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The Canadian Journal of Commercial Arbitration



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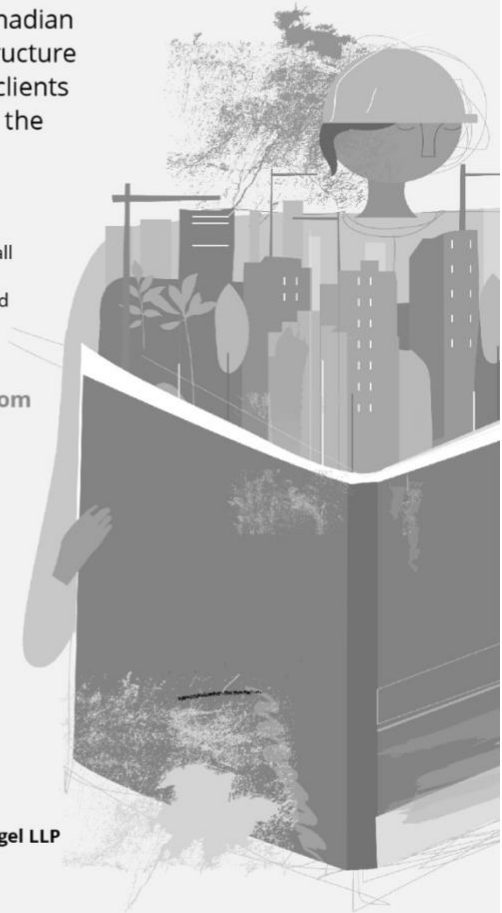
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An aerial photograph of a modern cable-stayed bridge spanning a large body of water. The bridge features two tall, white, A-frame pylons with numerous stay cables supporting the deck. The water is a deep blue-green color. In the upper left corner, there is a red diagonal banner with the word "Blakes" written in a white, cursive script font.

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THE CANADIAN JOURNAL OF COMMERCIAL ARBITRATION

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MASTHEAD

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EDITORS' NOTE

Before introducing this issue's contents, I would like to announce two changes to *CJCA*'s masthead.

First, with this issue we bid a sad but fond farewell to Executive Editor Gerald W. Ghikas KC, a co-founder *CJCA* and a stalwart member of our senior editorial team. Gerry is justly renowned among the Canadian commercial arbitration community, and his contributions are legion. For us at *CJCA*, he brought so much to the creation and evolution of this journal: wisdom, experience, perspective, good humour, and two excellent examples of his many published writings: "Consent to Arbitration, Party Autonomy, and Non-Signatories: A Review of Procedural, Analytical, and Substantive Approaches under Canadian Laws" (2020) 1:2 *Can J Comm Arb* 1 and "The 'Tabula Rasa' Illusion: Procedural Norms and Procedural Flexibility in Commercial Arbitrations" (2023) 3:2 *Can J Comm Arb* 96.

Second, the senior editors are delighted to welcome our friend and newly-minted Assistant Professor at Queen's Law, Dr Stanley Nweke-Eze. Beginning with the next volume of *CJCA*, Stanley will join me as co-Managing Editor. Welcome, Stanley!

This issue of *CJCA* contains our usual wide-ranging mix of updates, in-depth explorations, and regular features.

In the lead article, Bill Horton, Lisa Munro, and Emily McMurtry describe the new ADRIC Arbitration Rules: the process of their development, the innovative provisions within them, and the impact they are likely to have on arbitration in Canada.

Next, we present two short essays. The first, by Frank Wu, re-assesses the Court of Appeal for Ontario's landmark opinion in *Aroma*, two years after its issuance. One might think the decision had been discussed to death, but Wu finds a fresh angle that may prompts many readers to re-think their opinion of *Aroma*. The second, by Bill Horton, considers identical

provisions of the Alberta and Ontario *Arbitration Acts*, which have been interpreted by the two provinces' courts in divergent ways. Horten sees danger in the Alberta approach, and calls for legislative intervention to bring it into line with the national and international mainstream.

The issue continues with two case comments, one by Eric Myles on the BCCA's decision in *Bollhorn v Lakehouse Custom Homes* and the other by Zain Mookhi on the Saskatchewan Court of King's Bench's decision in *Gencore Properties v Kowbel*.

Next, Rebecca Shoom provides a year-in-review roundup of key developments in Canadian arbitration case law in 2024.

Finally, the issue is rounded out by reviews of two recent books by Canadian authors, which combine theoretical sensitivity with practical utility: *An Empirical Study of the Fair and Equitable Treatment Standard Clause: How Tribunals Have Examined the Relationship with the Minimum Standard*, by Patrick Dumberry, and *Joint Venture Disputes in the Energy and Natural Resource Sectors*, by A. Timothy Martin, John Gilbert, and Peter Roberts.

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

on behalf of the senior editors:
Barry Leon, Executive Editor
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UNVEILING THE NEW ADRIC ARBITRATION RULES: AN UPDATED APPROACH TO COMMERCIAL ARBITRATION IN CANADA

William G. Horton, Lisa C. Munro** & Emily McMurtry****

I. INTRODUCTION

In early 2025, the ADR Institute of Canada Inc. (“ADRIC”) will adopt new Arbitration Rules (the “Rules”). They represent a comprehensive rethinking of the current version of the Rules, adopted in 2014. The Rules reflect over two years of thoughtful discussion and analysis by the drafters, a committed group of arbitrators and arbitration counsel representing all regions in Canada.¹ The focus of the discussions has been to provide a framework for arbitration as a means of resolving disputes in a full, fair and final manner using up-to-date arbitration procedures and streamlined institutional support when needed.

The changes to ADRIC’s arbitration rules are being accompanied by structural changes to improve ADRIC’s services to users through the oversight of an “Arbitration Committee”

* Independent arbitrator, www.wgharb.com; co-chair of the ADRIC Arbitration Modernization Committee that drafted the new ADRIC Arbitration Rules.

** FCIArb; Q.Arb.; Partner, Lerner LLP; Roster Arbitrator, Arbitration Place; Editor, *Arbitration Matters*; Host, *Arbitration Boot Camp*; member of the ADRIC Arbitration Modernization Committee.

*** ACIArb; Senior Associate, Dentons Canada LLP; member of the ADRIC Arbitration Modernization Committee.

¹ Those who contributed to the drafting the Rules are: William G. Horton, Jim McCartney, and Jim Musgrave, (Arbitration Modernization Committee co-Chairs); Glen Bell, Mary Comeau, Stephen Drymer, Bryan Duguid, Angus Gunn, Joshua Karton, Lisa Munro, David McCutcheon, Emily McMurtry, and Lauren Tomasich (Arbitration Modernization Committee Members); Brian Casey, Megan Keenberg, Jack Marshall, Eric Morgan, Murray Smith, Doug Stollery, and Hon. Neil Wittmann (Advisory Committee Members).

comprised of leading practitioners, as well as a more robust and transparent appointment process.

The new ADRIC Rules have been written from a Canadian national perspective. They are designed for use in ad hoc arbitrations, which remain the majority in Canada, but are flexible enough to include services from ADRIC on an *à la carte* basis, so that parties can also use the Rules for an administered arbitration or choose only those services from ADRIC that they want to use. The Rules recognize that in some cases legislation or jurisprudence may not allow parties in one part of Canada to agree to or adopt certain rules, for example with respect to rights of appeal or grounds for non-enforcement. However, they are also sufficiently flexible to adapt to the slightly different regulatory regimes for domestic arbitration in the various provinces. They do not conflict with substantive law applicable to a particular issue that may result in a different outcome, such as with respect to with-prejudice and without-prejudice offers to settle. The new ADRIC Rules respect these limitations where they apply (Rules 1.3.3 and 4.7.1).

The Rules are also customizable on a case-by-case basis, so that they can be tailored to the particular needs of each dispute. Parties are free to agree in writing to vary or exclude any of the Rules except the provisions that require procedural fairness, arbitrator independence and impartiality, arbitrator immunity, and payment of fees for ADRIC services (Rule 1.3.4).

A key change in the New ADRIC Rules is that ADRIC only provides services if they are needed by one or more parties. Parties are not required to provide notice of commencement of an arbitration to ADRIC and no initiation or case maintenance fee is required. However, under the Rules, ADRIC provides those aspects of administered arbitrations that are of use to the parties.

The ADRIC Rules assume that parties who choose arbitration want an effective and self-contained process that avoids the courts and their inefficiencies. Given the perennial

backlogs affecting Canadian courts and their lack of capacity to deal with civil disputes in a timely way, this assumption is more important than ever. Under the New ADRIC Rules, appeals of awards are excluded by default. ADRIC also provides a service whereby arbitrator challenges are determined by a “Challenge Adjudicator” without recourse to the courts (Rule 3.6). The role of “Interim Arbitrators” has been expanded from the previous version of the Rules to explicitly include the power to order alternative means of delivering a “Notice to Arbitrate” where needed (Rule 2.1.1). Steps have been taken to provide greater consistency and expedition in the appointment of Challenge Adjudicators and Interim Arbitrators by standardizing terms of appointment. Applications to challenge an arbitrator and to seek interim measures prior to constitution of the tribunal are treated with the same urgency.

The New ADRIC Rules also provide a practical and flexible procedural framework for parties, counsel and the tribunal to apply. Best practice case management is built into the process, with a detailed outline of issues that should be considered at a first procedural meeting (Appendix R1) and a Sample Procedural Order (Appendix R2), which parties and the tribunal can adopt in whole or in part or use as a reference in crafting their own procedure.

Consistent with the needs and expectations of modern arbitration users, the new ADRIC Rules impose an obligation upon parties and their counsel to cooperate with each other and with the tribunal to achieve the objectives of a just, speedy, and cost-effective determination of the dispute on its merits, taking into account the values that distinguish arbitration from litigation (Rule 4.8) – and they expressly allow the arbitrator to consider compliance with these obligations when making a cost award (Rule 5.3.2).

By emphasizing cooperation between parties, streamlining processes, and integrating modern practices, the New ADRIC Rules are designed to meet the needs of contemporary arbitration users, who can confidently adopt the Rules to

provide either default or bespoke dispute resolution procedures that position them to get back to business quickly.

II. HIGHLIGHTS OF THE NEW ADRIC RULES

The new ADRIC Rules contain a variety of new provisions intended to promote efficiency and minimize court intervention, without sacrificing flexibility. In this section, we describe the most significant of these features of the new Rules.

1. Commencement of an Arbitration

Under Rule 2.1, parties may validly initiate an arbitration simply by delivery of a Notice of Arbitration to other parties, without notifying ADRIC, thereby eliminating an additional step and avoiding possible disputes over the date of commencement (which can occur under most institutional rules when the institutional rules are not strictly complied with). This means that the Rules do not add any requirement for commencement of an arbitration beyond the minimum required by applicable legislation, typically the delivery of a request to arbitrate to a respondent. The lack of any requirement to immediately notify ADRIC of an arbitration or to have ADRIC automatically retain a record of pleadings and correspondence also provides an enhanced level of confidentiality for the dispute as compared to the involvement of institutional staff and processes.

The New ADRIC Rules also recognize that delivery of the Notice of Arbitration to respondents can sometimes be difficult, so delivery is also possible to ADRIC as an initial step. ADRIC also provides support via the Interim Arbitrator process, as Interim Arbitrators have the power to order alternative means of delivery (Rule 2.1.1).

2. Customized Support from ADRIC Based on a Menu of Available Services

Most commercial arbitrations that take place within Canada, whether the disputes are international or non-international in

nature, are conducted on an *ad hoc* basis without the involvement of an arbitral institution. Due to the widespread and successful use of *ad hoc* arbitration in Canada, parties often do not see the value of institutional involvement, and either do not include an institution in their arbitration agreement or dispose of institutional involvement after a dispute arises. This is especially likely if parties are able to form a tribunal without the aid of the institution. The New ADRIC Rules do not attempt to overpower this resistance but instead offer to provide the parties only with the services they require. Parties are free to arbitrate under the ADRIC Rules without initially involving an institution but also have the benefit of ADRIC's assistance as appointing authority (to which parties agree when they adopt the ADRIC Rules), instead of having to go to court. The parties can therefore resolve most procedural issues that arise without having to go to court.

By adopting the New ADRIC Rules, parties agree that the services described in the Rules will be provided exclusively by ADRIC, but unless and until they are needed, ADRIC will not be involved. No case initiation fees are payable, only fees for services provided.

The services that ADRIC provides on this basis include:

- a. approving alternative means for delivering the Notice to Arbitrate (Rule 2.1.1(b));
- b. assisting the parties with tribunal formation (Rule 3.1.4(a));
- c. appointing an arbitrator or tribunal (Rule 3.1.4(b));
- d. deciding applications for urgent interim measures, including applications without notice where justified (Rule 3.7);
- e. resolving challenges to arbitrators (Rule 3.6);
- f. appointing an Appeal Tribunal (Appendix R4);
- g. creating and maintaining a record of the arbitration (Schedule A(1)); and
- h. holding and administering deposits for arbitrators' fees and expenses (Schedule A(2)).

The services listed in a. to e. are automatically and exclusively provided by ADRIIC when the parties adopt the new ADRIIC Rules. An additional agreement of the parties (either in the original agreement to arbitrate or later) is necessary for provision of any of the services listed in f. to h..

3. Elimination of Distinction between International and Non-international Disputes

The New ADRIIC Rules apply equally to international and non-international disputes. The superseded old Rule 1.3.2 provided that unless the parties agreed otherwise, an arbitration that is international under the law of the seat of the arbitration was governed by the UNCITRAL *Arbitration Rules* to the extent of any inconsistency with the old Rules. This provision had the potential to cause confusion about which aspects of the old Rules applied and which were displaced by the UNCITRAL *Rules*. Indeed, the distinction between international and non-international disputes can itself give rise to debates which are ultimately fruitless, especially if there is a dispute as to the seat of the arbitration. The new ADRIIC Rules follow the modern trend toward integration of many international procedures into all commercial arbitrations. The new ADRIIC Rules avoid the need to characterize an arbitration as international or non-international. Rule 1.3.1 has been simplified to provide that the Rules apply if an “Arbitration Agreement” or “Submission to Arbitration” expressly or implicitly adopts them.

This revision aims not only to clarify when the Rules apply, but also to reflect that the Rules provide an effective platform for international commercial arbitrations conducted in Canada, without the need for any additional analysis or scope for potential disagreement. Alongside the revision to Rules 1.3.1, the new ADRIIC Rules:

- a. reflect that there may be more than one language of the arbitration (Rule 4.2);

- b. encourage an “evidence-first” approach that is common to international arbitration practice and essential to arbitration efficiency;
- c. place limitations on requests for information and documents (Rule 4.7.2, Appendix R3 - Sample Procedural Order), which adopt many key aspects of international practice while maintaining some disclosure requirements that meet standards of fairness considered to be essential in Canadian legal culture (see below); and
- d. clarify the definition of the “Seat of Arbitration” (Rule 1.2).

With an emphasis on flexibility and the ability to create tailored procedures, the new ADRIC Rules provide the parties and the tribunal (as the case may be) with the freedom to apply or be guided by principles best suited to the particular dispute at hand.

4. Enhanced Arbitrator Appointment Process

ADRIC’s new Arbitrator Appointment Protocol, enacted with the new Rules, prescribes how arbitrator appointments will be made, what criteria will be applied, and by whom.²

An “Appointment Committee” has been established for this purpose, comprised of ADRIC members who are arbitrators and arbitration counsel from across Canada. The makeup of this Committee ensures greater knowledge of local markets and arbitrator candidates across the country, which in turn allows for consideration of a broader range of arbitrator candidates. Parties will have greater access to arbitrators they may not be familiar with, but who have expertise and a degree of experience appropriate for the dispute. Simultaneously, arbitrators seeking

² The Arbitrator Appointment Protocol was drafted by a sub-committee chaired by Lisa Munro and comprised of Amy Crosbie, Stephen Drymer, Douglas Harrison, Matti Lemmens, Jim McCartney, Sabri Shawa, and Junior Sirivar.

appointments will have greater access to opportunities and the arbitration field in Canada can work toward greater diversity.

