *UNCITRAL Model Law of International Commercial Arbitration, 2006* (the "*Model Law*").[18] Canadian businesses have an increasingly global reach, and they should not be potentially subject to different arbitration frameworks for their commercial disputes.

This is particularly the case given that procedural elements of international arbitrations are increasingly being adopted by participants in domestic arbitrations. For example, the *IBA Rules for the Taking of Evidence*[19] are often applied in domestic arbitrations. Consolidating commercial arbitrations into one statute would create consistency in practice and enhance the commitment to *Model Law* principles. Increased experience and expertise with international standards in the context of growing globalization will only serve to advance that reputation of Canada as a world leader in arbitration of which Justice Côté wrote.

Finally, having all commercial arbitrations proceed under a single statute eliminates any confusion as to whether the domestic *Act* or the *ICAA* applies. There are currently substantive differences between the two statutes,[20] and, as *Uber*

---

[18] *Uber*, *supra* note 2 at para 23, citing n 2 to *Model Law*, art 1(1).

[19] International Bar Association, "IBA Rules on the Taking of Evidence in International Arbitration" (2021), online (pdf): <https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b>.

[20] For example, appeal rights differ. The *ICAA* does not permit appeals (following *Model Law* principles), while the Act does and currently provides a substantive right to appeal on a question of law, even if the parties do not expressly provide for one.

illustrates, the question of which applies may be a matter of considerable dispute among parties trying to obtain a legal advantage from one or the other statute. Since courts may not receive as much exposure to either statute except on appeal or review, they may struggle to (and may not always correctly)[21] identify which statute applies to a commercial dispute. This is not to fault courts or counsel. Rather, it reflects the existence of a somewhat arbitrary distinction between international and commercial arbitration, which gives rise to substantive consequences.

II. THE JUSTIFIABLE DISTINCTION BETWEEN COMMERCIAL AND NON-COMMERCIAL DISPUTES

Not only are there benefits to eliminating the distinction between international and domestic commercial arbitrations, it is also appropriate to introduce a distinction between commercial and non-commercial matters. The existing Ontario *Act* does not recognize the diverse nature of matters that come to arbitration, and that the origins and characteristics of the arbitrated disputes may be significantly different.

Central to commercial arbitration is the notion of party autonomy. As Horton and Campbell note in their article, "party autonomy was key to this concept of merchant-to-merchant arbitration"[22] and is consistent with the historic origins of commercial arbitration grounded in the Geneva Convention.[23] This long history of party autonomy as a foundation for commercial arbitration has had implications for the conduct of

---

[21] See, for example, *Novatrax International Inc v Hagele Landtechnik GmbH*, 2016 ONCA 1771 in which the court and the parties applied the Act and did not appear, on the face of the decision, to have considered that the applicable statue was, in fact, the *ICAA*.

[22] William G. Horton and David Campbell, "Arbitration as an Alternative to Dispute Resolution: Class Proceedings and the Mirage of Mandatory Arbitration" (2019) Annual Review of Civil Litigation (WestLaw), at 1.

[23] *Ibid* at 5.

arbitration, including, for example, the need (or lack thereof) of ensuring access to the courts.

Party autonomy, including the ability to control a dispute resolution process, is supportive of business interests. In discussing the themes of freedom of contract and party autonomy in the context of choice of forum and choice of law in international commercial arbitration, Catherine Walsh notes that "deference to party autonomy in international commerce also advances the commercial values of certainty and predictability, relieving the contracting parties from having to deal with multiple overlapping state claims to exercise prescriptive and judicial authority over their affairs".[24] While the same concerns about state claims and interventionist judicial authorities do not arise in domestic disputes, the desire of commercial parties for certainty and predictability is not limited to international matters. Virtually all business entities want to be able to predict and minimize their exposure from disputes. The means of obtaining those objectives is the exercise of each party's autonomy in deciding the procedure for the determination of claims.

Party autonomy is not, however, the foundational principle of all disputes to which existing domestic arbitration legislation may apply. Statutory arbitrations, family law disputes, arbitrations involving contracts of adhesion (which may or may not be commercial in nature), religious arbitrations,[25] and labour and employment disputes may have limited or no grounding in the notion of arbitration as an exercise of the free will of the parties through contractual agreement. This point was made in the intervener's factum of the Consumers Counsel of Canada filed in the Supreme Court of Canada in *Uber*:

---

[24] Catherine Walsh, "The Uses and Abuses of Party Autonomy in International Contract" (2009) 60 UNB LJ, at 12.

[25] For an interesting review of judicial interventionism in religious arbitrations, see Trevor Farrow, "Re-Framing the Sharia Debate" (2006) 15:2 Constitutional Forum, at 79—86.

> There can be no doubt that party autonomy and freedom of contract are fully engaged at one end of the spectrum where, for example, contracts result from negotiations between sophisticated commercial parties with equal bargaining power. As one moves farther down the spectrum, however, where parties' sophistication and relative bargaining power becomes polarized, the concepts of party autonomy and freedom of contract devolve into legal fictions.[26]

Reduced emphasis on party autonomy may promote increased judicial intervention. The Supreme Court of Canada has held that strictly holding parties to their "bargain" may not be appropriate in certain circumstances. In a non-arbitration case, *Facebook v Douez*,[27] the court recognized that the consumer context may provide a reason not to enforce a forum selection clause in a contract.[28] In *Uber*, the Court was concerned with whether the enforcement of an arbitration clause would be unconscionable.[29] While it is not impossible that these concerns may arise in the type of "merchant-to-merchant" disputes seen in commercial arbitration matters, the realization of these concerns is much more likely in the areas of consumer contracts, labour and employment, and family. The result is that the courts may be less hesitant to intervene in matters for which there is confidence that the contract before the court, including the arbitration clause, reflects the will of two (or more) commercial parties, and more so in these other forms of disputes.

---

[26] Factum of the Intervener, Consumers Council of Canada, 2020 CCELMotionF 64181, SCC File No. 38534 (Uber), at paras 11—13.

[27] 2017 SCC 33 [*Douez*].

[28] *Ibid* at para 33.

[29] *Uber*, *supra* note 2 at paras 47—50.

Party autonomy is not the only hallmark of commercial arbitration that distinguishes it from the non-commercial matters. The Final Report of the Alberta Law Reform Institute Report noted that the hallmarks of international commercial arbitration also include consensual agreement whereby no party can be forced to arbitration (as compared to statutory arbitrations), the choice of impartial adjudicators, limited court interventions and the finality of the award.[30] Domestic commercial arbitrations have the same hallmarks, born predominantly out of business interests in the expedient and (often) private resolution of their disputes.

Those same considerations or "hallmarks" do not necessarily apply to non-commercial arbitrations, where the parties may have less concern with expediency and privacy and more concern with the management of potentially unequal bargaining power. The disparities in the theoretical underpinning of commercial and non-commercial arbitrations do not necessarily lend themselves to a common set of legislated procedural and substantive rights and powers. Yet that is what is offered by the *Act* and makes it particularly suitable for reform in this area.

One question arising from the single act proposal is whether sufficient meaning and definition of "commercial" can be given. Absent clear definitions, the confusion between international and non-international matters may simply devolve into confusion between commercial and non-commercial matters, with court intervention made necessary to resolve any dispute. *Uber* is identified as exemplifying the potential problem.

The AARC has not proposed a definition of "commercial", relying on the *Model Law* and the existing jurisprudence. There is no definition in the *Model Law*, however. Rather, in a footnote

[30] Alberta Law Reform Institute, Final Report on Uniform International Commercial Arbitration (March 2019) ALRI, at 9.

to Article 1(1), the *Model Law* gives examples of what may (or may not) be considered "commercial".[31]

The *Model Law* examples and related commentary[32] were key to the Supreme Court of Canada's determination in *Uber* as to whether the matter before it was an international commercial arbitration to which the *ICAA* applied or an international non-commercial arbitration to which the *Act* applied. There, the majority of the Court found that whether a matter is "commercial" is determined by the nature of the parties' dispute (as determined by their pleadings), not by an extensive review of the factual record.[33] Adopting an approach that, in effect, categorizes disputes, it noted that the examples of commercial matters in the *Model Law* did not include consumer claims and labour and employment disputes, even if related to business.[34] Having characterized the nature of the dispute as an employment matter, it was not "commercial" in nature.

Importantly, the division between the majority and dissent was not in respect of whether employment matters are "commercial" in nature or, more generally, on the interpretation of the word "commercial". While the Court agreed that the term "commercial" should be interpreted broadly and that employment matters were not commercial disputes, they disagreed as to the approach to be taken in making a determination as to whether the dispute before them was an employment matter at all.

---

[31] *Model Law*, *supra* note 10 art 1(1), n 2.

[32] In *Uber*, *supra* note 2 at para 24, the Court references The Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration: Report of the Secretary-General on whether labour or employment disputes fall into the definition of "commercial".

[33] *Uber*, *supra* note 2 at para 25.

[34] *Ibid* at paras 23—24.

Should the determination be based on the nature of the dispute (as the majority found)[35] or the nature of the relationship between the parties (per Justice Côté in dissent)?[36] The choice of analytic approach resulted in a different characterization of the dispute. Once the approach was decided upon by the majority, and the dispute characterized as an employment one, it was not controversial that the dispute concerned a non-commercial matter to which the *Act* (and not the *ICAA*) applied. The *Model Law* provided sufficient guidance.

The decision to rely on the *Model Law* in this respect was not new. Some 12 years earlier in *Patel v Kanbay International Inc*,[37] the Ontario Court of Appeal used a similar analysis, again relying on the *Model Law* and s. 13 of the *ICAA* to determine whether the dispute before it was commercial in nature.[38] While at least one earlier case referenced dictionary definitions and a consideration as to whether the transaction was conducted in "business-like way"[39] the majority of the jurisprudence focuses on the *Model Law* examples as a guide.

Legislative drafters cannot eliminate the potential for some conflict or debate, even if a clear definition of "commercial" were to be included in a new Act. When disputes do arise, reference to the examples in the *Model Law* has served well as a substitute for a clear definition. Further, as Redfern and Martin point out,

---

[35] *Uber*, *supra* note 2 at para 25.

[36] *Ibid* at paras 211—212.

[37] 2008 ONCA 867 [*Patel*].

[38] *Ibid* at paras 11—13. See also, the 1992 decision in *Canada Packers Inc v Terra Nova Tankers*, 11 OR (3d) 382, 1992 CanLII 7463 (ONSC).

[39] See *Carter v McLaughlin*, 1996 27 O.R. (3d) 792, 61 ACWS (3d) 11 (Ontario General Division), at para 15 ["*Carter*"]. In *Carter*, the court considered whether the transaction was "commercial" for the purpose of the *Model Law* even though the parties themselves were not commercial businesses (at para 15—16).

"terms in common use tend to elude definition".[40] The term "commercial" is one that is part of the language of arbitration, and while there may be some controversy over its definition, in many respects, you know it when you see it.

By giving "commercial" a wide interpretation, the law will capture the transactions which are business-like in nature and ones for which the concept of party autonomy is most likely to be foundational. Labour and employment disputes and commercial consumer contracts properly fall outside the scope of the *Model Law* examples and these foundational principles. Future disputes can be decided with these same principles in mind.

Finally, and in any event, as *Uber* illustrates, the current legislative framework does not obviate the potential for a conflict over whether a dispute is "commercial". Movement to a single commercial arbitration act simply shifts that debate from being whether the *Act* or the *ICAA* applies, to whether the single commercial arbitration act would apply. Given the benefits of a single act, any ambiguity in defining the word "commercial" ought not to be an impediment to legislative reform.

III. CONCLUSION

Legislative reform is necessary to modernize the Ontario legislation, which will in turn assist in maintaining Canada's position as a world leader in arbitration. With increasing globalization of business conflicts, reforming the existing legislation to create a single commercial arbitration act would provide a valuable opportunity to merge the benefits from the *Act,* the *ICAA* and international standards into one statute. Such a development would best serve the interests of parties, counsel, the court, and the broader arbitration community.

---

[40] Alan Redfern and Martin Hunter, Law and Practice of International Commercial Arbitration (2d), London: Sweet & Maxwell, 1991, at 14.

THE REFORM OF APPEALS PROVISIONS IN CANADIAN COMMERCIAL ARBITRATION STATUTES

*Joel Richler**

Whenever reform of Canadian arbitration statutes is considered, the subject of appeals from awards is always a focus of acute attention. There are at least three reasons for this. First, apart from Québec and under the federal arbitration statute, every province has separate acts for domestic and international arbitrations. All the domestic acts permit appeals in certain circumstances, while all of the international acts—modeled on the *UNCITRAL Model Law on International Commercial Arbitration* (the "Model Law")—make no mention of appeal rights and thus preclude appeals from awards.[1] Without any apparent logical basis, there is a stark difference between domestic and international cases.

Second, on the domestic side, appeal rights vary from jurisdiction to jurisdiction. In Ontario, parties are permitted to agree to the availability of appeals on questions of law, mixed fact and law, or fact. If they do not "deal with" (i.e., preclude) appeals on questions of law in their arbitration agreements, they are entitled to appeal on questions of law with leave.[2] The Alberta, Saskatchewan, Manitoba, and New Brunswick Acts are

* LLB, BCL, FCIArb. The author practised for 40 years as a dispute resolution lawyer at Blake, Cassels & Graydon LLP. In 2015, Mr. Richler joined Bay Street Chambers and Arbitration Place where he now practices as an arbitrator and mediator. For a more detailed discussion of appeals in Canadian domestic arbitration, see the author's article, "A Second Kick: Appeals in Canadian Domestic Commercial Arbitration" (2021) 51:3 Advocates Q 342.

[1] The Model Law was promulgated in 1985 and adopted by Canada soon thereafter. It was amended in 2006, with the 2006 version adopted by Ontario and British Columbia, respectively, in 2017 and 2018.

[2] *Arbitration Act*, SO 1991, c 17, ss 45(1—3).

substantially the same, except that in Alberta and New Brunswick, parties may not contract out of appeals on questions of law.[3] A provision unique to Alberta is that parties may not appeal on a question of law that has been "expressly referred to the arbitral tribunal for decision".[4] In Manitoba, parties may in their arbitration agreements provide for appeals directly to the Court of Appeal, in which case the normal test for leave will not apply and the Minister of Justice must be satisfied that the arbitration relates to a matter of major importance to the province.[5] In Nova Scotia, no appeals are permitted unless the parties opt in by providing in their arbitration agreements for rights of appeal on questions of law, fact, or mixed fact and law.[6] In British Columbia before 2020, parties could contract out of appeals on questions of law, but only after the commencement of an arbitration.

As to jurisdictions with domestic acts that pre-date the Model Law, Newfoundland and Labrador's statute is silent as to appeals, save for a provision that awards may be set aside where an arbitrator has committed misconduct, or where awards have been improperly procured.[7] In Prince Edward Island and the Territories, parties are able to opt into appeals by contract.[8]

Finally, in Québec and under the federal commercial arbitration statute, there are no rights of appeal. The arbitration

---

[3] *Arbitration Act*, RSA 2000, c A-43, s 44(1-3); *The Arbitration Act*, SS 1992, c a-24.1, s 45(1-2); *The Arbitration Act*, CCSM, c A120, s 44(1), (2), and (5); *Arbitration Act*, RSNB 2014, c. 100, s 45(1—3).

[4] *Arbitration Act*, RSA 2000, c A-43, s 44(3).

[5] *The Arbitration Act*, CCSM., c A120, s 44(1), (2), and (5).

[6] *Commercial Arbitration Act*, SNS 1999, c 5, s 48(1—2).

[7] *Arbitration Act*, RSNL 1990, c A-14, s 14(1).

[8] *Arbitration Act*, RSPEI 1988, c A-16, s 21(2); *Arbitration Act*, RSY 2002, c 8, s 26(1); *Arbitration Act*, RSNWT (Nu) 1988, c A-5, s 27(1); *Arbitration Act*, RSNWT 1988, c A-5, section 27(1).

provisions of Quebec's *Code of Civil Procedure*[9] and the federal *Commercial Arbitration Act*[10] both adopt the Model Law.

Third, and most important, appeal rights arguably engage a clash between two foundational arbitration precepts. On one hand, the central aim of commercial arbitration is efficiency and finality.[11] As Jan Paulsson wrote, "The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision makers".[12] On the other hand, arbitration is contractual, and on this basis it is often observed that parties should be free to bargain for court appeal rights should they wish.

Domestic arbitration legislation was reconsidered almost a decade ago by the Uniform Law Conference of Canada, which released its Uniform Arbitration Act in 2016. As noted in the ULCC Commentary, the Uniform Act reflected a consensus of opinion that appeals on questions of fact and questions of mixed fact and law should no longer be permitted in domestic arbitrations, and that the scope of appeals on questions of law should be limited. The Uniform Act provides that parties are only able to appeal on questions of law arising from arbitral awards with leave of the courts that would hear such appeals, and only if they provided for such an appeal in their arbitration agreements (an "opt-in" right). Appeals on questions of mixed fact and law and on questions of fact are precluded. To obtain leave, applicants must show that: (i) the question of law would significantly affect their rights; (ii) leave might prevent a miscarriage of justice; (iii) the question of law is of importance

---

[9] Arts 620-655 CCP.

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

[11] *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32, at paras 1, 74, and 83, Gascon J [*Teal Cedar*].

[12] Jan Paulsson, *The Idea of Arbitration*, 1st ed (Oxford: Oxford University Press, 2013) at 1.

to a class or body of persons of which the applicant is a member; or (iv) the question of law is of general public importance. Finally, appeals would go directly to provincial courts of appeal.

Consistent with the ULCC's stated objectives, British Columbia enacted a reformed domestic arbitration act in 2020.[13] Thereunder, parties may by contract opt into rights of appeal, but only on questions of law. Conversely, parties may agree to preclude all appeals, including appeals on questions of law. Where they do not opt out of all appeals or are silent on appeals, they may appeal on questions of law with leave. The statutory test for leave to appeal resembles the test in the Uniform Arbitration Act. Finally, all appeals and applications for leave to appeal are made directly to the British Columbia Court of Appeal.

After much discussion, the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society (the "AARC") also followed the ULCC's recommendations. It proposed that: (i) parties may opt into rights of appeal directly to the Ontario Court of Appeal; and (ii) such appeals may only lie in respect of questions of the laws of Canada or any of its provinces and territories. The AARC considered and rejected any default or non-consensual rights of appeal and any process that would require leave to appeal. Thus, without opting in, there are no rights of appeal.

In making these recommendations, the AARC deliberately chose not to address several of the appeal-related issues that have occupied Canadian courts for years. The AARC recommendations do not deal with the vexing question of what constitutes an "extricable question of law" as contemplated by the Supreme Court of Canada in *Sattva Capital Corporation v Creston Moly Corporation*,[14] and *Teal Cedar Products Ltd. v*

---

[13] *Arbitration Act*, SBC 2020, c 2.

[14] *Creston Moly Corp. v Sattva Capital Corp.,* 2014 SCC 53 [*Sattva*].

British Columbia.[15] Similarly, the AARC report does not consider the question of standard of review and, more particularly, whether *Canada (Minister of Citizenship and Immigration) v Vavilov*[16] has any application to commercial arbitration. Also, since it would eliminate the leave to appeal process, the AARC Report does not deal with any issues relating to tests for leave to appeal. The AARC considered that these types of issues are best resolved by the courts without further and perhaps fruitless or counterproductive legislative action.

The proposals made by the AARC meet several important objectives, which should be shared, or at least considered, as other Canadian jurisdictions contemplate changes to their own legislation.

First, a reformed and consolidated Ontario Commercial Arbitration Act (the "CAA") would eliminate the artificial distinction between domestic and international arbitration. It is easily observed that domestic cases can be as complex and as important to the parties as international cases. Conversely, many international cases are comparatively small and straightforward. Apart from the possible application of non-Canadian law in international cases seated in Canada, the legal issues that present themselves in domestic and international cases are the same.

Moreover, while it is true that appeal rights in international arbitration are rare, they are not unknown. In New Zealand, under a single act covering both domestic and international arbitration, parties in international cases may opt into appeal rights.[17] In England, which also maintains a single act, there is an opt-out regime for appeals. In Singapore, parties in

---

[15] *Teal Cedar*, *supra* note 11.

[16] *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65.

[17] *New Zealand Arbitration Act 1996*, sched 2, s 5.

international cases can, and often do, avail themselves of appeal rights by opting into that state's domestic act.[18] In Canada, it is an open question whether parties may have appeals in international cases simply by agreeing to conduct their cases under our domestic statutes. If there are sound policy reasons for limiting appeals, what is sauce for the domestic goose should be sauce for the international gander.

Second, there should be a significant reduction in the absolute number of arbitration appeals. While most appeals are now made in respect of questions of law, parties do bargain for expanded appeal rights, and arbitration agreements that permit appeals on questions of fact or mixed fact and law are not unknown. Such agreements are often made with little thought given to the actual utility of appeals or the costs associated with adding litigation to arbitration.

As a matter of sound arbitration policy, and consistent with the goal of easing the congestion in our courts, parties who consider the use of arbitration should be taken to accept that arbitration is an alternative to litigation, and should produce final determinations of commercial disputes without the need for protracted and expensive court intervention following the issuance of final awards. As well, parties should be assumed to understand that their investment of time and money in an appeal process be limited to a rare and narrow range of situations. Where parties have a legitimate or perceived need for court appellate intervention in the resolution of their disputes, they should as a matter of policy and efficiency opt for litigation at the outset.

It is important to note that the suggested limitation on appeal rights would not make Canada an outlier in the arbitration world. To the contrary, Canada is now an outlier to the extent that it provides for broad-ranging appeal rights, albeit only from domestic awards. In England, for example, while there

[18] *Singapore International Arbitration Act 1994*, s 15.

is an opt-out regime, appeals are permitted only on questions of law. In order to appeal absent agreement of the parties, leave must be obtained under a rigorous test that requires that all of the following criteria be met: (i) the question will substantially affect a party's rights; (ii) the question is one that the tribunal was asked to determine; (iii) the decision in issue is "obviously wrong" or, if a matter of general public importance, subject to "serious doubt"; and, (iv) despite the parties' agreement to arbitrate, "it is just and proper in all the circumstances for the court to determine the question".[19]

In Australia, using New South Wales as an example, only appeals on questions of law are permitted. Parties must opt into the appeal regime by agreement made no later than three months after issuance of the final award, meaning that as a practical matter they must have consented to the possibility of appeals when they made their arbitration agreements. Even with this agreement of the parties, appeals are only permitted with leave of the appellate court, using the same rigorous test as in England.[20]

As to the United States, it is worth noting that under the *Federal Arbitration Act* the grounds upon which awards may be "reviewed" are limited to miscalculations, mistakes in the description of persons, things or property, excess of jurisdiction and imperfections in matters of form "not affecting the merits of the controversy", fraud, corruption, due process issues and arbitrator misbehavior, the latter of which has been interpreted to include the problematic doctrine of "manifest disregard of the law".[21] In practice, this doctrine is rarely invoked, let alone successfully invoked. Apart from "manifest disregard of the law", the foregoing grounds are provided for under the set-aside

---

[19] *England & Wales Arbitration Act 1996*, c 23, s 69.

[20] *Commercial Arbitration Act 2010* (NSW), 2010/61, s 34(a).

[21] *Federal Arbitration Act*, 9 USC § 1—14 (1947).

provisions of the provinces' domestic arbitration acts and the Model Law.

Third, under the recommended CAA, the gate-keeping function of the leave to appeal process would be eliminated. The benefits of this gate-keeping function are illusory. In the vast majority of cases, leave is granted, so the leave process contributes little other than to add time, expense, and legal uncertainty. It also forces judicial attention to issues that may not be legally significant and worthy of the courts' attention. In many instances, leave has been granted purely on the basis that an appeal is of importance to the losing party because that party has lost and it is possible that a legal error was made.[22] Leave to appeal provisions only exist to preserve the possibility of appeals where parties have not expressly agreed to waive the principle of arbitral finality. Under a reformed CAA, parties will make their decisions to provide for appeal rights when they make their arbitration agreements, which is as it should be: the time of contracting is the time that parties focus on delineating their respective rights and obligations.

Fourth, a streamlined appeal process that would eliminate appellate proceedings at the trial court level serves to put arbitral awards on the same footing vis-à-vis the appellate court as judgments obtained at trials. To parties that opt for appeals, there is an inherent logic in having awards made by arbitrators of their choice appealed to the same level of court authority that hears appeals from trial judges. There is an inherent illogic in having awards appealed to trial judges at the lowest levels of the courts, chosen at random and having no necessary expertise in the subject-matter of the awards under appeal. This illogic is aptly illustrated by the fact that in many cases, the arbitrators selected by the parties are themselves retired appeal court judges. Further, appeals directly to the Court of Appeal mitigate

[22] See, as stark examples, *Aronowicz v Aronowicz* (2007), 84 OR (3d) 428 (SC), 2007 CanLII 1885; *Camerman v Busch Painting Limited et al*, 2020 ONSC 5260.

against the time and expense associated with appeals by eliminating additional time-consuming and expensive levels of appeal. Finality delayed is often finality denied.

Fifth, and perhaps most important, is the AARC's recommendation that Ontario's appeal regime be opt-in as opposed to opt-out. The obvious consequence of an opt-out regime (such as the new regime in British Columbia) is that appeal rights exist when no action is taken by arbitral parties.

Given the contractual nature of arbitration and the foundational principles of finality and cost-and-time efficiency, the current situation of widespread appeals to the courts should not be allowed to continue. Appeals rights should not exist as a matter of default. Parties should, at the outset of their commercial relationships, be required to weigh the costs and benefits of appeals. Their lawyers should be required to consider the possibility of appeals, and the resultant delays to final dispute resolution, as part of the bargaining process. This should entail considerations of why arbitration is being selected as an alternative to litigation, what types of disputes are likely to arise between the parties, what types of arbitrators will be chosen and how many, whether the contemplated disputes are likely to engender the type of legal issues that should require court determination, and whether there will be a need for confidentiality that would be eviscerated by appeals to public courts. Such a focus on the need for appeals at the outset may well entail consideration of an obvious alternative: appeals to appellate arbitral tribunals, with appeal panels, procedural rules, standards of review, and scope of appeal provisions open to full negotiation by the parties.

Finally, and as a matter of principle as well as sound policy, an opt-in appeal regime will clarify that arbitration is an alternative to litigation, not simply one stage of a multi-tiered court process.

As noted at the outset, the subject of appeals invokes the foundational arbitration principles of finality and efficiency, together with the principle of contractual autonomy. The AARC recommendations are consistent with and flow from the precepts of the Model Law, the revisitation of appeal rights by the ULCC, and (with some deviation) the legislative reforms in British Columbia. This is fully consistent with the consolidation of Ontario's two arbitration acts into a single act, and the creation of a single appeal regime that respects these foundational principles. Ontario should adopt the AARC recommendations and other provinces should follow suit.

A REVIEW OF LEGISLATED SET-ASIDE REMEDIES: WHAT WORKS, WHAT DOESN'T, AND WHAT MAY NEED SOME TWEAKING

J. Brian Casey[*]

It has been over 30 years since Canada and the provinces introduced modern arbitration legislation. After the ratification of the New York Convention in 1985 through the *United Nations Foreign Arbitral Awards Convention Act*,[1] Canada and the provinces went on to adopt the UNCITRAL Model Law on International Commercial Arbitration. Thereafter, many of the provinces used the Model Law as a framework for modernizing their domestic arbitration legislation,[2] in a flurry of new legislation that ended in approximately 1991. This article will focus on what are known as the set-aside provisions in our legislation with a view to opining on what, after 30 years, still works, what doesn't work, and what may just need some tweaking.

In 2006, UNCITRAL introduced amendments to the Model Law. For the most part these amendments consisted of extensive new sections dealing with interim measures; the provisions regarding the court's power to set aside an arbitral award remained unchanged. These amendments were reflected in the Uniform Law Commission of Canada's promulgation of a

[*] FCIArb; Independent Arbitrator, Bay Street Chambers.

[1] *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp) [UNFAC].

[2] Ontario *Arbitration Act,* 1991, SO 1991, c 17; Alberta *Arbitration Act*, RSA 2000, c A-43; BC *Arbitration Act*, RSBC 1996, c 55; replaced by *Arbitration Act*, RSBC 2020 c 2; Manitoba *The Arbitration Act*, CCSM, c A120; New Brunswick *Arbitration Act*, RSNB 2014, c 100; Nova Scotia *Commercial Arbitration Act*, SNS 1999, c 5; Saskatchewan *Arbitration Act,* SS 1992, c a-24.1.