An arbitrator who would like to be considered for appointment must complete an online profile that contains information such as the arbitrator's location, areas of expertise, professional designations, experience, and rates. This information will be found on the new "RADAR" platform on ADRI's website. The Appointment Committee will use it to make arbitrator appointments; however, anyone can access this information. RADAR allows users to search multiple fields at one time to identify arbitrator candidates who best suit the nature of the dispute and the needs of the parties.

There is explicit provision for the recognition of equity, diversity and inclusion criteria in the appointment of members of the Arbitration Committee and arbitrators appointed by the Committee. The objective is to ensure that arbitrator candidates reflect a broad range of perspectives and backgrounds, including representation from equity-seeking groups.

These measures will ensure the quality of arbitrator appointments, the transparency of the appointment process, and the integrity of ADRI's role as appointing authority.

5. Expedited and Integrated Challenge Process

The new ADRI Rules provide for a comprehensive and streamlined arbitrator challenge procedure, one that allows parties to avoid the need for resort to the courts. Arbitrator challenges processed in the courts can disrupt and delay the arbitration and inevitably publicize the dispute. Occasionally, court decisions on such challenges are not based on a good understanding of arbitration culture and standards. In jurisdictions where institutional arbitration is more common, most arbitrator challenges are dealt with by an institution, whether it administers the arbitration or acts only as appointing authority. The new ADRI Rules provide for arbitrator

challenges to be decided by ADRIC in an expedited process, even if the arbitration is not otherwise administered. (Rule 3.6).

Under Rule 3.6, a party seeking to challenge an arbitrator must submit a “Challenge Application”, including a statement of the grounds for the challenge and any evidence and submissions relied upon in support of the challenge. ADRIC will appoint a “Challenge Adjudicator”, normally within two days. Standard terms of appointment for a Challenge Adjudicator are pre-set and a procedure for challenging a Challenge Adjudicator is also provided to avoid delay in the appointment process and the Challenge Application.

Either the party making the Application or any party responding to it may request that the challenge be decided by a panel of three Challenge Adjudicators. This may be desired by some parties, as there is no right of appeal. Evidence and submissions will be exchanged in writing and normally the decision will be made based on the written submissions. However, there is provision for a party to request additional process if these are needed for factually or legally complex challenges.

An arbitrator who is challenged may, but is not required to, deliver a response to the Challenge Application.

The decision on the challenge must state the reasons on which it is based and must be rendered within 15 days of delivery of all evidence and submissions, unless the parties agree or the Challenge Adjudicator orders otherwise.

Taken together, the provisions establishing the arbitrator challenge process ensure that challenges to arbitrators will be resolved confidentially, and expeditiously by expert decision-makers familiar not only with the law applicable to arbitrator challenges in Canada but also with the Canadian arbitration market and professional community.

6. *Conflicts Disclosure Processes and Standards*

The new ADIC Rules affirm the requirement that arbitrators must be, and remain, independent and impartial (Rule 3.3.1). Opting out of this standard is not allowed under the new ADIC Rules (Rule 1.3.4(a)). Realistically, it is recognized that parties may agree to proceed with party-appointed arbitrators who may not meet these criteria. However, the drafters of the new ADIC Rules have expressed their emphatic view that this would be a departure from what ADIC considers to be a minimum requirement for an arbitration conducted under its Rules.

The new ADIC Rules adopt the standard in the UNCITRAL *Model Law* (and, accordingly, in the provinces' *International Commercial Arbitration Acts*) that arbitrators may be challenged if circumstances give rise to justifiable doubts as to their independence and impartiality (Rule 3.6.1). They do not seek to change applicable law or influence developing jurisprudence as to how that standard should be applied. In this, as in other areas, the Rules are designed to work with Canadian legislation and case law, not to push against them.

In the interests of ensuring that potential arbitrators are, to the greatest extent possible, wholly aware of all circumstances surrounding their appointment, Rule 3.3.2 now requires each party to provide a "Party Disclosure" before an arbitrator is appointed that sets out any information reasonably known to the party that would enable the arbitrator to assess whether circumstances exist that could give rise to justifiable doubts as to their independence or impartiality. Examples of information to be disclosed in the Party Disclosure include: (i) all parties to the dispute; (ii) other individuals or entities with a significant financial interest in the result of the arbitration; (iii) expected witnesses; (iv) individual counsel and law firms; and (v) any other information that would assist the arbitrator in assessing whether to accept an appointment and what circumstances to disclose. The Rules take into account the reality that parties may not, at the outset of arbitral proceedings, have access to all

information that will eventually become relevant to arbitrator conflicts of interest. Accordingly, Rule 3.3.2 provides that “reasonably known” information should be included in the initial Party Disclosure. Rule 3.3.2(c) requires each party to update its Party Disclosure as soon as information changes or additional information becomes available (e.g., a change in party counsel or additional witnesses).

Rule 3.3.3 establishes the arbitrator’s reciprocal obligation to deliver a statement (the “Arbitrator Disclosure”), before accepting an appointment, disclosing “to the best of their knowledge” any circumstances that may give rise to justifiable doubts as to their independence and impartiality. The Arbitrator Disclosure must be accompanied by a declaration that they will act with independence and impartiality, among other things. Like the Party Disclosure, the arbitrator is required to update the Arbitrator Disclosure “as soon as possible” if any circumstances arise after acceptance of the appointment and before the arbitration concludes.

While the Party and Arbitrator Disclosures might at first glance appear to place additional obligations on parties and arbitrators, their effect is to streamline the appointment process and reduce the need for challenges. The new ADRIC Rules put the responsibility on both counsel and arbitrators to determine on an ongoing basis what information they must disclose.

Rule 3.3.5 clarifies a matter that has occasionally been the subject of controversy. It provides that arbitrators cannot be disqualified or challenged because they and another arbitrator, counsel, or party are fellow members of any professional, legal or arbitration-related association or body; or they have jointly participated in a program, project, or activity of any such association or body. This is an expanded version of the old Rule, which only applied to common membership and activity within ADRIC. This revision is particularly important given Canada’s relatively small arbitration community, where practitioners are likely (and arguably expected) to be active members of the same professional associations or bodies.

7. *Sample Procedural Order*

The old Rules were prescriptive as to various procedures and timelines, which in many ways mirrored actions in court. While the procedures could be modified by agreement or direction of the tribunal, they established expectations. Those expectations were appropriate when the old Rules were written but are no longer in tune with the expansion of commercial arbitration, the increased sophistication of arbitration practitioners with different expectations, and the availability of tested “evidence-first” procedures.

Rule 4.7 replaces the old regime with a tiered approach. The arbitration “must” be conducted in accordance with the parties’ agreement, unless the tribunal finds that this would violate mandatory requirements of applicable law. Absent party agreement, the tribunal has discretion to set the procedure. However, both the parties and the tribunal are encouraged to consider adopting the “Sample Procedural Order” attached to the Rules as Appendix R3, making any necessary modifications (Rule 4.7.1(c)). The objective is to guide users away from inefficient rules of court and toward procedures that have been proven to allow most disputes to be fully, fairly and finally decided within a year or less.

If the tribunal sets the procedure, the new ADRIC Rules require the tribunal to be guided by the following sets of principles, unless it is satisfied that there are good reasons not to do so (Rule 4.7.2):

- a. principles relating to evidence-first arbitration, whereby the first substantive submission by any party must include all the evidence within that party’s possession or control, including any witness statements, on which it intends to rely in advancing its claims or defences, or in resisting the claims or defences of an opposing party. The drafters considered such evidence-first procedures to be the key to efficient arbitration procedure and the most significant differentiator from normal court proceedings;

- b. principles relating to the right of a party to seek and obtain relevant and material documents and information from an opposing party where the written request is narrow and specific, to avoid the “fishing expeditions” common in litigation practice.

The new ADRIC Rules are consistent with international arbitration practice in that they apply the restrictions on disclosure set out in Article 3(3) of the *IBA Rules on the Taking of Evidence*. In recognition of longstanding Canadian practices, they depart from common international arbitration practice in that they contemplate a right to seek information as well as documents, albeit only information that fits within the limitations prescribed by the *IBA Rules* (Rule 4.7). The limitation of disclosure obligations to documents places the rights of a party to seek “relevant and material” information in the possession of an opposing party at the hazard of an opposing party’s record keeping practices. Applying the same limitations to requests for information as to requests for documents ensures that abusive requests will not be made or allowed. Experience has shown that the tribunal’s supervision of the entire process is an effective control on abuse.

Appendix R3 is a detailed “Sample Procedural Order” that addresses most issues that need to be considered at the outset of the arbitration. Like Rule 4.7.2, Appendix R3 contemplates an evidence-first approach. Evidence is adduced primarily through sworn witness statements. For information in the possession of the opposing party, parties may make and the tribunal may grant evidentiary requests as follows:

- a. Requests for information or documents will not be granted by the tribunal, in the absence of party agreement, unless they are:
 - i. with respect to specific and narrowly defined areas of inquiry;
 - ii. reasonably known or expected to exist and to be within the control of the requested party;
 - iii. not reasonably available to the requesting party;

- iv. not disproportionate to the facts or conclusions sought to be proved; and
- v. not privileged.

Pre-hearing witness examinations will only be allowed if the requests meet the same criteria as required for disclosure requests and all other means of obtaining the disclosure provided by the Procedural Order have failed. This, too, is a potential departure from international arbitration practice. However, it is a useful safeguard against non-co-operation by a party with the other prescribed means of disclosure. In the drafters' experience, where an initial procedural order similar to the Sample Procedural Order has been used, requests for pre-hearing examinations of witnesses are rare and, when made, are even more rarely allowed. That is the drafters' expectation with respect to the use of this provision of the Sample Procedural Order when it is adopted by the parties or the tribunal.

To complement the Sample Procedural Order, the new ADRIC Rules contain a detailed checklist for the first procedural meeting setting out most, if not all, issues that may need to be considered in modifying or supplementing the Sample Procedural Order, or in choosing a different procedure (Appendix R1). The overall approach taken by the new Rules to questions of procedure and evidence is to make it easy for parties and arbitrators to adopt modern, efficient procedures, while preserving flexibility for cases where it makes sense to depart from the standard procedures.

8. Access to Expedited/Simplified Procedures and Med-Arb

Under the new ADRIC Rules, parties have the benefit of access to "Expedited/Simplified Procedures" (Rule 6.2.1 and Appendix R2) and the "ADRIC Med-Arb Rules" (Rule 4.20.1).

Rule 4.7.1(c) encourages parties and tribunals to consider whether the Expedited/Simplified Arbitration Procedures (Appendix R2) can be used because of the size, simplicity or urgency of the dispute. The new ADRIC Rules avoid mandating

the use of the Expedited/Simplified Procedures for use in claims of a certain type or below a specified monetary threshold, which is the only criterion under many institutional rules. Using a single, rigid criterion can handcuff lower-value but complex disputes to inappropriate procedures with unrealistic timelines, and equally can leave parties with the “full” process for disputes where the parties disagree on only a small number of legal or factual matters. Under the new ADRIC Rules, the Expedited/Simplified Arbitration Procedures are available to be adopted by party agreement or by tribunals in the exercise of their discretion.

The Expedited/Simplified Procedures contain a model compressed procedure, subject to modification by agreement of the parties, which provides that the dispute will be resolved by a single arbitrator to be appointed by agreement of the parties within two days of delivery of the Notice to Arbitrate. Failing such agreement, either party may request that ADRIC appoint the arbitrator using the same procedures applicable to ADRIC’s appointment of an Interim Arbitrator. Where a three-person tribunal has already been formed at the time the parties agree or the tribunal orders the application of the Simplified/Expedited Procedures, the parties may agree or, if the value of the dispute is less than \$2.5 million, the tribunal may decide that the arbitration will proceed with the Chair as sole arbitrator.

After the tribunal’s appointment, the exchange of statements, evidence, and the hearing take place within approximately one month and the tribunal must deliver its award within 7 days thereafter. In the interest of efficiency, the award may state the reasons for the decision briefly. As with other awards made under the New ADRIC Rules, there is no appeal from an award made pursuant to the Expedited/Simplified Procedures unless the parties expressly agree otherwise.

The new ADRIC Rules provide that the tribunal may encourage settlement of the dispute and recommend that the

parties use mediation, conciliation, or other dispute resolution procedures at any time during the arbitration proceedings (Rule 4.20).

With respect to Med-Arb, Rule 4.20.1 provides that the parties may agree to “continue” the arbitration as a Med-Arb and, unless they agree otherwise, the tried and tested ADRIC Med-Arb Rules apply. This flexible approach gives parties the opportunity to engage in constructive dialogue at any time facilitated by the arbitrator, who will already have a deep understanding of the case and each party’s specific needs and interests. Few institutions that offer arbitration services also provide Med-Arb rules, and this is another area where the New ADRIC Rules allow parties to establish procedures that work for their dispute, without having to go outside the proceedings by adopting procedures not contemplated in the Rules or by resorting to court action.

9. Post-Award Recourse to the Tribunal

The new ADRIC Rules provide procedures, including strict time limits, for the parties to return to the tribunal after an award has been issued to seek an amendment, clarification, or correction of awards, rulings, orders, or decisions, or delivery of an additional award (Rule 5.4). The grounds for seeking recourse are expanded beyond those provided by other rules and applicable statutes, which typically limit post-award recourse to mathematical, typographical, and clerical errors or other “slips and omissions” (Rule 5.4.2). These limitations often leave one or more parties feeling that they have been the victim of an injustice where a seemingly obvious error has been made that does not fit the narrow test, but the only recourse is an appeal or set-aside application in court. The new ADRIC Rules give a tribunal the opportunity to address a broader scope of potential errors before, and possibly instead of, a lengthy court proceeding. Although the wording differs, the new ADRIC Rules are in line with arbitration legislation in some provinces, which allow a tribunal to “amend the award so as to correct an injustice caused by an oversight on the part of the arbitral tribunal”.

The new ADRIC Rules do not preclude an application to the court following a request to the tribunal, but the complaint must first have been raised with the tribunal. Timelines have been kept short to prevent applications under Rule 5.4 from becoming a source of undue delay or expense.

Rule 5.4.1 entitles parties to apply for amendments, variations, or clarifications within 15 days of issuance of the relevant award, ruling, order or decision. The tribunal does not have discretion to make amendments, variations or clarifications its own initiative—relief under Rule 5.4.1 is only available upon a party’s application.

Rule 5.4.2 entitles a tribunal, on its own initiative or at the request of a party, “to correct” (i) clerical or typographical errors; (ii) errors, slips, omissions, or “other similar mistake[s]”; and (iii) arithmetical errors.

Rule 5.4.3 prohibits a tribunal from amending an award, ruling, order or decision more than 30 days after delivery of the award, ruling, order or decision unless the parties agree otherwise.

The practical effect of these provisions is to enable parties to seek correction of obvious errors or omissions within the arbitral proceeding. In their absence, a party that thinks a mistake has been made has no option other than to commence lengthy, expensive, and usually public court proceedings, which could result in the dispute being referred, many years later, to a second arbitration before a different tribunal. Under Rule 5.4, if the tribunal rejects the suggestion that an error has been made, the rights of the applicant to seek recourse in the courts are preserved. If the tribunal recognizes that an error has been made, the new ADRIC Rules give the tribunal an opportunity to amend the award, so the parties need not seek recourse in the courts. However, the rights of parties to seek recourse in the courts are also preserved.