Uniform International Commercial Arbitration Act in 2014. To date, only three provinces have amended their international acts to adopt the amended Model Law. British Columbia amended its *International Commercial Arbitration Act* in 2018,[3] Québec amended its *Code of Civil Procedure* in 2016,[4] and Ontario introduced a new *International Commercial Arbitration Act* in 2017.[5] The amendments respecting interim measures of protection are extremely valuable, particularly with respect to enforcement. While beyond the remit of this paper, I would strongly urge the provinces that have not done so to update their international arbitration acts to conform with the current Model Law.

On the domestic side, the Uniform Law Commission of Canada proposed a new uniform domestic Arbitration Act in 2016 but, since then, only British Columbia has updated its domestic arbitration Act.[6] We are thus left with the situation in which legislation dealing with the ability of the court to set aside an arbitral award has not been updated in approximately 30 years. On the one hand, if it ain't broke, don't fix it. But on the other, after 30 years of judicial interpretation and developments in arbitral practice, it is time for legislatures to review what has worked, what hasn't, and what might just need some tweaking.

I. BACKGROUND-TRACING THE LANGUAGE

With respect to the grounds upon which a court may set aside an arbitral award, the analysis starts with the grounds for recognizing and enforcing foreign arbitral awards under New York Convention Article V. The first part of Article V deals solely

[3] *International Commercial Arbitration Act*, RSBC 1996, c 233.

[4] Quebec *Code of Civil Procedure*, Book VII, Title II.

[5] Ontario *International Commercial Arbitration Act*, SO 2017, c 2, Sch 5.

[6] *Arbitration Act*, RSBC 2020, c 2. Québec's *Code of Civil Procedure* covers both international and domestic arbitration and was updated in 2016.

with the procedural validity of the arbitration. The grounds for refusing enforcement include:

- the parties were under some incapacity when they signed the arbitration agreement;
- the arbitration agreement was not valid under the law to which the parties have subjected it;
- the respondent was not given provided proper notice or was otherwise unable to present his case;
- the award deals with an issue not within the terms of the submission to arbitration; and
- the tribunal was not constituted in accordance with the arbitration agreement.[7]

When the Model Law was drafted by UNCITRAL, there was an effort made to harmonize the grounds for setting aside at the place of arbitration with the grounds in place for refusing recognition and enforcement under the New York Convention. The idea was to make it clear that an arbitral award would be enforced unless it had been set aside at the place of arbitration for one of the same and exclusive grounds listed in the New York Convention; an award set aside at the place of arbitration on some ground other than those in the New York Convention could still be enforced in other countries.

The Model Law was designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It reflected a worldwide consensus on key aspects of international arbitration practice across all regions and legal or economic systems of the world.

---

[7] *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 (entered into force 7 June 1959, 24 signatories, 166 parties), 330 UNTS 3, art V [*New York Convention*].

There is no question that the state has an interest in protecting a person's right to have an arbitration conducted in accordance with its local mandatory arbitration law. It is also unquestioned that at the very least a state should see to it that arbitrations conducted in its territory meet basic standards of procedure that provide for equality and a reasonable opportunity to present a case. As a result, in addition to the grounds for set-aside listed above, article 34(2)(a) provides that an arbitral award may be set aside if the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the Model Law.

When the provinces came to draft legislation for domestic arbitrations, the set-aside provisions were taken almost word-for-word from the Model Law. It is one of those sections for which the various provinces' domestic acts are most similar.

By now you may be wondering why anyone would write an article on possible reform of legislative provisions for setting aside an arbitral award, when there does not appear to be much if anything to change. However, a closer look points to a few areas that could benefit from some tweaking.

II. EQUAL TREATMENT

As stated above, one of the grounds for setting aside an arbitral award is that the procedure that was followed did not comply with the Model Law. Article 18 of the Model Law states:

> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.[8]

[8] United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration* (21 June 1985), UN Doc A/40/17, Annex 1 [*Model Law*], art 18.

At first blush, one can see a losing party taking advantage of the language that they were not given a "full opportunity" of presenting their case. While the words "full opportunity of presenting his case" appear expansive and uncurtailed in article 18, courts in a variety of Model Law jurisdictions have held that the words must be interpreted as being limited by considerations of reasonableness and fairness to both sides. For example, in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another*, the Singapore Court of Appeal stated:

> What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.[9]

There do not appear to be any cases where the words of article 18 have been taken literally and expansively, so it is debatable whether legislative action is necessary to amend article 18. That said, for the avoidance of doubt, British Columbia's international Act has changed the words of the Model Law to provide a party must be given "a <u>reasonable</u> opportunity to present its case".[10]

---

[9] *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another*, [2020] SGCA 12 (Singapore).

[10] *International Arbitration Act*, RSBC 1996 CH 233, s 18.

The TCAS initiative respecting legislative reform in Ontario has also recommended that Ontario adopt the same language.

The Domestic Acts

The point made above respecting a reasonable opportunity to present a case has been followed in the domestic Acts. For example, the Alberta domestic Act provides:

> 19(1) An arbitral tribunal shall treat the parties equally and fairly.[11]
>
> (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.[12]

A careful look at this section however shows that Alberta and most of the other provinces have added a separate obligation of "fairness." For example section 46(1)(5) of the Ontario domestic Act provides, as a ground for setting aside:

> The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case,[13]

At first blush, one might ask: what could be wrong with requiring "fairness"? Adding such a word should cause no difficulty whatsoever, as it is clear an arbitrator must treat the parties fairly. However, the addition of the word "fairly" has opened the door for courts to examine the details of the procedures followed in the arbitration, compare them to local court procedure, and decide, in the court's opinion, if what was done was "fair". The argument from counsel goes as follows: if I can't have the full rights I have under my local court system—

---

[11] *Arbitration Act*, RSA 2000, c A-43, s 19(1).

[12] *Ibid,* s 19(1)—(2).

[13] *Arbitration Act*, SO 1991, c 17, s 46(1)(5).

which is of course perfection—and if I do not have the full ability to plead any allegation, without proof, and then have unlimited discovery of persons and documents in the hope of being able to prove the allegation at a hearing years in the future, my client has not been treated fairly. The problem with fairness is its subjectivity. It is not a word used in the Model Law. Rather the Model Law requires the more objective test of the parties having been treated equally and having been given a reasonable opportunity to present their case.

Various responses are possible. The Alberta domestic Act in section 45(1)(f) has tempered the generous review criterion of "fairness" by providing that the impugned procedure or behaviour must be *manifestly* unfair.

> (f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;[14]

By contrast, the new British Columbia domestic Act reverts to the original language of the Model Law and does not speak of "fairness" at all The proposed language under the TCAS initiative for legislative reform in Ontario also reverts to the Model Law language.

Equality- Domestic Acts Suggested Change No. 1

If legislatures are of the view that they must have the word "fairly" in their domestic legislation, then any legislative reform should include the word "manifestly", as in the Alberta domestic Act, in order to modify the requirement of fair treatment by removing some of its subjectivity. A better solution—since it discourages courts from delving too deeply into the procedure

[14] *Arbitration Act*, RSA 2000, c A-43, s 45(1)(f).

followed, and imposing their own litigation-oriented sense of procedural fairness—would be simply to follow the wording of the Model Law.

III. EXCLUSIVITY

The language of the Model Law establishing the grounds for setting aside makes it clear that the grounds are exclusive:

> 34(1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.[emphasis added]
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if: [emphasis added][15]

Most domestic legislation does not include the word "only".

A consequence of this language has been to allow the courts to explore the extent to which concepts of judicial review, applicable to reviews of administrative tribunals, may be imported into private consensual commercial arbitration in a set-aside application.

The seminal case on judicial review is *Dunsmuir v New Brunswick*.[16] For our purposes, one of the main findings of that case was that the decision of a tribunal could be reviewed to determine whether it was reasonable. The Supreme Court clarified aspects of *Dunsmuir* in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[17] and affirmed *Dunsmuir* on the

---

[15] *Model Law*, *supra* note 8 at arts 34(1)—(2).

[16] *Dunsmuir v New Brunswick*, 2008 SCC 9.

[17] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

point that a court conducting judicial review of an administrative law decision can consider both the reasonableness of the reasoning process that led to the outcome and the reasonableness of the outcome itself.[18]

The problem is that judicial review jurisprudence has no application to a statutory right to set aside a consensual arbitral award, yet *Vavilov* and *Dunsmuir* keep being cited in arbitration set-aside cases for the proposition that an arbitrator's decision can be set aside if the award or the reasoning process was unreasonable. There is no such test in any of the legislative provisions dealing with setting aside awards, in the domestic or international acts.

The Ontario Court of Appeal in the *Alectra Utilities Corporation v Solar Power Network Inc.* appeal decision dealt directly, but in a cursory manner, with the question of whether the judicial review test of reasonableness applies to a set-aside application under the Ontario domestic arbitration Act. At the end of its decision, the Court stated:

> [44] For greater certainty I would add this: once the jurisdictional question is answered, in the absence of a right of appeal pursuant to s 45 the court has no authority to go on to review the arbitrator's award for reasonableness"[19]

To date the writer is unaware of any other decision making this point as clearly as the Ontario Court of Appeal. To reduce the risk that courts will import standards for judicial review into set-aside applications, the new British Columbia domestic Act clearly provides:

---

[18] *Vavilov, supra* note 17 at para 87.

[19] *Alectra Utilities Corporation v Solar Power Network Inc,* 2019 ONCA 254 at para 44.

> A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds […][20]

The TCAS legislative reform proposal tracks the Model Law which makes it clear the grounds for setting aside are exclusive and exhaustive.

Exclusivity- Domestic Acts Suggested Change No. 2

Make sure the language for setting aside makes it clear that the grounds listed for setting aside are exclusive and exhaustive, using language such as "only if".

IV. REMEDIES

Except for British Columbia, the provinces' domestic Acts provide that the court presiding over a set-aside application can, amongst other remedies, "give directions" to the arbitral tribunal. For example, section 45(8) of the Alberta domestic Act states:

> (8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.[21]

While this section has not been frequently used, on its face it creates serious questions as to the extent to which a court may make mandatory procedural orders to an arbitrator directing them to conduct the arbitration in a particular manner. Are such "directions" binding on the arbitrator who has not appeared in the set-aside application and may not even have been given notice? Does the court have jurisdiction over the arbitrator? Do the arbitrator's terms of appointment contemplate further work after the award? What if the arbitrator has not been paid? How

[20] *Arbitration Act*, SBC 2020, c 2, s 58(1).

[21] *Arbitration Act*, RSA 2000, c A-43 s 45(8).

far should the court go in involving itself in procedural matters within the arbitration?

The Model Law and the international acts of the provinces have a completely different provision, which avoids the risks created by the domestic acts. Model Law article 34(4) states:

> (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.[22]

1. Remedies- Domestic Acts Suggested Change No. 3

Domestic legislation should follow the Model Law and simply provide that the court may adjourn the set-aside application to allow a tribunal time to consider its position, given the court's view of the procedural challenge. This is the recommendation of the TCAS legislative reform report.

V. CONCLUSION

As can be seen from the discussion above, there are few differences between the Model Law for international commercial arbitrations and the provinces' domestic arbitration legislation when it comes to grounds for setting aside an arbitral award. If we review the present acts after some thirty years of experience, it can be seen that there are a few changes that should be made to our domestic legislation, but most of these would have the effect of better aligning the domestic acts with the Model Law. In general therefore, but particularly in this area of set aside, the question must be asked

[22] *Model Law*, *supra* note 8 at art 34(4).

why two separate statutes dealing with arbitration are necessary, when the wording between the Model Law and the domestic acts are so similar and—if the above recommendations are taken into account, would become more similar still? In this regard, the proposed single commercial Arbitration Act for Ontario, as proposed by the TCAS legislative reform committee makes sense.

THE IMPORTANCE OF APPLYING INTERNATIONAL STANDARDS TO COMMERCIAL ARBITRATION STATUTES: MATTERS OF SUBSTANCE AND FORM[AT]

Hon. Barry Leon[*]

I. INTRODUCTION

This article deals with two related topics concerning a reformed Ontario arbitration law. First, it sets out the case for applying international standards for all commercial arbitrations in Ontario in one commercial arbitration statute covering both international and non-international (domestic) arbitrations. Second, it considers whether an UNCITRAL Model Law-based[1] arbitration statute should indicate where it differs from the Model Law, and if so, which provisions differ and how they differ.

II. THE CASE FOR APPLYING INTERNATIONAL STANDARDS FOR ALL COMMERCIAL ARBITRATIONS IN ONTARIO

One of the major recommendations in The Final Report of the Arbitration Act Reform Committee dated February 12, 2021 (AARC Report)[2] is that the proposed Commercial Arbitration Act (CAA) for Ontario be enacted, and that, in doing so, Ontario make international standards relating to the conduct of arbitrations and the role of the courts, as set out in the

---

[*] Independent Arbitrator and Mediator, Arbitration Place, 33 Bedford Row Chambers, and Caribbean Arbitrators; Executive Editor, *Canadian Journal of Commercial Arbitration*.

[1] See *UNCITRAL Model Law on International Commercial Arbitration* UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006) [*Model Law*].

[2] See "AARC Final Report 12 Feb 21" (12 February 2021), online: *Toronto Commercial Arbitration Society* <torontocommercialarbitrationsociety.com/arbitration-act-reform-committee/> [*AARC Report*].

UNCITRAL Model Law on International Commercial Arbitration ("Model Law") and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), applicable to all commercial arbitrations conducted in Ontario.

The overarching premise of the AARC Report is adherence to the Model Law and the New York Convention.[3]

What degree of conformity with the Model Law is desirable?

For a smaller jurisdiction in the arbitration world (which Ontario is), it is better to adhere to the Model Law to the extent possible. Doing so makes it much easier for people elsewhere to instantly know what they would be getting by choosing the jurisdiction as their seat of arbitration.

One of the reasons articulated for a single Act for all commercial arbitrations in Ontario, domestic and international, is that all commercial arbitrations in Ontario would be better served by closer adherence to the Model Law.[4]

It is widely accepted globally that commercial arbitration should be conducted in ways that are more efficient, expeditious, and cost-effective than domestic court proceedings in many jurisdictions, and than non-international (domestic) commercial arbitration proceedings in many jurisdictions. Also, it is widely accepted globally that commercial arbitration should be conducted in line with the needs of commercial parties. While these important principles are not expressly stated in the AARC Report, they are fundamental to its recommendations.

The AARC Report concludes that a single Act with unified terminology and concepts based on international standards

---

[3] AARC Report, *supra* note 2 at 6.

[4] *Ibid* at 7, Reason (e).

would raise the practices and skills of Ontario lawyers and arbitrators to international standards.[5] In particular, it would help bring some of the practices that have been proven effective and efficient in international disputes to Canadian domestic arbitration procedures, which can otherwise amount to "litigation sitting down". As a result, a single Act based on international standards would enshrine the concepts of efficiency, expeditiousness, and cost-effectiveness in arbitration procedure, in line with the needs of commercial parties.

Accordingly, the AARC Report recommends that the CAA should make it clear that commercial arbitrations in Ontario are to be conducted to the standards of the Model Law.[6]

Appendix B to the AARC Report, "Reasons to Consolidate Commercial Arbitration in a Single Act in Ontario", explains the rationale as follows:

> A single Act would encourage the courts to apply international standards to all commercial arbitrations. Moreover, a section that requires the courts to consider the international origin of the Act would apply to all commercial arbitrations, thereby fulfilling the original assumed goal of the Arbitration Act to conform more to the Model Law.[7]

One significant point on which the AARC Report deviates from the Model Law, favouring increased party autonomy, is its recommendation that a right of appeal on a question of law, on an opt-in basis, be permitted for both non-international and international arbitrations.[8] The Report reasons as follows:

---

[5] AARC Report, *supra* note 2 at 8, Reason (i).

[6] *Ibid* at 9, under "Topics to be Addressed in the CAA".

[7] *Ibid* at Appendix B, p 4.

[8] *Ibid* at Appendix B, p 6.

> A right to appeal to the court on a point of law may be considered valuable by parties seeking to hold tribunals to the mandatory provision of the Model Law that the "tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties".[9]

While the AARC Report intentionally does not recommend a specific language for the CCA, it does include (as its Appendix E) a draft CAA in integrated format with cross-references to the Model Law "for the purpose of presenting the conclusions of the work of the Committee as a whole in a comprehensive way that can be viewed in a single continuous format."[10]

Consistent with the intent of the Report's overarching premise of adherence to the Model Law and the New York Convention, and of implementing international standards relating to the conduct of arbitrations and the role of the courts, it should be expected that the provisions in Part I and in section 6(3) of Part II of the Ontario *International Commercial Arbitration Act*[11] ("ICAA") will be included in the CCA.

Those provisions read:

> **Part I The Convention**
>
> **Application of Convention**
>
> **2** (1) Subject to this Act, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial

[9] *AARC Report, supra* note 2

[10] *Ibid* at 14.

[11] 2017, SO 2017, c 2, sched 5.

Arbitration in New York on 10 June 1958 and set out in Schedule 1, has force of law in Ontario in relation to arbitral awards or arbitration agreements in respect of differences arising out of commercial legal relationships.

Part II The Model Law

…

Use of extrinsic material

6 (3) In applying the Model Law, 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) and 39th (19 June – 7 July 2006) sessions (U.N. Docs. A/40/17 and A/61/17);

(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); and

(c) 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).[12]

[12] These materials collectively form the *travaux préparatoires* of the Model Law. They are available online, <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/travaux>.

Importantly, the ability to have regard to the materials described in section 6(3) of the ICCA in applying the Model Law means that the drafting history of the Model Law will be available to interpret provisions of the CCA taken from the Model Law, as will jurisprudence from all jurisdictions that have Model Law arbitration statutes. Currently, arbitration legislation based on the Model Law has been adopted by 85 states and a total of 118 jurisdictions.[13]

Indeed, the illustrative CCA in Appendix E to the Report provides as follows:[14]

> **International origin and general principles**
>
> **8 (cf. Article 2)**
>
> (1) In the interpretation of this Act, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
>
> (2) Questions concerning matters governed by this Act which are not expressly settled in it are to be settled in conformity with the general principles on which the Model Law is based.
>
> (3) In determining the general principles of the Model Law, recourse may be had to,
>
> (a) the Reports of the United Nations Commission on International Trade Law

[13] See "Status: UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations Commission On International Trade Law* <uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[14] AARC Report, *supra* note 2, at Appendix E.

> on the work of its 18th (3 – 21 June 1985) and 39th (19 June – 7 July 2006) sessions (U.N. Docs. A/40/17 and A/61/17);
>
> (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); and
>
> (c) 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).

UNCITRAL explains what the AARC Report terms "international standards" as follows:

> The Model Law is designed to assist States in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by States of all regions and the different legal or economic systems of the world.[15]

[15] See "UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006", online: *United Nations*

Ontario and its arbitration practitioners will benefit from conducting commercial arbitrations in accordance with this "worldwide consensus on key aspects of international arbitration practice".

It will mean that commercial parties and their legal advisors outside Ontario will have a clear understanding of Ontario's commercial arbitration law without having to ask themselves anything more than how it differs from the Model Law. As a result, they will be able to comfortably choose Ontario as their seat of arbitration.

Having a commercial arbitration law that is so close to the Model Law is, of course, not the only factor that parties will consider in choosing a seat. However, it will also help them "tick some of the other boxes", including the presence of a judiciary that is conversant with and supportive of arbitration.

An illustration of this can be seen by looking at the Chartered Institute of Arbitrators' *London Centenary Principles 2015*, which define the necessary characteristics of "an effective, efficient and 'safe' seat for the conduct of International Arbitration". The first of the 10 Principles is the jurisdiction's international arbitration law, the second is its judiciary having (among other things) "expertise in International Commercial Arbitration", and the third is an "independent competent legal profession with expertise in International Arbitration and International Dispute Resolution providing significant choice for parties who seek representation in the Courts of the Seat or in the International Arbitration proceedings conducted at the Seat".[16]

Commission On International Trade Law <uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration>.

[16] See "CIArb London Centenary Principles" (2015), online: *CiArb* <www.ciarb.org/media/4357/london-centenary-principles.pdf>.

Looking outward, Ontario arbitration practitioners—counsel and arbitrators alike—likewise will be able to participate more readily in arbitrations in the 85 states and 118 jurisdictions that have as their arbitration law the Model Law, as well as those important states (such as England and Wales, and France) that have not adopted the Model Law but have arbitration laws and practices that are consistent with the international standards and practices reflected in the Model Law. This will be so not just because of the similarity of their arbitration laws to the commercial arbitration law of Ontario but because Ontario arbitration practitioners will become increasingly conversant and comfortable with how things are done internationally in commercial arbitration.

In turn, commercial parties arbitrating their disputes in Ontario—both international and non-international—will have greater access to, and will be able to make greater use of, arbitration practices that, if applied as they should be, will lead to more efficient, timely, and effective resolution of commercial disputes.

III. FORMAT/FORM OF THE PROPOSED COMMERCIAL ARBITRATION ACT

An important consideration for any statute based on the Model Law is whether it will indicate expressly (a) where it differs from the Model Law, and (b) if so, which provisions differ and how they differ.

Showing where the particular statute differs from the Model Law will make the statute more user-friendly, so that anyone looking at it, particularly from outside the jurisdiction, will be able to home in on the ways it is distinct from the Model Law that they know.

There is a compelling logic to making any statute user-friendly, and particularly a statute that will have an audience outside the jurisdiction.

Apart from that, it makes sense for it to be easy to identify the points of difference from the Model Law. As stated earlier, one of the reasons for a jurisdiction having a Model Law arbitration statute is to make it easy for those choosing a seat to know the arbitration law to which they would be agreeing.

Some jurisdictions which have not adopted the Model Law verbatim do not indicate the differences in any way, creating traps for the unwary. For example, a jurisdiction could implement the Model Law almost exactly as written, but add a wide domestic public policy ground for the setting-aside of arbitral awards and the non-enforcement of foreign awards.

There are a number of ways in which a Model Law statute could indicate how it differs from the Model Law.

One approach is that used in Ontario's existing ICCA, which is to have a short statute setting out provisions that have been changed from provisions of the Model Law, followed by an appendix comprising the entire text of the Model Law. A drawback to this approach is that the reader must keep checking back and forth in some manner to see what has been changed.

A second approach is to include a table of concordance between the statute and the Model Law, which while helpful, still requires the reader to check back and forth between the jurisdiction's statute and the Model Law.

A third approach is to set out, beside each provision of the statute, the article or sub-article number of the Model Law that it reflects, so that a reader knows which provision of the statute corresponds to, or deals in a different way with, each provision of the Model Law. Of course, this still leaves the reader having to compare the provisions of the statute and the Model Law to see how they differ.

A fourth approach is that taken by the British Virgin Islands in the *Arbitration Act, 2013*[17] ("BVI Act"), which is to set out in the body of the statute the provisions of the Model Law that are part of the BVI Act, either with no change or with one or more specified changes. To accomplish this, the BVI Act states that the particular article of the Model Law "has effect", or "has effect subject to", and then reproduces it in the body of the statute.

For example, in section 40:

> 40. Article 17G of the UNCITRAL Model Law, the text of which is reproduced below, has effect:
>
> "Article 17G. Costs and damages
>
> The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party …"

And in section 22:

> 22. (1) Article 11 of the UNCITRAL Model Law, the text of which is reproduced below, has effect subject to subsection 11 (2) and (3):

Where the BVI Act differs from corresponding provisions of the Model Law, the BVI Act so states. For example, in section 11:

> 11. (1) Subsections (2) to (5) have effect in substitution for article 6 of the UNCITRAL Model Law.

---

[17] *Arbitration Act, 2013*, No 13 of 2013, as amended (British Virgin Islands); British Virgin Islands International Arbitration Centre > Arbitration > BVI Arbitration Act (bviiac.org).

And in section 44(1):

> 44. (1) Article 18 of the UNCITRAL Model Law is substituted by this section …

While this approach provides all the information needed to see differences from the Model Law in the body of the statute, it may appear to be awkward, and is inconsistent with ordinary statute drafting practices.

A fifth approach would be a combination of other approaches where they can be implemented in a consistent manner. In particular, having a table of concordance (the second approach) would be consistent with the third and fourth approaches. Also, enacting the Model Law as an appendix to the statute can be utilized not only with the first approach but with all the others as well.

The AARC Report does not recommend a particular approach but does recommend that whichever format is used, it should be made easy for readers of the CAA to identify the points of similarity and departure from the Model Law. This is an important recommendation.

> [F]or the purpose of presenting the conclusions of the work of the Committee as a whole in a comprehensive way that can be viewed in a single continuous format, we have attached to this Report as Appendix E a draft CAA in integrated format with cross-references to the Model Law.[18]

Without question, for the reasons set out above, every Model Law statute—and of course including the proposed CAA—should be drafted in a manner that involves the easiest possible,

[18] AARC Report, *supra* note 2 at 14.

most user-friendly way for readers to readily identify the points where the statute is identical to, similar to, or departs from the Model Law.

In my view, for the CAA, this would be achieved best, and in a manner that is consistent with common ordinary legislative drafting in Ontario and in many other jurisdictions, by adopting the approach taken in Appendix E to the Report.

The CAA should be a self-contained, integrated statute with all provisions flowing sequentially, and with cross-references to the Model Law beside each provision. In addition, the CAA should include as appendices, first, a copy of the Model Law, and second, a table of concordance between the CAA and the Model Law for further assistance to a reader.

ARBITRATION LEGISLATION REFORM IN CANADA: A VIEW FROM QUÉBEC

Matthias Heilke, Laurence Ste-Marie, Stephen L. Drymer[*]

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

---

[*] The authors are, respectively, a senior associate and partners at Woods LLP in Montréal.

[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

---

[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

---

[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

---

[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]

---

[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

---

[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

---

[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

---

[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]

---

[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]

---

[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

---

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

---

[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]

---

[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.

---

[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.

UPDATING BC'S ARBITRATION ACT: LESSONS LEARNED

*Tina Cicchetti**

On September 1, 2020, with the coming into force of British Columbia's new *Arbitration Act*,[1] the most recent chapter in the story of the evolution of BC's arbitration legislation began. The *Act* modernized the *Commercial Arbitration Act,* RSBC 1996, c. 55 (the "Previous Act"), the non-international arbitration statute enacted in the 1980s.[2]

Once upon a time, the Previous Act was introduced to the legislature as part of the government's focus on economic recovery from the recession of the early 1980s and a desire to stimulate business. Coincident with Vancouver hosting Expo '86, the Province established the British Columbia International Commercial Arbitration Centre (the "BCICAC"), an institution to administer arbitrations, and enacted new commercial arbitration legislation for both international and non-international arbitrations. The *International Commercial Arbitration Act* (*ICAA*)[3] adopted the then brand new *UNCITRAL Model Law on International Commercial Arbitration* ("1985 Model Law"). The Previous Act was based on the English *Arbitration Act, 1979*,[4] and also integrated the BCICAC

* Independent arbitrator, Vancouver Arbitration Chambers and Arbitration Place, and member of the AAG.

[1] SBC 2020, c 2. For a summary of the *Act,* see Tina Cicchetti and Jonathan Eades, "The New BC *Arbitration Act*" (2021) 1:2 CJCA 144.

[2] As part of legislative housekeeping reforms, an interim update in 2013 renamed the *Commercial Arbitration Act* the *Arbitration Act* and included new provisions relating to non-commercial arbitrations. This update did not affect the substantive provisions applying to non-international commercial arbitrations in the Province, but it did pull in non-commercial arbitrations including family law arbitrations.

[3] RSBC 1996, c 233.

[4] 1979, c 42.

arbitration rules to apply by default, providing parties with a more detailed default procedure for non-international arbitrations than what was available in the legislation alone. Other than providing default rules, the other key difference between the international and non-international regimes was that a limited right of appeal to the courts was retained for non-international arbitrations.[5] Commercial parties who preferred the international regime and its greater finality could opt into the *ICAA* by agreeing that the subject matter of their dispute was international.

When the *Act* was introduced in the legislature, it brought the non-international regime into modern times. The then Attorney General stated:

> I'm pleased to introduce the Arbitration Act. This bill repeals and replaces British Columbia's domestic Arbitration Act. It will modernize British Columbia's domestic arbitration regime and achieve greater harmony with the International Commercial Arbitration Act, benefiting business parties, legal counsel and arbitrators.
>
> British Columbia's domestic Arbitration Act has not had major revisions in more than 30 years. Many of its provisions are outdated and no longer reflect best arbitration practices.
>
> In 2017, government requested recommendations for domestic arbitration reform from a group of leading arbitration practitioners — the then Attorney General's

[5] The Previous Act abolished the stated case mechanism and replaced it by a limited right of appeal. The *ICAA,* which applied to international commercial disputes provided for no right of appeal; international awards could be set aside in certain, limited circumstances related to issues of fundamental fairness or public policy.