This approach supports the concept of arbitration as a self-contained dispute resolution process that does not require the courts to assist on all matters that arise in the arbitration process. All decision makers, whether judges or arbitrators, are vulnerable to human error and such errors should be open to amendment or correction. On the other hand, the requirement of finality requires that arbitrations not be recapitulated after an award is rendered or the proceedings unnecessarily reopened. Winning parties are entitled to receive promptly the remedy granted to them, and losing parties should not be able to drag out the proceedings by re-arguing the entire contents of the award. The strict time limits of the new ADRI Rules on the correction process ensures that undue delays will not occur, and that the types of errors that are the subject of Rule 5.4 applications will be focussed and finite.

10. Optional, Limited, and Integrated Right of Appeal

Under the new ADRI Rules, the default position is that there is no appeal from an award, ruling, order, or decision unless the parties agree otherwise (Rule 5.4.6). This is in keeping with the *Uniform Arbitration Act* (2016) adopted by the Uniform Law Conference of Canada, which specifies that appeals to the court from arbitration awards should be on an “opt-in basis” only, i.e., where the parties have expressly made that choice in their arbitration agreement. As with all of the Rules, this provision is subject to applicable laws that prevent parties from limiting appeals to the court from arbitration awards. Equally, nothing in the new ADRI Rules prevents parties from agreeing to pursue appeals in the courts on whatever basis the applicable law allows.

Subject to those qualifications, where parties agree, the new ADRI Rules provide for appeal within the arbitration process on an “extricable question of law that is material to the outcome of the case”. The availability of an “internal” appeal process is consistent with the recommendations of the Uniform Law Conference of Canada, except that the new ADRI Rules make it explicit that appeals are to be brought only on “extricable”

questions of law. Canadian jurisprudence is somewhat equivocal on the significance and application of the requirement of “extricability”. The new ADRIC Rules make it clear that the element of extricability of the question of law is important. The assumption is that by choosing an arbitration appeal process, the parties are seeking a more focused right of appeal that does not involve re-arbitrating issues of fact and issues of mixed fact and law unique to the case.

For parties that choose this appeal option, the process is efficient. Per Appendix R4, the appealing party must commence the process within 20 days of delivery of the award and, unless the parties agree otherwise, the appeal proceeds entirely in writing before a panel of three arbitrators. The Rules provide that the appeal tribunal will decide the process to be used in the appeal but must do so “with the goal of” completing the appeal process within 3 months of delivery of the Notice of Appeal (Appendix R4, Rule 10).

The appeals procedure in the new ADRIC Rules strikes a balance between party autonomy, finality, and flexibility. The opt-in appeals process is efficient both in terms of time limits and in that it limits the scope of appealable matters. At the same time, it preserves the parties’ expectations of privacy and confidentiality expressed by when they agreed to arbitrate.

III. CONCLUSION

In the decade since the old ADRIC Rules were adopted, arbitration practice has evolved to meet the needs of parties and counsel who are increasingly turning to arbitration, both in response to court backlogs and because of the distinct benefits of arbitration. Increasingly, users recognize that procedural flexibility and active case management are hallmarks of good arbitration. The new ADRIC Rules reflect these developments, showing how these procedures can be used in practice, for example, by including the Sample Procedural Order.

Parties can adopt the new ADRIIC Rules as-is without modification, or tailor them to suit their specific needs. Either way, ADRIIC remains available to provide efficient administrative support on an as-needed basis, without the unnecessary additional processes (and fees) that sometimes characterize institutional involvement. Ultimately, the new ADRIIC Rules provide the flexibility that reflects arbitration's *raison d'être*: party autonomy.

Ultimately, though, ADRIIC's commitment to providing parties with flexible and customized processes to achieve full, fair, speedy, and final adjudication will only succeed if users provide feedback on the new ADRIIC Rules. Parties, counsel, and arbitrators are invited to reach out to any member of the Committee that drafted the Rules, provide comments on the ADRIIC website (<https://adric.ca/rules-codes/arbrules/>), or contact ADRIIC Case Services at arb-admin@adric.ca. With this feedback, the Rules will continue to evolve to achieve their purposes.

A WAFTING AROMA: THE ONTARIO COURT OF APPEAL'S REASONS MAY NOT PASS THE SMELL TEST

*Frederick Wu**

In *Aroma Franchise Company Inc et al v Aroma Espresso Bar Canada Inc et al* (“*Aroma ONCA*”),¹ the Court of Appeal for Ontario redefined the test for setting aside an arbitral award for reasonable apprehension of bias, by introducing a bright-line rule barring hindsight evidence, and by modifying the objective test to be limited by the arbitrator’s perspective. Building on previous comments on the *Aroma* case published in this journal,² I add to the ink spilt on the *Aroma* saga and caution against overreliance on the ONCA’s reasoning.

In *Aroma ONCA*, the Court of Appeal clarified the scope of arbitrators’ duty to disclose facts that may give rise to a reasonable apprehension of bias, and elaborated on what can be inferred from a failure to disclose. In the first instance judgment (“*Aroma ONSC*”), the application judge held that the arbitrator had a duty to disclose a second, overlapping arbitral appointment by the same law firm (and at least one of the same counsel) in an unrelated matter.³ The application judge held further that arbitrator’s failure to disclose the second appointment gave rise to a reasonable apprehension of bias, on which basis the judge set aside the arbitrator’s award. However,

* Principal Lawyer, Wu Law.

¹ 2024 ONCA 839 [*Aroma ONCA*], leave to appeal to SCC refused, 41640 (24 July 2025).

² Joshua Karton, “Mo’ Appointments Mo’ Problems? *Aroma Franchise v Aroma Canada*” (2024) 4:2 Can J Comm Arb 48 [Karton]; Bruce Reynolds, James Little & Nicholas Reynolds, “The Implications of Repeat Arbitral Appointments: *Aroma Franchise Company v Aroma Espresso*” (2023) 4:1 Can J Comm Arb 60 [Reynolds et al].

³ 2023 ONSC 1827 [*Aroma ONSC*].

the Court of Appeal vacated the lower court's judgment, restoring the arbitral award. The Supreme Court of Canada refused leave to appeal, so *Aroma ONCA* represents good law in Ontario and persuasive authority across Canada.

In *Aroma*, the Court of Appeal appears to have made an inordinate effort to find a reviewable error in the application judge's decision. While the Court elucidated the objective standard governing reasonable apprehension of bias in arbitration, it unduly curtailed the admissibility of subjective evidence in applying that standard. The upshot is that it will be exceedingly difficult to set aside an award for reasonable apprehension of bias, unless courts read down or distinguish *Aroma ONCA*'s adherence to the arbitrator's actual knowledge of facts that might give rise to an apprehension of bias in the mind of a reasonable observer.

Since others have reviewed the case leading up to and following *Aroma ONCA*,⁴ this commentary focuses on elements of the test set out in *Aroma ONCA*. If that test solidifies with the accumulation of precedent, the consequences will be much broader than the Court of Appeal seems to have anticipated.

I. TEST MODIFIED ONLY TO EVADE A MORE STRINGENT STANDARD OF REVIEW

As is well known, different questions attract different standards of review on appeal.⁵ Appellate courts are loath to interfere with fact-based findings of lower courts.⁶ Such reluctance is well founded in policy: to limit appeals, both in scope and number; to promote public confidence in lower courts; and to recognize the advantageous position of the adjudicator closest to the evidence in making findings of fact.

⁴ See e.g. Karton, *supra* note 2; Reynolds et al, *supra* note **Error! Bookmark not defined.**

⁵ See *Housen v Nikolaisen*, 2002 SCC 33 [*Housen*].

⁶ *Ibid* at paras 16-18, 32.

None of these policy considerations applies to questions of pure law, which is why such questions attract a more stringent standard of review on appeal.

This bears elaboration because *Aroma ONCA* makes conspicuous reference to Supreme Court of Canada jurisprudence on standards of appellate review.⁷ If a lower court opines incorrectly on a question of legal principle—*e.g.*, what “recklessness” is—that is an error of law, which an appellate court may reverse simply because it is not correct.⁸ If the court applies a legal standard to facts in arriving at a conclusion—*e.g.*, whether certain conduct was reckless—such analysis answers a question of mixed fact and law, which is reviewable only where palpable (obvious) and overriding (determinative) error is found.⁹

In practice, it suffices to simplify thus: if you cannot extricate an error of law from the first instance reasons, you generally do not have a viable appeal. The standard of palpable and overriding error is effectively insurmountable unless one can show that, *e.g.*, a judge summed two and two to equal five, where the judgment turned on the difference between four and five. Appeals are about teasing the purely legal questions apart from their milieu of reasons because, “[w]here the legal principle is not readily extricable, the matter is one of ‘mixed law and fact’ and is subject to a more stringent standard”.¹⁰

An error of law in *Aroma ONSC* would not have been readily extricable—but for the Court of Appeal’s a reformulation of the reasonable person test. The Court of Appeal’s reasoning centred on its finding that the objective test for apprehension of bias

⁷ *Aroma ONCA*, *supra* note 1 at para 142, citing *Housen*, *supra* note 5 at para 27.

⁸ *Ibid* at para 8.

⁹ *Ibid* at para 37. See also *ibid* at para 10 (palpable and overriding error standard also applies to findings of fact).

¹⁰ *Ibid* at para 36.

contained in the governing statute¹¹ must take precedence over the subjective test in the International Bar Association Guidelines on Conflicts of Interest. Nevertheless, *Aroma ONCA* acknowledges that “the application judge articulated the objective test”.¹² To extricate an error of law, therefore, the Court of Appeal introduced a new formulation of the reasonable person standard, as one unable to even consider anything “never shared with the [a]rbitrator [or] correspondence that the [a]rbitrator was not reasonably aware of”,¹³ and should consider only “what the [a]rbitrator was told”.¹⁴ Since *Aroma ONCA*, any circumstance unshared with the arbitrator “falls into the category of subjective views” which “are not relevant” and “cannot be germane”.¹⁵ The Court restricts the reasonable person’s knowledge to the arbitrator’s actual knowledge.

Despite the Court’s approval of and reliance on *Halliburton*, there, the UK Supreme Court was unanimous on the opposite view: “courts in applying the test of the fair-minded and informed observer would credit that objective observer with the knowledge both that some, maybe many, parties and some, maybe many, arbitrators in international arbitrations have [an] understanding” and “[t]o do so is not to measure apparent bias by reference to the subjective understanding of the parties to a particular arbitration and thereby to abandon the objective assessment” entailed by that reasonable person.¹⁶ “But the weight which the fair-minded and informed observer should

¹¹ The Ontario *International Commercial Arbitration Act, 2017*, SO 2017, c 2, s 5 at art 12, which adopts the *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).

¹² *Aroma ONCA*, *supra* note 1 at para 142.

¹³ *Ibid* at paras 88-89.

¹⁴ *Ibid* at para 144.

¹⁵ *Ibid* at paras 89, 139, 144.

¹⁶ *Halliburton v Chubb* [2020] UKSC 48 at para 66 [*Halliburton*].

give to that consideration will depend upon the circumstances of the arbitration”.¹⁷

Halliburton sets out a reasonable person aware of the totality of the circumstances, assessing subjective expectations as subject to weight, and not excluding those subjective expectations. The reasonable person under *Halliburton* is informed. The reasonable person under *Halliburton* is not a person of singular perspective. Reference to subjective knowledge does not abandon the objective assessment. *Aroma ONCA* is new law.

The Court of Appeal’s only authority for the reformulation of perspective arises from jurisprudence about perceived bias in a judge, not an arbitrator.¹⁸ For the purposes of this paper, I need not expound a lengthy exegesis on the fundamental distinctions between judge and arbitrator. Critically, however, the arbitrator’s authority is rooted solely in the parties’ contractual relationship, between each other, and as with the tribunal. The judge’s is not.¹⁹ “Arbitration involves the conferral of jurisdiction by contract, through the consensus of the parties to the reference”, as Lord Hodge condensed in *Halliburton*.²⁰

The Court of Appeal disliked the outcome of *Aroma ONSC*. A reweighing of all the circumstances would amount to a question of mixed fact and law. To sidestep the otherwise applicable standard of review, the Court needed to carve out a legal exemption in the objective analysis, by restricting the perspective of the reasonable person to the contemporaneous perspective of the arbitrator. Its approach was formalistic and

¹⁷ *Ibid* at para 67.

¹⁸ *Aroma ONCA*, *supra* note 1 at para 89.

¹⁹ *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 96 (judges’ appointment to superior courts); *Endean v British Columbia*, 2016 SCC 42 at para 23 (superior courts’ inherent jurisdiction).

²⁰ *Halliburton*, *supra* note 16 at para 126.

arbitrary. Ironically, in effect, the Court of Appeal's redefines "objective" to mean the arbitrator's subjective perspective.

Aroma ONCA is not problem-free. The modified test answers a question "of law" but is now fraught with untested implications. As well, the underlying policy reasons for *prima facie* confidence in impartial arbitration are underdeveloped. Disappointingly, the contractual relationship, among and between the parties and arbitrator, remains unexamined. The law should not pretend judges and arbitrators are the same. Most concerningly, there now appears to be a perverse incentive to (attempt to) subpoena impugned arbitrators for impartiality determinations in the future.²¹

II. A KNOWLEDGE STANDARD MAKES THE RIGHT TO IMPARTIAL ARBITRATION ILLUSORY

Professor Karton describes the arbitration bar's collective relief upon "a return to normalcy" since the Court handed down *Aroma ONCA*.²² Of course, *Aroma ONSC* set out an unexpected outcome, and *Aroma ONCA* may allay concerns prompting arbitrators' pre-emptive *Aroma* disclosure letters peppering the bar's e-mail inboxes. However, we should critically consider the precedential implications of *Aroma ONCA* on the courts' ability to set aside arbitral awards for reasonable apprehension of bias.

Per *Aroma ONCA*, because these circumstances were not made known to an arbitrator, they are categorically irrelevant to an impartiality analysis.²³ As made abundantly clear in Paciocco JA's oft-cited treatise on evidence,²⁴ that irrelevance

²¹ The consequences of treating a tribunal like a witness at an impartiality hearing deserve their own paper.

²² Karton, *supra* note 2 at 48.

²³ *Ibid* at paras 88-89, 139, 144.

²⁴ On the "basic rule of admissibility", see generally David M. Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law 2020) at Chapter 2.

makes hindsight evidence inadmissible.²⁵ The Court of Appeal reversed the application judge by ruling irrelevant this evidence:²⁶ “that if the [a]rbitrator had disclosed any other engagements with the [other side’s] counsel, [the complainant] would not have supported his appointment [and] hindsight evidence that [the complainant] would have objected [...] if he had been informed earlier”.²⁷ Similar evidence is no longer admissible for any arbitral impartiality analysis going forward.

This prospect is problematic. It raises the question of how an arbitral award can *ever* be set aside for reasonable apprehension of bias. If a complainant’s hindsight evidence is not admissible, then what evidence is?

Consider these circumstances: an arbitrator becoming romantically entangled with opposing counsel, during a years-long arbitral proceeding, remaining undisclosed until the award is issued. The complainant might seek the award’s set-aside, which sounds arguable. All the evidence such complainants could adduce would be the hindsight that they would not have supported the arbitrator’s appointment and would have objected if informed earlier, but that evidence is irrelevant and inadmissible under *Aroma ONCA*.

Consider also whether the test in *Aroma ONCA* is capable of setting aside the award in clearer circumstances of a partial arbitrator, such as one secretly accepting a valuable “gift” from opposing counsel, where the complainant does not learn of the gift until after the arbitral proceedings conclude. Under *Aroma ONCA*, the complainant can only bring the same kind of subjective hindsight evidence on application for set-aside, and the respondent can rely on the complainant’s failure to specifically share to the arbitrator that large cash gifts are not

²⁵ See, for example, *R v White*, 2011 SCC 13 at para 36 (“if an item of evidence is not relevant to a live issue, then that item of evidence should be removed from consideration”).

²⁶ *Aroma ONCA*, *supra* note 1 at para 143.

²⁷ *Ibid* at para 55.

agreeable, even when the parties or counsel expressly discuss the objectionability of large cash gifts.

The plain counterargument here is that *Aroma ONCA* simply puts an onus on the parties to pre-specify their impartiality-related disclosure expectations, and that is a predictable principle guiding arbitral procedure and set-aside going forward. That is unsatisfactory for two reasons. First, while the parties in *Aroma* were sophisticated commercial entities, those are not the only persons engaging in arbitration. The most vulnerable, non-commercial persons should also be able to rely on impartial arbitration to resolve disputes, and they should not be forced to learn secret handshakes or arcane incantations before doing so. Second, the pre-specification of expectations would invariably become lengthy, exhaustive, rote, standard-form fine print, quickly emailed, quickly ignored, just as unhelpful as the parties' failure to share expectations to the arbitrator in *Aroma*. We should not expand the legal fiction that an abundance of unread words flying about online governs reasonable expectations.²⁸

The test must be construed to give effect to the statutory right to challenge arbitral awards for reasonable apprehension of bias.²⁹ The *Aroma ONCA* test fails to accomplish this. Making the parties' impartiality expectations known to an arbitrator should not be a prerequisite for alleging reasonable apprehension of bias. The arbitrator's actual knowledge might be a factor, but some things should—*must*—go without saying. The actual knowledge standard, applied from the arbitrator's perspective, is a flawed standard permitting far too much mischief, and making illusory arbitral parties' rights under Article 12 of the Model Law.

²⁸ See also *Douez v Facebook*, 2017 SCC 33 at para 99 (per Abella J, concurring (“legal acknowledgment should be given to the automatic nature of the commitments made” in online click-through contract construction)).

²⁹ *International Commercial Arbitration Act*, *supra* note 11.

III. A CONSTRUCTIVE (NOT ACTUAL) KNOWLEDGE STANDARD SHOULD APPLY

I have outlined above my reservations about the reasons reversing *Aroma ONSC*. Simply to review the lower court's ruling, the Court of Appeal has myopically gerrymandered a jagged line through the law of reasonable apprehension of bias. While *Aroma ONCA* is now law, and while the Court sets out a reasonable person limited to the actual knowledge of its arbitrator, the test should be read to include both actual and constructive knowledge of the arbitrator.

As the Court of Appeal reasoned, actual knowledge can be inferred from the complete record of what was told to the arbitrator.³⁰ Constructive knowledge would ask the courts to assess what the arbitrator *ought to have* known; in the limitations context, for example, the courts ask what a plaintiff should have known upon reasonable diligence and suspicion using direct and circumstantial evidence.³¹ Constructive knowledge is broader than actual, encompassing the courts' prescriptive standards, not relying simply on express notice to and from the parties.

The constructive standard could support the same outcome held in *Aroma ONCA*, while remaining permissive to set-aside for the example challenges raised above. Because the arbitrator was not told of the complainant party's disclosure expectation, the courts could still hold no reason the arbitrator *ought to have* known, thus grounding impartiality in the same analytical framework. At the same time, under the constructive standard of knowledge, the courts could hold arbitrators receiving a large

³⁰ Or, more problematically, adduced directly from the arbitrator as a witness.

³¹ *Grant Thornton LLP v New Brunswick*, 2021 SCC 31 at para 44. See also *R v Briscoe*, 2010 SCC 13 at para 21 (in the criminal context, constructive knowledge applies under the willful blindness doctrine where "suspicion is aroused to the point where he or she sees the need for further inquiries, but *deliberately chooses* not to make those inquiries" [emphasis in original]).

cash gift or romancing counsel to be disqualified, irrespective of their actual knowledge of parties' expectations per *Aroma ONCA*.

If the test is the arbitrator's constructive knowledge, instead of actual, then Article 12 is saved from illusory effect. The courts would be able to assess arbitrator's knowledge from the circumstances, irrespective of any complainant's subjective hindsight evidence being (in)admissible, based on the courts' own normative standards of conduct, while guided by the arbitrator's perspective as *Aroma ONCA* prescribes. More generally, however, the courts in the future should question whether there was any principled basis to depart from *Halliburton's* informed reasonable person.

While *Aroma ONCA* hints that arbitrators are "legislatively endorsed" and arbitrating parties deserve "confidence in the finality" of arbitration,³² the Court declined to reason through the contractual terms of the arbitrator's appointment. In *Aroma*, presumably, the text of that contract provided no guidance on the arbitrator's duties of disclosure. Perhaps arbitrators and arbitral institutions should make express contractual promises regarding impartiality obligations. What is clear from *Aroma ONSC* and *Aroma ONCA* is that our courts are poorly equipped to interrogate arbitral impartiality.

³² *Aroma ONCA*, *supra* note 1 at para 137.

OPPOSING VIEWS OF COURT “ASSISTANCE” TO ARBITRATION IN ALBERTA AND ONTARIO

*William G. Horton**

I. INTRODUCTION

The *Arbitration Act* (the “Act” or “Acts”) in both Alberta and Ontario contains the following provision:

Court intervention limited

6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

- (a) to assist the arbitration process;
- (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
- (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
- (d) to enforce awards.¹

Although courts in both provinces interpret the same language, recent decisions from their courts of appeal highlight a stark and critically important difference in the ways they interpret this section. The difference lies in whether courts see this provision as creating avenues for court intervention in itself, or as expressing an overall policy or benchmark that may be used to understand other provisions of the Acts.

* Independent Arbitrator, www.wgharb.com.

¹ Alberta *Arbitration Act*, RSA 2000, c A-43, s 6; Ontario *Arbitration Act*, SO 1991, c 17, s 6. The two provisions are identical except that the subparagraphs in the Alberta Act are labeled (a)-(d), while in the Ontario Act they are labeled 1-4.

In Alberta, section 6 has been interpreted to mean that a party may seek relief from a court—and the court may grant such relief—for any of the purposes set out in section 6, independently of any other section in the Act and without regard to any of the particular conditions or restrictions in those other sections. This was the case in *Sivitilli v PesoRama Inc.*²

In Ontario, section 6 has been interpreted differently, to mean that any relief sought or granted must be as provided under another provision of the Act, whether or not section 6 is cited. This reasoning can be seen in *Toronto Standard Condominium Corporation No. 2299 v Distillery SE Development Corp.*³

These two cases can be very simply summarized.

II. THE *SIVITILLI* DECISION

In *Sivitilli*, PesoRama initially sought to stay an arbitration. It attempted to do so under section 47(1)(b) of the Alberta Act, on the ground that the arbitration agreement was invalid. It also argued under section 6, on the ground that court intervention was necessary to prevent manifestly unfair or unequal treatment. The application was rejected on both grounds by the application judge. PesoRama initiated an appeal. It sought leave to appeal, as required by the Act in relation to a decision under section 47, but also argued that no leave to appeal was necessary with respect to the order under section 6, as the Act imposed no limitation on the right to appeal an order made under that section. Hawkes JA, the leave application judge in the Alberta Court of Appeal, conducted an extensive review of the *Alberta Rules of Court* and section 3(b)(iv)(A) of the *Judicature Act*, to determine what rights of appeal exist from an order made by a judge under a statutory provision that expresses neither a right of appeal nor a limitation on rights of appeal. He concluded that in such a case, there is an unconditional right of appeal. On

² 2024 ABCA 249 [*Sivitilli*].

³ 2024 ONCA 712 [*Distillery*].

that basis, the Court found that *PesoRama* could appeal as of right from the order made by the judge under section 6.

The important point for the present discussion is that Justice Hawkes's decision assumes that there was an order made under section 6. Beginning from that premise, his analysis led directly to an entitlement to appeal that order. In coming to this conclusion, Justice Hawkes followed an earlier decision of the Alberta Court of Appeal, in *New Era Nutrition Inc. v Balance Bar Company*,⁴ which held that a party may apply for a stay of arbitration under section 6, even though section 6 does not explicitly provide for stays.⁵ In *New Era*, the Alberta Court of Appeal had cited legislative history in Alberta, which demonstrated that an earlier proposal to restrict court intervention under section 6 to other specific provisions in the Act had been rejected in favour of the current language, which lists what seem to be exceptions to the general rule of exclusion of court intervention.

Although the Alberta Court of Appeal's decision in *New Era* has been called into question by at least one lower court,⁶ it was never overturned and has now been affirmed in *Sivitilli*.

⁴ 2004 ABCA 280.

⁵ s 7(4) provides for a stay of the arbitration only if an application to stay a court proceeding is refused. A respondent can move under s 47 of the Alberta Act (or s 48 of the Ontario Act) to have the arbitration declared invalid, but only if it has not participated in the arbitration and only on specified grounds. If those grounds do not exist, the respondent may commence an action in court and wait for the claimant in the arbitration to move to stay the action. If the claimant's motion is defeated, the arbitration will be stayed under s 7(4). However, if the respondent does not have the grounds to have the arbitration declared invalid and does not wish to commence its own action, there is no provision for the respondent to apply for a stay of the arbitration. One might view this, alternatively, as either a lacuna in the legislation or as an expression of legislative intent that a stay of the arbitration should not be allowed in these circumstances.

⁶ *Alberici Western Constructors Ltd v Saskatchewan Power Corporation*, 2015 SKQB 74 at para 56. The decision in *Alberici Western Constructors* seems to

III. THE *DISTILLERY* DECISION

In *Distillery*, the Condo Corp. applied to the Ontario Superior Court, requesting appointment of an arbitrator. It invoked sections 6, 7, and 17 of the Ontario Act, and rule 14 of the *Rules of Civil Procedure*, RRO 1990, Reg 194. It made no reference to section 10 of the Act, which is the provision that authorizes the court to appoint an arbitrator, and which excludes any right of appeal from that decision. The Application Judge appointed an arbitrator. Distillery appealed that decision under section 6 of the Act, noting that neither section 6 itself nor the Rules of Civil Procedure imposed any express restriction on appeals under section 6.

The Ontario Court of Appeal rejected this submission:

[18] Distillery's first point can be dealt with briefly. Although the Condo Corp. did not expressly cite s. 10 of the Act, the notice of application stated that it was made under the Act. It stated it was seeking directions (including the appointment) to ensure the arbitration was conducted in accordance with the SFA and the agreement to appoint Mr. Campbell. Section 6 of the Act, which the application did cite, permits court intervention for such purposes "in accordance with the Act". Section 10 is the only arguably applicable provision of the Act that contemplates the court appointing an arbitrator.

...

[20] Nor is it significant that the application judge did not cite the source of her authority to make the appointment. If the authority to appoint came

miss, or gloss over, the question of whether an order may be made independently under s 6. Indeed, it seems to assert, without providing reasoning, that s 6 permits "intervention" in an ongoing arbitration to prevent "manifestly unfair treatment". *Ibid.*

from the Act, it came from s. 10, whether or not the application judge referred to it.

The Ontario Court of Appeal conducted no examination of prior jurisprudence or statutory history in arriving at its conclusion, saying only that:

In accordance with the modern approach to statutory interpretation, the meaning of [the provision in issue] must be determined by considering its text, context and purpose

It is noteworthy that the Ontario Court of Appeal considered section 10, not section 6, to be “the provision in issue” for the purpose of determining a right of appeal. This is consistent with its view that the order sought could only have been made under section 10. It might also be noted that, while the Court did not cite Brian Casey’s treatise on arbitration in Canada, its position is consistent with Casey’s:

The words “as provided by this Act” [in s 6] limit court intervention to matters that are expressly set out in the Act. The court cannot treat the itemized purposes as creating some sort of general jurisdiction to intervene.⁷

IV. CORRECTNESS AND CONSEQUENCES

The purpose of this case comment is not to consider the correctness of either decision. Decisions of the Alberta Court of Appeal are not binding on the Ontario Court of Appeal, and vice versa. Moreover, the legislative history in Alberta which was cited in the *New Era* decision is not directly relevant to the interpretation of the Ontario Act, despite the identical wording in the two Acts’ section 6. The modest goal of this case comment

⁷ J Brian Casey, *Arbitration Law of Canada*, 4th ed (Huntington: Juris 2020) at 315.

is to draw attention to the immense consequences that could arise from the different approaches in the two provinces.

The effect of both approaches to the interpretation of section 6 is to give it a meaning that could be more clearly expressed with minimal change to the statutory language. To illustrate:

Alberta Approach: Clearer Rewording	Ontario Approach: Clearer Rewording
<p>6 A court <i>may</i> intervene in matters governed by this Act, for the following purposes:</p> <ul style="list-style-type: none"> (a) to assist the arbitration process; (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement; (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement; (d) to enforce awards. 	<p>6 No court may intervene in matters governed by this Act, except as provided by this Act <i>and only</i> for the following purposes:</p> <ul style="list-style-type: none"> (a) to assist the arbitration process; (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement; (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement; (d) to enforce awards.

Under the Alberta approach, the restrictive words of the lead-in to the enumerated purposes in the actual text of the section have no meaning. Obviously, a court may intervene where the Act says so in other sections of the Act. The gist of the Alberta interpretation is to say that a court may *also* intervene for the purposes enumerated in s 6. On the Alberta interpretation, the enumerated grounds are additive, so any curtailment of court intervention is read out of the section. Under the Ontario

approach, the words “as provided by this Act” are instead interpreted to not include section 6. The enumerated purposes are treated as a limitation on the exercise of jurisdiction under other provisions of the Act.

While both judgments arose in relation to rights of appeal, the underlying analysis turns on an issue of much broader application: whether section 6 provides a separate and independent basis for court applications, as well as for court jurisdiction and rights of appeal in dealing with those applications. If it does not, any analysis based on rights of appeal from a court order made under a section that makes no provision for a right of appeal is irrelevant because there is no statutory basis for the order in the first place. This is the core distinction between the approaches of the Alberta and Ontario Courts of Appeal.

The clear implication is that, in Alberta, applications that parties bring in reference to arbitrations need not be confined to—or even invoke—any of the other provisions of the Act as long as their applications engage (or are alleged to engage) one of the very broad purposes enumerated in section 6. On this interpretation, section 6 is broad enough, for example, to empower a court to make directions to the tribunal during an arbitration “to prevent manifestly unfair treatment”.

If section 6 provides an independent basis for judicial intervention, parties may bring applications only under section 6 or in combination with applications under other sections of the Act; in either case, the outcomes of those applications can be appealed as of right. Possibly, this unconditional appeal right would exist even if an application is not brought under section 6, but the judge who makes the order invokes section 6. The effect is to eliminate any limitations on rights of appeal under other sections of the Act as long as grounds for the application can be stated under section 6.

Indeed, if section 6 is treated as an independent basis for applying to the court, it is not clear why any other sections

granting specific jurisdiction to the court in particular circumstances are necessary. The purposes enumerated in section 6 would be broad enough to cover almost any situation. The exceptions will have swallowed the rules.

This observation highlights another feature of section 6, namely that the section does not refer to any specific form of application that may be brought or any specific relief that the court is empowered to grant. Legal and judicial creativity, based on an appeal to the equitable discretion of the court and exercised in reference to the enumerated “purposes”, is encouraged by this approach. The salient point on this interpretation is the judge’s intention in granting or refusing an order under section 6.

On first reading, the overall impression of section 6 is that imposes a restriction. However, if read as providing an independent power of courts to intervene for any of a number of widely stated purposes, and carrying an unconditional right of appeal, section 6 would appear to confer a jurisdiction to intervene more extensive than even the largest-footed Chancellor’s shoes. This approach could easily lead to numerous, lengthy court interventions during any arbitration. While that appears to be the law in Alberta, it is not so in Ontario.