> arbitration advisory group. We continued that work, and I would like to thank this group for the many hours of work they put into this project. This bill is based on their recommendations.
>
> Family law arbitration has some similarities to commercial arbitration, but there are significant differences. The provisions related to family law arbitration are being moved into the Family Law Act. Generally, the policy underlying family law arbitration is being retained using updated language that aligns with the new Arbitration Act provisions. A separate advisory group of family law arbitrators and practitioners has provided recommendations to government regarding the move.[6]

The *Act* was the culmination of more than two years of work by the Legislative Subcommittee of the Arbitration Advisory Group, a volunteer group of senior arbitration practitioners and businesspersons assembled to advise the BC Attorney General on matters of importance to arbitration (the "AAG").[7] BC's arbitration legislation had not been substantively revised since it was initially adopted in the 1980s and in the meantime UNCITRAL had updated the 1985 Model Law in 2006 to incorporate additional mechanisms seen as desirable in international arbitration. In May 2018, on the recommendation of the AAG, BC updated the *ICAA* to adopt these innovations and then attention turned to updating the non-international regime.

---

[6] "Bill 7 – Arbitration Act", 1st reading, *Legislative Assembly Debates*, 41-5, No 309 (19 February 2020) at 11016 (Hon David Eby), online (pdf): <https://www.leg.bc.ca/content/hansard/41st5th/20200219pm-Hansard-n309.pdf>.

[7] The AAG began its work on the *ICAA* revisions that were passed in 2018, and then turned to the *Act*.

In considering potential amendments, the AAG had in mind the policy behind the legislation—to facilitate the effective determination of commercial disputes—as well as both internal and external audiences. The guiding principle was to ensure that the non-international arbitration regime continued to meet the needs of its users by providing an efficient and effective alternative to litigation in the courts. Most commercial arbitration parties are not repeat or regular users of arbitration. Put differently, only a minority of arbitration users see disputes as a regular part of their commercial operations. It was necessary to structure the new legislation in a way that is accessible to all parties who may find themselves in an arbitration governed by the *Act,* and that provides for some default best practices that increase the odds of an efficient and effective arbitration process for all parties, regardless of their level of experience with arbitration. It was also important that BC maintain its international reputation as an arbitration-friendly jurisdiction. The jurisprudence arising out of the *ICAA* respects party autonomy and is supportive of international commercial arbitration. As the recent Supreme Court of Canada decision in *Uber Technologies Inc v Heller*[8] demonstrates, courts can be persuaded to take a different view of party autonomy when the parties to an arbitration agreement are less sophisticated or when their contractual relationship is not clearly commercial in nature. Given this context, the AAG saw retaining a distinction between the regimes governing international commercial arbitration and non-international arbitration as desirable.

It was accepted that the audience for the non-international regime differed from that for the *ICAA*, and that it had evolved to include non-commercial parties. The Previous Act had been revised to include within its scope family law disputes and other arbitrations provided for by statute that were not based on the traditional model of party consent found in commercial arbitration. After consultation with the family law bar, it was

[8] 2020 SCC 16.

decided that arbitrations related to family law disputes should be migrated to the *Family Law Act*. Aside from this carve-out, the *Act* would continue to be a catch-all for arbitrations with their place of arbitration in BC, so it would need to address the needs of diverse types of users.[9]

Against this backdrop, the legislation was reviewed section by section. In performing this review, the AAG kept in mind the 2006 UNCITRAL Model Law, the newly revised *ICAA*, the Uniform Law Commission of Canada's (ULCC's) 2016 Model Law, arbitration acts from other comparable jurisdictions, the BCICAC Rules and the more than thirty years of jurisprudence applying the Previous Act. The discussions were also informed by the practical experience of the AAG members as counsel and arbitrators in proceedings under the Previous Act.

Some recommendations were easy to agree upon. For example, the overall structure needed to be overhauled to make it more logical and accessible. As noted, a return to a specialized regime for family law disputes was also seen as desirable by arbitration practitioners and was readily accepted by members of the family law bar. The provision relating to stays of proceedings was seen as functioning smoothly, and maintaining it was seen as important to avoid disrupting the case law that had developed around this section.

On the other hand, many sections of the *Act* were the subject of extended study and discussion before recommendations were made. For the purposes of this essay, four of these will be discussed further: the provisions addressing appeal rights and set aside, the default to a set of rules not part of the act itself, confidentiality obligations and arbitrator immunity. For each, I will describe how the AAG came to formulate its

[9] See *Act*, s 2(5). In addition to international commercial disputes and family law disputes, there is also a third carve-out for certain prescribed government agreements which had been swept into the *Act* through the 2013 revision.

recommendation, and offer some suggestions as to what other provinces might learn from BC's experience.

I. APPEAL RIGHTS AND SET ASIDES

The Previous Act had given rise to what were considered to be negative developments in the case law relating to court review of arbitral awards. Recommendations were focused on ensuring that arbitration remains an effective alternative to litigation with limited interaction between the two processes.

In general, the possibility of an appeal on a question of law from a non-international award was not seen as problematic. In fact, the availability of appellate review appears to match the expectations of parties who hail from a common legal background, have a shared understanding of the applicable law, and expect that an arbitral tribunal's decision will be consistent with that law.[10] The jurisprudence on what constitutes an error of law has developed significantly in recent years, and was seen to have evolved to provide appropriate limits on appeals from arbitral awards.[11] Courts have limited appeals to extricable errors of law and closed the door on the position that an error in interpretation of the contract amounts to an error of law. This was seen as an appropriate balance between finality and legal correctness.

However, the procedure for challenging awards set out in the Previous Act was found to be problematic, as it had led in a number of cases to protracted post-award proceedings.[12] The *Act* addresses this problem in two ways. First, it puts arbitration awards on the same footing as decisions of the Supreme Court

---

[10] Sophisticated commercial parties who prioritize finality and certainty over the risk of a legally incorrect result can opt into the *ICAA*, and parties can opt out of appeals under the *Act.*

[11] See *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 [*Sattva Capital Corp*].

[12] See, for example, *Boxer Capital Corporation v JEL Investments Ltd*, 2013 BCCA 297.

by directing all appeals to the Court of Appeal. This was intended to reduce the number of leave applications and appeals in respect of the same award. Second, it removes the possibility of commencing set-aside and appeal proceedings simultaneously which led to mischief by expanding the scope of materials submitted to the court. By separating out these processes, the *Act* limits the scope of the record available to the court on appeal, recalling that in British Columbia, the question of law that motivates the appeal must arise from the award and not from the arbitration proceeding.[13]

Other Canadian jurisdictions, particularly those that have retained a separate act for commercial arbitration, may want to consider whether it is desirable to maintain any possibility for appeal of a commercial arbitration award.

II. MAKING EXPLICIT CERTAIN PROVISIONS PREVIOUSLY FOUND ONLY IN THE PROCEDURAL RULES

As mentioned, the Previous Act provided for the rules of the BCICAC to apply by default in the event that other procedural rules had not been selected by the parties. This provision contributed to the creation of a culture of institutional arbitration in BC and to the use of codified procedural rules, which differs from that in other provinces. After three decades of this default, practitioners in BC had become accustomed to arbitration rules that simplified the procedure in arbitrations, rather than importing rules of court into a private dispute

[13] The recent decision of the BC Court of Appeal in *Escape 101 Ventures Inc v March of Dimes Canada*, 2022 BCCA 294 [*Escape 101 Ventures*] may reignite this debate, as some consider the Court to have endorsed a review of the underlying submissions in the arbitration in identifying an error of law, rather than doing so based on the arbitral award itself. The court in *Escape 101 Ventures* arguably also eroded the advancements in the jurisprudence that limited the scope of extricable errors of law following the Supreme Court's decision in *Sattva Capital Corp* and the cases that followed the restrained approach advocated there as to the review of factual determinations in commercial arbitration. See *Sattva Capital Corp, supra* note 11 at para 104.

resolution system. Now that this culture is established, it was seen as unnecessary to continue providing for a default, so the AAG recommended returning the selection of the applicable rules to the parties.[14]

Even under the Previous Act, the parties were free to agree to other rules or to dispense with the application of the BCICAC rules. When parties did so, this created gaps in the legislation, which in some circumstances relied on the rules to articulate certain powers or to provide guidance on best arbitration practice.

To remedy this situation, some concepts were expressly imported into the *Act* from the BCICAC Rules. For example:

- Section 23 of the *Act* now expressly incorporates the core concepts of competence-competence (the ability of the arbitral tribunal to determine its own jurisdiction) and the doctrine of separability (that the arbitration agreement is an agreement separate from the agreement in which it is contained, so that termination or invalidity of the main agreement does not automatically deprive an arbitral tribunal of jurisdiction).
- The BCICAC Rules also set out a non-exhaustive list of powers conferred on the arbitral tribunal, but the *Act* itself was unclear as to whether a tribunal could apply equity and grant equitable remedies. Section 25 clarifies that, to the extent equity and equitable remedies form part of the applicable law, tribunals have the power to grant such remedies on an equal footing with courts. Section 32 of the *Act* now sets out a non-exhaustive list of the tribunal's procedural powers.
- Section 28 protects the efficiency of arbitration procedure by confirming that the strict rules of evidence,

[14] Coincident with the revisions to the *Act*, the BCICAC rebranded as the Vancouver International Commercial Arbitration Centre ("VanIAC") and updated its rules. The VanIAC rules continue to provide an excellent option for parties to arbitrations seated in BC and elsewhere.

developed in the context of court proceedings, do not apply. Tribunals are expressly empowered to decide all evidentiary matters. Further, the well-established best practice in international proceedings of direct evidence being provided in writing, rather than by live examinations in chief, has been incorporated into the *Act* in order to limit the time needed for hearings and to allow parties to focus on the issues in dispute in cross-examination.

- Section 31 empowers arbitral tribunals to receive oral evidence and submissions by electronic means. In hindsight, this provision was prescient in that it clarified an issue that is the subject of doubt in other jurisdictions, *i.e.,* whether parties have the right to insist on an in-person hearing.[15]
- Section 50 confirms that a tribunal has the discretion to award costs and that these can include actual legal fees to the extent those fees are considered reasonable. This helpfully displaces any suggestion that cost scales applied in court have any application in arbitration proceedings. A provision confirming that costs can be assessed summarily was included to overcome the notion that had arisen in a problematic line of cases that doing so was somehow unfair.[16]

Other jurisdictions reviewing their non-domestic arbitration legislation may wish to consider whether the legislation should provide guidance as to procedures that can assist in achieving the benefits of arbitration over litigation. While *ad hoc* arbitration proceedings work well for sophisticated parties with a shared legal culture, not all parties in arbitration or their counsel have experience with arbitration practices. Providing some framework or default arbitration procedure could assist

[15] See Chester Brown et al, "Does a Right to a Physical Hearing Exist in International Arbitration?" (2022), online (pdf): <https://cdn.arbitration-icca.org/s3fspublic/document/media_document/ICCA_Reports_no_10_Right_to_a_Physical_Hearing_final_amended_7Nov2022.pdf>.

[16] See *Williston Navigation Inc v BCR Finav No 3 et al*, 2007 BCSC 190.

in developing familiarity with arbitration practices intended to resolve disputes efficiently and expeditiously. This could also assist in providing a distinction between court practice and arbitration practice and resist the temptation to default to court practices that are ill-suited to commercial arbitration, which is a private means of dispute resolution between parties in a contractual relationship.

III. CONFIDENTIALITY OBLIGATIONS

It is uncontroversial that arbitration proceedings are private. What is less clear is whether they are confidential. Different jurisdictions have arrived at different conclusions on this question and the matter has not been decided by courts in Canada. The AAG determined that most users of arbitration in BC expect that arbitration proceedings will be confidential, and that it was valuable to provide a clear direction in the *Act* to this effect. Such an addition also brings the *Act* into line with the *ICAA*. Parties are able to displace this default rule by agreement.

IV. ARBITRATOR IMMUNITY

Another important modernization included in the *Act* is an immunity provision for arbitrators that protects them against suits for acts or omissions in the course of the arbitration proceedings unless committed in bad faith. Arbitration practice has seen an increase in arbitrator challenges, and the AAG saw immunity provisions as a necessary tool to protect arbitrators from spurious challenges. It is expected that jurisdictions that provide immunity in this way will be popular choices as the seat of arbitration. Further, including an immunity provision in the *Act* is consistent with making arbitration proceedings analogous to court proceedings, as the immunity is similar to that provided by statute to other adjudicators in BC.

V. CONCLUSION

While it is still early in the story of the *Act,* as cases subject to it are only now starting to appear in the courts, it already

shows signs of delivering a more efficient process for non-international arbitrations. The first appeal subject to the *Act* has now been heard by the Court of Appeal. The case was decided after a single leave-to-appeal application followed by the appeal on the merits, all determined by the Court of Appeal. This procedure was decidedly more efficient than that under the Previous Act, which would have created the possibility of an appeal of the decision to grant leave before the merits of the appeal could be heard.[17]

Another positive lesson arising from the process used to revise the *Act* is that collaboration between the stakeholders in arbitration and legislators through the AAG resulted in better legislation. The coordination between these groups allowed for practical solutions to the perceived problems with the Previous Act and, ultimately, legislation that better serves the policy considerations that animate it.

A number of promising features have been built into the *Act.* It is hoped that the new provisions of the *Act* will continue to deliver on the expectations of efficient and effective non-international arbitration proceedings that meet the needs of users of arbitration seated in BC.

However, the moral of the story: that commercial arbitration as a consensual form of binding dispute resolution serves a unique role as an effective alternative to court litigation has yet to be fully embraced by the courts. For policy reasons, the *Act* prioritizes a final result with limited review over a correct result. For this policy to prevail, practitioners must assist in educating the judiciary as to the appropriate limits of review in

[17] See note 14, above. Although the process relating to the leave to appeal in *Escape 101 Ventures* operated as expected and the appeal was notionally limited to an extricable error of law, some consider the approach of the court in deciding the appeal to be problematic, as it reviewed the record of the proceedings in arriving at the conclusion that the arbitrator had made an error of law.

this context and a culture of arbitration as distinct from court litigation must continue to develop.

THE "TABULA RASA" ILLUSION: PROCEDURAL NORMS AND PROCEDURAL FLEXIBILITY IN COMMERCIAL ARBITRATIONS

*Gerry Ghikas**

"Tabula Rasa" - a situation in which nothing has yet been planned or decided, so that someone is free to decide what should happen or be done.[1]

"norm" - an accepted standard or a way of behaving or doing things that most people agree with.[2]

"flexibility" - (1) the ability to change or be changed easily according to the situation; (2) the ability to bend or be bent without breaking.[3]

Procedural flexibility is a hallmark of commercial arbitration, linked to the concept of party autonomy. Parties not only have the freedom to choose arbitration as the dispute resolution process, but also have the freedom, by agreement, to tailor the process to reflect their priorities. Given the volume of ink and exposition devoted to extolling the virtues of procedural

*Gerry Ghikas, Q.C. is a nationally and internationally recognized Canadian commercial arbitrator who practices from Vancouver Arbitration Chambers.

[1] *Cambridge Dictionary* (Cambridge: Cambridge University Press, 2022), sub verdo "tabula rasa" <https://dictionary.cambridge.org/dictionary/english/tabula-rasa?q=tabula>.

[2] *Cambridge Dictionary*, (Cambridge: Cambridge University Press, 2022), sub verdo "norm" <https://dictionary.cambridge.org/dictionary/english/norm>.

[3] *Cambridge Dictionary*, (Cambridge: Cambridge University Press, 2022), sub verdo "flexibility" <https://dictionary.cambridge.org/dictionary/english/flexibility>.

flexibility and party autonomy, a person with limited experience in the arbitration process could be forgiven for imagining that the development of the detailed pre-hearing and hearing procedures for an arbitration begins with a tabula rasa; that is, that the parties and the arbitrators arrive at the first procedural conference with no specific expectations as to what the procedural steps will be. This is, of course, incorrect. The reality is that each of the participants arrives with their own expectations, based on myriad factors, including the legal cultures in which they were trained and their past experience with arbitration and other forms of dispute resolution.

Procedural "norms" are essential to resolving disputes arising from differing expectations about procedural matters. Indeed, inherent in the concept of procedural flexibility is the premise that there are procedural norms. Procedural flexibility is the ability to depart from procedural norms in appropriate circumstances, without unduly compromising the ultimate objectives of the process. So, for example, if there is a procedural norm that pre-hearing examinations of witnesses[4] are not permitted in arbitration, procedural flexibility will allow a departure from that norm if good cause is shown for doing so and if goals such as time and cost efficiency are not unduly compromised.

Before deploying the notion of procedural norms, however, one must be mindful that "norms" differ from one arbitral community[5] to another, even though within each such community, once a critical level of shared experience is reached,

[4] Variously called "depositions", witness "questioning", and "examinations for discovery" depending on the proponent's legal tradition.

[5] I confess that "arbitral community" is an uncertain phrase, and that the notion of "community norms" is circular. The shared belief in a set of norms may define the community. As I use the phrase "arbitral community" I refer to a group of arbitration practitioners with shared experiences, sometimes connected by geography, but more often by training and experience, who share a belief in a set of procedural norms and objectives for commercial arbitration.

there are many common expectations. This means that, just as one may be called upon to identify an applicable law, one should have regard to which set of procedural norms is most relevant to the proceeding. For example, in a domestic arbitration seated in Ontario, should the procedures emulate those most familiar to a tribunal comprised of arbitrators with vast experience in international arbitration, or should they emulate those familiar to the parties and their counsel whose experience is largely limited to Ontario court proceedings?

Detailed procedures to be used in arbitrations generally are not legislated.[6] The purpose of arbitration legislation, and of legislative reform initiatives, is to establish the legal framework within which arbitrations are to be conducted. Legislation cannot, and should not attempt to, replicate or limit the results of the chemistry involved in developing a procedural schedule for a case through exchanges among the parties and the tribunal. For the same reason, while they are very specific about how arbitrations are to be commenced and how tribunals are to be constituted, even widely-used institutional arbitration rules tend to provide parties and tribunals broad discretion to shape pre-hearing procedures and the conduct of any hearings. This approach is best exemplified by the exhortation in article 25 of the ICC Rules that "[t]he arbitral tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means".[7] The flexibility that results from this

[6] See e.g., article 19(1) of the *UNCITRAL Model Law on International Commercial Arbitration (1985, with 2006 amendments)* (which is the basis for international arbitration legislation in Canada, states "[s]ubject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings". Under article 19(2), failing agreement, "the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate.")

[7] *ICC Arbitration Rules 2021,* Public Source Materials, pp 1—104, in Force 1 January 2021. Article 22 states: "1) The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute. 2) In order to ensure effective case management, after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it

approach is essential to the effectiveness of the arbitral process, but leaves open the question of norms or defaults that should apply if there is not good reason to depart from them.

Even so, there has been a broad consensus among international practitioners concerning procedural norms for international commercial arbitrations. The *IBA Rules for Taking of Evidence in International Arbitration* ("IBA Rules"), first published in 1999,[8] sought to identify some of these norms of procedure based on the vast experience of its working group members and their consultations with members of the international arbitral community. In international commercial arbitrations, even when they come from very different domestic legal cultures, experienced counsel and arbitrators typically arrive with common expectations as to what steps the process should include, and in what sequence, unless good cause is shown to depart from them.[9]

---

considers appropriate, provided that they are not contrary to any agreement of the parties;" Article 20 of the "Canadian Dispute Resolution Procedures," *ICDR Canada,* states "[subject to these Rules, the arbitral tribunal may conduct the arbitration in whatever manner it considers appropriate, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case;" The *UNCITRAL Arbitration Rules, 2021* state, at article 17(1) "1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute".

[8] *IBA Rules on the Taking of Evidence in International Arbitration*, 17 December 2020. Even the IBA Rules, however, do not specify a sequence of pre-hearing steps or prescribe detailed hearing procedures.

[9] See Jennifer Kirby, "In International Arbitration, There Are No Tribes," in Julie Bédard & Patrick W Pearsall, *Reflections on International Arbitration – Essays in Honour of Professor of George Bermann,* (The Juris Arbitration Law Online Library, 2022), pp 285—291. ("[t]he IBA Rules effectively described in words the bridge that parties and arbitrators had built in practice – case by case, tribal clash by tribal clash – to span the divide that separated

In 2018, a Working Group of civil law trained arbitration practitioners developed the *Inquisitorial Rules of Taking Evidence in International Arbitration* ("Prague Rules").[10] The development of the Prague Rules was both a recognition of the widespread acceptance of the IBA Rules as exemplifying existing procedural norms, and an effort to provide an alternative. The impetus for the Prague Rules, as explained by the Working Group, was the perception that procedures based on the IBA Rules involved an adversarial approach—characterized by more passive case management by arbitrators, extensive document production, fact witnesses, party appointed experts and cross-examination—associated with common law traditions. The Working Group said:

> In light of all of this, the drafters of the Prague Rules believe that developing the rules on taking evidence, which are based on the inquisitorial model of procedure … would contribute to increasing efficiency in international arbitration. By adopting a more inquisitorial approach of the Arbitral Tribunal, the new rules will help the Parties and Arbitral Tribunals reduce the duration and costs of arbitrations.[11]

It lies outside the scope of this article to discuss the specific differences between the IBA Rules and the Prague Rules, but

---

common-law and civil-law Lawyers. That bridge incorporated elements of both legal cultures and also left elements of both behind…. Becoming a member of the international arbitration community does not mean renouncing our tribes of origin. On the contrary, it means embodying our tribe's principles of fairness and justice and using them to enrich the arbitral process.")

[10] *Rules of Taking Evidence in International Arbitration* (Prague Rules), Draft of 1 September 2018, www.praguerules.com, p 2.

[11] *Ibid*.

much has been written on the subject.[12] It is significant, however, that both sides of the debate concerning the Prague Rules accept that there are, indeed, well entrenched norms of procedure for international commercial arbitrations that differ in important respects from national legal cultures.

While Canadian international arbitration practitioners generally subscribe to the procedural norms described in the IBA Rules, there is no apparent consensus among Canadian practitioners about norms of procedure for domestic commercial arbitrations. Some practitioners prefer a series and sequence of pre-hearing steps similar to those used in court proceedings, culminating in an oral hearing resembling a trial. Other practitioners are convinced that the norms of procedure for international arbitrations should also be used in Canadian domestic arbitrations. A third group favours an intermediate approach, in which what are thought to be the best features of Canadian court procedures and international arbitration procedures are attempted to be combined. As a consequence of this disparity of views, and the absence of a widely accepted set of procedural norms, within Canada there is not yet a fully coalesced community of like-thinking domestic commercial arbitration practitioners. In practice, these differences in the procedural expectations of participants can give rise to concerns, often unjustified but nonetheless genuinely felt, about the fairness and integrity of the arbitral process.

Parties with different expectations often frame the discussion about appropriate procedures as a choice between achieving procedural fairness and achieving time and cost

---

[12] See e.g., Duarte G. Henriques, "The Prague Rules: Competitor, Alternative or Addition to the IBA Rules on the Taking of Evidence in International Arbitration?", (2018), 36, ASA Bulletin, Issue 2, pp 351—363, <https://kluwerlawonline-com.proxy.queensu.ca/JournalArticle/ASA+Bulletin/36.2/ASAB2018030>; Charles Tian, "The Prague Rules and the IBA Rules on Taking of Evidence in International Arbitration: Friends or Foes?" (6 February 2019), online (blog): *Transnational Notes* <blogs.law.nyu.edu/transnational/2019/02/the-prague-rules-and-the-iba-rules-on-taking-of-evidence-in-international-arbitration-friends-or-foes/>.

efficiency. Experienced arbitration practitioners, having seen that both goals are achieved by a properly structured process, would consider this a false dichotomy. A counsel whose training and experience leads them to consider that a "normal" process involves an exhaustive exploration of the facts over three or four years, with expansive appeal rights thereafter, may understandably hold a different view. One should not underestimate the influence that the disappointed expectations of counsel have on the perceptions of the parties themselves. If there were widely accepted norms for the procedural steps in a domestic arbitration, which the parties could fairly be taken to have accepted when agreeing to arbitration, there should be less room for disappointed expectations.

Sometimes, the procedural expectations of the parties differ from those of the arbitrator, resulting in clashes between the principle of party autonomy and the principle that the arbitrator is to manage the process in a fair and efficient manner. The parties, of course, can trump the authority of the arbitrator by agreement. In some instances, this results in the parties negotiating a detailed arbitration agreement to tie the arbitrator's hands and build-in processes that one would normally associate with a domestic court action. As they do so, however, parties and their counsel may lose sight of the fact that the process to which they are agreeing inevitably undermines any prospect of achieving time and cost efficiency. The existence of a widely recognized set of procedural norms for domestic commercial arbitrations would assist in moderating differences in the expectations between the parties and tribunals.

The lack of consensus about procedural norms can also expose awards to judicial second-guessing of decisions which, although they may be dressed-up as errors of law, are in fact rooted in concerns about arbitrators' procedural decision-

making.[13] Some judges are naturally imbued with the sense that the procedural checks and balances in the rules of court reflect what parties are entitled to expect from any fair dispute resolution process, and cannot help but harbour genuine concerns about the impact on fairness of structures with which they are not familiar. An identifiable set of procedural norms for domestic commercial arbitrations which could be cited in such cases would provide comfort to courts that, despite differences between court and arbitration procedures, the arbitral process is fair.

In Canada, geography and political boundaries have contributed to differences of perspective about procedural norms for domestic arbitration. Domestic arbitration practices vary from province to province to reflect the experiences and traditions of the local arbitration communities. Factors such as the level of international experience of local counsel and arbitrators, the extent to which arbitration work is concentrated among specialists or shared among generalists, local judicial interpretation and application of domestic arbitration legislation, whether or not there is a strong local arbitral institution, the number of arbitrators who are retired judges or retired senior counsel with vast experience in court processes and limited experience in arbitration practice, the availability of specialized training in arbitration procedures, and a host of other factors explain these regional differences of expectation.

As mentioned above, there are good reasons for arbitration legislation not to be too prescriptive about the conduct of arbitral proceedings, so as to preserve procedural flexibility. Initiatives to reform Canada's domestic arbitration laws should be supplemented by the development of some form of protocol, statement of principles, or other soft law instrument, akin to the IBA Rules and Prague Rules, but informed by Canadian domestic arbitration practice. The process of developing such a protocol

[13] See discussion of this phenomenon in, Gerald W. Ghikas, "Costs in Domestic Arbitrations: Who Decides How to Decide What Is 'Reasonable?," 78 Advocate (Vancouver) 29—38 (2020).

would allow for a fulsome discussion of best practices across the country, and its publication would lead to better informed procedural expectations. This project could be undertaken by one or more of our national arbitral organizations, or by an *ad hoc* group. Key to its success, however, would be meaningful consultation and representation with all relevant arbitral communities.

Such a statement might include a description of norms regarding:

- When and how the procedural schedule is established;
- The use and form of intermediate, court-like pleadings such as statements of claim, statements of defence, counterclaims, and replies;
- The use and form of statements of case or memorials, and what they include;
- The number and sequence of statements of case or memorials;
- Amendments to claims and defences;
- The scope and sequence of document production requests;
- How disputes about document production are to be resolved;
- The form in which documents are to be produced;
- The form of direct evidence, the content of witness statements and their evidentiary status;
- The content of expert reports and their evidentiary status;
- The identification of documents tendered as exhibits and the timing and sequence for their delivery;
- Any presumptions that might apply to documents tendered as exhibits to obviate individual proof, and when they achieve evidentiary status;
- The timing of delivery of pre-hearing written arguments of fact and law;
- Objections to the admissibility of evidence, when they are made and when they are decided;
- Pre-hearing witness questioning;

- How procedural applications are made and decided;
- The scope of oral witness evidence (on direct, cross, and re-direct) at the evidentiary hearing;
- The use at the hearing of documents that have not been tendered as exhibits;
- Exclusion of witnesses at the evidentiary hearing;
- Protocols for virtual hearings; and
- When, how, and on what evidentiary basis costs are decided.

While there is value to "codifying" procedural norms in a soft law instrument, it is important to repeat that such an instrument should serve only to provide a common starting place for discussions about the procedures to be used in a particular case. Such discussions should focus on whether there is a good reason to depart from the normal way of doing things. If not, the normal process would apply. The parties would have greater certainty about what they are bargaining for when they agree to arbitrate rather than litigate in the Canadian courts. Counsel would be able to present the case for a departure from procedural norms in a reasoned and persuasive manner. Arbitrators would have a better framework for making procedural choices and could be more confident in their decisions. Perhaps most importantly, courts might be less likely to second-guess arbitral decisions based on perceived deficiencies in processes that actually accord with widely accepted procedural norms.