V. THE TREND AWAY FROM COURT INTERVENTION

In concluding, it is worth noting that, while *Sivitilli* and *Distillery* may correctly state the law in their respective provinces, the general trend in Canada and internationally, for some time, has been in the direction of greater and more specific limitations on court intervention. For example, the *Uniform Arbitration Act* promulgated in 2016 by the Uniform Law Conference of Canada⁸ recommends using the simpler wording of the equivalent

⁸ Uniform Law Conference of Canada, *Uniform Arbitration Act* (2016), online: <[https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Arbitration-Act/Uniform-Arbitration-Act-\(2016\)>](https://www.ulcc-chlc.ca/Civil-Section/Uniform-Acts/Uniform-Arbitration-Act/Uniform-Arbitration-Act-(2016)>).

provision of the *UNCITRAL Model Law on International Commercial Arbitration*:

6 No court may intervene in matters governed by this Act, except as expressly provided by this Act.⁹

The same recommendation was made in February 2021 by the Arbitration Act Reform Committee of the Toronto Commercial Arbitration Society.¹⁰

The new *Arbitration Act* enacted in British Columbia in 2020 contains the following provision, which presumably addresses additional issues which have arisen in that province:

4 In matters governed by this Act,
(a) a court must not intervene unless so provided in this Act, and
(b) the following must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act:
(i) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal;
(ii) a determination or direction by the designated appointing authority.¹¹

Thus, regardless of the correctness of *Sivitilli*, or perhaps especially because it should be taken as a correct statement of

⁹ *UNCITRAL Model Law on International Commercial Arbitration*, Annex 1, UN Doc A/40/17 (1985), with amendments as adopted in 2006 (7 July 2006) at art 6.

¹⁰ Toronto Commercial Arbitration Society, "AARC Final Report" (2021), online: <<https://web.archive.org/web/20250201193921/https://torontocommercialarbitrationsociety.com/arbitration-act-reform-committee/>>.

¹¹ *Arbitration Act*, SBC 2020, c 2.

Alberta law, the need for legislative reform and greater clarity seems obvious and urgent. The entrenchment in Alberta or elsewhere in Canada of the notion that courts can intervene in an arbitration, directly and independently, for any of the purposes set out in section 6, with any such intervention being subject to an absolute right of appeal would be problematic. It would dismantle of all other protections against court intervention that have previously been assumed to be integral to Canadian arbitration legislation.

THE BRITISH COLUMBIA COURT OF APPEAL'S JUDGMENT IN *BOLLHORN V LAKEHOUSE CUSTOM HOMES*: ITS CONSEQUENCES FOR ARBITRATION IN BRITISH COLUMBIA

Eric Myles*

I. INTRODUCTION

The British Columbia Court of Appeal's judgment in *Bollhorn v Lakehouse Custom Homes Ltd.*¹ represents a significant step in British Columbia's evolving arbitration environment. Newbury JA, writing for a unanimous division of the Court of Appeal,² dismissed an application for leave to appeal an arbitrator's decision in a case arising from allegations of deficient home construction. The judgment turned on four issues: how the doctrine of *res judicata* applied, if at all; whether the arbitrator's decision represented an "award"; what implications followed from changes in the rules of the Vancouver International Arbitration Centre ("VanIAC") governing recourse from arbitral awards to the courts; and whether the VanIAC could intervene in the leave application. The issues addressed by Newbury JA are likely to engage courts again, and not only in the construction context.

* Q.Arb., FCI Arb; Department of Justice Canada. All views expressed in the article are solely those of Dr. Myles and should not be taken as expressing any views of the Department of Justice.

¹ 2024 BCCA 192, leave to appeal refused, 41389 (9 January 2025) [*Bollhorn* BCCA 2024].

² Willcock and Fisher JJA concurred in Newbury JA's judgment.

II. BACKGROUND TO THE COURT APPLICATION

The interactions between the Applicant, Robert Tyler Bollhorn (“Mr. Bollhorn”), and the Respondent, Lakehouse Custom Homes Ltd. (“Lakehouse”), proceeded in three phases.

The first phase began on 18 February 2021, when the Applicant and the Respondent entered into a contract (“the Contract”), under which Mr. Bollhorn purchased real property at Kelowna, British Columbia, and Lakehouse agreed to construct a home on it, all at a price to him of \$1,865,000. On 7 February 2022, Lakehouse advised Mr. Bollhorn that it was terminating the Contract, although the home was 90% complete. He countered by instituting a civil claim in the BC Supreme Court on 10 March 2022, seeking a declaration that Lakehouse had breached the Contract and an order for specific performance (i.e., for Lakehouse to finish construction). Lakehouse counterclaimed on 12 April 2022, also alleging breach of contract.

Following a summary trial in the BC Supreme Court, on 5 December 2022, Stephens J ordered Lakehouse to specifically perform the Contract and held that the total purchase price would include Lakehouse’s 6% markup and taxes on 24 change orders made by Mr. Bollhorn.³ However, Stephens J concluded that he lacked sufficient evidence on “downgrades” or “deficiencies” alleged by Mr. Bollhorn to account for these in calculating the price to be paid on completion of the work.⁴

The second phase largely comprised attempts by Mr. Bollhorn and Lakehouse to resolve their ongoing disputes over the alleged deficiencies through arbitration. Shortly before the property transfer scheduled for 16 February 2023, Mr. Bollhorn conducted two walk-throughs of the property, during which he

³ *Bollhorn v Lakehouse Custom Homes Ltd.*, 2022 BCSC 2120 at para 94 [*Bollhorn* BCSC]. This recapitulation of events is drawn from *Bollhorn* BCCA 2024 at paras 2-3 and *Bollhorn* BCSC at paras 20, 29, 33, and 34.

⁴ *Bollhorn* BCSC, *supra* note 3 at para 91.

observed deficiencies in plumbing, lighting fixtures, and toilets, as well as unfinished landscaping; he estimated the total cost of remediation as \$131,350.19.⁵ Arguing that these deficiencies remained uncorrected, Mr. Bollhorn invoked the Contract's arbitration clause, which read:

Any dispute concerning the identification and pricing of deficiencies, the rectification of the deficiencies, and release of the holdback will be settled by arbitration under the British Columbia *Commercial Arbitration Act* at the expense of the Seller.⁶

Consistent with the arbitration clause, Mr. Bollhorn filed a Notice to Arbitrate with VanIAC on 15 March 2023, seeking a determination of the deficiencies, quantification of the cost of rectifying them, and miscellaneous orders regarding payment.⁷ Lakehouse opposed the claims, asserting that issues surrounding the deficiencies had already been determined by Stephens J and were therefore *res judicata*.⁸ The arbitrator sided with Lakehouse and Mr. Bollhorn sought leave to appeal.

In the third phase, the British Columbia Court of Appeal ("BCCA") considered Mr. Bollhorn's application for leave to appeal the arbitrator's decision. Saunders JA, after hearing the application in chambers, referred it to a division of the BCCA on 30 November 2023.⁹ That decision is described in the next section.

⁵ *Bollhorn BCCA 2024*, *supra* note 1 at paras 7, 9.

⁶ Quoted *ibid* at para 6. The British Columbia *Commercial Arbitration Act* was renamed the *Arbitration Act* by the *Family Law Act*, SBC 2011, c 25, s 305, effective 18 March 2013.

⁷ *Bollhorn BCCA 2024*, *supra* note 1 at para 12.

⁸ *Ibid*.

⁹ *Bollhorn v Lakehouse Custom Homes Ltd.*, 2023 BCCA 444 [*Bollhorn BCCA 2023*].

III. THE BCCA JUDGMENT

Saunders JA's referral encompassed three of the four issues described above: whether the arbitrator erred in law by holding that the doctrine of *res judicata* applied to Mr. Bollhorn's Notice to Arbitrate; whether the arbitrator's decision counted as an "award"; and whether the *Arbitration Act* and VanIAC's Domestic Arbitration Rules, in combination, precluded any appeal from an award when the disputed amount did not exceed \$250,000.¹⁰ Newbury JA and her division colleagues resolved these issues in their judgment of 16 May 2024, where they also addressed whether VanIAC might be admitted as an intervenor in the leave application. I will discuss these issues in turn.

1. *Res Judicata*

The BCCA division first considered the *res judicata* issue, which Newbury JA described as a threshold matter. Mr. Bollhorn, noting that he had not raised deficiency-related issues when he applied to the BC Supreme Court or during the summary trial, argued that a change in the situation precluded the application of *res judicata*: at the summary trial, the issue was whether the deficiencies he observed sufficed to justify lowering the purchase price of the home under the Contract; whereas in the arbitration, the issue was whether, immediately before completion of the property transfer, there remained deficiencies that he would need to remedy.¹¹

Lakehouse replied that the arbitrator's application of *res judicata* was a mixed issue of fact and law not involving any alleged extricable error of law, so it was not subject to appeal pursuant to subsections 59(2) and (3) of the *Arbitration Act*.¹² Newbury JA held that there existed viable arguments for Mr.

¹⁰ *Ibid* at paras 8-22.

¹¹ *Bollhorn BCCA 2024, supra* note 1 at para 40.

¹² *Ibid* at para 44.

Bollhorn’s “change of situation” theory, and declined to hold that Mr. Bollhorn’s claims were barred by *res judicata*.¹³

2. *The Availability of an Appeal Right*

A. *The Arbitrator’s Decision as an “Award”*

Whether the arbitrator’s decision qualified as an “award” was a controversial issue at the BCCA.¹⁴ Mr. Bollhorn contended that the decision was not an “award” on the basis that the arbitrator had not addressed the substantive issues raised in the Notice to Arbitrate. In reply, Lakehouse cited seven principles for determining whether an arbitrator’s decision qualifies as an “award”, which were propounded by the English High Court in *ZCCM Investment Holdings plc v Kansanshi Holdings plc*, and have been cited widely.¹⁵ Especially apposite is the second principle, which asserts:

Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim.¹⁶

¹³ *Ibid* at para 45. Newbury JA’s conclusion on this point chimes with the view that “[t]here can be no effective *res judicata* in a changing situation”. G Spencer Bower & KR Handley, *Res judicata*, 4th ed (London: LexisNexis, 2009) at §17.30.

¹⁴ The submissions of Mr Bollhorn and Lakehouse are recapitulated in *Bollhorn BCCA 2024*, *supra* note 1 at paras 25-32.

¹⁵ [2019] EWHC 1285 (Comm.) [*ZCCM*]. See “Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position” (1 November 2019), online (blog): *Kluwer Arbitration Blog* <<https://arbitrationblog.kluwerarbitration.com/2019/11/01/procedural-orders-or-challengeable-awards-the-english-high-court-clarifies-its-position/>>.

¹⁶ *ZCCM*, *supra* note 15 at para 40.

Newbury JA, finding that the arbitrator's decision was "substantive" and its effects "final" as to the issues addressed, and that the arbitrator was *functus officio* save for costs, held that the decision did constitute an award.¹⁷

B. The Effect of the Arbitration Act and the VanIAC Rules

Mr. Bollhorn and Lakehouse's arbitration agreement incorporated VanIAC's Domestic Arbitration Rules, including the Expedited Procedures set out in Part B, Rules 24-27.¹⁸ Rule 24(a) states that the Expedited Procedures apply if the parties agree, or if no claim by any party exceeds \$250,000 exclusive of interest and costs.¹⁹ The scope of application of the Expedited Procedures was crucial to the outcome, since Rule 27 provides:

For arbitrations brought under an arbitration agreement entered into on or after September 1, 2020 that provide for arbitration under these Rules, the parties expressly agree that there shall be no appeal on a question of law from an Award issued under the Expedited Procedure, unless consented to by both parties.

Mr. Bollhorn asserted that Rule 27, read in conjunction with Rule 31 of Part D's Optional Arbitration Appeal Rules (which sets out prerequisites and procedures for appeals from arbitrators' decisions under the VanIAC Rules), did not prevent

¹⁷ *Bollhorn BCCA 2024*, *supra* note 1 at paras 33-34.

¹⁸ *Ibid* at para 6.

¹⁹ VanIAC, "Domestic Arbitration Rules", online: <<https://vaniac.org/arbitration/rules-of-procedure/domestic-arbitration-rules/>>.

him from instituting an appeal.²⁰ Lakehouse replied that Rule 27 answered his leave application completely.²¹

Newbury JA found that the Expedited Procedures were dispositive. She found that, by agreeing to the VanIAC Domestic Arbitration Rules the parties had agreed to the Expedited Procedures. Since Mr. Bollhorn’s was for less than \$250,000, exclusive of interest and costs, the Expedited Procedures applied, including their prohibition on appeals. Accordingly, she reasoned, Mr. Bollhorn and Lakehouse had “expressly agreed” that no appeal on a question of law from the arbitrator’s award was available.²² Thus, despite the existence of an “award” and a genuine question about whether that award was constrained by *res judicata*, the parties’ agreement precluded any appeal.

3. *The Intervention of VanIAC*

Since the implications of VanIAC’s Expedited Procedures were in controversy, VanIAC sought leave to intervene in Mr. Bollhorn’s leave application.²³ Newbury JA observed that under section 30(f) of the recently amended *Court of Appeal Act*,²⁴ a justice—and hence, a division—could grant leave to intervene “on an appeal or other matter”.²⁵ Persuaded that VanIAC offered an instructive perspective on whether Rule 27 of the Expedited

²⁰ *Bollhorn BCCA 2024, supra* note 1 at paras 53-54.

²¹ *Ibid* at para 55.

²² *Ibid* at para 62.

²³ *Ibid* at para 56 et seq. VanIAC requested intervenor status only in respect of the leave application, not in an eventual appeal should leave be granted.

²⁴ SBC 2021, c 6. This provision expanded the opportunities for intervening previously afforded by Rule 36 of the *Court of Appeal Rules*, BC Reg 297/2001, which restricted intervention applications to those wishing to intervene “in an appeal”.

²⁵ *Bollhorn BCCA 2024, supra* note 1 at para 22.

Procedures precluded Mr. Bollhorn's appeal, she granted it intervenor status.²⁶

IV. LEGACY OF THE JUDGMENT

Newbury JA's judgment has four immediate consequences for British Columbia's courts, arbitrators, and practitioners.

First, the judgment demonstrates that an arbitrator's decision that an issue raised in a notice to arbitrate is *res judicata* is not impregnable. Whether the doctrine of *res judicata* has been properly applied is a question of law reviewable on a correctness standard.²⁷ Whether a "change of situation" prevents the invocation of *res judicata* is a narrower question of law. In appropriate circumstances, the public importance of a question of law may also oppose the application of *res judicata*.

Second, the judgment paves the way for later courts to consult the seven principles that the English High Court of Justice set forth in *ZCCM* for establishing whether an arbitrator's decision amounts to an "award". This step is particularly welcome insofar as a comprehensive definition of "award" is contained in neither the *Arbitration Act* nor the VanIAC Rules.²⁸ Since arbitration legislation in other provinces also does not define "award" in anything close to a comprehensive manner, the *ZCCM* factors could be helpful to courts across Canada.

Third, the judgment is noteworthy for its exposition of the VanIAC Expedited Procedures, especially Rule 27. Newbury JA interpreted the words of Rule 27 exactly as they appear, expressing an agreement not to permit appeals, which is binding pursuant to subsection 59(3) of the *Arbitration Act*. Nevertheless, Rule 27, which bars appeals in disputes not

²⁶ *Ibid* at para 57.

²⁷ *Ibid* at para 45.