MOVING FORWARD WITH FEDERAL REFORMS

*Alexander M. Gay**

Through the enactment of the *Commercial Arbitration Act* ("*Commercial Arbitration Act*"),[1] the federal government adopted the 1985 version of the UNCITRAL Model Law, although with some significant changes. While arbitration is not a subject matter falling within federal constitutional jurisdiction, it is within the federal government's jurisdiction to legislate with respect to the liability of the Crown and federal Crown agents.[2] The enactment of a set of adjudicative rules to govern dispute resolution in contracts binding the federal government, such as the *Commercial Arbitration Act*, falls within this federal power. However, there are two large legislative gaps with the current state of affairs at the federal level. Firstly, the *Commercial Arbitration Act* does not include the amended 2006 UNCITRAL Model Law, which has been adopted by a host of nations and instead relies on the 1985 version. There are important differences between both versions and the *Commercial Arbitration Act* is not current. Secondly, the *Commercial Arbitration Act* applies only to commercial disputes — both domestic and international — leaving an important gap as it relates to the arbitration of non-commercial disputes that involve the federal government. The fixes necessary to deal with both legislative gaps are relatively simple. Firstly, amending the *Commercial Arbitration Act* to incorporate the 2006 version of the Model Law requires a simple amendment. Secondly, as it relates to non-commercial disputes, the enactment of a set of

* Alexander M. Gay is General Counsel with the Department of Justice and a part-time professor at the faculty of law of the University of Ottawa.

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

[2] *Rudolph Wolff & Co v Canada*, [1990] 1 SCR 695, 1990 CanLII 139 (SCC) [*Rudolph Wolff*].

arbitration rules is also within federal constitutional powers.[3] The federal government has a number of options in this regard.

I. COMMERCIAL ARBITRATION ACT: 1985 VERSION OF THE MODEL LAW

The *Commercial Arbitration Act* adopts the Model Law developed by the United Nations Commission on International Trade Law ("UNCITRAL") on June 21, 1985 ("Code"), although with some important changes to account for the division of powers between the federal and provincial governments. The Act is also the vehicle used to arbitrate admiralty and maritime cases as well as international trade disputes. The enactment of the *Commercial Arbitration Act* was seen as an important accomplishment, allowing Canada to align itself with other nations in creating a level playing field in commercial dispute resolution. The *Commercial Arbitration Act*, in combination with the New York Convention, which was also given legal force through federal legislation,[4] creates a regime that allows for an expedited dispute resolution process that is able to transcend national borders and, more specifically, allows a judgment debtor in a commercial dispute to quickly satisfy an award through the domestic courts.

Canada, as a federal state, had some added challenges when adopting the Model Law in its jurisdiction. Legal effect could only be given to the international commitments if the provinces enacted the Model Law, which they did, with some minor modifications in some cases.[5] A level playing field was created at the domestic level which was aligned somewhat with that of other nations that had also adopted the Model Law. A set of

---

[3] *Rudolph Wolff, supra* note 2.

[4] *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp.).

[5] See for example: *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sched 5.

uniform dispute resolution rules that were understood by all nations was erected.

While Canada and the provinces enacted the 1985 version of the Model Law, there were some important differences between the various provinces and between the provinces and the federal government. Canada, for instance, modified the Model Law to apply to all commercial arbitrations and not just international commercial arbitrations. Most provinces adopted the 1985 version of the Model Law without any significant changes to the text. Since its adoption in 1985, the gap has widened and the differences between the provinces and the federal government and even between provinces has amplified. There has been an uncoordinated response to the 2006 amendments to the Model Law in Canada which accounts for some of the more important differences. With the exception of Ontario and British Columbia, all other jurisdictions continue to rely on the 1985 version of the Model Law. The end result is that the remedies available in some jurisdictions as they relate to international commercial arbitration are greater in some jurisdictions than in others, depending on which version has been adopted.[6] The interim measures and preliminary order provisions of the 2006 version of the Model Law which are found in article 17, for example, are far more expansive than what exists under the 1985 version of the Model Law. The reason for the delayed response by some Canadian jurisdictions in adopting the 2006 amendments remains unanswered, other than to say that legislative change is slow unless there is pressing commercial necessity. Having said that, in a highly competitive world where commercial parties often forum shop, it would make some sense for all Canadian jurisdictions to update the legislation to the most current version of the Model Law. There is nothing in the 2006 amendments to the Model Law that could not be rolled into the *Commercial Arbitration Act*

[6] See for example, *UNCITRAL Model Law on International Commercial Arbitration, 2006* at art 17.

or that could not be adopted by the provinces that continue to rely on the 1985 version.

Parties that arbitrate under the federal *Commercial Arbitration Act* are left with the 1985 version of the Model Law, which they can modify through contractual arrangements, where it is permissible to do so. Not all articles under the Code are open to amendment through agreement and some are hardwired. The equal treatment of the parties found at article 18 is, for example, an inalienable provision that cannot be modified as it would undermine the very essence of arbitration. The language and the internal logic to the Code must be respected in assessing whether parties can amend a given article. Although, there is not a universal understanding on what can be modified in the Model Law and what is hardwired, with different jurisdictions taking different views. Thus, parties to a dispute can adopt rules that modify the current version of the Model Law and, where possible, align themselves with the 2006 version of the Model Law. However, there are obvious limitations in that the rules must be the result of an arbitration agreement, or after a dispute arises, a submission agreement. Reaching agreement between commercial parties is not always an easy task.

II. ABSENCE OF LEGISLATION IN RESPECT OF NON-COMMERCIAL DISPUTES

The *Commercial Arbitration Act* is limited in application. Firstly, the Act applies only in relation to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation, or in relation to maritime or admiralty matters.[7] The Act is also used as a vehicle to settle trade disputes under the various trade agreements for which Canada is a signatory. This limitation provides the constitutional basis for the passing of the legislation. Secondly, the word "international", which appears in paragraph (1) of article 1 of the Model Law, was deleted from

[7] *Commercial Arbitration Act*, *supra* note 1 at s 5(2).

paragraph (1) of article 1 of the Model Law. Paragraphs (3) and (4) of article 1 of the Model Law, which contain a description of when arbitration is international, were also deleted. Thus, paragraph (5) of the Model Law appears as paragraph (3) under the *Commercial Arbitration Act*. The result is that the *Commercial Arbitration Act* is not limited to international disputes, but captures all commercial disputes that involve the federal Crown. Thirdly, the Code applies where the dispute is in relation to a commercial dispute. As regards the term "commercial", no hard and fast definitions are provided in the Model Law, in large part because agreement could not be reached by the UNCITRAL Working Groups. Instead, article 1 of the Model Law contains a footnote calling for "*a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not*".[8] The footnote to article 1 then provides an illustrative list of relationships that are to be considered commercial under the Code. Guidance has to be taken from the Code and reliance on domestic law should be avoided.[9] Regardless of the definition that is ascribed to the word “commercial” in the *Commercial Arbitration Act* and its scope of application, it remains that the Act only applies to commercial disputes. There is no federal legislation in relation to non-commercial disputes where the federal Crown is a party to the dispute. There is also subject matter that escapes the application of the Act, such as claims grounded in intellectual property statutes and the *Competition Act*.[10]

The problem that arises from a practical perspective is that claims can encompass both a commercial and a non-commercial component. In cases where the non-commercial component of a dispute does not stem from the commercial relationship, a claimant will either not pursue arbitration altogether or move

---

[8] See *UNCITRAL Model Law on International Commercial Arbitration, 1994*.

[9] *Carter v McLaughlin*, [1996] CanLII 7962 (ON SC), 27 OR (3d) 792.

[10] *General Entertainment and Music Inc v Gold Line Telemanagement Inc*, 2022 FC 418 (CanLII).

to bifurcate the proceeding and pursue the claim under two sperate forums, creating a multiplicity of proceedings. Although, the frequency with which these cases occur should not be overstated.

III. CONSEQUENCES ARBITRATING UNDER THE WRONG ACT

There are clear consequences from arbitrating under the wrong legislation. For decades, there was the common belief in the legal marketplace that the federal government could not arbitrate non-commercial disputes, even under provincial legislation. The absence of legislation coupled with the fact that the federal government had only legislated in relation to commercial arbitration led to this flawed conclusion. The federal government often refused to arbitrate non-commercial disputes. In more recent years, the federal government has allowed non-commercial disputes to be adjudicated under provincial arbitration legislation. The current thinking is that non-commercial disputes involving the federal government can be adjudicated under provincial arbitration legislation.

However, the limited application of the *Commercial Arbitration Act* is often ignored by counsel—it is used either to adjudicate non-commercial disputes or, alternatively, the parties to an arbitration will adopt provincial legislation to adjudicate a commercial dispute. The *Commercial Arbitration Act* states that it applies to arbitral awards and arbitration agreements whether made before or after the coming into force of the Act.[11] Thus, the clear intent of the legislation is to ensure that the Act applies whether or not the parties referred specifically to the *Commercial Arbitration Act* in the arbitration agreement. The *Commercial Arbitration Act* does not require the Crown and federal Crown agents to agree to arbitration under that legislation, but applies once they have exercised their power of contract and have agreed to arbitration. The combined effect of sections 5(2) and 5(3) of the *Commercial Arbitration Act* is that federal legislation has mandatory application where all

[11] *Commercial Arbitration Act*, *supra* note 1 at s 5(3).

preconditions have been satisfied. There is no opting out of the federal legislation in favour of a provincial legislation where the federal Crown is a party to the dispute and where the dispute is commercial. Having said that, a party to an arbitration agreement to which the federal Act applies has the right to specify rules that are different from those outlined in the Code, to the extent that the Code allows for it and to the extent that they can be accommodated. This allows the federal Act to be aligned somewhat with the provincial acts. However, not all articles in the Code can be amended to align the arbitration with a provincial regime. For example, an appeal right cannot be created through agreement. The legal result of arbitrating a non-commercial dispute under federal legislation or adjudicating a commercial dispute under provincial legislation could be dire. While there are no reported cases on this point, the basic rule is that the federal Crown is immune from the application of provincial arbitration statutes.[12] Thus, to the extent that parties to an agreement have incorporated provincial legislation and ignored the application of the federal Act to a commercial dispute, it is likely that the award is unenforceable against the federal Crown. The legal consequence could be the same where a non-commercial dispute is arbitrated under federal legislation that has no application.

IV. ULCC EFFORTS TO HARMONIZE LEGISLATION

There has been dialogue between the various levels of government as it relates to the domestic provincial arbitration acts and the international commercial arbitration acts. On the domestic arbitration legislation, the Uniform Law Conference of Canada (ULCC) has had some impact on Canada's legal landscape and some provinces have adopted the proposed legislation or some variation thereof, creating some uniformity across some jurisdictions as it relates to domestic arbitration legislation. The more recent ULCC report that was issued in 2016 has only been partially adopted by one province, namely British Columbia. Regardless, a great deal of work needs to

[12] *Gauthier v R* (1918), 56 SCR 176, CanLII 85 (SCC).

happen before the domestic arbitration acts of the provinces are aligned with international arbitration standards. The ULCC proposed legislation continues to embrace English arbitration concepts that should be abandoned in favour of a more simplified approach, as is the case with the Model Law. For example, the inclusion of a provision in provincial legislation that allows a party to escape a stay of proceeding where there is a possibility for a motion for summary judgment has no place in commercial arbitration. This is an example where the balance between arbitration and the courts is disrupted, allowing the courts to unnecessarily involve themselves in arbitral matters. Regardless, attempts to harmonize domestic legislation through the ULCC do not directly concern the federal government in that it does not occupy this field entirely. As it relates to the federal *Commercial Arbitration Act*, it can be applied to both domestic and international arbitrations, but not to non-commercial arbitrations and it thus straddles the domestic and international acts under review by the ULCC. Canada is likely to resist deviating from the Model Law, as presented by UNCITRAL. Maintaining some consistency across the various international signatories is likely to remain a preoccupation of the federal government. Thus, the impact of the ULCC on the evolution of federal legislation has been marginal.

V. FEDERAL CHOICES GOING FORWARD

There are a number of choices for the federal government going forward in dealing with the legislative gaps.

Firstly, as it relates to the current *Commercial Arbitration Act*, some thought will have to be given to updating the current Act and aligning it with the 2006 version of the Model Law. Claimants must be given access to the interim measures and preliminary orders provisions found in article 17 of the 2006 Model Law. The amendments are easy to achieve. When adopted, it will achieve some uniformity with the provinces, such as Ontario and British Columbia, that have adopted the 2006 version of the Model Law. It is expected that the remaining

provinces will eventually adopt the 2006 version of the Model Law.

Secondly, as it relates to the gap that exists with non-commercial disputes, there are a number of options.

The first option would be to allow for the status quo. When necessary, the federal government could use the provincial acts to adjudicate non-commercial disputes or, alternatively, include dispute resolution provisions into different pieces of legislation on a case-by-case basis, where necessary. The problem with the current state of affairs is that where a dispute encompasses both a commercial and a non-commercial dispute, a claimant is forced to abandon arbitration or bifurcate the claim and pursue two separate claims in two different forums. This leads to inefficiencies and generally dissuades parties from arbitrating a dispute with the federal government. Also, allowing arbitration to exist in various federal acts and in different forms would impede the uniform development of arbitration principles at the federal level.

A second option would be to pass legislation that deals only with non-commercial disputes that involve the federal government. The issue is whether Canada stays faithful to the Model Law or whether it gives in to what exists at the provincial level in common law jurisdictions that refuse to move away from the arbitration Act that was inherited from the United Kingdom. What is proposed by the ULCC at the domestic level is not an answer for the federal government in that it results in a lengthy act that is overly prescriptive in nature. It may also not be an answer for the provinces. It would also be difficult to justify such an act in a context where Québec has adopted the Model Law to resolve both commercial and non-commercial disputes.

A third option would be to amend the current *Commercial Arbitration Act* and allow it to be applied to commercial and non-commercial disputes. Only a few amendments would be necessary, including the title of course. Québec has adopted the

Model Law and allows it to be applied to both commercial and non-commercial disputes without issue. Québec is aligned with international standards which has put it at the forefront of arbitration in Canada. There is simplicity in approach and a common understanding as it relates to the law of arbitration in Québec, regardless of whether it is commercial or non-commercial. The Model Law was intended to be supplemented with domestic law. Thus, the Model Law is ideal for a federal state in that it can draw on different aspects of provincial law. The third option is the favoured option. The federal government has an opportunity to move the arbitration agenda forward by signalling to the provinces that the overly prescriptive approach found in the domestic acts must be abandoned and that there must be an alignment with international arbitration standards.

DOMESTIC COMMERCIAL ARBITRATION REFORM IN CANADA: LESSONS FROM DOWN UNDER

*Professor Janet Walker, CM**

I. DOMESTIC ARBITRATION IN CANADA AT A CROSSROADS

Canada is a country of extraordinary potential in the field of commercial dispute resolution. Its increasingly multicultural and multilingual legal profession and judiciary are among the most highly qualified and respected in the world. Yet, for such a strong legal community, its development of the field of commercial arbitration began relatively late in comparison with the major centres in Europe and the United States. With fewer entrenched practices and conventions, the Canadian arbitration community is freer to adopt state-of-the-art legislation and soft law in the field and perhaps even to lead the way with new innovations. There is room to grow in the collective knowledge and experience of the field.

In 1986, Canada was the first jurisdiction to adopt the 1985 UNCITRAL Model Law on International Commercial Arbitration and, as one province after another enacted implementing statutes over the next few years, the Model Law replaced the antiquated legislation derived from the English Acts. With this new standardized legislation, Canadian practitioners in the field of international commercial dispute resolution gained familiarity with the legislation that has been adopted in many of the countries in which they might find their arbitrations seated. In learning to practice international commercial arbitration in Canada, they were learning the legal *lingua franca* of arbitration.

* Janet Walker, CM is a Distinguished Research Professor at Osgoode Hall Law School and co-author of *Commercial Arbitration under the Model Law in Australia* (3rd ed, 2022).

Unlike some other countries, the Canadian provinces did not, at that time, make the Model Law applicable to domestic arbitration, nor did they revise their domestic legislation, which governed both commercial and non-commercial arbitration. However, as the experience of arbitration has increased, so has the recognition that commercial arbitration in Canada has much more in common with international commercial arbitration than it does with domestic arbitration of non-commercial disputes such as labour and family disputes. Legislative reform initiatives to establish specialized regimes based on the Model Law for commercial matters are now underway in Ontario[1] and such regimes are in place elsewhere in Canada.[2] This article considers the experience in Australia with reforming its domestic commercial arbitration law; and it suggests ways that Canada might learn from the experience of a similar legal community.

II. ADOPTING THE MODEL LAW IN AUSTRALIA FOR DOMESTIC COMMERCIAL DISPUTES

The Model Law was adopted in 2010 as the framework for domestic commercial arbitration across Australia.[3] This was the culmination of decades of legislative reform in which each new Act had been based largely on developments in the English legislation.[4] For example, the NSW 1902 *Arbitration Act* and those of other states and territories were based on the UK

[1] See Toronto Commercial Arbitration Society, "Arbitration Act Reform Committee Report" (12 February 2021), online (pdf): *Toronto Commercial Arbitration Society* <https://torontocommercialarbitrationsociety.com/wp-content/uploads/2021/03/AARC-Final-Report-12-Feb-21.pdf>.

[2] See *Arbitration Act,* SBC 2020, c 2.

[3] See *Commercial Arbitration Bill 2010* (Cth), 61/2010.

[4] See Hilary Astor & Christine Chinkin, *Dispute Resolution in Australia*, 2nd ed (Sydney, Australia: LexisNexis Butterworths, 2002) at 11 (tracing the history of arbitration in Australia to Indigenous dispute resolution practices).

Arbitration Act 1889,[5] and they remained largely unamended for nearly a century.[6] Reforms that were enacted during this time also followed developments in the English arbitration legislation.

Throughout the 20th century, arbitral practice in Australia varied from jurisdiction to jurisdiction, with each state and territory having its own, separate Act. This lack of uniformity prompted a series of reforms that ultimately led to the enactment of uniform statutes in several States between 1984 and 1990.[7] While this legislation was itself ultimately superseded, it confirmed Australia's commitment to legislating for commercial arbitration separately from arbitration in non-commercial fields such as labour law. It also confirmed the commitment to a unified statute applicable throughout Australia.

Despite these achievements, it gradually became clear that these uniform statutes needed further reform. Although the Acts sought to promote "economy, celerity and finality",[8] the provisions of the legislative regime enabled undue judicial intervention and departed from international best practice in

---

[5] *Arbitration Act 1958* (Vic); *Arbitration Act 1935* (SA); *Arbitration Act 1892* (Tas); *Arbitration Act 1970* (WA). Queensland retained the *Interdict Act 1867* (Qld), modelled on England's 1698 legislation (as amended by the 1833 and 1854 legislation until enacting the *Arbitration Act 1973* (Qld), adopting the *Arbitration Act 1950* (UK).

[6] See Austl, Commonwealth, Law Reform Commission of the Australian Capital Territory, *Report on the Law Relating to Commercial Arbitration*, Parl Paper No 23 (1974) at 2.

[7] *Commercial Arbitration Act 1984* (NSW); *Commercial Arbitration Act 1984* (Vic); *Commercial Arbitration Act 1990* (Qld); *Commercial Arbitration Act 1985* (WA); *Commercial Arbitration and Industrial Referral Agreements Act 1986* (SA); *Commercial Arbitration Act 1986* (Tas); *Commercial Arbitration Act 1985* (NT); *Commercial Arbitration Act 1986* (ACT).

[8] *Tuta Products Pty Ltd v Hutcherson Bros Pty Ltd* (1972) 127 CLR 253 at 257 per Barwick CJ.

various ways.[9] The Standing Committee of Attorneys-General (SCAG) determined that a new domestic arbitration Act should strike out on a fresh course, departing from the previous practice of following the English legislation.[10]

Unlike Canada, law reform in Australian benefits from the work of the SCAG, which is comprised of the Attorneys-General from the Australian Government, all states and territories, and the New Zealand Minister for Justice. Although it has a similar function to a law reform commission, it is embedded in government, giving it the benefit of more direct engagement with the legislative process and agenda. Pursuant to recommendations of the SCAG, in 2010, the Australian States, began adopting a uniform Commercial Arbitration Act based on the 2006 version of the UNCITRAL Model Law.[11]

III. ADAPTING THE MODEL LAW FOR DOMESTIC COMMERCIAL ARBITRATION

Of particular interest for law reform initiatives in Canada are the ways Australia adapted the Model Law to regulate domestic commercial arbitrations.

1. Necessary adaptations and supplementary provisions

Several adaptations were needed to meet the logistical requirements of domestic arbitration. For example, definitions

---

[9] See Hon J Spigelman AC, "Opening of Law Term Dinner 2009" (2 February 2009), online (pdf): The Law Society of NSW <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2009/16.pdf>.

[10] See Parliament of Australia, "Standing Committee of Attorneys-General Communique (7 May 2010), online (pdf): <https://perma.cc/6UDU-9JWE>.

[11] *Commercial Arbitration Act 2010* (NSW); *Commercial Arbitration Act 2011* (Vic); *Commercial Arbitration Act 2011* (SA); *Commercial Arbitration Act 2012* (WA); *Commercial Arbitration Act 2011* (Tas); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT); *Commercial Arbitration Act 2013* (Qld); *Commercial Arbitration Act 2017* (ACT) (collectively "CAAs").

were provided to clarify relevant provisions of the operation of the Model Law in the domestic context.[12] Further, the provision in the Model Law for identifying which court at the seat is competent to perform the functions designated by the Model Law was completed to designate Australia's counterparts to the provincial superior courts in Canada, and to permit the parties to agree that a lower court may also have jurisdiction.[13] The legislation also removes the nationality requirement for arbitrators appointed by the court. While many tribunals are constituted by the parties in accordance with the arbitration agreement, when there is need to resort to an appointing authority, the question of an arbitrator's qualifications becomes relevant.

In international arbitrations, the nationality of arbitrators—especially sole and presiding arbitrators who have not been appointed by the parties—may be of significance. Arbitrators of a nationality other than the parties' may be less familiar with the governing law, the language of the proceedings, and the way contracts are typically interpreted or performed in the parties' home countries. These factors may be seen as affecting the understanding an arbitrator may have for the parties' positions. Where an arbitrator shares the nationality of one party and not the other, this may seem to create a risk that the parties will not be treated with equality. Accordingly, in addition to other concerns about the arbitrators' qualifications, the Model Law provides that "in the case of a sole or third arbitrator, [the appointing authority] shall take into account as well the advisability of appointing an arbitrator of a nationality other

[12] CAAs, *supra* note 11. The CAAs amend the definition for 'arbitration' and introduce definitions for the following terms not defined in the Model Law: 'arbitration agreement,' 'confidential information,' 'Disclose,' 'domestic commercial arbitration,' 'exercise,' 'function,' 'interim measure,' 'party,' and, 'the Court.'

[13] See *Commercial Arbitration Act 2010*, 2010/61, s 6 [*Commercial Arbitration Act*].

than those of the parties."[14] No such concern is likely to arise in a domestic case and, accordingly, a provision for the nationality of the sole or third arbitrator appointed by the court was omitted.

The legislation also contains a number of provisions for court support of arbitration, such as those for applications to issue subpoenas,[15] and those for a court to make orders requiring a defaulting party to attend in court, to produce relevant documents, or otherwise to comply with the tribunal's orders.[16] The legislation also supplements the Model Law with provisions relating to consolidation,[17] arb-med,[18] and costs and interest.[19]

2. The standard of fairness

A critical mandatory, or "non-derogable," feature of the Model Law is the requirement that the parties must be treated with equality and that each party must be given a full opportunity to present its case. It is important to have a standard of fairness (or due process) in a procedure that encourages party autonomy and enhance efficiency. However, the experience in many countries with the "full opportunity" standard shows that it may be set too high, in that it can become a basis for parties to resist appropriate measures to advance the arbitration in cost-effective manner.

---

[14] *UNCITRAL Model Law on International Commercial Arbitration*, UNCITRAL, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006), art 11(5) [*Model Law*].

[15] *Commercial Arbitration Act*, *supra* note 13 at s 27A.

[16] *Ibid* at s 27B.

[17] *Ibid* at s 27C.

[18] *Ibid* at s 27D.

[19] *Ibid* at s 33B—F.

Accordingly, the drafters of the Australian legislation adopted the approach taken in the English *Arbitration Act* of requiring that the parties be given a *reasonable* opportunity to present their cases. Although the change from "full" to "reasonable" opportunity might appear to depart from that in the Model Law, it reflects the sense of the official Analytical Commentary on the Model Law, which observes that the provision "does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award."[20] The "reasonable opportunity" standard also reflects the interpretation given to the "full opportunity" standard in many jurisdictions.[21] In this way, this adjustment to the text of the Model Law is probably better understood as a clarification rather than an amendment.

3. Default number of arbitrators

A further provision dictated by the domestic arbitration context—one that represents a genuine departure from the Model Law—is the provision for the default number of arbitrators.

Most arbitral tribunals consist of one or three arbitrators. The cost and administrative burden of conducting an arbitration with a tribunal of three arbitrators is greater than with a tribunal of one, but parties may prefer a three-member tribunal for a variety of reasons. In principle, it is assumed that, subject to the parties choosing otherwise for their own particular reasons, a tribunal of three is preferable in contracts likely to give rise to larger and more complex arbitrations, while a sole

---

[20] *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration,* 18th sess, UN Doc A/CN.9/264 (3-21 Jun 1985) Art 18, para 8.

[21] Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill* (February 1996) paras 164—165; See also *Corporacion Transnacional de Inversiones, SA de CV et al v STET International,* SpA (2000), 49 OR (3d) 414, [2000] OJ No 3408 (Ont CA).

arbitrator is preferable in contracts likely to give rise to smaller and more straightforward arbitrations.

Where the parties have not agreed on the number of arbitrators, the question must be resolved before a tribunal can be constituted. The Model Law addresses this impediment by providing for a default number of three arbitrators.[22] In international arbitrations, with the greater likelihood of a need to interpret and apply multiple laws and standards, a three-person tribunal is suitable as a default. In addition, international arbitrations often involve parties, witnesses, experts and counsel from different language and legal traditions, making it helpful to have some tribunal members who are familiar with these languages and legal systems. This is particularly true where a relevant language or legal system is different from that of the designated seat or language of the arbitration.

These considerations arise less often in domestic arbitrations. Accordingly, where the size and complexity of a domestic arbitration do not otherwise warrant the constitution of a three-person tribunal, a sole arbitrator is likely to be more suitable. Therefore, the CAAs provide that unless the parties agree otherwise, the number of arbitrators is to be one.[23] This approach has also been taken in Singapore[24] and England.[25]

4. The duties of the Tribunal and the parties

Litigation lawyers in North America and elsewhere in the common law world will be familiar with provisions in civil procedure rules that guide the interpretation and application of the rules. For example, in the Ontario *Rules of Civil Procedure*,

---

[22] *Model Law, supra* note 14 at art 10.

[23] *Commercial Arbitration Act*, supra note 13 at s 10.

[24] *Arbitration Act* Cap 10, 2002 Ed (Singapore), s 12(2).

[25] *Arbitration Act 1996* (UK), s 15(3).

Rule 1.04(1) provides that "[T]hese rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits"; and Rule 1.04(1.1) adds that "[i]n applying these rules, the court shall make orders and give directions that are proportionate to the importance and complexity of the issues, and to the amount involved, in the proceeding."[26] Although these rules are rarely invoked in litigation, provisions for interpretive guidance, such as these, can encourage an appropriate interpretation and application of the rules by the parties, and they can empower the tribunal to act decisively in furtherance of the objectives identified.

Beyond the interpretive guidance found in Art 2A of the Model Law, which is discussed below, there is no provision comparable to Rule 1.04(1.1) in the Model Law for the conduct of the arbitration. Provisions such as this are usually found in institutional rules and soft law instruments. For example, the LCIA Rules[27] provide

> 14.1 Under the Arbitration Agreement, the Arbitral Tribunal's general duties at all times during the arbitration shall include:
>
> (i) a duty to act fairly and impartially as between all parties, giving each a reasonable opportunity of putting its case and dealing with that of its opponent(s); and
>
> (ii) **a duty to adopt procedures suitable to the circumstances of the arbitration, avoiding unnecessary delay and expense, so as to provide a fair, efficient**

[26] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 1.04(1).