²⁸ Sections 48 and 54 of the *Arbitration Act* specify various minimum requirements that an arbitral award must fulfil, but those provisions fall short of setting out a definition of "award".

exceeding \$250,000, save by the parties' mutual consent, raises the risk that parties will unknowingly abdicate a potentially important right. For this reason, Newbury JA was surely justified in encouraging VanIAC to draw the attention of parties seeking to utilize its Domestic Arbitration Rules to this implication.²⁹

Finally, the judgment shows that pursuant to section 30(f) of British Columbia's *Court of Appeal Act*, interventions in an application for leave to appeal can and will be allowed if, in the Court's view, the proposed intervenor has useful perspectives to contribute. However, the Court also noted its expectation that requests to intervene in leave applications will remain rare.³⁰

Instructive as Newbury JA's judgment is, one of the foremost legacies of the dispute between Mr. Bellhorn and Lakehouse stems from the analysis of Saunders JA. She remarked that if Mr. Bollhorn correctly asserted that his claim was not blocked by *res judicata* and if Lakehouse equally accurately contended that the arbitrator's award was unappealable, the claim would not be heard on its merits.³¹ Her observation, which foreshadowed Newbury JA's conclusions, suggests that the time-honoured maxim, "where there is a right, there is a remedy", may not always obtain in the arbitration context.³²

Implicit in Newbury JA's judgment is a tension between two choices that Mr. Bollhorn and Lakehouse made. On the one hand, they adopted VanIAC's Rules, including the Expedited Procedures, into their arbitration agreement.³³ On the other, the language of the arbitration agreement suggests that they intended disputes to be determined according to their substance, and not cut off by procedural mechanisms. While

²⁹ *Bollhorn* BCCA 2024, *supra* note 1 at para 51.

³⁰ *Ibid* at para 23.

³¹ *Bollhorn* BCCA 2023, *supra* note 9 at para 22.

³² This maxim received its classic expression in the judgment of Holt LCJ in *Ashby v White* (1703), 92 ER 126.

³³ *Bollhorn* BCCA 2024, *supra* note 1 at para 6.

Newbury JA resolved the tension in favour of the parties' express agreement to adopt the VanIAC Rules, future courts will likely need to address its consequences in other contexts.

THE FAMOUS FIVE? *GENCORE V KOWBEL* AND THE “FIVE FOUNDATIONAL POINTS” FOR APPEALING ARBITRATION AWARDS

*Zain Mookhi**

Successfully appealing arbitral awards has long been a challenging task in Canada. Canadian courts tend to grant leave to appeal awards only when narrow and specific statutory grounds are established and, even when they grant leave, seldom overturn awards. Arguably, still greater challenges confront parties seeking to set aside awards; Canada’s courts have narrowly interpreted the grounds for setting aside arbitral awards under both the domestic and international Arbitration Acts, and their interpretations remain largely consistent across the country’s provinces and territories.

In this context, it is perhaps unsurprising that some parties facing unfavourable awards launch broad challenges listing numerous grounds for appeal and set-aside. The decision of the Saskatchewan Court of King’s Bench [SKKB] in *Gencore Properties GP Inc. v Kowbel* illustrates the breadth of some parties’ challenges to arbitral awards, and the sceptical attitude of Canadian courts toward broad challenges.¹ *Gencore v Kowbel* shows that a “kitchen sink” approach to challenging awards can be counterproductive, and that parties should generally confine their challenges to established legal frameworks.

I. THE COURT’S DECISION

The award originated from a commercial dispute between Gencore (a real estate developer) and a group of investors, who signed a Limited Partnership Agreement [LPA] creating an

* PhD Candidate, Queen’s University Faculty of Law; Adjunct Professor, University of Mumbai – Pravin Gandhi College of Law; member of the bars of India and Ontario.

¹ 2025 SKKB 121 [*Gencore v Kowbel*].

entity to purchase and manage nine apartments in a property development in Moose Jaw. Disagreements arose between the parties, which were referred to arbitration. The arbitrator eventually awarded the claimants their damages, half of the pre-judgment interest claimed, and costs. Gencore filed applications under ss 45(2) and 46 of Saskatchewan's Arbitration Act.²

S 45(2) permits a party to appeal an award on a question of law if the arbitration agreement so provides or with leave of the court, 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.

S 46 of the Act empowers courts to set aside an award only on one or more of the grounds listed in that provision, which include a party's legal incapacity, invalidity of the arbitration agreement, and corruption or fraud.

In its application for leave to appeal, Gencore challenged "many aspects, if not every aspect, of the Arbitrator's [a]ward."³ It divided its allegations of legal error into 11 categories, including interpretation errors, jurisdictional defects, and lack of evidence, with the individual alleged errors numbering at least 123.⁴

The SKKB confined its inquiry to determining whether any of the issues raised by the appellant were correctly identified as questions of law. In doing so, the court relied on the decision of the Supreme Court of Canada (SCC) in *Teal Cedar Products Ltd. v*

² *The Arbitration Act, 1992*, SS 1992, c A-24.1 [the Act].

³ *Gencore v Kowbel*, *supra* note 1 at para 35.

⁴ *Ibid* at para 41.

British Columbia.⁵ In *Teal Cedar*, the SCC held that contractual interpretation can involve an “error of law” where “the decision-maker interpreted the factual matrix isolated from the words of the contract” and effectively created a new contract.⁶ In the same passage, the SCC emphasized the distinction between an arbitrator applying the principle properly—a question of mixed fact and law—and an arbitrator applying the proper principle—a question of law.⁷

To identify an appealable question of law, the SKKB also relied on *Schafer v Schafer*, where the Alberta Court of King’s Bench found that, “[i]f the specific issue is capable of only one conclusion, it will often be considered a question of law. However, if the specific issue is capable of a range of reasonable outcomes, that issue ‘almost always’ is considered to be a question of fact or a question of mixed fact and law.”⁸ The SKKB also relied on *Association of Academic Staff of the University of Alberta v University of Alberta (Board of Governors)*, where it was observed that courts must “exercise caution” and conduct a “robust analysis” when deciding whether an applicant’s framing of an issue truly establishes an error of law as required by statute.⁹

After referring to the relevant case law on identifying questions of law in arbitration appeals, the *Gencore v Kowbel* court set out five foundational points to distinguish between questions of law and mixed questions of fact and law:

1. Courts must be cautious of generalized complaints about the outcome “masquerading as questions of law”.

⁵ 2017 SCC 32, [2017] 1 SCR 688 [*Teal Cedar*].

⁶ *Ibid* at para 65.

⁷ *Ibid*.

⁸ 2023 ABKB 448 [internal citation omitted] [*Schafer*].

⁹ 2024 ABCA 350 at para 8.

2. Whether an arbitrator properly interprets a contract is a question of mixed fact and law.
3. Whether an arbitrator properly applies a legal principle is a question of mixed fact and law.
4. An arbitrator's preference for the evidence of one witness over that of another witness is not, on its own, an error of law.
5. An allegation that a trier of fact failed to provide sufficient reasons is not a stand-alone ground for an appeal.¹⁰

Applying this rubric, the Court found that only one of the issues raised by Gencore was "capable of only one conclusion" and thus satisfied the test laid down in *Schafer*: the arbitrator's order of pre-award interest. Accordingly, leave to appeal was granted on this point alone. With respect to Gencore's allegation that the arbitral award lacked sufficient reasons, the Court added this helpful *obiter dictum*:

[A] complaint about insufficient reasons must be tethered to some suggestion that the reasoning pathway of the Arbitrator cannot be discerned. A simple statement that the reasoning is insufficient does not automatically elevate the allegation into a question of law. If that were the case, dissatisfaction with a ruling could improperly masquerade as a question of law.

The Court also rejected Gencore's application to set aside the award based on the grounds specified in ss 46(1)(c) and (f) of the Act. Gencore had applied for set-aside under s 46(1)(c) of the Act, arguing that the arbitrator had decided questions beyond the scope of the Notice to Arbitrate. The Court dismissed this argument on two grounds. First, during the proceedings, the

¹⁰ *Gencore v Kowbel*, *supra* note 1 at para 63.

arbitrator had (correctly) advised the parties that he had jurisdiction to grant “such further and other relief as counsel may advise and the arbitrator may allow” and that because the parties were represented by competent counsel who “are deemed to know the law”, the arbitrator could not be limited only to those claims raised in the Notice to Arbitrate.¹¹ Moreover, the Court reasoned, even if the arbitrator had erred in law in addressing these claims, section 46(1)(c) was not “intended to address this kind of complaint”. Second, Gencore did not raise any objections during or after the hearing, so it had acquiesced to the arbitrator deciding these claims.¹²

Gencore also claimed that the award should be set aside because Gencore had not received notice that a 2016 appraisal of the disputed properties would be relied upon, and because the arbitrator ruled on a claim that the Claimants had indicated they would not pursue. These errors, Gencore argued, constituted violations of s 46(1)(f) of the Act, which provides that an award may be set aside if “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, or was not given proper notice of the arbitration or of the appointment of an arbitrator.” The Court rejected both arguments, reasoning once again that the statutory provision Gencore relied on was not meant to “ground complaints such as those raised by Gencore”.¹³ Moreover, given the “context of expedited proceedings in an arbitration hearing”, Gencore had not been treated unfairly or unequally.¹⁴

Ultimately, the Court granted Gencore leave to appeal only the arbitrator’s order of pre-award interest and dismissed all of

¹¹ *Ibid* at para 80.

¹² *Ibid* at para 81.

¹³ *Ibid* at para 83.

¹⁴ *Ibid*.

Gencore's other allegations of legal error and claims for set-aside of the award.

II. COMMENTARY

Gencore v Kowbel provides a valuable addition to existing case law on appeals from domestic arbitral awards. While all provinces that permit appeals generally limit those appeals to questions of law, uncertainty persists regarding the circumstances in which courts will identify a pure question of law, or an extricable error of law within a mixed question of fact and law. The Court's review of jurisprudence across several provinces informed its list of five "foundational points", which represents a helpful distillation of the Canadian case law on arbitral appeals.

Previous assessments of Canadian courts' approaches to arbitral appeals have focused on the SCC's decision in *Sattva Capital Corp. v Creston Moly Corp.*¹⁵ and on rulings from appellate courts in Ontario and British Columbia.¹⁶ Although each of these decisions was made within the scope of its respective provincial arbitration act, the laws of most Canadian provinces permit appeals on questions of law, either with the agreement of the parties or with leave of the court. The SKKB's decision in *Gencore v Kowbel* is a welcome aid to parties, and perhaps to courts in other provinces, in identifying the circumstances in which leave to appeal an arbitral award should be granted.

¹⁵ 2014 SCC 53,

¹⁶ See, for example, Joshua Karton et al, "Arbitration Appeals on Questions of Law in Canada: Stop Extricating the Inextricable!" (2023) 3:2 Can J Comm Arb 138.

2024 CANADIAN COMMERCIAL ARBITRATION CASE LAW: A YEAR IN REVIEW

*Rebecca Shoom**

I. INTRODUCTION

Canadian courts released relatively few decisions in 2024 that broadly advanced or changed the arbitration landscape in Canada. However, a lack of true blockbusters does not mean a lack of relevant case law. Several decisions issued by trial and appeal courts in 2024 assist in clarifying judicial interpretation and application of significant cases from prior years, including those that caused much discussion and, in some cases, concern in the arbitration community.

The standout exception is the Ontario Court of Appeal's decision in *Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al.* ("*Aroma*").¹ This much-anticipated multiple appointments decision confirmed that an arbitrator has no general duty to disclose a second appointment by a party or counsel during the pendency of an arbitration in which that party or counsel is involved.

In this 2024 case law review, I canvass the most recent jurisprudence on key issues that have been the subject of interest in prior years. In addition to the Court of Appeal's decision in *Aroma*, I check in on how courts are applying the unconscionability doctrine to arbitration clauses in the wake of the Supreme Court of Canada's 2020 decision in *Uber Technologies Inc. v Heller* ("*Uber*")² and comment on the tension

* Q.Arb.; Partner, Lerner LLP.

¹ *Aroma Franchise Company Inc et al v Aroma Espresso Bar Canada Inc et al*, 2024 ONCA 839 [*Aroma*].

² *Uber Technologies Inc v Heller*, 2020 SCC 16 [*Uber*].

between Ontario and British Columbia case law with respect to identifying extricable errors of law for purposes of arbitral appeals.

II. THE RETURN OF *AROMA*

Another year gone by, and *Aroma* continues to be the talk of the Canadian commercial arbitration community. In 2024, the Court of Appeal for Ontario weighed in on the case.

The facts and the Ontario Superior Court decision in *Aroma* were detailed in last year's case law year-in-review.³ In brief, the case arose from a franchisor-franchisee dispute with a sole arbitrator appointed by party agreement. During the arbitration, the arbitrator accepted an appointment in another, unrelated arbitration from a law firm that represented one of the parties in the *Aroma* arbitration, and did not disclose it to the other party. The Ontario Superior Court set aside the arbitrator's awards based on reasonable apprehension of bias, finding that he should have disclosed the second appointment to the parties.⁴

This result was surprising to many. In particular, it was not the expected outcome when compared to the facts and outcome in the the leading United Kingdom case on multiple appointments, *Halliburton Company v Chubb Bermuda Insurance Ltd.*, which the Superior Court decision cited extensively.⁵ Additionally, the decision turned largely on pre-appointment correspondence between counsel to which the arbitrator was not privy, which indicated the importance the parties placed on appointing an arbitrator with no connection to the parties or counsel.

³ Lisa C Munro and Rebecca Shoom, "2023 Canadian Commercial Arbitration Case Law: A Year in Review" (2023) 4:1 Can J Comm Arb 76.

⁴ *Aroma Franchise Company Inc v Aroma Espresso Bar Canada Inc*, 2023 ONSC 1827 [Comm List] at paras 91-92.

⁵ *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

In November 2024, the Court of Appeal overturned the Superior Court decision, finding no reasonable apprehension of bias.⁶ The court confirmed that the scope of an arbitrator's duty to disclose is determined objectively, so that it was an error of law for the application judge to consider subjective party expectations that were not communicated to the arbitrator. Applying an objective test, the arbitrator was not required to disclose the second appointment, as there were no overlapping parties or issues and the arbitrator and law firm did not have an extensive history with each other.

This is the first time that a Canadian appellate court has provided guidance on the test applicable to an arbitrator's duty of disclosure. However, the result is more of a return to the norm than a step forward. We now have confirmation that the test is the same under both Ontario's domestic legislation and the *UNCITRAL Model Law*, thus improving consistency across the two statutes on a matter where there is no principled reason to distinguish between domestic and international arbitrations.⁷ The test requires consideration of "the relevant circumstances from the standpoint of a fair-minded and informed observer, applied against the backdrop of a strong presumption that an arbitrator is impartial."⁸ Moreover, where that test dictates a duty to disclose, the failure to disclose does not in itself give rise to a reasonable apprehension of bias; it is a "relevant, but not determinative" factor.⁹

Notably, this test contrasts with that in the *IBA Guidelines on Conflicts of Interest in International Arbitration*, which approach

⁶ *Aroma*, *supra* note 1 at paras 145-47. The arbitrator's awards were reinstated, subject to remitting to the Superior Court certain issues other than reasonable apprehension of bias on which the application judge did not adjudicate.

⁷ *Arbitration Act, 1991*, SO 1991, c 17, at s 11(2)-(3); *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).

⁸ *Aroma*, *supra* note 1 at para 13.

⁹ *Ibid* at para 122.

the duty of disclosure through a subjective lens focused on the parties' perceptions.¹⁰ However, the Court held that the *IBA Guidelines* may provide guidance in determining what matters may require disclosure, but they cannot supplant or change the objective test in the applicable legislation unless they have been expressly adopted by the parties.¹¹

III. THE LEGACY OF *UBER*

The Canadian arbitration landscape changed in 2020 with the Supreme Court of Canada's decision in *Uber*.¹² *Uber* established that an arbitration clause could be rendered unenforceable on the basis of unconscionability, such that a court is not required to stay a proceeding and refer to arbitration where an arbitration agreement may apply. In other words, the Court held that unconscionability can be an exception both to the enforceability of an arbitration agreement (which always was true in principle, although it seldom came up in practice)¹³ and to *competence-competence* (which was new).¹⁴ The Court held that the arbitration clause in a standard form services agreement between Uber and an Uber food delivery driver was unenforceable. The majority grounded that finding in the doctrine of unconscionability, finding the clause to be unfair because of the parties' unequal bargaining power and the disproportionately high fees and other onerous terms that

¹⁰ International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (23 October 2014), online: <<https://www.ibanet.org/MediaHandler?id=e2fe5e72-eb14-4bba-b10d-d33dafee8918>>. Subsequent to the Ontario Superior Court's decision in *Aroma*, the IBA released an updated version of these guidelines: see International Bar Association, *IBA Guidelines on Conflicts of Interest in International Arbitration* (25 May 2024), online: <<https://www.ibanet.org/document?id=Guidelines-on-Conflicts-of-Interest-in-International-Arbitration-2024>>.