[27] London Court of International Arbitration, *Arbitration Rules*, effective 1 October 2020, r 14.

> **and expeditious means for the final resolution of the parties' dispute.**
>
> 14.2 ***The Arbitral Tribunal shall have the widest discretion to discharge these general duties***, subject to the mandatory provisions of any applicable law or any rules of law the Arbitral Tribunal may decide to be applicable; and at all times ***the parties shall do everything necessary in good faith for the fair, efficient and expeditious conduct of the arbitration, including the Arbitral Tribunal's discharge of its general duty***.
>
> … (emphasis added)

Like the LCIA Rules, which often apply in cases involving counsel practising in the same jurisdiction, the CAAs frequently operate in ad hoc matters involving counsel accustomed to the same local rules, who may tend to default to the less efficient local court practices. Accordingly, there was thought to be a need for the legislation to empower tribunals to encourage the parties to proceed with greater expedition. Stipulating the adoption of efficient procedures as a duty of the tribunal that the parties must support can have a subtle but profound effect on the arbitral process. It encourages all the participants in the arbitration to adhere to practices that support efficiency in the arbitral process.

Accordingly, the drafters of the CAAs included a provision identifying a paramount object and setting out the role of the tribunal in achieving that object:

> 1C (1) The paramount object of this Act is to facilitate the fair and final resolution of commercial disputes by impartial arbitral tribunals without unnecessary delay or expense.

> (2) This Act aims to achieve its paramount object by:
>
> (a) enabling parties to agree about how their commercial disputes are to be resolved (subject to subsection (3) and such safeguards as are necessary in the public interest), and
>
> (b) providing arbitration procedures that enable commercial disputes to be resolved in a cost-effective manner, informally and quickly.[28]
>
> (3) This Act must be interpreted, and the functions of an arbitral tribunal must be exercised, so that (as far as practicable) the paramount object of this Act is achieved.

As in the LCIA Rules, the approach in the CAAs is further supported by a provision imposing analogous duties upon the parties:

> 24B (1) The parties must do all things necessary for the proper and expeditious conduct of the arbitral proceedings.
>
> (2) Without limitation, the parties must:
>
> (a) comply without undue delay with any order or direction of the arbitral tribunal with respect to any procedural, evidentiary or other matter, and
>
> (b) take without undue delay any necessary steps to obtain a decision (if required) of the Court with respect to any

[28] *Commercial Arbitration Act*, *supra* note 13 at s 1C.

> function conferred on the Court under section 6.
>
> (3) A party must not willfully do or cause to be done any act to delay or prevent an award being made.[29]

This encourages parties to engage fully in the development of the process and to support arbitrators in resolving disputes over the procedure of the arbitration and in fashioning appropriate procedures that enhance efficiency. In most arbitrations, the subtle interplay between the authority of the tribunal and party autonomy is achieved more through moral suasion than through the coercive exercise of the tribunal's powers. The bare provisions of the Model law that appear to bind a tribunal to the agreed position of the parties and to permit it to exercise discretion only where the parties have not agreed, may not assist a tribunal in guiding the parties to more effective and efficient procedures.

In contrast, provisions that give the tribunal powers and responsibilities, and that establish correlative responsibilities for the parties, transform party dictates on the procedure into *proposals* for discussion, and give the tribunal confidence that the directions and orders that it issues will be followed. These provisions promote the engagement of arbitrators and parties in a collaborative effort to conduct the arbitration efficiently. As mentioned, this is particularly important in domestic cases, which often proceed without institutional rules containing provisions like those in the LCIA Rules quoted above.

5. Appeals on a question of law

The most contentious of issues for the reform of domestic commercial arbitration are probably those of whether there

[29] *Commercial Arbitration Act*, *supra* note 13 at s 24B.

should be appeals on a question of law. On the one hand, arbitration is prized for its finality, and the parties' freedom to choose to resolve their disputes outside the confines of the courts. Review of the merits of the award by a court could undermine this choice. Finally, where the parties have chosen their decision-maker, particularly where the tribunal is comprised of three arbitrators, it seems inappropriate to have the merits of the dispute revisited by a first instance judge who has been assigned randomly to the matter.

Nevertheless, appeals on a question of law have been included in the various arbitration acts modelled on the English legislation, raising the question of the historic role of appeals. Two points of context are worth noting. First, where the legislation also provides for the arbitration of non-commercial matters, this will include matters involving statutory and other legal rights that reflect important social policies. Societies are unlikely to accept that a private dispute resolution system supported by legislation and the courts would permit parties to depart from the application of these policies in deciding the dispute without the possibility of review by the courts. This concern, however, is less pressing where the arbitration legislation is limited to commercial matters.

Secondly, the English provisions for review on a question of law have a very different history and application from those in the legislation of Australia or Canada. The position of London, historically, as an international dispute resolution venue of unique significance is said to have grown from the application of English commercial law around the world.[30] Accordingly, ensuring that the jurisprudence continues to develop through the caselaw, and ensuring that it is applied correctly by arbitrators, has been essential. Furthermore, in maritime

[30] Lord Justice Gross, "A Good Forum to Shop in: London and English Law Post-Brexit" (Speech delivered at the 35th Annual Donald O'May Maritime Law Lecture, 1 November 2017), online (pdf): *Judiciary of England and Wales* <https://www.judiciary.gov.uk/wp-content/uploads/2017/11/gross-lj-omay-maritime-law-lecture-20171102.pdf> [Gross].

disputes, a field in which the annual caseload of the LMAA outpaces that of the major international institutions combined,[31] the law goes hand-in-hand with the standard insurance forms. This symbiotic relationship[32] between arbitral tribunals and courts was once enshrined in the "case stated" procedure, by which arbitrators could ask the courts for a determination on a point of law as it applied to a specified set of facts.[33] This may now be history, but its function has survived in the English *Arbitration Act 1996*, section 69 provision for appeal on a question of law.[34] These considerations have less significance for domestic commercial arbitration in Australia or Canada.

In the Australian legislative reforms, various means were considered for retaining appeals but constraining their availability. Following two decades of debate, the CAAs now contain narrow arrangements for appeals on a question of law:

---

[31] Sofia Syreloglou et al, "The UK Maritime Sectors Beyond Brexit", (2017) at 14–18, online (pdf): *University of Southampton* <https://perma.cc/974P-6W7F>.

[32] Gross, *supra* note 30.

[33] Lord Hacking, "The 'Stated Case' Abolished: The United Kingdom Arbitration Act of 1979" (1980) 14 *Int. Lawyer* 95.

[34] Section 69 of the *Arbitration Act, 1996* provides

> (b) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.

An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.

(2) An appeal shall not be brought under this section except—

(a) with the agreement of all the other parties to the proceedings, or

(b) with the leave of the court.

- within three months of receiving the award,[35] an appeal may be sought by any party to the agreement, but only if the parties agree ***and*** the court grants leave.[36]
- leave may be granted if (a) the determination of the question *will* substantially affect the rights of one or more of the parties;[37] ***and*** (b) the question is one which the tribunal was asked to determine;[38] ***and*** (c) it is just and proper in all the circumstances for the court to determine the question.[39]
- the court must not grant leave unless satisfied that on the basis of the findings of fact in the award, the decision of the tribunal on the question is obviously wrong.[40]
- the court must not grant leave unless satisfied that on the basis of the findings of fact in the award, the question is one of general importance and the decision of the tribunal is at least open to serious doubt.[41]
- the application must identify the question of law to be determined and state grounds on which appeal should be granted.[42]
- the court is to determine the application for leave without a hearing, unless it appears to the court that a hearing is required.[43]
- the court may confirm, vary, set aside in whole or in part or remit award if the appeal is successful ***but*** s 34A(8)

---

[35] Section 34A(6) of the *Commercial Arbitration Act 2010*, or three months from the date of the tribunal's response to a request for interpretation, clarification, or correction of the Award.

[36] *Commercial Arbitration Act*, *supra* note 13 at s 34A(1)—(2).

[37] *Ibid* at s 34A(3)(a).

[38] *Ibid* at s 34A(3)(b).

[39] *Ibid* at s 34A(3)(d).

[40] *Ibid* at s 34A(3)(c)(i).

[41] *Ibid* at s 34A(3)(c)(ii).

[42] *Ibid* at s 34A(4).

[43] *Ibid* at s 34A(5).

> the court may set aside the award only if it is inappropriate to remit.[44]

Of these provisions, the most important is the conjunctive requirement of the parties' agreement *and* the leave of the court. That the availability of an appeal is optional removes the shadow of the lack of finality from the arbitral process, replacing it with a provision that supports party choice by requiring the parties to opt in.

The opt-in requirement signals to commercial parties that there is no general expectation that the decisions of a tribunal will be reviewable in the courts. Moreover, as it is unlikely that parties will agree to permit an appeal once the arbitration is underway, the availability of appeals is limited to business relationships in which at least one of the parties requires judicial oversight as a basic feature of its dispute resolution. Enabling the parties to choose to allow appeals makes it possible for them to choose arbitration without losing the opportunity of court review. It may serve the needs of parties that might otherwise seek to establish more controversial asymmetric arbitration clauses in which a party with greater bargaining power reserves for itself alone the freedom to litigate its claim instead of going to arbitration.[45]

The leave requirement is designed to reduce further the availability of the appeals, thereby promoting finality and judicial economy. However, leave requirements can be difficult to apply in ways that will achieve the desired result. Disappointed parties who are determined to reverse the

---

[44] *Commercial Arbitration Act*, *supra* note 13 at s 34A(7).

[45] Brooke Marshall, "Asymmetric jurisdiction clauses and the anomaly created by Article 31(2) of the Brussels I Recast Regulation" (2022) 71:2 *ICLQ* 297; Alexander Gay, "Legal pitfalls in asymmetrical arbitration clauses" (15 May 2019), online: *The Lawyer's Daily* <https://www.thelawyersdaily.ca/articles/12278/legal-pitfalls-in-asymmetrical-arbitration-clauses>.

outcome of the arbitration, and who are able to invest the resources in the effort to so do, may seek leave to appeal regardless of the merits of their entitlement to it. Clever arguments will be developed to establish why the question appealed *will* substantially affect the rights of the appellant, why the question is one of general importance, why the decision of the tribunal is at least open to serious doubt, and why it is just and proper in all the circumstances for the court to determine the question on appeal. Some parties may also seek to persuade the court that the application for leave requires an oral hearing and cannot be decided in writing. Regardless of the odds of success, applications for leave (particularly those that are heard orally) may undermine finality and judicial economy.

Therefore, of the two requirements—party agreement and leave—the requirement of party agreement is the more decisive in promoting the ends of finality and judicial economy; but each requirement serves a useful purpose, and it is only by requiring both party agreement and leave that the two requirements have the desired effect.

One further provision for ensuring that the law is applied correctly that has been included in the CAAs is the infrequently used option for a party to an arbitration agreement to ask the court to determine a question of law during the course of the arbitration—a vestige of the now-obsolete English case stated procedure.[46] This provision can be excluded by the parties, and it can be invoked only with the consent of the arbitrator, where the arbitrator has been appointed, or with the agreement of all the parties. Together with the many other mechanisms in the legislation for redressing dilatory tactics, it appears to have caused little mischief and, when invoked successfully, to have proved useful.[47]

---

[46] *Commercial Arbitration Act*, *supra* note 13 at 27J.

[47] *Goodwood Investments Holdings Inc v Thyssenkrupp Industrial Solutions AG*, [2018] EWHC 1056 (Comm) at [1]—[2] per Males J. (Court observing

6. Optional protocol on confidentiality

Commercial arbitration is a private process, but few national laws and institutional rules provide for the confidentiality of the process, the documents, and the outcome. The Model Law is silent on the question. Some who choose arbitration do not expect or need assurances of confidentiality. Those who do choose arbitration believing it to be confidential may not need confidentiality in every dispute that might arise, and they may not need it for all aspects of a dispute. Nevertheless, subject to the need to disclose certain information, and the need to resolve certain disputes in public, it is generally accepted that the parties should be entitled to maintain the confidentiality of their commercial arbitration if they wish to do so.

The issue for legislators is whether it is appropriate to leave it to the parties to provide for confidentiality, creating the risk of disappointment for parties who thought that it was assured by the choice of arbitration, or whether it should be included it in the legislation so that it can be guaranteed by choosing the seat. The framers of the Australian domestic legislation chose the middle ground of including a default protocol for confidentiality that the parties may exclude.

This protocol addresses several complexities associated with confidentiality, such as the circumstances in which confidential information may be disclosed,[48] and in which the Tribunal may allow disclosure;[49] and the circumstances in which the Court may prohibit[50] or allow[51] disclosure. These

---

the utility of this method of resolving the question of whether "without prejudice" communications represented a binding settlement).

[48] *Commercial Arbitration Act*, *supra* note 13 at 27F.

[49] *Ibid* at s 27G.

[50] *Ibid* at s 27H.

[51] *Ibid* at s 27I.

provisions may be supplemented or varied by the parties in agreements between them and in applications to the tribunal, but the inclusion of the protocol in the legislation reflects a formal commitment to the principle of confidentiality that creates a foundation for support by tribunals and the local courts.

IV. MAINTAINING CONSISTENCY WITH THE MODEL LAW FOR DOMESTIC COMMERCIAL ARBITRATION

With these measures customizing the Model Law for adoption by the Australian States and Territories, the drafters achieved a first-rate legislative regime for commercial arbitration in Australia. However, the true genius of the CAAs lies not so much in the departures from the Model Law, but in their *consistency* with it. Apart from the distinctive features of the Acts, which are identified above, the legislation faithfully adheres to the Model Law—from its language and structure to its section and paragraph numbering.

This point is critical. The Model Law has been "adopted" in many different ways around the world. In some civil law jurisdictions, the Model Law provisions have been integrated with those of the Civil Code and the Code of Civil Procedure.[52] In some common law jurisdictions,[53] provisions of the Model Law have been introduced into a single statute with a variety of other provisions designed to reflect the interests of local legislators. In others, such as the Canadian provinces, the Model Law is a schedule appended to an implementing statute that contains the locally drafted provisions. As a result, the official UNCITRAL website refers to countries that have enacted arbitration laws *based on* the Model Law.[54]

---

[52] *Civil Code of Québec* SQ 1991, c 64; Code of Civil Procedure, SQ 2014, c 1.

[53] E.g., the legislation in the British Virgin Islands and in India.

[54] "Disclaimer: A model law is created as a suggested pattern for lawmakers to consider adopting as part of their domestic legislation. Since States

In Australia, the CAAs include sections numbered identically with the articles of the Model Law and text that reproduces those articles faithfully. Apart from gender neutrality and a few modernized terms, every departure and every addition to the Model Law is highlighted in commentary that is included in the text. In this way, domestic commercial arbitration practitioners in Australia are practising commercial arbitration pursuant to the Model Law, not merely inspired by the Model Law.

Why does this matter? The importance of this is seen from s 2A of the Model Law itself, which provides that, "in the interpretation of this Act, regard is to be had to the need to promote so far as practicable uniformity between the application of this Act to domestic commercial arbitrations and the application of the provisions of the Model Law … to international commercial arbitrations … ."[55]

The reference here to uniformity in interpretation is no mere vague exhortation. The Model Law, unlike typical common law statues, comes with an official commentary to guide its interpretation.[56] But more than this, through the United Nations Commission on International Trade Law (UNCITRAL) it also

---

enacting legislation based upon a model law have the flexibility to depart from the text, the above list is only indicative of the enactments that were made known to the UNCITRAL Secretariat. The legislation of each State should be considered in order to identify the exact nature of any possible deviation from the model in the legislative text that was adopted. The year of enactment indicated above is the year the legislation was passed by the relevant legislative body, as indicated to the UNCITRAL Secretariat; it does not address the date of entry into force of that piece of legislation, the procedures for which vary from State to State, and could result in entry into force some time after enactment" online: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status>.

[55] *Model Law*, *supra* note 14 at arts 2A.

[56] See Secretariat of the United Nations Commission on International Trade Law (UNCITRAL), "On the UNCITRAL Model Law on International Commercial Arbitration", online: *McGill University* <https://www.mcgill.ca/arbitration/files/arbitration /ExplanatoryNote-UNCITRALSecretariat.pdf>.

comes with a database of free and text-searchable online digest of cases from courts around the world that have interpreted and applied its provisions.[57] This database is but one source of many that offer commentary and reporting on the approaches to these provisions that have been taken by leading courts around the world.[58]

Accordingly, adopting the Model Law as the basis for Australia's domestic arbitration legislation has opened a gateway for every Australian arbitration practitioner and every Australian court into the leading jurisprudence on commercial arbitration from around the world. Moreover, by facilitating their familiarity with the Model Law, it has opened a gateway for them to contribute to that jurisprudence.

To be sure, there are counsel whose arbitration practices will be domestic throughout their career. However, the continuity in relevant provisions between domestic and international law enables all arbitration practitioners to benefit from state-of-the-art techniques in the field of commercial dispute resolution. More than this, it strengthens the collective appreciation of arbitration across the profession. As in Australia, young lawyers, who once had to choose between a career in domestic dispute resolution in Canada and an international practice abroad, would now be free to pursue exciting opportunities in both domestic and international arbitration without leaving Canada, relying on their

---

[57] See United Nations Commission on International Trade Law, "Case Law on UNCITRAL Texts (CLOUT)", online: *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/case_law>.

[58] See United Nations Commission on International Trade Law, "Travaux préparatoires: UNCITRAL Model Law on International Commercial Arbitration (1985)", online: *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial _arbitration /travaux>. See also United Nations Commission on International Trade Law, "Bibliography", online: *United Nations Commission on International Trade Law* <https://uncitral.un.org/en/library/bibliography>.

sophisticated grasp of the most prevalent arbitration statute around the world.

For all these reasons, the experience of the Australian legal community enacting uniform domestic and international commercial arbitration based on the Model Law can serve as a model for the reform of domestic commercial arbitration law in Canada.

ARBITRATION APPEALS ON QUESTIONS OF LAW IN CANADA: STOP EXTRICATING THE INEXTRICABLE!

Joshua Karton,[*] Hon. Barry Leon,[**] Joel Richler,[***] and Lisa C. Munro[****]

Domestic arbitral awards are generally appealable only on questions of law or on questions of mixed fact and law where there is an extricable error of law. The standard for identifying extricable errors of law is therefore crucial to determining the scope of court intervention into commercial arbitrations. In recent cases, provincial courts of appeal have split on this important issue, with the BC Court of Appeal taking an expansive approach and the Court of Appeal for Ontario taking a narrow approach. This article surveys the case law and concludes that Ontario's approach to extricable errors of law is preferable. The narrow approach is more consistent with Supreme Court of Canada jurisprudence, truer to the spirit of arbitration, and provides greater certainty to contracting parties. The Supreme Court of Canada should avail itself of an opportunity to resolve this inter-provincial split by espousing the Ontario approach, and to reaffirm that Canada is committed to an arbitration regime consistent with international standards, commercial efficiency, and effective dispute resolution in a party-chosen process.

[*] Associate Professor, Queen's University Faculty of Law; Managing Editor, *Canadian Journal of Commercial Arbitration*.

[**] Independent Arbitrator and Mediator, Arbitration Place, 33 Bedford Row Chambers, and Caribbean Arbitrators; Executive Editor, *Canadian Journal of Commercial Arbitration.*

[***] Independent Arbitrator, Bay Street Chambers and Arbitration Place.

[****] Partner and Arbitrator, Lerners LLP and Arbitration Place.

I. INTRODUCTION

In *Sattva Capital Corp v Creston Moly Corp*[1], the Supreme Court of Canada limited the availability of appeals from commercial arbitration awards on questions of law to those "rare" cases where the arbitral tribunal has made an "extricable error of law".[2] While the court provided some guidance as to how such errors should be identified, it is not surprising that creative counsel have tried to fit any and all grounds of appeal into this category, with some success. One result is that recent appellate decisions in Ontario and British Columbia have adopted different standards for the identification of extricable errors of law.

To eliminate the resulting uncertainty, to provide for a uniform national approach to this important question, and to enhance Canada's global place in arbitration, the Supreme Court of Canada will inevitably have to establish clear national parameters. The issue will take on even greater significance in Ontario if the province implements the recommendation of the Toronto Commercial Arbitration Society's Arbitration Act Reform Committee for a single statute governing all commercial arbitrations in Ontario and allowing appeals of both domestic and international arbitral awards if the parties opt in.

As discussed below, the British Columbia courts have adopted an expansive view of extricable errors of law and the Ontario courts have adopted a narrow approach.

Ontario's approach should be preferred,[3] for at least three reasons.

---

[1] 2014 SCC 53 [*Sattva*].

[2] Under current Canadian arbitration legislation, appeals are permitted only in domestic arbitrations.

[3] We do not suggest that a narrow approach to extricable errors of law is unique to Ontario. For example, in *Christie Building Holding Company, Limited v Shelter Canadian Properties Limited*, 2022 MBKB 239 [*Christie*], The Manitoba Court of King's Bench followed the same approach as that of

First, the narrow approach is more consistent with Supreme Court of Canada jurisprudence; second, it is truer to the spirit of arbitration and the place of arbitration within the range of commercial dispute resolution options; and third, it provides greater certainty and predictability to parties that have contracted for arbitration to provide a final resolution to their disputes.

This article discusses two key appellate decisions issued in 2022, namely the decisions of the BC Court of Appeal in *Escape 101 Ventures Inc. v March of Dimes Canada* ("*March of Dimes*")[4] and of the Court of Appeal for Ontario in *Tall Ships Landing Development Inc. v Brockville (City)* ("*Tall Ships*").[5] It explains why alleged errors in contractual interpretation by an arbitrator, no matter how much based on misapprehended facts, should not be characterized as extricable errors of law except in narrow and specific circumstances.

Before proceeding, we provide some caveats concerning the scope of our analysis.

First, we deal here with appeals on questions of law that are either permitted in domestic arbitration legislation (in most cases, only with leave of the court), or to which the parties have agreed in their arbitration agreements.

Second, this article is not intended to apply to statutory arbitrations and is of limited application to arbitrations arising from relationships affected by systemic inequalities in bargaining power, such as consumer and employment relationships. Our line of argument is specific to commercial arbitrations, those arising from voluntary agreements to arbitrate between commercial parties.

---

the Ontario courts. However, since the Manitoba Court of Appeal has not yet weighed in on the issue, we refer here to the "Ontario approach".

[4] 2022 BCCA 294, Fitch, Abrioux, and Voith JJA.

[5] 2022 ONCA 861, Doherty, Grant Huscroft, and Harvison Young JJA.

Finally, the exceptions to the general principle of arbitral competence-competence recognized in *Dell Computer Corp. v Union des consommateurs*[6] and *Uber Technologies Inc. v Heller*[7] do not affect the issues discussed here. This article focuses on the consequences when a valid arbitration agreement exists, and does not address questions of whether an arbitration agreement is valid.[8] Most saliently, the access to justice concerns that underpin the majority and concurring opinions in *Uber* are not implicated by the questions addressed in this article.

II. RELEVANT ARBITRATION PRINCIPLES

Since the *Tall Ships* and *March of Dimes* cases raise fundamental questions about the nature of arbitration and the relationship between arbitration and the courts, before discussing them we first review some relevant essential principles of commercial arbitration.

A commercial arbitration agreement is a contract: a private agreement subject to enforcement through the court system. While this may be a trite principle, its consequences are often forgotten. By agreeing to arbitrate, the parties choose to bind themselves to a set of jurisdictional and procedural outcomes. An arbitration agreement is said to have a dual effect: it confers upon the arbitral tribunal the power to issue a decision—an award—that resolves the parties' dispute in a final and binding manner, and it ousts the jurisdiction of courts that would otherwise be seized of any disputes arising from the parties'

---

[6] 2007 SCC 34.

[7] 2020 SCC 16.

[8] That is, we are not concerned here with whether an arbitration agreement is "null and void, inoperative or incapable of being performed" within the meaning of Article 8 of the UNCITRAL Model Law on International Commercial Arbitration, on which the provincial International Commercial Arbitration Acts are based, or invalid under any of the grounds for invalidity recognized in the provinces' domestic Arbitration Acts.

relationship.[9] The possibility of an appeal from an arbitral award—in Canadian jurisdictions and in other jurisdictions that permit appeals—does not alter this fundamental precept.

Thus, when a court stays litigation of a dispute that is subject to a valid arbitration agreement, it does so for the same reason it enforces any contract: in order to hold the parties to their bargain. When a court enforces an arbitral award, it holds the parties to that same bargain.

This does not mean that parties have no recourse against an arbitral award. In all jurisdictions of which we are aware, including all Canadian provinces and territories and under federal legislation, an award may be set aside, when the arbitration agreement itself is unenforceable, so that there is no valid bargain to which to hold the parties (for voidness, lack of capacity to contract, termination, violation of public policy, or other standard grounds of contractual invalidity), or when the arbitral process deviated from the arbitration agreement, so that enforcing the award would not uphold the parties' bargain (when the arbitral tribunal decided issues that the parties did not entrust to it the composition of the tribunal or the arbitral procedure did not accord with the parties' agreement, one party was denied an opportunity to present its case, or the arbitral tribunal was corrupt or biased).

Appeals, even on questions of law, are antithetical to these principles. Nonetheless, all Canadian domestic arbitration statutes, except for those of Québec and the Federal government, provide losing parties, in specified circumstances (including where they have expressly so agreed), with recourse against arbitral awards in the form of appeals to the courts.[10]

---

[9] For a more detailed explanation of the dual effect of arbitration agreements, see Gary B. Born, *International Commercial Arbitration*, 3rd ed (Kluwer Law International, 2021) at § 8.01.

[10] Parties may also choose to permit appeals to a second arbitral tribunal, on whatever terms they have agreed, but such appeals are rare and outside the scope of this article.

This policy choice is intended in part to enable parties to be protected from outcomes arguably contrary to law, but more importantly to protect and uphold the consistency of the law itself. That is why most Canadian provinces permit appeals in domestic arbitrations (by default) only with leave of the courts and only on questions of law. As the Supreme Court observed in *Sattva*:

> One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation.[11]

The problem is that the availability of appeals also provides losing parties with opportunities to upset the basic tenets of their arbitration agreements at the expense of winning parties and the public purse. As the last sentence of that passage from *Sattva* indicates, the corollary to the principle that losing parties may appeal questions of law in order to ensure the consistency of the law is the principle that appeals should not become just another "kick at the can".[12]

It follows that losing parties should not be permitted to escape from their arbitration agreements, inflicting costs and delays on winning parties and imposing costs on the public purse, by relitigating in an appellate context factual matters already determined by arbitrators. Such parties should be held

---

[11] *Sattva*, *supra* note 1 at para 51.

[12] For a fuller discussion of this issue, see Joel Richler, "A Second Kick: Appeals in Canadian Domestic Commercial Arbitration" (2020) Adv Q 342. Making a similar point with respect to jurisdictional determinations by arbitrators, see J. Brian Casey, "Setting Aside: Excess of Jurisdiction or Error of Law?—A Second Kick at the Can" (2020) 1:1 Can J Comm Arb 37.

to their bargains, by which they entrusted those determinations to arbitral tribunals.

These considerations are especially salient when the decision under appeal involves contractual interpretation by the arbitral tribunal—a frequent occurrence, since commercial arbitrations "most commonly turn on issues of contractual interpretation".[13] In *Sattva*, the Supreme Court recognized that contractual interpretation involves questions of mixed fact and law, "as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix".[14]

Accordingly, as the Supreme Court ruled in *Sattva*, appellate intervention is restricted to those cases where an error of law is extricable from the arbitral tribunal's mixed fact-and-law exercise of applying the principles of contractual interpretation to the words of the contract and its factual matrix. More precisely, "[l]egal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'."[15]

Most importantly, the Supreme Court in *Sattva* warned that "courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation."[16] Litigants will

---

[13] Alan S. Rau and Edward F. Sherman, "Tradition and Innovation in International Arbitration Procedure" (1995) 30 Texas Intl L J 89, 101. See also James Spigelman, "The Centrality of Contractual Interpretation: A Comparative Perspective", The 2013 Kaplan Lecture (Hong Kong, 27 November 2013), online: <https://www.neil-kaplan.com/s/2013-The-Honourable-James-Spigelman-AC-QC-Issues-in-Contractual-Interpretation-A-Comparative-Perspec.pdf> accessed January 5, 2023 ("In my experience ... the majority of commercial disputes involve questions of contractual interpretation. Often, such questions are at the heart of the dispute.").

[14] *Sattva*, *supra* note 1 at para 50.