¹¹ *Aroma*, *supra* note 1 at para 74.

¹² *Uber*, *supra* note 2.

¹³ *Ibid* at paras 92-98.

¹⁴ *Ibid* at paras 37-39.

would apply to an arbitration, which made arbitration prohibitive in the driver's circumstances. Justice Brown, in his concurring opinion, would have found the clause to be void as contrary to public policy because, by simultaneously foreclosing litigation and raising practically insurmountable hurdles to arbitration, it denied access to justice and thereby undermined the rule of law.¹⁵

In the wake of *Uber*, it was unclear how far this expansion of the unconscionability doctrine might go. It became prudent for every contracting party, particularly those using standard form contracts and those seeking to include arbitration clauses in employment and consumer contracts, to assess their arbitration clauses for potential unenforceability under this new principle. Many arbitration clauses were modified to build in safeguards to accessibility to mitigate the risk of unconscionability, such as by providing for virtual hearings where parties are geographically disparate, arbitration seats that are local or may be changed by party agreement, or coverage of upfront costs.

Predictably, parties seeking to overcome arbitration clauses and resolve their disputes in court have attempted to expand the boundaries of the principles established in *Uber*, advocating for the unconscionability of arbitration clauses with varying features and in different contractual contexts. Court decisions on these applications have turned on the themes of fairness and access to justice that characterized the majority and concurring opinions in *Uber*.

Several decisions released in 2024 join the growing group of cases confirming that, while *Uber* opened the door for courts to deal with issues of arbitral jurisdiction themselves rather than referring the matter to the arbitrator in accordance with the *competence-competence* principle, the door has not been thrown wide open.¹⁶ Courts remain cautious about overstepping party

¹⁵ *Ibid* at para 110.

¹⁶ See, for example, *Difederico v Amazon.com, Inc.*, 2023 FCA 165, leave to appeal to SCC ref'd 2024 CanLII 43121; *Williams v Amazon.com Inc.*, 2023

autonomy and finding unconscionability where the facts do not clearly and demonstrably meet the test established in *Uber*.¹⁷ For example:

- In *Lin v Uber Canada Inc.*, an individual that used the Uber Eats platform (as opposed to a driver, as in *Uber*) alleged that the arbitration clause in Uber's terms and conditions was unconscionable.¹⁸ There was no evidence of dependency or a special relationship of trust between the consumer and Uber, nor was there an informational or cognitive asymmetry between the parties. Uber's arbitration clause could have been more generous to consumers, such as by incorporating access to small claims courts for claims within its jurisdiction, a right to opt out of arbitration, or prevention of a possible costs award against the consumer. However, the clause did not "unduly" advantage Uber or disadvantage the consumer. The Federal Court therefore found that the clause was not unconscionable and stayed the claims in favour of arbitration.
- In *Spark Event Rentals Ltd. v Google LLC*, a corporate user of Google Ads alleged that the arbitration clause in Google's Advertising Program Terms was unconscionable.¹⁹ In the absence of evidence of the plaintiff's financial constraints or inability to afford the applicable arbitration fees, the British Columbia Court of Appeal ruled that there was no "brick wall" of the kind identified in *Uber* preventing determination of a jurisdictional challenge within the arbitration.

BCCA 314, leave to appeal to SCC ref'd 2024 CanLII 43110; *Petty v Niantic Inc.*, 2023 BCCA 315, leave to appeal to SCC ref'd 2024 CanLII 43098.

¹⁷ The test for unconscionability requires (1) inequality of bargaining power, and (2) a resultant improvident bargain: see *Uber*, *supra* note 2 at para 79.

¹⁸ 2024 FC 977 [*Lin*].

¹⁹ 2024 BCCA 148, leave to appeal to SCC ref'd 2024 CanLII 122490.

Therefore, it was appropriate to refer the threshold jurisdictional challenge to arbitration.

- In *Tahmasebpour v Freedom Mobile Inc.*, a Freedom Mobile account holder alleged that the arbitration clause in Freedom Mobile’s Terms of Service was unconscionable.²⁰ The Supreme Court of British Columbia disagreed, staying the litigation. It found no particular vulnerability or dependence on the account holder’s part, and no evidence that the upfront costs of arbitration would prevent the claim from proceeding in arbitration.
- In *Wasylyk v Lyft*, a driver on the Lyft rideshare platform alleged that the arbitration clause in Lyft’s Terms of Service was unconscionable.²¹ The Ontario Superior Court found no unconscionability. Even assuming an inequality of bargaining power (despite the contract containing a right to opt out of arbitration), the arbitration agreement contained none of the “pitfalls” or “sinkholes” related to time, place, cost, procedure, or law that existed in the clause at issue in *Uber*.

Despite the cases cited above, where an arbitration clause contains procedural features like those at issue in *Uber*, courts are prepared to find unconscionability. For example, in *Pokornik v SkipTheDishes Restaurant Services Inc.*, the arbitration clause in the agreement between the SkipTheDishes delivery platform and its couriers was held to be unconscionable.²² The Manitoba court noted that, while the arbitration agreement in *Pokornik* was “not as lopsided” as that in *Uber*, the plaintiff would need to pay for legal representation to successfully advance the claims through arbitration. Those costs would be beyond her financial means and disproportionate to the small monetary value of her

²⁰ 2024 BCSC 726.

²¹ 2024 ONSC 664, leave to appeal to SCC ref’d 2024 CanLII 85665 [*Wasylyk*].

²² 2024 MBCA 3, leave to appeal to SCC ref’d 2024 CanLII 80700.

claims. Forcing the action into arbitration therefore would likely deny the plaintiff access to any dispute resolution process.²³

While courts may draw comparisons to the facts of other cases, the doctrine of unconscionability ultimately will be applied based on the facts of each case. Not all arbitration agreements in standard form contracts, nor in all consumer or employment contracts, will be unconscionable.²⁴ Each arbitration clause will be assessed on its own terms, and courts will require specific evidence on which they can determine that the arbitration clause is improvident, such as the costs of the arbitration process contracted for and the significance or impact of those costs on the party. Ultimately, the question will be whether a particular clause, in the particular circumstances of the party and the dispute, blocks access to dispute resolution.

In sum, while *Uber* undoubtedly opened the door for courts to address arbitral jurisdiction under the doctrine of unconscionability, they are exercising restraint in when they choose to step through that door.

IV. *SATTVA* AND THE CONUNDRUM OF THE EXTRICABLE ERROR

In *Sattva Capital Corp. v Creston Moly Corp.*, the Supreme Court of Canada confirmed that domestic commercial arbitration awards involving an alleged error on a matter of mixed fact and law may be appealed only where there exists an “extricable error of law”.²⁵ The Court’s emphasis that appellate courts should “exercise caution in attempting to extricate a question of law” appeared to be a win for arbitration enthusiasts, promoting finality in commercial arbitrations.²⁶

²³ *Ibid* at para 92.

²⁴ *Ibid* at para 85; *Wasylyk*, *supra* note 21 at paras 6, 91; *Lin*, *supra* note 18 at para 171.

²⁵ 2014 SCC 53 [*Sattva*].

²⁶ *Ibid* at paras 54-55. See also *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 45.

Ontario courts have continued down that road by taking a narrow approach to the identification of extricable errors of law, as reflected in *Tall Ships Development Inc. v Brockville (City)*.²⁷ By contrast, in British Columbia, most notably in the 2022 decision *Escape 101 Ventures Inc. v March of Dimes Canada*, courts have taken a more expansive approach, finding that “a misapprehension of evidence that goes to the core of the outcome is an extricable error of law”, including if an arbitrator’s conclusion is not reasonably supportable on the available evidence.²⁸

This split between two of the most active appellate courts for arbitration matters has left the arbitration community hoping for the country’s highest court to provide guidance on the issue and confirm Canada’s commitment to an effective arbitration regime.²⁹ That hope remains unfulfilled: the Supreme Court of Canada denied leave to appeal in both *Escape 101 Ventures* and *Tall Ships*. However, recent case law from British Columbia may be cause for some optimism.

Desert Properties Inc. v G&T Martini Holdings Ltd. arose from arbitration awards related to a real estate development transaction.³⁰ The parties sought leave to appeal and cross-appeal different aspects of the award.³¹ The British Columbia Court of Appeal dismissed both parties’ leave applications on the basis that they failed to disclose extricable errors of law.

²⁷ 2022 ONCA 861 at para 16.

²⁸ 2022 BCCA 294 at paras 43, 71-74 [*Escape*].

²⁹ See, for example, Joshua Karton et al, “Arbitration Appeals on Questions of Law in Canada: Stop Extricating the Inextricable!” (2023) 3:2 Can J Comm Arb 138.

³⁰ 2024 BCCA 320 [*Desert Properties*].

³¹ One party also sought leave to appeal the Supreme Court of British Columbia’s refusal to set aside a subsequent award related to interest. That leave application, which also was dismissed, is not addressed here.

The court acknowledged the province's existing jurisprudence on extricable errors of law, including that "[m]isapprehensions of evidence that go the core of the outcome of a case are extricable errors of law" and that an error of law may arise where there is "no evidence to sustain [an arbitrator's] conclusion or if his conclusion was not reasonably supportable on the available evidence."³² However, the court does not appear to have actually engaged with or evaluated the evidence underlying the arbitrator's award. It seems the court's determination that the arbitrator's conclusions were open to him on the evidence was based entirely on the award itself. That review satisfied the court that the arbitrator had sufficiently considered the evidence and arguments, and did not interfere with his factual determinations.³³

In *Farrow v RLG International Inc.*, the British Columbia Court of Appeal reached the same outcome on different grounds. It refused leave to appeal an arbitration award relating to a share purchase transaction.³⁴ One error asserted by the applicants related to the arbitrator's alleged misapprehension of certain evidence. There was no dispute that the arbitrator had misstated evidence in various passages of the award, which was clear on the face of the award. However, the court found that these misstatements were inconsequential; they neither went to the core of the arbitrator's reasoning nor affected the outcome of the case. Other alleged errors relied on characterizations of the evidence that contradicted factual findings made by the arbitrator, with which the court did not interfere. These alleged errors therefore did not raise an extricable error of law.

Parties retain their right to contract out of appeals if they wish to avoid this scheme. British Columbia's *Arbitration Act*

³² *Ibid* at paras 49-50, citing *Escape*, *supra* note 28.

³³ This issue was not addressed in *Escape*, because it was undisputed that the judge had misapprehended the evidence. Such circumstances are unlikely to be replicated in most cases, making the analysis in *Desert Properties*, *supra* note 30, particularly useful.

³⁴ 2024 BCCA 198.

provides that there can be no appeal on a question of law where appeals are expressly disallowed by the arbitration agreement.³⁵ Where the parties agree to adopt procedural rules that foreclose appeals on questions of law, this may fulfill that statutory requirement, as confirmed in *Bollhorn v Lakehouse Custom Homes Ltd.*³⁶ In that case, the British Columbia Court of Appeal dismissed an application for leave to appeal an arbitral award where, by party agreement, the arbitration was pursuant to the VanIAC Expedited Procedures of the Domestic Arbitration Rules, which foreclose appeals on questions of law.³⁷

These recent decisions indicate that at least some British Columbia courts may be reluctant to go beyond an arbitral award and wade into the evidentiary record to identify extricable errors of law, despite being empowered to do so. In most cases, they defer to the arbitrator's factual assessments, conduct their review on the face of the award, and maintain a meaningful standard for appealing arbitration awards, closer to the less intrusive approach taken in Ontario.

The law on this point continues to be inconsistent between Ontario and British Columbia, potentially due to discomfort among British Columbia judges with the regime in British Columbia's 2020 arbitration statute, which provides for appeals only on questions of law. However, in practice, their approaches may not be as far apart as many feared in the wake of *Escape*.

V. CONCLUSION

Although they address disparate subjects, the cases reviewed above all reflect the respect that Canadian judges generally afford to the arbitration process and to arbitrators. In

³⁵ *Arbitration Act*, SBC 2020, c 2, s 59(3).

³⁶ 2024 BCCA 192.

³⁷ *Ibid* at para 62. See Vancouver International Arbitration Centre, *Domestic Arbitration Rules* at Rule 27 (1 September 2020), online: <<https://vaniac.org/arbitration/rules-of-procedure/domestic-arbitration-rules/>>.

Aroma, the Ontario Court of Appeal overturned the lower court's subjective approach to the arbitrator's disclosure duty, which had risked setting up arbitrators to fail in meeting that duty by measuring it in reference to matters which they could not have knowledge about. *Uber* created a new avenue through which courts may intervene in determinations of arbitral jurisdiction, but the case law following it reveals that judges exercise restraint in using that tool, generally granting stays in favour of arbitration unless the arbitration clause under consideration contains the specific features that were present in *Uber*: arbitration costs and burdens (including, eg, initiation fees, costs for travel to a foreign seat, accommodations, legal representation, lost wages) that are significantly disproportionate to the monetary value of the claim. Even British Columbia courts appear reluctant to reevaluate evidence when seeking to identify extricable errors of law, including where *Escape* permits them to do so, instead deferring to arbitrators' determinations and assessments of the facts.

These 2024 cases should engender optimism among arbitration practitioners. Certainly, some Canadian case law is not as deferential to arbitral proceedings as some see necessary to maximize its effectiveness and efficiency. Nevertheless, judges appear to be trying to interpret and apply that case law in a manner that protects and promotes the arbitration process.

AN EMPIRICAL STUDY OF THE FAIR AND EQUITABLE TREATMENT STANDARD CLAUSE: HOW TRIBUNALS HAVE EXAMINED THE RELATIONSHIP WITH THE MINIMUM STANDARD

BY PATRICK DUMBERRY

Reviewed by Kevin W. Gray & Kabir Duggal***

Over the last decade, Patrick Dumberry has produced an impressive body of empirical work exploring how arbitral tribunals have interpreted the Fair and Equitable Treatment (“FET”) standard, especially in relation to the minimum standard of treatment (“MST”) in international investment law. In *An Empirical Study of the Fair and Equitable Treatment Standard Clause: How Tribunals Have Examined the Relationship with the Minimum Standard*, Dumberry continues that important and timely work, looking to how tribunals have engaged in treaty interpretation. The monograph is directed both to academics in the field and to practitioners of international investment law who may have to engage with the interpretation of FET clauses.

Both the scope of FET and its relationship to MST are highly contested.¹ Roughly speaking, there are two groups of commentators, those who argue that FET is identical to the minimum standard of treatment under customary international

* Assistant Professor, Peking University School of Transnational Law.