[15] *Ibid* at para 53, quoting *King v Operating Engineers Training Institute of Manitoba Inc*, 2011 MBCA 80 at para 21.

[16] *Sattva*, *supra* note 1 at para 54.

understandably "seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized."[17]

This is the context for the cases that motivated this article, all of which deal with alleged extricable errors of law by arbitral tribunals in their interpretations of contracts, and all of which were issued in the second half of 2022.

III. THE BRITISH COLUMBIA DECISIONS

In *March of Dimes*, the contract was for sale of a business. The purchase price was calculated as an initial payment plus an annual "earnout" based on the business's revenue over the following five years. The dispute arose over the value of the earnout, specifically whether revenue from contracts entered into after the sale should be included in the calculation.[18]

In reaching his conclusion that some of the new contracts should be included, the arbitrator relied on evidence of the parties' post-contractual conduct to interpret their purchase and sale agreement, specifically the fact that Escape 101 did not object to March of Dimes' omission of a particular new contract from its revenue calculations. The arbitrator characterized this as an instance of admissible post-contractual conduct evidence to interpret an ambiguous contractual provision.[19]

The problem is that the new contract did not actually begin until the year after the arbitrator held that Escape 101 should have objected to its exclusion. At the time, there was nothing to which Escape 101 could object.[20] Still worse, it appears that the

---

[17] *Sattva, supra* note 1. See also *Teal Cedar Products Ltd v British Columbia*, 2017 SCC 32 at para 45 [*Teal Cedar*].

[18] *March of Dimes*, *supra* note 4 at para 19.

[19] *Ibid* at paras 33—34.

[20] *Ibid* at para 38.

arbitrator never heard arguments from either party as to the relevance of this supposed subsequent conduct evidence.

Escape 101 sought leave to appeal on several bases, and leave was granted on the earnout issue, specifically that the arbitrator may have committed an extricable error of law in misapprehending the evidence.[21]

The BC Court of Appeal (per Voith JA) found that the arbitrator had indeed misapprehended the evidence, and ruled that this misapprehension constituted an extricable error of law. (This was the first case to reach the Court of Appeal under the new BC *Arbitration Act*,[22] which among other things requires that appeals from arbitral awards go directly to the Court of Appeal.)[23]

The issue was whether, as Escape 101 argued, the arbitrator's misapprehension of the facts constituted an extricable error of law that might justify overturning the award. The Court reiterated earlier jurisprudence holding that, "a misapprehension of evidence that goes to the core of the outcome is an extricable error of law".[24] It later added, "[a] misapprehension of the evidence will warrant appellate intervention where a trial judge or arbitrator makes mistakes as to the substance of material parts of the evidence and those

---

[21] 2021 BCCA 313.

[22] British Columbia *Arbitration Act*, SBC 2020 c 2, s 59; RSBC 1996 c 55, s 31(1).

[23] See Lisa Munro, "B.C.—Material misapprehension of evidence is an extricable error of law" (23 September 2022), online (Arbitration Matters Blog): <https://arbitrationmatters.com/b-c-material-misapprehension-of-evidence-is-an-extricable-error-of-law-662/>. There was detailed argument about whether the legislature had intended to narrow the grounds for appeal when it amended the Act in 2020, but those issues are not relevant for present purposes because both the old and new versions of the Arbitration Act limit appeals to "questions of law".

[24] *March of Dimes*, *supra* note 4 at para 43.

errors play an essential part in the reasoning process."[25] Since the arbitrator had misapprehended the evidence, and this misapprehension was central to his reasoning and the outcome, the Court held that the arbitrator had made an extricable error of law. Finally, the Court held that due to the incompleteness of the evidentiary record, it lacked the evidentiary foundation necessary to interpret the contract itself, so it remitted the case back to the arbitrator.[26]

It appears—at least from the Court of Appeal's portrayal of the award—that the arbitrator did indeed misapprehend the facts. In fact, both parties agreed that he had. One might argue that, on the assumption that the award was plainly wrong, the Court was correct in its ultimate decision to not let that award stand. But this would miss the salient point that the parties had agreed to a final determination of their dispute by their chosen arbitrator to the exclusion of the courts, the very point addressed by the Supreme Court in *Sattva*. In our view, the Court was wrong in finding that the arbitrator's misapprehension of the facts could be treated as an extricable error of law. No appeal ought to have been permitted.

The Supreme Court in *Sattva* emphatically admonished courts to exercise caution in identifying extricable errors of law from contractual interpretations.[27] Here, there was no evidence that the arbitrator "applie[d] an incorrect principle, fail[ed] to consider a required element of a legal test, or fail[ed] to consider a relevant factor", the examples of extricable errors of law given in *Sattva*. Instead, the arbitrator engaged in contractual interpretation, as he was empowered to do by the parties' agreement. Even if he erred in the process, that was a risk the parties accepted when they entrusted their dispute to

---

[25] *March of Dimes*, *supra* note 4 at para 74.

[26] *Ibid* at para 108.

[27] The BCCA even cited the key passages in *Sattva*. *Ibid* at para 41. *See* Munro, *supra* note 23.

arbitration. In line with their agreement and the BC *Arbitration Act*, such errors are not appealable.

It is telling to look at the cases that the Court of Appeal cited to establish the test for when a misapprehension of facts constitutes an extricable error of law.[28] None of them involved misapprehension of evidence for the purposes of contractual interpretation. What is more, not one involved an appeal from an arbitral award. They were all appeals from decisions of trial judges or administrative tribunals.

Context is critical. As the Supreme Court noted in *Teal Cedar*, the consequences of the distinction between questions of law and questions of mixed fact and law differ depending on the context. In civil litigation, the characterization of a question as one of mixed fact and law changes the standard of review; in an appeal from an arbitral award, "identification of a mixed question … defeats a court's jurisdiction".[29]

The difference arises because the scope of appellate jurisdiction turns not just on the type of determination under appeal (fact, law, or mixed fact and law), but also on the relationship between the appellate court and the first instance adjudicator. Regardless of whether any aspects of *Vavilov*[30] apply to appeals from commercial arbitrations (such as standards of review),[31] neither trial court nor administrative tribunal processes arise from contracts whereby the parties agree to oust the jurisdiction of the courts. In recognition of parties' autonomy to choose arbitration—and thereby to oust

---

[28] *March of Dimes*, *supra* note 4 at para 43, citing *Sharbern Holding Inc. v Vancouver Airport Centre Ltd.*, 2011 SCC 23 at para 71; *Armstrong v Armstrong*, 2012 BCCA 166 at paras 65—67; *Bayford v Boese*, 2021 ONCA 442 at para 28; *Carmichael v GlaxoSmithKline Inc*, 2020 ONCA 447 at para 125.

[29] *Teal Cedar*, *supra* note 17 at para 46.

[30] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[31] Whether any aspects of *Vavilov* apply to appeals from commercial arbitrations is expressly not addressed in this article.

court jurisdiction—the Supreme Court of Canada and our legislatures have expressly limited the scope of appeals from arbitral awards. Holding the parties to their agreement to arbitrate includes holding them to their agreement that arbitral tribunals' decisions will be final.

It is important to note that limited appeal rights do not require that the arbitrator's award in *March of Dimes* had to stand. There was a route to a remedy.

As described by the Court of Appeal, the arbitrator relied on an interpretation of the evidence that was never argued by a party, and on which the parties had no opportunity to comment. If this was so, it would have been a reviewable procedural error: denial of a reasonable opportunity to present one's case, and possibly even reasonable apprehension of bias. If these had been established on an application to set aside the award, a court may well have granted that relief.[32]

Unfortunately (although understandably), *March of Dimes* has already been followed. In *A.L. Sims & Son Ltd. v British Columbia (Transportation and Infrastructure)* ("*A.L. Sims*"),[33] the BCCA considered an application for leave to appeal on the basis of alleged misapprehensions of facts constituting extricable errors of law, one of which involved the interpretation of the contract.

Dickson JA held that she was bound by her Court's decision in *March of Dimes*, although the respondent in that case has sought leave to appeal to the Supreme Court.[34] Moreover,

---

[32] British Columbia *Arbitration Act* at ss 58(1)(g) and 58(1)(h). As discussed below, the applicant in *Tall Ships* simultaneously appealed and moved to set aside the arbitral awards on the basis that the arbitrator's findings were based on arguments not made by the parties. Its application was rejected by the Court of Appeal as nothing more than a "bootstrap" of its unmeritorious appeal.

[33] 2022 BCCA 440 [*A.L. Sims*].

[34] *Ibid* at para 42.

Dickson JA chose to add in *obiter* that she supports the decision in *March of Dimes*: "Specifically, I agree that a material misapprehension of evidence going to the core of the outcome of an arbitral award can amount to an extricable legal error for purposes of s. 59 of the *Arbitration Act*."[35] Given the contrary authority in Ontario, which we discuss in the next section, *A.L. Sims* at minimum raises the prospect that an inter-provincial split will continue despite substantial overlap in the provinces' domestic arbitration statutes.

Despite these legal findings, *A.L. Sims* does not represent as expansive a view of extricable errors of law as *March of Dimes*. Ultimately, Dickson JA rejected every allegation of an extricable error of law, including those relating to contractual interpretation. She reasoned that the arbitrator's interpretation of the contract "manifestly involved multiple unreviewable factual findings", in particular his assessment of the contract's factual matrix, which included findings as to what a experienced contractor would or should have foreseen.[36] This emphasis on the factual character of the arbitrator's findings for the purpose of contractual interpretation is hard to square with *March of Dimes*, where the BCCA found that similar references to the contract's factual matrix constituted extricable errors of law.

As *A.L. Sims* shows, BC's approach to the scope of appeals from arbitral awards is not uniformly interventionist. For example, in another recent case decided after *March of Dimes*, the BC Court of Appeal declined to overturn an arbitral award despite finding that the arbitrator had made errors of law.

Spirit Bay Developments Limited Partnership v Scala Developments Consultants Ltd,[37] ("*Spirit Bay*") dealt with a construction dispute. Scala, the builder, initiated arbitration against Spirit Bay, the developer, seeking damages for unpaid

---

[35] *A.L. Sims, supra* note 33.

[36] *Ibid* at para 101.

[37] 2022 BCCA 407, Hunter, Stromberg-Stein, and Marchand JJA.

invoices. Spirit Bay counterclaimed, alleging negligent work. The arbitrator found for Scala.

Spirit Bay appealed, alleging three extricable errors of law: that the arbitrator resorted to subsequent conduct evidence without first finding an ambiguity in the contractual terms; that the arbitrator erred in applying a "commercial reasonableness test" to interpretation of the contract; and that the arbitrator erred by granting unjust enrichment in a claim governed by an existing contract.

On appeal to the BC Supreme Court,[38] the application judge, Davies J, found that all three allegations of error were made out. However, he also found that the arbitrator's two errors with respect to contractual interpretation had no effect on the outcome of the award, and dismissed Spirit Bay's appeal in respect of those two issues. On the other hand, the application judge did set aside the award based on a finding that the arbitrator had erred in applying unjust enrichment to a claim that was covered by an existing contract, and remitted the case back to the arbitrator.

The Court of Appeal (per Hunter JA) in effect restored the arbitrator's award. With respect to the two contractual interpretation issues, the Court agreed with the application judge that the arbitrator's errors of law did not affect the result. Accordingly, they could not ground an appeal. For example, with respect to the role of commercial reasonableness in contractual interpretation, the Court emphasized that:

> … this analysis must be placed in the context of the requirement that parties can appeal arbitration awards on questions of law alone. The appellant has not identified an element of the Award that was affected by an erroneous

[38] The case came up before the new BC *Arbitration Act* came into force, which provides for appeals of arbitration awards directly to the Court of Appeal, with leave.

> application of the principle of commercial reasonableness. Accordingly, the possible overstatement of the principle by the arbitrator does not support setting aside the Award.[39]

With respect to the unjust enrichment issue, the Court found that, while the arbitrator could have explained his reasoning more clearly (and indeed made several "unnecessary … and potentially confusing" references to unjust enrichment),[40] he had in fact based his conclusions on breach-of-contract grounds, specifically that Spirit Bay's failure to pay for work received entitled Scala to treat the contract as having been repudiated. Since this was a finding of mixed fact and law, it was not appealable.[41]

While *Spirit Bay* appears to stand for a limited scope of appeals from arbitral awards, it is not inconsistent with *March of Dimes*. In *March of Dimes*, the arbitrator's error indisputably affected the outcome, while in *Spirit Bay* the court found either that the arbitrator had made no error of law or that his error did not affect the outcome. Moreover, in *March of Dimes*, the alleged extricable error of law came from misapprehension of the facts, while in *Spirit Bay* there was no alleged misapprehension of facts. Thus, BC courts appear to remain open to the possibility of extricating errors of law from arbitral tribunals' factual misapprehensions for the purposes of contractual interpretation where they affect the outcome.

Accordingly, despite the result in *Spirit Bay*, the approach of the BC courts remains worryingly contrary both to Supreme Court of Canada precedent (especially *Sattva*, but also the Supreme Court's overall approach to the relationship between arbitration and the courts) and to fundamental arbitration principles. It seriously misconstrues the role of the courts in

---

[39] *Spirit Bay, supra* note 37 at para 36.

[40] *Ibid* at para 50.

[41] *Ibid* at paras 47—48.

relation to arbitral awards, which is not to be roving righters of wrongs, but rather to be guardians of party autonomy, the arbitration agreement, the arbitral process it gave rise to, and the integrity of the law. And it misconstrues the likely intentions of the parties when they agreed to arbitration.

IV. THE ONTARIO DECISIONS

In *Tall Ships*, the Court of Appeal for Ontario heard an appeal from the decision of an application judge setting aside three arbitral awards arising from the same dispute. As the Court emphatically noted, it was "central to this appeal" that the parties had expressly agreed that the decision of the arbitrator would be final, subject only to appeals on questions of law.[42]

The dispute arose from a set of related contracts between Tall Ships and the City of Brockville establishing a public-private partnership to develop a waterfront property. Tall Ships made three claims. First, it claimed approximately $1,000,000 in remediation costs that Brockville refused to pay on the ground that the invoice was submitted after a contractual deadline to give notice of a dispute. Second, Tall Ships claimed $1,800,000 in construction costs beyond the estimated budget, allegedly incurred because the project grew in scope from the original plans. Third, Tall Ships claimed interest on its invoice, which it included in its statement of claim but which it had not notified Brockville it would claim prior to the contractual closing date.

In three awards, the arbitrator dismissed Tall Ships' claims. The remediation cost claim was dismissed because Tall Ships had not provided a notice of dispute until after a 15-day contractual deadline. Tall Ships was responsible for the additional construction costs since it breached an implied obligation as construction manager to notify Brockville of any cost overruns as they were incurred. Tall Ships' claim for

[42] *Tall Ships*, *supra* note 5 at para 2.

interest was estopped, as Tall Ships did not give notice of that claim before the date specified in the contract.

Tall Ships appealed to the Ontario Superior Court of Justice. Perhaps anticipating that the court would reject the appeals because they did not raise extricable questions of law, Tall Ships also relied on procedural unfairness grounds and applied to have the awards set aside on the basis that the arbitrator had decided based on arguments not raised by the parties.

The application judge, Gomery J, held that the arbitrator had both made errors of law and committed instances of procedural unfairness in the process of interpreting the parties' contracts. Here, we are interested primarily in the alleged extricable errors of law. However, it is worth noting that the application judge accepted Tall Ships' position that the alleged legal errors also constituted a basis for setting aside the awards on procedural fairness grounds under section 46 of Ontario's *Arbitration Act*.[43]

As explained above, set-aside applications and appeals are distinct remedies designed to deal with different kinds of defects in an arbitral process. Indeed, the Court of Appeal noted in its decision overturning the application judge that mixing the two was inappropriate. It correctly observed that, by characterizing the arbitrator's interpretation of the parties' contracts as both legally erroneous and procedurally unfair, "the application judge effectively bootstrapped the substantive arguments."[44] Set-aside under section 46, the Court continued, is a "narrow basis" on which to attack an arbitrator's award. It

---

[43] *Arbitration Act*, *1991*, SO 1991, c 17 ("*Arbitration Act*"). *Tall Ships* cited authority to the effect that the breach of a duty of procedural fairness is an error of law: Factum of the Respondent, Tall Ships Landing Development Inc., Court of Appeal File No.: C69715 (on file with authors) at para 36, citing *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62. This appears to be the argument that the application judge accepted but that the Court of Appeal dismissed as "bootstrapping".

[44] *Tall Ships*, *supra* note 5 at para 2.

is "not concerned with the substance of the parties' dispute and is not to be treated as an alternate appeal route."[45]

Returning to the application judge's findings of errors of law by the arbitrator, on the claim for remediation costs, the application judge held that the arbitrator had made an error of law because his interpretation of the contracts as containing an implied "time of the essence" clause was "clearly unreasonable".[46]

On the cost overrun claim, the application judge held that the arbitrator erred in law by implying a term (for Tall Ships to keep Brockville informed of cost overruns) contrary to the established legal rules for implication of contractual terms and contrary to an express exclusion of liability in the Purchase Agreement. Since the contract contained an express term that appeared to exclude Tall Ships' liability for construction costs, the arbitrator's holding had to have been based only on his characterization of Tall Ships as a construction manager with notice obligations to Brockville, rather than on the elements of the legal test for implying terms. This, the application judge reasoned, was an error of law even under *Sattva*: that the arbitrator had allowed the factual matrix to overwhelm express contractual language.[47]

On the interest claim, the application judge held that the arbitrator's finding was erroneous in law because it relied on his previous finding that Tall Ships had a construction manager's notification duties.[48] Moreover, she held that the arbitrator's finding that Tall Ships was estopped from claiming interest

---

[45] *Tall Ships*, *supra* note 5, citing *Alectra Utilities Corporation v Solar Power Network Inc.*, 2019 ONCA 254 at paras 20—27, 40—44, leave to appeal refused, [2019] SCCA No 202; *Mensula Bancorp Inc. v Halton Condominium Corporation No. 137*, 2022 ONCA 769, at paras 5, 40.

[46] *Ibid* at para 27.

[47] *Ibid* at paras 56—57.

[48] *Ibid* at para 92.

stemmed from the same improperly implied duty, a finding that was "manifestly unfair" to Tall Ships.[49]

The Court of Appeal (per Harvison Young JA) reversed the application judge as to all three claims.

The Court held as a general matter that the judge had "erred by characterizing questions of mixed fact and law as extricable questions of law".[50] It emphasized the point that was not appreciated by the BC Court of Appeal in *March of Dimes*, namely that according to *Sattva* and its progeny, "judges exercising appellate powers … should be cautious about extricating questions of law from the interpretation process…. Failing to exercise such caution will result in the very inefficiencies, delays and added expense that choosing an arbitral process seeks to avoid."[51]

Further, the application judge erred by finding that the arbitrator's reliance on an unargued interpretation of the contract is an error of law where the interpretation was "clearly unreasonable", observing further that the deference due to arbitrators does not "displace the imperatives of fairness and reliability".[52] (It is worth noting in this regard that the City of Brockville did not accept that the arbitrator based his decision on submissions not made by the parties, arguing that those findings were supported by the evidence and submissions made by the parties.)[53]

---

[49] *Tall Ships*, *supra* note 5.

[50] *Ibid* at para 2.

[51] *Ibid* at para 3.

[52] *Ibid* at para 27.

[53] It is also noteworthy that the arbitration hearing was not transcribed, giving rise to some doubt as to what was actually submitted to the arbitrator at that hearing. The consequences of a limited record available to a court presiding over an appeal from an arbitral award are discussed in *Christie*, *supra* note 3 at paras 52—60.

As the Court of Appeal emphasized, regardless of the appropriate standard of review, appeals from arbitral awards are not opportunities to litigate the case anew. One gets the sense that the application judge thought the role of a judge in reviewing applications for leave to appeal is to correct erroneous decisions by arbitrators. The Court of Appeal appropriately stepped in to correct this misunderstanding.

As we have discussed, the Ontario *Arbitration Act* and Supreme Court of Canada precedent make clear that the role of courts in arbitration appeals is substantially narrower. The provincial legislatures have sought to restrict the scope of appeals, for the most part limiting them to questions of law unless the parties agree otherwise.[54] These limitations were enacted not in deference to the supposed wisdom of arbitrators, but rather in deference to the parties' agreement to have their dispute determined by an arbitral tribunal. After all, from the parties' perspective, the whole point of an arbitration agreement is to have their dispute resolved in arbitration rather than in court. Thus, while it is possible for an extricable error of law to arise in parts of an arbitral award, including those dealing with contractual interpretation, courts should be on guard for attempts to dress up determinations of fact or determinations of mixed fact and law (no matter how dubious) as errors of law.

Moreover, in *Tall Ships*, the parties had expressly limited the grounds of appeal to questions of law. It should be presumed that they did so because they wanted to guard against repetitive

[54] In Ontario, under s 45 of the *Arbitration Act*, if the arbitration agreement so provides, an award may be appealed on questions of law (s 45(2)) or on questions of fact and mixed fact and law (s 45(3)). If the arbitration agreement does not deal with appeals, under s 45(1), a party may appeal an award "on a question of law with leave, which the court shall grant only if it is satisfied that, (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and (b) determination of the question of law at issue will significantly affect the rights of the parties." There are variances among the appeal provisions of provincial territorial acts. For example, in British Columbia, only appeals on questions of law are permitted. In Alberta, parties may not contract out of appeals on questions of law. In Québec, no appeals are permitted.

and costly re-litigation of factual issues in multiple fora. (The same could be said about the parties in the *March of Dimes* case.)

Narrowly construing the grounds of appeal is particularly important when the alleged error of law arises from contractual interpretation, which, since *Sattva*, is clarified to be an issue of mixed law and fact. As the Supreme Court remarked in *Sattva* (in a passage quoted by the Court of Appeal in *Tall Ships* at para 40):

> [C]ourts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *[Arbitration Act]*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized.[55]

Taking this admonition into account, the Court of Appeal overturned the application judge on all her findings of extricable errors of law. While one might disagree with the arbitrator's interpretations of the relevant contractual provisions, these were questions of "mixed fact and law which fell squarely within the purview of the arbitrator, by which process the parties had chosen to resolve this dispute, with appeals on questions of law only."[56] The arbitrator, rather than improperly implying terms into the contract, "did precisely what he was asked to do: he interpreted the contract as a whole, within its relatively

[55] *Sattva*, *supra* note 1 at para 54.

[56] *Tall Ships*, *supra* note 5 at para 49 (emphasis in original).

complex factual matrix of the agreements and relationships in play."[57]

Tall Ships was foreshadowed by two prior Ontario Superior Court of Justice decisions.

The first is *BBL. Con Design Build Solutions Ltd. v Varcon Construction Corporation* ("*BBL*"),[58] in which the application judge, Perell J, rejected as meritless BBL's application for leave to appeal. BBL hired Varcon to construct the underground shell of a residential building. Before construction was complete, BBL terminated the contract and served notice of arbitration. BBL and Varcon both accused the other of breaching the contract. The arbitrator dismissed BBL's claims and allowed Varcon's counterclaims.

BBL applied for leave to appeal, arguing that "because the Arbitrator failed to interpret and apply the contract based on the express words of the Construction Contract in accordance with the governing principles of contractual interpretation, the Arbitrator made multiple errors of law."[59] It identified 45 separate instances, each comprising multiple errors of law, falling into 16 distinct categories of errors. Since the parties' agreement did not address the scope of appeals, only questions of law were appealable. Considering both the statutory language and case law, the Court helpfully set out the prerequisites for leave to appeal under s 45(1) of the *Arbitration Act*:

> a. First, the putative appellant must identify one or more arguable errors of law as opposed to questions of fact or questions of mixed fact and law.

---

[57] *Tall Ships*, *supra* note 5 at para 81.

[58] 2022 ONSC 5714 [*BBL*].

[59] *Ibid* at para 79.

> b. Second, the importance to the parties of the matters at stake in the arbitration must justify an appeal.
>
> c. Third, the identified question of law must significantly affect the rights of the parties. Once a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal may prevent a miscarriage of justice.[60]

The application judge further set out a list, derived from extensively cited case law, of 18 principles he found "helpful" for differentiating issues of law from issues of fact and issues of mixed fact and law.[61] A key lesson to be taken from that list was:

> [Q]uestions of contract interpretation and questions about whether a contract has been breached are questions of mixed fact and law. Extracting an error of law from an arbitrator's decision about the interpretation of and the performance of the terms of a contract in a breach of contract dispute is a very difficult assignment.[62]

The Court found that "the essence of BBL's argument for leave to appeal just comes down to an argument that the Arbitrator erred by looking to extrinsic facts to read the contract differently than what it plainly says."[63] Thus, BBL's claims of extricable errors of law failed because, even taking its arguments as correct, they would show only that the arbitrator erred in determining facts relating to whether the contract was breached, which are pure questions of fact. Even the alleged

---

[60] *BBL, supra* note 58 at para 86 (citations omitted).

[61] *Ibid* at para 88.

[62] *Ibid* at para 89.

[63] *Ibid* at para 94.

errors with respect to determining facts for the purposes of contractual interpretation were questions of mixed fact and law.[64]

The only actual extricable error of law alleged by BBL was that the arbitrator considered extrinsic evidence to interpret unambiguous contractual terms. However, the Court also found that BBL's understanding of the law of contractual interpretation was mistaken, as ambiguity is not a prerequisite to the use of extrinsic evidence to interpret a contract within its factual matrix.[65] The result was that since BBL had not alleged any extricable errors of law, its application for leave to appeal was dismissed.

The second case that presaged the outcome in *Tall Ships* is *The Tire Pit Inc. v Augend 6285 Yonge Village Properties Ltd.*,[66] in which the Ontario Superior Court of Justice again refused to grant leave to appeal for alleged extricable errors of law arising from contractual interpretation by an arbitrator. Tire Pit exercised its option to extend a commercial lease but the parties could not agree on the base rent. That determination was submitted to arbitration, and the arbitrator set the base rent at $50.00 per square foot.

Tire Pit sought leave to appeal, alleging 48 separate errors of law that the Court described as "extremely repetitive".[67] The application judge, Vermette J, refused leave to appeal, noting that most of the errors of law alleged by Tire Pit represented

---

[64] Cf *Christie*, *supra* note 3 at para 135 (rejecting a similar allegation that an arbitrator's reliance on surrounding circumstances evidence to interpret the express terms of a contract constituted an extricable error of law).

[65] *BBL*, *supra* note 58 at paras 104—106, quoting *Sattva, supra* note 1 at paras 56—61.

[66] 2022 ONSC 6763 [*Tire Pit*].

[67] *Ibid* at para 13.

arguments it had made in the arbitration and that the arbitrator had rejected.[68]

Citing *Sattva*, the application judge found that all but one of Tire Pit's alleged errors clearly raised questions of fact or mixed fact and law; [69] Tire Pit did not identify any instances where the arbitrator allegedly failed to apply the correct legal test.[70] The other alleged error arguably raised a question of law, but the Court found it unnecessary to determine the character of the question since the complaint was meritless.[71]

The application judge therefore found that there was no question of law that could be a ground for leave to appeal. She went on to observe that, even if questions of law had been involved, none would have an impact beyond the parties, nor did they have "the degree of generality or precedential value that is generally expected of questions of law." Accordingly, granting leave to appeal would not contribute to the consistency of the law, "but, rather, would only provide a new forum for the parties to continue their private litigation".[72]

V. THE WAY FORWARD

In coming to our conclusion, we return to the two main forms of recourse Canadian law allows against a domestic arbitral award: set-aside and appeal.

In a set-aside application, the *outcome* of the arbitration *per se* is not determinative. Instead, grounds for set-aside arise from defects in the arbitrator's jurisdiction or the arbitration

---

[68] *Tire Pit, supra* note 66 at para 14.

[69] *Ibid* at paras 17—19.

[70] *Ibid* at para 30.

[71] *Ibid* at paras 31—36.

[72] *Ibid* note 66 at para 37, quoting *Sattva*, *supra* note 1 at para 51.

process.[73] An award that is scrupulously accurate in its characterization of the law and faultless in its identification and discussion of the facts may be subject to set-aside on such bases as that the arbitral tribunal decided issues outside its remit, or that one party was deprived of a reasonable opportunity to present its case. Equally, a poorly-written award replete with embarrassing legal errors may still withstand a set-aside application if the arbitral tribunal stayed within its jurisdiction, observed due process, and so forth.

In agreeing to arbitrate, parties must be taken to have agreed to have their disputes finally and efficiently determined by a decision-maker of their choice, to the exclusion of the courts. As the Court of Appeal for Ontario observed in *Tall Ships*, the application judge's decision setting aside the arbitrator's interpretation of the parties' contract not only contravened *Sattva*, but also undermined the parties' agreement:

> Characterizing the obligation to keep the [City of Brockville's] Steering Committee informed as an "implied term", such that it attracts a right to appeal in these circumstances, would entirely undermine the intent of these parties to submit this dispute, which arose out of a complex network of agreements and relationships which developed over a decade, to arbitration, and would particularly frustrate their specific provision that only errors of law could be appealed.[74]

---

[73] Cf *Tire Pit*, where the court rejected the applicant's motion to set aside the award for lack of procedural fairness, observing that "There is no basis to set aside the Award under subsection 46(1)6 or section 19 of the *Act*. The fairness arguments raised by Tire Pit all relate to the fairness of the decision, not the fairness of the process leading to the decision." *Ibid* at para 27. See also *Tall Ships*, *supra* note 5 to the same effect.

[74] *Tall Ships, supra* note 5 at para 81.

To the extent that our legislatures allow appeals on questions of law with leave, or allow parties to agree to have appeals on questions of law, unsuccessful parties should not be permitted to avoid their arbitration agreements by, in effect, treating their arbitrations as merely the first step in a litigation process. As an obvious example, even though the City of Brockville succeeded at the Court of Appeal, one would understand if it regretted its decision to arbitrate, and it may have achieved the same result at less cost and in less time had it proceeded with court litigation in the first instance.

The BC Court of Appeal in *March of Dimes* went off track because it failed to appreciate the importance of context in identifying which arbitral determinations involve questions of law, and are therefore appealable. If an appeal involves contractual interpretation by *any* first-instance adjudicator, courts should be "cautious in identifying extricable questions of law".[75] But if that first instance adjudicator is an arbitral tribunal, from which legislatures have expressly limited the scope of appeals, courts should be downright skeptical.

No doubt, cases will arise where an extricable error of law can be identified, but these will be very rare when the alleged error of law involves contractual interpretation.[76] If the appeal does not turn on the arbitral tribunal's interpretation of the contract, an extricable error of law may be more easily identifiable.[77]

---

[75] *Sattva*, *supra* note 1 at para 54. See also *Corner Brook (City) v Bailey*, 2021 SCC 29 at para 44.

[76] Cf *Christie*, *supra* note 3, rejecting all of the appellants' allegations of extricable errors of law in the arbitral tribunal's interpretation of the parties' contract.

[77] An example of an appeal from an arbitral award on an issue other than contractual interpretation is *Wastech*, where the main issue on appeal was the scope of contracting parties' duty of good faith performance. *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7.

An extricable error of law may arise from contractual interpretation by an arbitrator in the three circumstances listed by the Supreme Court in *Sattva*: the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. While the Court stated that legal errors made in the course of contractual interpretation "include" those three circumstances, and thus may have intended to suggest that other such circumstances may exist, no others have been identified in subsequent jurisprudence.

More generally, when an appellant, or applicant for leave to appeal an arbitral award, alleges an error of law in an award, courts should consider the above three circumstances set out in *Sattva* and ask themselves primarily whether the alleged error involves misinterpretation of a statutory or regulatory provision or departure from an established common law principle. If not, courts should hesitate to accept that an appealable question of law exists.

When confronted with apparent egregious errors that lead to unfairness, like the arbitrator's misapprehension of the facts in *March of Dimes*, the temptation will be strong to find a way to "make things right" by overturning the arbitral tribunal's decision. If the arbitral tribunal has committed a procedural error in finding and analyzing the facts, setting aside the award is a viable option. However, if a court grants leave to appeal because the arbitral tribunal misapprehended key facts or because the court disagrees with the tribunal's interpretation of a contract, it will have fallen into the trap identified by Gascon J, writing for a unanimous (on this point) Supreme Court in *Teal Cedar*:

> Courts should … exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question—for example, to gain jurisdiction in appeals from

> arbitration awards or a favourable standard of review in appeals from civil litigation judgments—are transparent. A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings.[78]

Inevitably, the issue of properly identifying extricable errors of law in arbitral awards will again come before the Supreme Court of Canada. When it does, it will present the Court with an opportunity to extend its series of judgments supportive of the concept of arbitration as a private process driven by party autonomy, and to make clear that Canada is committed to an arbitration regime that is consistent with international standards, commercial efficiency, and effective dispute resolution in a process chosen by the parties. The Court should take advantage of that opportunity to espouse, once again, the narrow approach to extricable errors of law exemplified by the Ontario judgments discussed in this article, and to reject the BC Court of Appeal's expansive approach.

[78] *Teal Cedar*, *supra* note 17 at para 45 (citations omitted).

COMITY AND THE ANTI-SUIT INJUNCTION: DEVELOPMENTS SINCE *AMCHEM*

*Stephen Armstrong**

I. INTRODUCTION

The anti-suit injunction is a controversial form of relief.[1] The House of Lords has described it as an "important and valuable" remedy that promotes the objectives of commercial arbitration.[2] The Supreme Court of Canada has described it as an "aggressive remedy" that "raises serious issues of comity".[3] Consonant with its remarks, the Supreme Court of Canada created a high bar to obtain an anti-suit injunction in *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* ("*Amchem*"). The Supreme Court's cautionary approach is apposite where a claimant seeks anti-suit injunctive relief on the basis that they are being vexed or oppressed by legal proceedings commenced in a foreign forum. The Alberta Court of Appeal's recent decision in *Pe Ben Oilfield Services (2006) Ltd v Arlint* ("*Pe Ben*") reinforces that view.[4] However, neither *Amchem* nor *Pe Ben* were concerned with the enforcement of arbitration agreements.

A line of authority is emerging in the Canadian jurisprudence which distinguishes *Amchem* where the claimant seeks specific

---

* Of the Alberta and Ontario bars.

[1] Thomas Raphael, *The Anti-Suit Injunction*, 2nd ed (Oxford: OUP, 2019) at para 1.01.

[2] *West Tankers Inc v RAS Riunione Adriatica di Sicurta SpA & Ors*, [2007] UKHL 4 at para 19, per Lord Hoffmann. See also at paras 29—30, per Lord Mance; *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb* (Rev1), [2020] UKSC 38 at paras 175—176 [*Enka Insaat*].

[3] *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)*, 1993 CanLII 124 (SCC), [1993] 1 SCR 897 at 912—913 [*Amchem* cited to SCR].

[4] *Pe Ben Oilfield Services (2006) Ltd v Arlint*, 2019 ABCA 400 [*Pe Ben*].

relief to enforce a contractual right not to be sued in a particular forum. The jurisprudence originates with motions for anti-suit relief to enforce arbitration agreements and forum selection clauses,[5] as well as from stay motions to enforce arbitration agreements and forum selection clauses.[6] This article aims to show that developments in the jurisprudence since *Amchem*, including decisions of the Supreme Court itself, undermine the authority of *Amchem* in the commercial arbitration context such that a different test is required.

Where the anti-suit injunction is sought in aid of an arbitration agreement, the order, which only operates *in personam* in any event, merely serves to hold the parties to their bargain. Comity does not "justify exceptional diffidence where the injunction is based on a breach of contract".[7] If the claimant demonstrates that proceedings have been commenced in another forum contrary to the terms of a valid and applicable arbitration agreement, the court should normally exercise its discretion to grant an anti-suit injunction, unless the responding party demonstrates a "strong cause" to not grant the relief.[8] The court retains a discretion to decline relief because the anti-suit injunction is equitable in nature and must be granted in accordance with equitable principles.[9]

---

[5] *Lincoln General Insurance Co v Insurance Corp of British Columbia*, [*Lincoln General*]; *Li v Rao*, 2019 BCCA 264 [*Li*]. In this article, "forum selection clauses" refers to an agreement between contracting parties to bring their disputes in the courts of a particular national or subnational jurisdiction on an exclusive basis. Non-exclusive forum selection clauses are not covered in this article.

[6] *ZI Pompey Industrie v ECU-Line NV*, 2003 SCC 27 [*ZI Pompey*]; *TELUS Communications Inc v Wellman*, 2019 SCC 19 [*Wellman*].

[7] *Li*, *supra* note 5 at para 73, paraphrasing Lord Millet in *Aggeliki Charis Compania Maritima SA v Pagnan SpA*, [1995] 1 Lloyd's Rep 87 at 96.

[8] *ZI Pompey*, *supra* note 6 at paras 19—21; *Li*, *supra* note 5 at para 59.

[9] Michael Douglas, "Anti-Suit Injunctions in Australia" (2017) 41:1 Melb U L Rev 66 at 78; Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford: OUP, 2008) at paras 6.58—6.63.

Part II of this article provides a brief background discussion on the anti-suit injunction and its relationship to the comity principle. Part III introduces the taxonomy deployed in the article's analysis of the Canadian jurisprudence. In short, the article proceeds by classifying the case law into two branches: the equitable rights branch and the contractual rights branch. The objective of this taxonomy is to provide a principled basis for understanding why it is that courts apply different standards in cases that address the same relief. Part IV proceeds with an analysis of the cases, beginning with the equitable rights branch before moving to the contractual rights branch. The main takeaways are that the comity principle speaks with its greatest force under the equitable rights branch and that it carries less importance under the contractual rights branch. Part V concludes the article.

II. THE ANTI-SUIT INJUNCTION AND THE ROLE OF COMITY

The anti-suit injunction is an equitable remedy. It is a form of injunction. More specifically, it is an order requiring the enjoined party not to commence, to cease to pursue, or to terminate court proceedings in a foreign jurisdiction.[10] The anti-suit injunction grew out of the Court of Chancery's practice of enjoining a party from commencing or continuing proceedings in the common law courts of England.[11] Equity acts *in personam* and, from its earliest equitable origins, the anti-suit injunction has always been directed at the party sought to be enjoined, rather than the court in which proceedings have been commenced.[12]

The anti-suit injunction is seen as being in tension with the comity principle. Comity is the "the deference and respect due by other states to the actions of a state legitimately taken within

[10] Raphael, *supra* note 1 at para 1.05.

[11] Dr. Andrew S Bell & Justice Gleeson, "The Anti-Suit Injunction" (1997) 71 Aust LJ 955 at 956; Douglas, *supra* note 9 at 70.

[12] *Ibid* at 956—957.

its territory".[13] Comity is not a positive legal rule or obligation.[14] It is, rather, a principle guiding the development of private international law jurisprudence.[15] The anti-suit injunction is said to be in conflict with the comity principle because, although the injunction operates *in personam*, it has the indirect effect of deciding a jurisdictional issue on behalf of a foreign court.[16]

III. TAXONOMY OF THE ANTI-SUIT INJUNCTION JURISPRUDENCE

Taxonomy is an important exercise for preserving and promoting the rationality of law.[17] Authors in this field have not, however, adopted a uniform way of categorizing the anti-suit injunction jurisprudence. One author divides the jurisprudence between "contractual" injunctions and "alternative forum" injunctions.[18] These labels overlap, however. The "alternative forum" label describes the existence of another forum in which the enjoined foreign proceeding could, and ought to be, pursued.[19] But, so-called "contractual injunction" cases typically also involve an alternative forum that is provided for by an arbitration agreement or forum selection clause. The "alternative forum" category could, therefore, encompass what is supposed to constitute a separate category for "contractual injunctions".

Other authors prefer to categorize the jurisprudence according to the nature of the equitable jurisdiction exercised by the court granting the remedy, being equity's auxiliary

---

[13] *Morguard Investments Ltd v De Savoye*, 1990 CanLII 29 (SCC), [1990] 3 SCR 1077 at 1095.

[14] *Ibid* at 1096.

[15] *R v Hape*, 2007 SCC 26 at para 47.

[16] *Amchem*, *supra* note 3 at 913.

[17] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26:1 UW Aust L Rev 1 at 3—6.

[18] Raphael, *supra* note 1 at para 1.09.

[19] *Ibid*.

jurisdiction and equity's exclusive jurisdiction.[20] However, categorizing anti-suit injunctions according to the equitable jurisdictions historically exercised by the Court of Chancery obscures more than it clarifies. In Canada, the superior courts of the common law provinces have all of the subject-matter jurisdiction historically exercised by the Court of Chancery in England such that jurisdiction is not a significant consideration in the jurisprudence. In short, a taxonomy focused on jurisdiction directs the mind to the wrong issue.

But, the effect of categorizing the jurisprudence according to the Chancery's historical bases for jurisdiction is to categorize the jurisprudence according to the nature of the right protected by the anti-suit injunction. Equitable intervention in the auxiliary jurisdiction protects a claimant's legal rights where the ordinary remedy at common law (i.e. damages) is inadequate.[21] Equitable intervention in the exclusive jurisdiction protects a claimant's equitable right not to be vexed or oppressed by the respondent's unconscientious use of its legal rights.[22] Thus, the real difference between the categories lies in the distinct rights vindicated by the remedy, rather than the nature of the equitable jurisdiction exercised by the court or the presence of an alternative forum in which to pursue the claim.

This article categorizes the jurisprudence according to the distinct rights protected by the remedy. The first branch is referred to as the "anti-suit injunction in aid of equitable rights" or the "equitable rights branch". The equitable rights branch is concerned with the protection of a purely equitable right not to be vexed or oppressed by proceedings commenced in another forum.[23] The second branch is referred to as the "anti-suit

---

[20] Bell & Gleeson, *supra* note 11 at 958.

[21] Bell & Gleeson, *supra* note 11 at 963; JD Heydon, MJ Leeming, PG Turner, *Meagher, Gummow & Lehane*'s *Equity: Doctrine & Remedies*, 5th ed. (Victoria: Butterworths, 2015) at paras 1—100.

[22] *Ibid* note 11 at 959.

[23] Briggs, *supra* note 9 at paras 6.23—6.26.

injunction in aid of contractual rights" or the "contractual rights branch". Arbitration agreements and forum selection clauses are the primary kind of contractual right contemplated under the contractual rights branch. It is hoped that this taxonomy provides clarity while also maintaining the traditionally distinct but related roles of rights and remedies in private law.[24]

As discussed below, a major difference between the contractual rights branch and the equitable rights branch is the weight that judicial comity commands in the analysis of whether an anti-suit injunction should be granted in a given case.

IV. THE ANTI-SUIT INJUNCTION IN AID OF EQUITABLE RIGHTS

Although commonly granted in aid of legal rights, an injunction may be granted to protect a purely equitable right.[25] This branch of the anti-suit injunction jurisprudence follows the classic equitable form of a right that has as its subject the right of another party.[26] That is, the equitable right protected by the anti-suit injunction has as its subject the unconscientious use of another party's right to commence legal proceedings in another forum.[27] Thus, the right at stake has as its subject a legal right granted by a foreign legal system. The case law demonstrates that comity has a very significant role in the analysis where the remedy is sought in aid of equitable rights.

---

[24] See *Day v Brownrigg* (1878), 10 Ch D 294 at 304, per Jessel MR; Robert Stevens, *Torts and Rights* (Oxford: OUP, 2007) at 57—62; Ernest J Wenrib, *Corrective Justice* (Oxford: OUP, 2012) at 81—116.

[25] Paul S Davies, *"Injunction" in Snell's Equity*, 34th ed., JA McGhee and S Elliot eds (London: Thomson Reuters, 2020) at paras 18—01; Heydon et al, *supra* note 21 at paras 21—015.

[26] See Ben McFarlane & Robert Stevens, "What's Special about Equity? Rights about Rights" in *Philosophical Foundations of the Law of Equity*, Dennis Klimchuk, Irit Samet, and Henry E Smith eds (Oxford: OUP, 2020) at 191—209.

[27] Bell & Gleeson, *supra* note 11 at 959.

In *Amchem*, a group of American companies involved in the manufacture, sale, and supply of Asbestos (the "Asbestos Companies") sought an anti-suit injunction to enjoin a group of 194 persons comprised mostly of residents of British Columbia, from pursuing an action against the Asbestos Companies in Texas for asbestos-related harms.[28] The Asbestos Companies were successful at first instance and at the Court of Appeal. However, in a unanimous decision, the Supreme Court allowed the appeal, reversed the lower courts, and made wide ranging comments on the nature of the anti-suit injunction.

The Court framed the issue in broad terms by asking "on what principles should a court exercise its discretion to grant an anti-suit injunction".[29] It described the anti-suit injunction as an "aggressive remedy" that "raises serious issues of comity", because it has the effect of enjoining a foreign court from hearing a case.[30] In articulating the test to grant an anti-suit injunction, the Court stated that it is "preferable" that the foreign court not be interfered with until the applicant for the injunction in the domestic court has sought a stay of the proceeding from the foreign court.[31] According to the Court, comity "demands" no less than that Canadian courts refrain from granting an anti-suit injunction when a foreign court assumes jurisdiction on a basis that generally conforms to the Canadian doctrine of *forum non conveniens*.[32]

Amchem has been criticized for elevating comity—a principle of interpretation—to that of a binding rule or obligation, particularly by requiring that the claimant first seek a stay in the foreign jurisdiction.[33] The merits or demerits of the

---

[28] *Amchem*, *supra* note 3 at 905.

[29] *Ibid* at 911.

[30] *Ibid* at 913.

[31] *Ibid* at 931.

[32] *Ibid* at 934.

[33] Bell & Gleeson, *supra* note 11 at 969.

Supreme Court's approach need not be resolved in this article. For present purposes, it is sufficient to observe that *Amchem* was not a case concerned with the enforcement of an arbitration agreement or forum selection clause. The injunction was not sought in aid of contractual rights. The high bar for relief established because of the comity principle should not, therefore, be read as applicable without qualification or modification to the contractual rights branch of the anti-suit injunction jurisprudence.

The Alberta Court of Appeal's decision in *Pe Ben Oilfield Services (2006) Ltd v Arlint* should dispel any doubts about comity's significant role under the equitable rights branch.[34] Pe Ben Oilfield Services ("Pe Ben") sought an anti-suit injunction in Alberta to restrain a worker, Ms. Arlint, from pursuing a personal injury action against it in British Columbia.[35] Ms. Arlint had been injured in British Columbia by an employee of Pe Ben and she received compensation for her injury from the Workers' Compensation Board of Alberta (the "Board").[36] Ms. Arlint was precluded by an Alberta statute from pursuing any causes of action she may have had against Pe Ben or its employee in Alberta as a result of her acceptance of the compensation from the Board.[37] She then commenced an action in British Columbia (the "BC Action") against Pen Ben alleging that Pe Ben's employee had negligently caused her injuries. Pe Ben was unsuccessful in seeking an anti-suit injunction at first instance and on appeal.

The Alberta Court of Appeal strongly emphasized the role of comity, elevating it to a rule of direct application above all other considerations. After finding that the British Columbia courts had jurisdiction *simpliciter* over the BC action, the Court offered

---

[34] *Pe Ben*, *supra* note 4.

[35] *Ibid*.

[36] *Ibid* at paras 3—5.

[37] *Ibid* at para 6.

no further analysis of the grounds on which an anti-suit injunction may be awarded other than to conduct what it styled as "a comity analysis".[38] The Court also held that Pe Ben was required to first seek a stay in British Columbia before seeking an anti-suit injunction in Alberta, because proceeding otherwise would be "contrary to the principles of private international law, conflict of laws, and comity".[39]

If the Supreme Court sought to set a high bar for obtaining relief in *Amchem*, the Court of Appeal's decision in *Pe Ben Oilfield Services* has followed that trajectory - and then some - by setting an almost insurmountable bar to obtaining an anti-suit injunction under the equitable rights branch. However, there are good reasons to read *Pe Ben Oilfield Services* narrowly. The Court appears to have been especially concerned for comity between provincial jurisdictions within the Canadian federation.[40] Further, as there was no arbitration clause or forum selection clause at issue, *Pe Ben Oilfield Services* has no application under the contractual rights branch.

V. THE ANTI-SUIT INJUNCTION IN AID OF CONTRACTUAL RIGHTS

The Supreme Court's failure to distinguish between the equitable rights branch and the contractual rights branch in *Amchem* has caused some confusion in the jurisprudence. After *Amchem*, it was unclear whether the *forum non conveniens* test should be applied even when the claimant seeking the anti-suit injunction had a contractual right not to be sued in the foreign forum.[41] A different test is warranted, however, because there are distinct rights at stake. Under the contractual rights branch, equity intervenes to hold the parties to their bargain. Arbitration agreements and forum selection clauses entail a

[38] *Pe Ben*, *supra* note 4at paras 18—23.

[39] *Ibid* at para 8.

[40] *Ibid* at paras 10, 20, 24.

[41] See Janet Walker, "A Tale of Two Fora: Fresh Challenges in Defending Multijurisdictional Claims" (1995) 33 Osgoode Hall LJ 549 at 555.

negative covenant not to litigate in other fora.[42] The Court of Chancery would restrain a breach of a negative covenant almost as of right because the parties to a contract have a right to expect its performance.[43] Hence, the gradual emergence of a distinct contractual rights branch in the anti-suit injunction jurisprudence.

The confusion caused by *Amchem* was evident in *Lincoln General Insurance Co v Insurance Corp of British Columbia* ("*Lincoln General*"). Lincoln General Insurance Co. ("Lincoln") and Insurance Corp. of British Columbia ("ICBC") agreed to arbitrate a coverage dispute in Ontario.[44] Subsequently, ICBC commenced an application in British Columbia for a declaration on the same subject-matter.[45] The Superior Court granted Lincoln an anti-suit injunction restraining ICBC from proceeding in British Columbia.[46] For the Court, the presence of an arbitration clause was sufficient to reduce the *Amchem* test to a simple question "of the enforcement of arbitration provisions".[47] However, the Court proceeded to apply *forum non conveniens* principles out of an abundance of caution.[48] Despite the understandable lack of clarity, the Court's acknowledgement that allowing a court proceeding on the same matter in a foreign jurisdiction "would render [Lincoln's] rights to arbitration

---

[42] *Ust -Kamenogorsk Hydropower Plant JSC v AES Ust-Kamenogorsk Hydropower Plant LLP*, [2013] UKSC 35 at para 1; *Enka Insaat*, *supra* note 2 at para 174; Raphael, *supra* note 1 at para 7.02.

[43] *Doherty v Allman* (1878) 3 App Cas 709 at 720, per Lord Cairns LC; Davies, *supra* note 25 at paras 18—035; Heydon et al, *supra* note 21 at paras 21—195.

[44] *Lincoln General*, *supra* note 5 at para 38.

[45] *Ibid* at para 11.

[46] *Ibid* at para 84.

[47] *Lincoln General*, *supra* note 5 at para 74.

[48] *Ibid* at paras 75—81.

nugatory" provides the seed for further development of a distinct contractual rights branch of the jurisprudence.[49]

The seed planted in *Lincoln General* grew to fruition in *Li v Rao* ("*Li*").[50] The BC Court of Appeal clarified that *forum non conveniens* principles do not apply under the contractual rights branch and that comity has a lesser role to play in this branch of the jurisprudence. The dispute arose out of the breakdown of Li and Rao's marriage and concerned the disentangling of their financial and business affairs. Rao commenced an action in British Columbia seeking the return of investment capital.[51] Li applied for summary judgment against Rao in this action. After the summary judgment application was filed, Rao initiated arbitration proceedings in China for the same relief.[52] Subsequently, Rao agreed not to take any further steps in the arbitration until the courts of British Columbia decided on Li's summary judgment application (the "Standstill Agreement").[53] Rao, nonetheless, proceeded with the arbitration and attempted to discontinue the civil action he had commenced in British Columbia.[54] Li sought, and obtained, an anti-suit injunction (or "anti-arbitration injunction" as it were) in British Columbia to restrain Rao from proceeding with the arbitration.[55] The BC Court of Appeal affirmed the lower court's order granting the anti-suit injunction.

The Court distinguished the case before it from *Amchem* on the basis that the Standstill Agreement constituted a forum

---

[49] *Lincoln General*, *supra* note 5 at paras 74, 78.

[50] *Li*, *supra* note 5.

[51] *Ibid* at para 12.

[52] *Ibid* at paras 7—8, 15.

[53] *Ibid* at para 17.

[54] *Ibid* at paras 18—20.

[55] *Ibid* at para 42.

selection clause in favour of British Columbia.[56] Drawing on English jurisprudence, the Court adopted a "strong cause test" and held that "there is no reason for this Court not to…grant anti-suit injunctions on a contractual basis in appropriate circumstances".[57] The Court observed that comity concerns arising from the grant of an anti-suit injunction are less significant where the ground for imposing the injunction is contractual, because in that circumstance the court "is not deciding that the domestic forum is the more appropriate forum" rather "it is enforcing the parties' contractual agreement not to proceed in the domestic forum".[58] The Court did not require Li to obtain a stay from the arbitral tribunal because "neither comity nor the objectives of arbitration justify exceptional diffidence where the injunction is based on a breach of contract".[59] Thus, it is the agreement of the parties not to sue in the foreign forum that calls for a different test than that laid down in *Amchem*. As there was no "strong cause" not to grant the anti-suit injunction, the appeal was dismissed.[60]

The holding in *Li* dovetails with related Supreme Court jurisprudence subsequent to *Amchem*. In *ZI Pompey Industrie v ECU-Line NV* ("*ZI Pompey*"), the Supreme Court held that *forum non conveniens* principles are abrogated in favour of a "strong cause" test in the case of applications for a stay of domestic Canadian proceedings based on a forum selection clause.[61] The strong cause test reverses the onus by requiring the party resisting enforcement of a valid and applicable forum selection clause to show a strong cause why it should not be enforced with

[56] *Li*, *supra* note 5at para 59.

[57] *Ibid* at para 56.

[58] *Ibid* at para 57.

[59] *Ibid* at para 73.

[60] *Ibid* at para 60.

[61] *ZI Pompey, supra* note 6 at para 21.

a stay.[62] The Court explained that the "presence of a forum selection clause is…sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain".[63] As there is substantial overlap in the standards courts apply when claimants seek a stay of proceedings or an injunction,[64] *ZI Pompey* serves as persuasive authority favouring the existence of a distinct contractual rights branch with different comity considerations from those articulated in *Amchem*.

Moreover, *ZI Pompey* and *Li* are applicable to anti-suit injunctive relief in aid of arbitration agreements, notwithstanding that the contractual rights at issue in those cases were forum selection clauses. The Supreme Court has, on other occasions, affirmed the importance of party autonomy and the need to give effect to arbitration agreements.[65] In *TELUS Communications Inc v Wellman* ("*Wellman*"), the Court observed that "the jurisprudence…has consistently reaffirmed that courts must show due respect for arbitration agreements and arbitration more broadly, particularly in the commercial setting."[66] The Court also identified a guiding principle underpinning modern arbitration legislation, which is that the "parties to a valid arbitration agreement should abide by their agreement".[67] The reasoning in *ZI Pompey* and *Li* were based on the existence of a contractual right not to be sued in the foreign forum and the importance of holding the parties to their bargain. Thus, *ZI Pompey* and *Li* should apply with equal force

[62] *ZI Pompey, supra* note 6.

[63] *Ibid*.

[64] Briggs, *supra* note 9 at para 6.26. The standard for a stay under modern arbitration legislation is a deviation from the common law in this respect because the stay motion is governed by statute.

[65] *Wellman*, *supra* note 6 at paras 48—57.

[66] *Ibid* at para 54.

[67] *Ibid* at paras 50—52, 55.

when an anti-suit injunction is sought in aid of an arbitration agreement.

VI. CONCLUSION

Amchem remains the leading authority on the anti-suit injunction in Canada. The strong role for comity envisioned in *Amchem* has been maintained in the subsequent jurisprudence under the equitable rights branch.[68] However, the emerging Canadian jurisprudence also suggests that *Amchem* must be qualified in the context of commercial arbitration. *Amchem* must be read in light of *Lincoln General*, *ZI Pompey*, *Li*, and *Wellman*. Where an anti-suit injunction is sought to enforce a contractual right, the comity principle speaks with less force because the parties have themselves agreed not to pursue litigation in the foreign forum. The Court will give effect to the parties' bargain and issue anti-suit injunctive relief, unless the party resisting enforcement can demonstrate a "strong cause" as to why the Court should not grant the relief.[69]

[68] *Pe Ben*, *supra* note 4.

[69] *Li*, *supra* note 5 at para 56; *ZI Pompey*, *supra* note 6 at para 21.

A YEAR IN REVIEW OF CANADIAN COMMERCIAL ARBITRATION CASE LAW (2022)

Lisa C. Munro[*]

I. INTRODUCTION

Every year, a handful of Canadian court decisions touching on commercial arbitration issues capture the interest and imagination of arbitration practitioners because these cases signify a new trend, clarify or change the law, raise novel principles, or just because they have surprising outcomes. This brief review presents a snapshot of the most "buzzworthy" decisions released in 2022. These cases highlight three main themes that emerged as key trends in 2022: (1) decisions binding non-signatories to arbitration agreements; (2) court reviews of tribunal preliminary jurisdiction rulings; and (3) a perennial topic with a new twist, appeals of arbitral awards on an extricable question of law.

II. BINDING NON-SIGNATORIES TO ARBITRATION

The year 2022 saw the release of several decisions by the Québec Superior Court that appeared to challenge the fundamental principle of arbitration as a consensual dispute resolution process. In each case, a non-signatory to an

[*] Lisa C. Munro, FCIArb, Q.Arb., is a partner at Lerners LLP and an arbitrator with Arbitration Place. She is also listed on the Toronto Commercial Arbitration Society, Vancouver International Arbitration Centre, ICC Canada, Chartered Institute of Arbitrators Canada, ADR Institute of Canada, and International Centre For Dispute Resolution Canada rosters. She is the Editor of Arbitration Matters (www.arbitrationmatters.com), which provides summaries of decisions on commercial arbitration issues as they are released across Canada. She thanks those who contributed to those case summaries for the analysis that provided the basis for this review (Eric Bédard, Laura Cundari, Jonathan Eades, Julie Hopkins, Rachel Howie, Timothy Hughes, Cynthia Kuehl, Joanne Luu, Marie-Claude Martel, Eric Morgan, James Plotkin, Liz Roberts, Myriam Seers, and John Siwiec).

arbitration agreement was required to participate in an arbitration on grounds of practicality, even where consent to arbitrate was not clear. Although articles 1 and 622[1][2] of the *Code of Civil Procedure* require courts to refer a dispute to arbitration (only) where there is agreement to arbitrate,[1] the Court prioritized other legislative imperatives, such as the principle of proportionality, "in terms of the cost and time involved" found in article 2[2] and 622[3],[2] the avoidance of multiplicity of proceedings, and the risk of inconsistent results. In some cases, the Court went further, binding a non-signatory because it was "inappropriate" to split disputes and that doing so would be to rely upon a "blind technicality".

In *Newtech Waste Solutions Inc. v Asselin*,[3] the parties entered into a share purchase and sale agreement that contained an arbitration clause. The vendor started arbitration proceedings claiming he was owed an unpaid balance by the purchaser. The purchaser counterclaimed and alleged that the vendor was in breach of the agreement's non-competition clause. The Tribunal allowed the purchaser to add a non-signatory corporation as a party to the arbitration. The Québec Superior Court dismissed the non-signatory's challenge to this jurisdictional decision because it was alleged to have participated in the vendor's breach of contract and the vendor was its principal and shareholder—he was "the center of all this case".[4] The Court reasoned that the non-signatory should be joined because otherwise the Tribunal would have to consider the conduct of both the vendor and the non-signatory to decide the dispute, which could lead to contradictory results. It was "not appropriate to split the dispute, which would have the

[1] CQLR c C-25.01.

[2] *Ibid*.

[3] 2022 QCCS 3537 [*Newtech*].

[4] *Ibid* at para 25.

effect of multiplying the procedures, slowing them down or complicate the process".[5]

To identify circumstances that justify an exception to the general rule of consent, the Court relied on the 1996 Québec Court of Appeal decision in *Décarel inc. v Concordia Project Management*.[6] In that case, the Court found that the corporation which signed the arbitration agreement could only act through the instrumentality of its shareholders and managers, and that any dispute about the corporation's alleged wrongdoing could only arise from their conduct. Therefore, the arbitration agreement expressed their desire that any dispute was to be resolved by arbitration: "[t]o rule out the application of the arbitration clause in such circumstances on the grounds that it concerns only legal persons would, at least in my opinion, be nonsense based on blind technicality and knowingly ignorant of the particular circumstances of the case and this, regardless of the corporate veil in other contexts".[7] Adopting a rule in which each case should be decided on its own circumstances would help avoid the potential "absurd outcome" of contradictory findings by a court and an arbitral tribunal. The Court described this as a liberalization of earlier principles, which now allow each case to be decided based upon its own particular circumstances.[8]

Similarly, in *Cannatechnologie inc. v Matica Enterprises inc*., a non-signatory to an arbitration agreement was forced to arbitrate based upon the Court's finding of the presumed

---

[5] *Newtech*, *supra* note 3 at para 27.

[6] 1996 CanLII 5747 (QCCA) [*Décarel*]. The Court in *Newtech* also relied upon other decisions of the Québec Court of Appeal to the same effect: *Société Asbestos Itée c. Lacroix*, 2004 CanLII 76694 (CA); *Société de cogénération de St-Félicien, société en commandite / St-Felicien Cogeneration Limited Partnership* c. *Falmec Industries Inc.*, 2005 QCCA 441; and a decision of the Québec Superior Court, *Cogismaq International inc. v Lafontaine,* 2007 QCCS 1214.

[7] *Ibid* at para 7.

[8] *Ibid* at paras 5—7.

intentions of the parties.[9] The plaintiff minority shareholder of a corporation sued, alleging oppression by the majority shareholder and its CEO/shareholder. The investment agreement pursuant to which the CEO purchased his shares from the majority shareholder contained an arbitration clause, to which the plaintiff shareholder was not a party; however, the plaintiff was a consultant to the corporation and participated in negotiating the investment agreement. The Québec Superior Court granted the defendants' application to dismiss the plaintiff's action and referred the parties, including the non-signatory plaintiff, to arbitration. It also referred all the claims to the same arbitration, although the Court acknowledged that some were outside the scope of the arbitration agreement. The Court found that it was, "reasonable to presume that—if the clause has no express limitation—the parties intended to refer all their related contractual matters to the arbitrator, in the interest of a single, neutral, efficient and competent dispute resolution mechanism, in order to avoid jurisdictional disputes and multiplicitous litigation".[10] The Court of Appeal reversed the dismissal of the action and ordered a stay to allow the arbitrator to determine the issue in accordance with the principle of competence-competence.[11] It concluded that, based upon a *prima facie* assessment of the evidence under article 622 of the *Civil Code of Procedure*, the record was sufficient to support the application of the arbitration clause to the plaintiff as a non-signatory.

Finally, in *Tessier v 2428-8516 Québec Inc.*,[12] the Québec Superior Court found that the "interests of justice, including the principle of proportionality" required closely linked parties and disputes to be arbitrated together.[13] It relied upon article 1[3] of the *Code of Civil Procedure*, which provides that, "[t]he parties

[9] 2021 QCCS 4249.

[10] *Ibid* at para 27 (internal quotation omitted).

[11] 2022 QCCA 758.

[12] 2022 QCCS 3159 [*Tessier*].

[13] *Ibid* at para 13.

must consider resorting to private means of preventing and resolving their dispute before going to court". The Court referred to arbitration disputes about the ownership of two companies, which operated together in the construction industry; both the applicants and the respondents claimed that they were the only shareholders of both companies. However, the shareholders of only one of the two companies were parties to a unanimous shareholders agreement that contained an arbitration clause. The Court found that the disputes were "intimately linked" and that it would be "inappropriate to split the actions"—and the parties agreed.[14] Instead, "rather than depriving the shareholders of the first [company, whose shareholders agreed to arbitration] of the effects of the arbitration clause, the shareholders of the second [company, whose shareholders did not] should be ordered to be subject to it".[15]

Compare these decisions to *Travelers Insurance Company of Canada v Greyhound Canada Transportation*,[16] where the Superior Court of Québec, Practice Division, declined jurisdiction over one part of the dispute which was not within the scope of the arbitration clause and which involved a non-signatory. The plaintiff lessor sued the lessee and its security services provider for losses it suffered on its premises as a result of an explosion. The lessee claimed that its security services provider was responsible and relied upon their contract, to which the plaintiff was not a party. It contained a warranty and indemnification provision, as well as an arbitration clause. The Court declined jurisdiction over the warranty claim because of the arbitration clause.[17] It recognized that this outcome would

[14] *Tessier, supra* note 12 at paras 11—12.

[15] *Ibid* at para 15.

[16] 2022 QCCQ 4746.

[17] The Court relied upon art 622 of the *Code of Civil Procedure,* CQLR c C-25, as well as the Supreme Court of Canada decision in *GreCon Dimter inc v JR Norman inc*, 2005 SCC 46, another warranty case. But compare this result to *Guns n' Roses Missouri Storm Inc v Donald K Donald Musical Productions Inc*, 1994 CanLII 5694 (QCCA).

result in parallel proceedings and possibly inconsistent results, but noted that the warranty claim involved different parties who had a clear intention to arbitrate.[18]

These cases suggest that the principle of consent to arbitration continues to hold where the non-signatories and signatories to the arbitration agreement are unrelated. Otherwise, where the dispute involves related corporations and their directors, officers, shareholders, or managers, all of which or whom operate business together under multiple contracts, these are circumstances which justify joining non-signatories to the arbitration to avoid multiplicity of proceedings and inconsistent results. However, it is unclear why the Québec Courts felt that the "liberalization" of the principles set out in *Décarel* is necessary. Well-established principles in contract and arbitration law are sufficient. For example, these cases could have been decided on the basis that a *prima facie* review of the evidence suggested that the non-signatories could be parties, with the result that the matters should be referred to the arbitrator. Alternatively, the Courts could have relied upon the principle of *alter egos* or piercing the corporate veil to achieve the same results.

A good example of this is the decision of *CC/Devas (Mauritius) Ltd. v Republic of India*,[19] which demonstrates the application of the *alter ego* principle. At first instance, the Québec Superior Court dismissed an application by Air India Ltd., a third party to an arbitration agreement, to quash an *ex parte* order permitting the seizure of its assets to satisfy a foreign arbitral award against its shareholder, the Republic of India. The Court cited the *alter ego* principle and referred to the "unique and extensive link" between the two entities and the fact that the Republic of India "exercises an exceptionally high degree of control over" Air India, a state-owned entity, which "goes way beyond the involvement and control normally

[18] Relying upon *Société québecoise des infastructures c WSP Canada Inc*, 2016 QCCA 1756.

[19] 2022 QCCS 7 [*CC/Devas*].

exercised by a shareholder over its wholly owned corporation".[20] The Québec Court of Appeal reversed this decision.[21] It referred to article 317 of the *Civil Code of Québec*, which allows the lifting of the corporate veil only where one corporation's separate legal personality is used to commit fraud, an abuse of rights, or contravention of a rule of public order for the benefit of the other corporation.[22] There was no such allegation here.

III. COURT REVIEW OF TRIBUNALS' PRELIMINARY RULINGS ON JURISDICTION

My 2021 year in review highlighted decisions in which courts considered their role on an application by a party to "decide the matter", where a tribunal "rules" on a jurisdiction objection as a preliminary question under article 16(3) of the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law") and comparable provisions of provincial domestic arbitration legislation.[23] The meaning of that language has continued to vex Canadian courts, even though it appeared that the 2021 decision of the Ontario Divisional Court in *Russian Federation v Luxtona* brought some clarity.[24]

---

[20] *CC/Devas, supra* note 19 at para 62.

[21] 2022 QCCA 1264. It later granted a stay of this order at 2022 QCCA 1439, pending appeal to the Supreme Court of Canada, to prevent the assets from being moved beyond the jurisdiction of the Court.

[22] CQLR c CCQ-1991.

[23] Lisa C. Munro, "2021 Canadian Commercial Arbitration Case Law: A Year in Review", (2021) 2:2 Can J Comm Arb 71. Of course, this provision applies only where the arbitrator's ruling is truly jurisdictional. In *Optiva Inc v Tbaytel*, 2022 ONCA 646, the Court found that the arbitrator's ruling contained in a procedural order, that he had jurisdiction to hear a party's summary judgment motion over the objection of the other party, was a procedural matter, not jurisdictional (citing *Inforica Inc v GCI Information Systems and Management Consultants Inc*, 2009 ONCA 642).

[24] 2021 ONSC 4604 (Div. Ct.) [*Luxtona*].

That Court held that, consistent with the weight of international authority,[25] the language in the Model Law requiring the court to "decide the matter" confers original jurisdiction on the court and provides for a hearing *de novo*, at which new evidence may be adduced as of right. This result came after two lower court decisions, which had come to contradictory conclusions.[26] The Ontario Divisional Court's decision in *Luxtona* was applied to section 17(8) of the Ontario *Arbitration Act, 1991*[27] in *Hornepayne First Nation v Ontario First Nations (2008) Limited Partnership.*[28] However, it was not considered in *Saskatchewan v Capitol Steel Corporation,*[29] which came to a different conclusion under section 18(9) of the Saskatchewan *Arbitration Act, 1992*—that the procedure is an application for judicial review of the arbitrator's ruling, reviewable on a correctness standard.[30]

Courts remained divided on this issue in 2022, even in Ontario. In *Electek Power Services Inc. v Greenfield Energy Centre Limited Partnership,*[31] the Court held that *Luxtona* had established (under the Model Law) that applications to a court to "decide the matter" are hearings *de novo.* This also applies to the comparable provision in the Ontario *Arbitration Act, 1991.*[32] However, in *PCL Constructors Canada Inc. v Johnson Controls*, the Court came to a different conclusion.[33] The plaintiff, which had

---

[25] The Court found that *Dallah Real Estate and Tourism Holding Inc v Ministry of Religious Affairs of the Government of Pakistan*, [2011] AC 763 (UKSC)[*Dallah*], is the leading international authority on this point, even though the UK is not a Model Law jurisdiction.

[26] 2018 ONSC 2419 (per Dunphy J) and 2019 ONSC 7558 (per Penny J).

[27] SO 1991, c. 17.

[28] 2021 ONSC 5534 at para 6.

[29] 2021 SKQB 224 at para 30.

[30] SS 1992, c. A-24.1.

[31] 2022 ONSC 894.

[32] *Ibid* at paras 20—22.

[33] 2022 ONSC 1642 at paras 18—24.

applied to the Court to "decide the matter" under the Ontario *Arbitration Act, 1991,* argued that the standard of review of the tribunals' rulings in two related arbitrations on a matter of jurisdiction was correctness. It relied upon one of the lower court decisions in *Luxtona*[34] (which had applied *Mexico v Cargill Incorporated*[35]). The Court agreed and found that the rulings of the arbitrators were correct. It does not appear that the Court was referred to the Ontario Divisional Court decision in *Luxtona,* which distinguished *Cargill* on the ground that it dealt with a set-aside application on jurisdictional grounds, not a challenge to the tribunal's jurisdiction.[36]

In Québec, the Court applied the *Luxtona* approach in *Newtech,*[37] in which the relevant language in art 632[3] of the *Code of Civil Procedure* provides that a party may request the court to "rule on the matter".[38]

Meanwhile, in Alberta, the 2022 case law was inconsistent. In *Ong v Fedoruk*,[39] the Court applied *Luxtona* to section 17(9) of the Alberta *Arbitration Act*.[40] It found that a *de novo* hearing better accords with the legislative direction that the courts are to "decide the matter".[41] It reasoned further that such actions attract a correctness standard because they involve "questions of law of central importance to the legal system as a whole and outside the [Arbitrator's] expertise".[42] On the other hand, the Court in *Brazeau (County) v Drayton Valley (Town)*

---

[34] 2018 ONSC 2419 (per Dunphy J).

[35] 2011 ONCA 622 [*Cargill*].

[36] *Luxtona*, *supra* note 24 at para 23.

[37] *Newtech*, *supra* note 3.

[38] *CQLR*, *supra* note 1.

[39] 2022 ABQB 557 [*Ong*].

[40] RSA 2000 c A-43.

[41] *Ong*, *supra* note 39 at paras 32—37.

[42] *Ibid* at para 31.

characterized the proceeding before it under section 17(9) as an application for judicial review.[43]

Brazeau also considered the difference between a "ruling" and an "award". The question was whether a party was out of time to bring an "application for judicial review" of the arbitrator's preliminary jurisdiction ruling, which was released to the parties early, and also later attached to the final award on the merits. The relevant legislation pursuant to which the arbitration was conducted permits "judicial review" of an award within 60 days. The Court found that there was some ambiguity about whether an arbitrator's preliminary "ruling" constituted an "award". Neither term is defined in the Alberta *Arbitration Act* (or in other provincial domestic arbitration legislation which contains this same provision). The Court noted that the Alberta *Arbitration Act* gives the arbitrator the power to issue "awards" (sections 37, 38, and 41), while section 17 gives the arbitrator the power to make "rulings" on jurisdiction. Further, section 17 itself refers to both "rulings" and "awards". Section 17(8), in particular, states that the arbitral tribunal may "rule" on an objection to jurisdiction as a preliminary question when it is raised, or may deal with it in an "award". The Court reasoned that, as a matter of statutory interpretation, when the legislature uses different words, it intends different meanings. Therefore, the application to the court to "decide the matter" following an arbitrator's preliminary jurisdictional "ruling" must be made within 30 days after it is released, according to section 17(9). The appellant was out of time by waiting to challenge the "ruling" as part of an appeal of the final "award".

The distinction between a ruling and an award has implications beyond the narrow issue raised in *Brazeau*. In *Luxtona*, the Tribunal's preliminary jurisdiction decision was apparently called an "interim award".[44] Therefore, the applicant also sought to set aside the interim award under article 46 of the Model Law and, in so doing, preserve a further right of appeal

[43] 2022 ABQB 443 at para 50 [*Brazeau*].

[44] 2019 ONSC 7558 (per Penny J) at para 6.

on the jurisdiction issue. There is no right of appeal from the court's ruling on an application to "decide the matter".[45] This raises the possibility that the label used by the arbitrator may determine both the right and route of appeal. The Ontario Divisional Court in *Luxtona* did not address this issue, but in 2021 in *United Mexican States v Burr*, the Ontario Court of Appeal left open the possibility that a party can "ride both horses".[46]

The lack of consistency in these cases arises, in part, because of the conflation of several distinct concepts. The first is the nature of the court's jurisdiction and whether it is original or is a form of judicial review. The second is the appropriate standard of review. The third is the nature of the hearing and whether or not it is "*de novo*". The fourth, which turns on whether the hearing is *de novo*, is whether the record before the court is limited to that before the tribunal, or whether fresh evidence may be adduced, and, if so, as of right or only with leave. Without a clear analytical framework to understand these provisions in the Model Law and the domestic arbitration legislation, courts will likely continue to confuse these concepts and reach inconsistent outcomes, particularly if they start their analysis without the benefit of the case law in other jurisdictions, both national and international.

---

[45] In *Iris Technologies Inc v Rogers Communications Canada Inc*, 2022 ONCA 634, the court quashed a "motion for leave to appeal" the lower court's decision in which it was asked to "decide the matter" of the tribunal's jurisdiction after it had made a preliminary ruling. The Court of Appeal found that the legislation is clear – s 17(9) of the Ontario *Arbitration Act, 1991*, expressly states that that "there is no appeal from the court's decision", at para 6, thereby affirming that Court's decision to the same effect under the Model Law in *United Mexican States v Burr*, 2021 ONCA 64.

[46] *Ibid* at paras 27—28.

IV. APPEAL OF AN ARBITRAL AWARD ON AN EXTRICABLE QUESTION OF LAW

One of the most talked-about decisions in 2022 was *Escape 101 Ventures Inc v March of Dimes Canada.*[47] The British Columbia Court of Appeal held that an arbitrator's material misapprehension of evidence going to the core of the outcome of the award constituted an extricable error of law, which was subject to appeal under section 59(2) of the British Columbia *Arbitration Act*.[48]

The parties' dispute arose out of an asset purchase agreement, pursuant to which the appellant sold to the respondent substantially all its business assets. The agreement provided for an "earnout" payment to be made to the appellant post-closing, based upon the business's gross revenue during a 5-year term. It required the respondent to deliver quarterly gross revenue reports, which the appellant was deemed to accept if it did not object in time. The parties disagreed on whether gross revenue from new business entered into after the sale was to be included in the earnout payment, and arbitrated their dispute. The arbitrator found that the agreement was ambiguous and considered the parties' post-contractual conduct as an aid to interpretation. He found that the appellant had failed to object in time to the absence of revenue from new business in several reports, which led him to conclude that the parties did not intend the agreement to include such revenue in the earnout payment calculation. The arbitrator dismissed the appellant's claim. It appealed directly to the British Columbia Court of Appeal, the first such appeal under British Columbia's new domestic *Arbitration Act*, which came into force in 2020.

The appellant argued that the arbitrator had misapprehended the evidence of its post-contractual conduct, which constituted an error of law since it was central to the

[47] 2022 BCCA 294 [*Escape 101*].

[48] SBC 2020, c 2.

arbitrator's reasoning and conclusions.[49] The parties agreed that the arbitrator had erred on the facts—he found that the appellant had failed to object to reports that did not disclose revenue with respect to a contract that would not take effect until the following year. The respondent's position was that *Sattva Capital Corp v Creston Moly Corp*[50] and *Teal Cedar Products Ltd v British Columbia*[51] narrowed the range of questions of law that may be raised on appeal of an arbitral award.

The Court of Appeal stated that *Sattva* and *Teal Cedar* concerned the analytical framework for drawing distinctions between questions of fact, of mixed fact and law, and of law alone. Neither decision suggested that a misapprehension of the evidence cannot be raised on appeal. In reaching this conclusion, the Court of Appeal referred to a series of appellate decisions (both pre- and post-*Sattva*) for the proposition that a misapprehension of evidence that goes to the core of the outcome is an extricable error of law, whether it be a failure to consider evidence relevant to a material issue, a mistake as to

[49] The question also arises as to whether the proceeding was properly framed as an appeal. The appellant's complaint was that the arbitrator had made findings that were not argued or pleaded by the parties. The respondent's position was that this issue ought to have been pursued as an application to the British Columbia Supreme Court to set aside the award on the ground that the applicant "was not given a reasonable opportunity to present its case or to answer the case presented against it" under s 58(1) of the British Columbia *Arbitration Act*. However, because this issue was raised for the first time in oral argument, the Court of Appeal declined to deal with it. In any event, the Court stated that the issue was academic because the appellant raised a question of law subject to appeal. See paras 25 to 32.

[50] 2014 SCC 53 [*Sattva*].

[51] 2017 SCC 32 [*Teal Cedar*].

the substance of the evidence, or a failure to give proper effect to the evidence.[52] The Court allowed the appeal.[53]

However, there are at least two good reasons to challenge the Court's analysis.

First, none of the cases the Court relied upon for this conclusion cited *Sattva* and none was a commercial contract interpretation case.[54] Further, none involved an appeal of an arbitral award or a consideration of the scope of such an appeal on an error of law (under the British Columbia *Arbitration Act*, or any other domestic arbitration legislation).[55]

Second, this decision is hard to reconcile with the *ratio* in *Sattva*, in particular the policy objectives of finality and deference to factual findings in arbitration that were espoused in that decision. *Sattva* very narrowly construed an extricable error of law that may arise in the contract interpretation process: the application of an incorrect principle; the failure to consider a required element of a legal test; or the failure to

---

[52] *Sattva*, *supra* note 50 at para 43. See *Sharbern Holding Inc v Vancouver Airport Centre Ltd*, 2011 SCC 23 at para 71; *Armstrong v Armstrong*, 2012 BCCA 166 at paras 65—67; *Bayford v Boese*, 2021 ONCA 442 at para 28; *Carmichael v GlaxoSmithKline Inc*, 2020 ONCA 447 at para 125, leave to appeal to SCC refused, 39437 (1 April 2021); *R v Morrissey* (1995), 1995 CanLII 3498 (ONCA); and *Waxman v Waxman*, 2004 CanLII 39040 (ONCA).

[53] The Court also found that the language in s 59(1) of the BC *Arbitration Act*, which provides that an appeal may be brought "on any question of law arising out of an arbitral award", did not require the error to be clear on the face of the award. Here, the error was only clear upon a review of the evidence. See *Escape 101*, *supra* note 47 at paras 28, 78—96.

[54] See *supra* note 52.

[55] Elsewhere in the decision, the Court referred only to its own decisions that express the view, in *obiter*, that a misapprehension of the evidence could constitute an error of law on an appeal of an arbitral award: *Van de Perre v Edwards*, 2001 SCC 60 at para 15; *Hayes Forest Services Ltd v Weyerhauser Co Ltd*, 2008 BCCA 31 at para 69; *Grewal v Mann*, 2022 BCCA 30; and *Richmont Mines Inc v Tech Resources Limited*, 2018 BCCA at paras 71—74.

consider a relevant factor.[56] *Sattva* cautioned that courts must be careful to ensure that the proposed ground of appeal is properly characterized, given the statutory requirement to identify a question of law.[57] Finally, it explained why extricable errors of law rarely arise in contract interpretation cases:

> [55] … [T]he goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies… from an arbitrator's interpretation of a contract.[58]

The appellant's objections to the award did not fall within any of the categories of legal errors that may arise in interpretation identified in *Sattva*. The appellant's complaint was simply that the arbitrator had erred in making factual findings. The question on appeal was not whether the arbitrator was correct in using evidence of the parties' post-contract conduct to interpret their agreement. It was whether, having considered that evidence to interpret the contract, he misconstrued it. To paraphrase from *Teal Cedar*,[59] this was a question about whether the arbitrator properly applied a relevant principle—a question of mixed fact and law—rather than whether he applied the proper principle.

---

[56] *Sattva*, *supra* note 50 at para 53.

[57] *Ibid* at para 54.

[58] *Ibid* at para 55.

[59] *Teal Cedar*, *supra* note 51 at para 65.

V. CONCLUSION

The decisions highlighted in this review are of interest because they address foundational arbitration principles—party autonomy, jurisdiction of the arbitral tribunal, and scope of court intervention—in surprising and sometimes perplexing ways.

The Québec decisions hold that non-signatories to arbitration agreements may be forced to arbitrate disputes involving closely related parties and intertwined disputes in order to avoid a multiplicity of parallel proceedings or based upon the presumption that such parties intended to have all their disputes determined in one forum. This is inconsistent with party autonomy.

Likewise, the parties in *Escape 101* chose arbitration under a legislative regime in which their only recourse against the award was either an appeal on a question of law or a set-aside application for procedural fairness issues.[60] In other words, it is arguable that both parties took the risk that their chosen arbitrator would make an error in finding facts that they would have no right of appeal.[61] Alternatively, and viewed in jurisdictional terms, the parties gave the Tribunal jurisdiction to find the facts, knowing there could be no court review. The Court's decision may have been an attempt to do justice between the parties where the arbitrator had made a material misapprehension of the evidence that had negative consequences for the appellant—it received only $402,311 of the potential maximum earnout payment of $1.1 million.[62] But if the Court had taken the party autonomy principle more

[60] Both the British Columbia *Arbitration Act, 1996*, RSBC 1996, c 55 (in effect when the parties made their agreement) and the *Arbitration Act, 2020*, SBC 2020, c 2 (in effect during the appeal) provided that a party may appeal on a question of law if the parties consent or if leave to appeal is granted.

[61] See *supra* note 52.

[62] This fact comes from the decision granting the appellant leave to appeal, 2021 BCCA 313 at para 3.

seriously, it may have viewed the situation as one in which the parties got exactly what they bargained for.

In addition, Canadian courts continue to struggle with basic concepts of jurisdiction when trying to interpret the language in arbitration legislation that, where a tribunal "rules" on an objection to the tribunal's jurisdiction as a preliminary question, a party may apply to the court to "decide the matter". The Ontario Divisional Court's decision in *Luxtona* provides a reasoned and reasonable approach. It followed the U.K. Supreme Court decision in *Dallah v Pakistan*,[63] which it found was the leading international authority. The U.K. Court found that its role was to "reassess the issue [of jurisdiction] itself", rather than review the Tribunal's decision. Put another way, "the tribunal's own view of its jurisdiction has no legal or evidential value, when the issue is whether the tribunal had any legitimate authority … at all".[64] Reference to U.K. case law is somewhat dubious given that England is not a Model Law jurisdiction, and the statutory language differs on this issue.[65] However, *Dallah* is consistent with the Ontario Court of Appeal decision of *Cargill*, decided in under the Model Law in another context.[66] Because the language in the Model Law is almost identical to that in the domestic legislation, it makes sense that a court reviewing a domestic award should follow *Luxtona*.[67]

---

[63] *Dallah*, *supra* note 25.

[64] See *Luxtona*, *supra* note 24 at paras 30—31.

[65] See the English *Arbitration Act 1996*, 1996 c 23, s 32.

[66] *Cargill*, *supra* note 35.

[67] It may also be required as part of Canada's obligation to comply with international arbitration standards. This obligation is codified in Art 2A of the 2006 version of the Model Law, although only BC and Ontario have adopted those amendments into their provincial *International Commercial Arbitration Acts*.

The Canadian Journal of Commerical Arbitration

2023 • Vol. 3, No. 2