** C.Arb, Partner, Akin Gump Strauss Hauer & Feld LLP; Lecturer in Law, Columbia Law School

¹ Patrick Dumberry, *An Empirical Study of the Fair and Equitable Treatment Standard Clause: How Tribunals Have Examined the Relationship with the Minimum Standard* (Alphen aan den Rijn: Kluwer Law International 2024) at 1 [Dumberry].

law, as initially enunciated in *Neer* (and developed since then), and those who argue that FET is an independent, higher standard. On the latter view, FET must have a distinct meaning from MST.² Some scholars and tribunals have even argued that the FET standard in those treaties has now crystalized as a new norm of customary international law.³

In this book, Dumberry proposes to engage in two tasks. First, he asks “how investment tribunals have asessed FET clauses in the last 25 years regard the complex question of the relationship between [FET] and [MST].” Second, he assesses “whether the answer given by the tribunals to [the] first question has had any impact on how they have examined the content of the standard and how they have address matters of liability and compensation.”⁴

It is well known that tribunals have frequently adopted a higher standard of protection than that accepted by states when considering the meaning of FET clauses in international investment law. In *Pope & Talbot*, a NAFTA arbitration against Canada, the arbitral tribunal initially found that the meaning of FET, both under NATFA and in international investment law, “must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.”⁵ In response, the state parties to

² Ioana Tudor, *The Fair and Equitable Treatment Standard in International Foreign Investment Law* (Oxford: OUP 2008) at 22.

³ Stephen M Schwebel, “Investor-State Disputes and the Development of International Law: The Influence of Bilateral Investment Treaties on Customary International Law” (2004) 98 ASIL Proc 27 (2004); Patrick Dumberry, “Are BITs Representing the ‘New’ Customary International Law in International Investment Law?” (2010) 28:4 Penn State Int’l L R 674.

⁴ Dumberry, *supra* note 1 at 2.

⁵ *Pope & Talbot v Canada*, Award, 10 April 2001 at para 111 [Pope & Talbot]; see also *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Partial Award of 13 November 2000 at para 266. Although modern commentators might consider Dr Mann’s statement to be an over-generalisation, and the Tribunal does not rule out the possibility that there could be circumstances in which a denial of the national treatment provisions of the NAFTA would not

NAFTA issued a note under the auspices of the NAFTA Free Trade Commission, clarifying that the FET standard in NAFTA did not depart from that of customary international law and should not be read as an independent standard.⁶ Reluctantly, the arbitral tribunal accepted the states' agreed interpretation, and found that the FET standard, at least as applied in NAFTA, was identical to MST.

There are two, not necessarily exclusive, explanations for how the divergence between states and tribunals has arisen. For formalists, tribunals have undertaken a largely textualist reading of treaty clauses to determine whether the FET standard is different from MST. On this view, the drafting of treaty clauses explains how tribunal practice has developed. For realists, who begin from the work of sociologists such as Dezalay and Garth, arbitrators and tribunals must be understood as acting within a specific professional milieu.⁷ As Smit has noted, they are incentivized to adopt broad readings of both jurisdictional and FET clauses, which advance their personal interests.⁸

necessarily offend the minimum standard provisions, a majority of the Tribunal determines that on the facts of this particular case the breach of Article 1102 essentially establishes a breach of Article 1105 as well. See also Patrick Dumberry, "The Quest to Define 'Fair and Equitable Treatment' for Investors under International Law - The Case of the NAFTA Chapter 11 Pope & Talbot Awards" (2002) 3:4 J World Investment 657; PG Foy and RJC Deane, "Foreign Investment Protection under Investment Treaties: Recent Developments Under Chapter 11 of the North American Free Trade Agreement" (2001) 16 ICSD Rev 299; JC Thomas, "Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators" (2002) 17 ICSID Rev 21.

⁶ NAFTA Free Trade Commission, North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions, July 31, 2001.

⁷ Yves Dezalay & Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (Chicago: U Chicago P 1998).

⁸ Hans Smit, "The Pernicious Institution of the Party-Appointed Arbitrator" (2010) Columbia FDI Perspectives No 33, Columbia University Vale Columbia Center on Sustainable International Investment.

There is broad support for this view. Scholars have argued that tribunals have played a significant role in the development of the FET standard, as they appear to have done with respect to other terms of art in international investment arbitration. In a related study, Van Harten coded all publicly available awards in English, which amounted to approximately 140 cases as of 2010, and argued that tribunals have adopted expansive readings of treaty terms in order to expand their own jurisdiction.⁹

The formalist approach has been embraced by many practitioners and international organizations. For example, a 2004 OECD working paper concluded:

Because of the differences in its formulation, the proper interpretation of the “fair and equitable treatment” standard depends on the specific wording of the particular treaty, its context, the object and purpose of the treaty, as well as on negotiating history or other indications of the parties’ intent.¹⁰

A similar conclusion was reached by UNCTAD, which argued in a 2012 report that variations in drafting introduced different thresholds for the violation of the standard.¹¹

⁹ Gus Van Harten, “Arbitrator Behaviour in Asymmetrical Adjudication: An Empirical Study of Investment Treaty Arbitration” (2012) 50:1 *Osgoode Hall LJ* 211 at 238.

¹⁰ Organization for Economic Cooperation and Development, “Fair and Equitable Treatment Standard in International Investment Law” (2004), 2004/3 OECD Working Papers on International Investment Law 40.

¹¹ United Nations Commission on Trade and Development, “Fair and Equitable Treatment” (2012), 8 UNCTAD Series on Issues in International Investment Agreements, II (“[I]dentification of the correct source of the FET standard—whether it is grounded in customary international law or is a self-standing obligation—can have important consequences in terms of the standard’s content and, more precisely, of the types of State measures that can be challenged as well as the required threshold for finding a violation, that is, the required degree of seriousness of the breach.”).

Ultimately, Dumberry embraces the same formalist approach. In Part I, he surveys the history of FET and identifies several different types of references to FET in treaty clauses. These include references to FET solely in a treaty preamble (which do not in themselves impose any binding obligations on the host state), stand-alone FET clauses (including autonomous and unqualified references to the FET), FET clauses by which treatment is required to be “in accordance with international law”, references to the FET in combination with other standards of protection (such as national treatment and Most-Favored-Nation clauses), references to FET with an additional specification that this treatment prohibits arbitrary and discretionary measures, FET clauses whereby treatment must be no less than that required by international law, and FET clauses linking FET to MST or custom international law.¹²

Next, in Part II, Dumberry considers how tribunals have interpreted different FET clauses. He identifies three main types of cases. First, he considers cases involving stand-alone FET clauses, which are those where the FET standard is not qualified by reference to international law or the customary standard. The majority of tribunals in those cases appear to have embraced the view that FET is an independent standard.

Thus, for example, the tribunal in *Saluka* found that the text of the treaty precluded a reference to customary international law.¹³ It noted, “[w]hichever the difference between the

¹² Dumberry, *supra* note 1 at 55. See also Patrick Dumberry, “Has the Fair and Equitable Treatment Standard Become a Rule of Customary International Law?” (2017) 8:1 J Int’l Disp Settlement 155; Patrick Dumberry, “The Practice of States as Evidence of Custom: An Analysis of Fair and Equitable Treatment Standard Clauses in States’ Foreign Investment Laws” (2015) 2:1 McGill J Disp Resol 66.

¹³ *Saluka v Czech Republic*, Partial Award of 17 March 2006 at para 294. (“[Article 3.1 of the Treaty] omits any express reference to the customary minimum standard. The interpretation of Article 3.1 does not therefore share the difficulties that may arise under treaties (such as the NAFTA) which expressly tie the ‘fair and equitable treatment’ standard to the customary minimum standard. Avoidance of these difficulties may even be regarded as the very purpose of the lack of a reference to an international standard in the

customary and the treaty standards may be, this Tribunal has to limit itself to the interpretation of the ‘fair and equitable treatment’ standard as embodied in Article 3.1 of the Treaty. That Article omits any express reference to the customary minimum standard.”¹⁴ Similar reasoning was employed by the tribunal in *Addiko*, which found that the omission of any reference to MST meant that the tribunal should rely on an autonomous standard.¹⁵ Ultimately, Dumberry finds that in 23 out of 29 awards that considered the relationship between FET and MST, tribunals concluded that the clause should be interpreted as having an autonomous character.¹⁶ Unfortunately, he does not adequately explain or identify the outliers, a lacuna to which we will return.

The next class of awards Dumberry considers are those which hold that the meaning of an FET clause should be determined according to international law generally (including clauses which set international law as a floor rather than a ceiling).¹⁷ In these cases, most tribunals (14 out of 19) found that the reference to FET in the treaty was not to MST. Thus, for example, the tribunal in *Vivendi* noted that:

Treaty. This clearly points to the autonomous character of a ‘fair and equitable treatment’ standard such as the one laid down in Article 3.1 of the Treaty.”).

¹⁴ *Ibid.*

¹⁵ *Addiko Bank AG v Montenengro*, ICSID Case No ARB/17.35, Award of 24 November 2021 at paras 543-544; *Tethyan Copper Company Pty Limited v Islamic Republic of Pakistan*, ICSID Case No ARB/12/1, Award of 12 July 2019 at paras 804-805; *Cairn Energy PLC and Cairn UK Holdings Limited v The Republic of India*, PCA Case No 2016-07, Final Award of 21 December 2020 at para 1701; *Gardabani Holdings B.V. and Silk Road Holdings B.V. v Georgia*, ICSID Case No ARB/17/29, Award of 21 November 21 2022 at para 498; *Sociedad Aeroportuaria Kuntur Wasi S.A. and Corporación América S.A. v Republic of Peru*, ICSID Case No ARB/18/27, Decision on Jurisdiction, Liability, and Quantum of 11 August 11 2023 at para 668.

¹⁶ Dumberry, *supra* note 1 at para 90.

¹⁷ *Ibid* at para 91.

The Tribunal sees no basis for equating principles of international law with the minimum standard of treatment. First, the reference to principles of international law supports a broader reading that invites consideration of a wider range of international law principles than the minimum standard alone. Second, the wording of Article 3 requires that the fair and equitable treatment *conform* to the principles of international law, but the requirement for conformity can just as readily set a floor as a ceiling on the Treaty's fair and equitable treatment standard. Third, the language of the provision suggests that one should also look to contemporary principles of international law, not only to principles from almost a century ago.¹⁸

¹⁸ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Award of 20 August 2007 at 7.4.7 (citing, for the proposition that MST could be a floor, not a ceiling, *American Manufacturing & Trading, Inc. (AMT) v Democratic Republic of Congo*, ICSID Case No ARB/93/1, Award of 21 February 1997; *Eastern Credit Limited, Inc. and A.S. Baltoil v The Republic of Estonia*, ICSID Case No ARB/99/2, Award of 25 June 2001 at para 367).

The floor-not-a-ceiling principle was also accepted by the *Azurix* tribunal: *Azurix Corp. v The Argentine Republic*, ICSID Case No ARB/01/12, Award of 14 July 2006 at para 361. The tribunal, in a footnote, rejected any reference to the statements of the NAFTA state parties: "Any suggestion that the minimum standard remains effectively unchanged since the 1926 Neer Claim is not supportable. Indeed, NAFTA cases that preceded the Free Trade Commission's interpretation of the Chapter Eleven F&ET provision ... affirm that the minimum standard has evolved significantly beyond Neer. Also, the *ADF Group* tribunal held that the minimum standard is not a static photograph dated 1927 ... and the Tribunal in *Mondev* held that the content of the minimum standard today cannot be limited to the content of customary international law as recognised in arbitral decisions in the 1920's. It added that, to the modern eye, what is unfair or inequitable need not equate with outrageous or egregious." (internal citations omitted).

A similar approach was taken by the tribunals in *Global Telecom* and *Suez*.¹⁹ These cases are controversial—not least, as Stern has noted, because the tribunals in question appear not to have conducted any analysis of the principles of international law underlying the autonomous interpretation of FET.²⁰

Next, Dumberry turns to the question of how tribunals have interpreted clauses which state that the FET standard requires treatment no less favourable than that required by international law. The tribunals in Dumberry’s data set were evenly split in these cases. Eleven out of twenty-two tribunals found that the standard contained in such clauses is a reference to the customary international law standard, while the other eleven found that such clauses require a heightened standard of protection.²¹ Thus, the tribunal in *Lemire* found that the FET standard exceeds MST, by protecting against inequitable treatment even if such treatment did not rise to the level of an outrage.²² Conversely, the *AMT* tribunal found that the reference in the treaty text to FET as “no less than” the standard

¹⁹ *Global Telecom Holding S.A.E. v Canada*, ICSID Case No ARB/16/16, Award of 27 March 2020 at para 484 (“Dealing first with Canada’s argument that the fair and equitable treatment standard set out in the BIT is limited to the minimum standard of treatment under customary international law, the Tribunal concludes that there is no basis for such an interpretation. Any such limitation runs counter to the explicit terms used in Article II(2)(a) and to the ordinary meaning to be given to those terms in their context and in the light of the BIT’s object and purpose.”); *Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v Argentine Republic*, ICSID Case No ARB/03/19, Decision on Liability of 20 July 2010 at para 179 (“the Tribunal rejects the Respondent’s argument that the fair and equitable treatment standard as embodied in the Argentina-Spain BIT is implicitly limited by minimum international standard.”).

²⁰ *Infinito Gold Ltd. v Costa Rica*, ICSID Case No ARB/14/5, Separate Opinion of Professor Brigitte Stern on Jurisdiction and on the Merits of 3 June 2021 at para 84. See also Dumberry, *supra* note 1 at 101 et seq.

²¹ *Ibid* at 116.

²² *Joseph Charles Lemire v Ukraine*, ICSID Case No ARB/06/18, Decision on Jurisdiction and Liability of 14 January 2010 at paras 253-254.

under international law must be a reference to MST.²³ In all cases examined to this point, Dumberry finds that a holding of heightened protection is positively correlated with success for the claimants and higher awards.

Finally, Dumberry examines cases turning on treaty clauses that expressly refer to MST, as in NAFTA cases. Tribunals in these cases have generally found, at least in the post-*Talbot & Pope* era, that the FET standard is equivalent to MST.²⁴ However, even where clauses clearly specify that the standard is one of customary international law or MST, not all tribunals have hewed closely to the text. In *Eco Oro*, the tribunal expanded MST to include legitimate expectations, despite that no international court appears to have found that the doctrine of legitimate expectations forms part of customary international law.²⁵ Additionally, at least one tribunal has found that anti-discrimination forms a part of MST.²⁶ Unfortunately, Dumberry does not provide total numbers of awards in this section, so the reader cannot determine how frequently tribunals adopted

²³ *American Manufacturing & Trading v Zaire*, ICSID Case No Arb/93/1, Award of 21 Feb 1997 at para 6.60.

²⁴ This approach has been adopted elsewhere, including in cases under the Canada-EU Free Trade Agreement (CETA), such as *Railroad Development Corporation v Republic of Guatemala*, ICSID Case No ARB/07/23; *Elliot v Korea*, PCA Case No 2018-451, Award of 20 January 2023; *Gramercy Funds Management LLC and Gramercy Peru Holdings LLC v Republic of Peru*, ICSID Case No UNCT/18/2, Award of 6 December 2022 at 823; *IC Power Ltd and Kenon Holdings Ltd v Republic of Peru*, ICSID Case No ARB/19/19, Award of 3 October 2023 at para 287 et seq; *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No ARB/11/33, Award of 3 November 2015 at para 382 et seq.

²⁵ *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No ARB/16/41, Decision on Jurisdiction, Liability and Directions on Quantum of 9 December 2021 at para 745; see also *OI European Group B.V. (OIEG) v Bolivarian Republic of Venezuela*, ICSID Case No ARB/11/25, Award of 10 March 2015 at para 491, where the tribunal found that a state may violate both FET and MFN “by means of general legislative actions, enacted by the State, if the new regulation contracts the investor’s legitimate expectations”.

²⁶ Dumberry, *supra* note 1 at 133. Others have expanded MST by including an expensive protection against arbitrary treatment. *Ibid* at 133-35.

expansive interpretations of clauses linking FET to MST. Dumberry concludes, however, that because of the narrow interpretations advanced by these tribunals, claimants are less likely to be successful and, when they are, awards are likely to be smaller.²⁷

In Part III, Dumberry turns to the so-called convergence thesis in ISDS. The convergence thesis argues that the FET and MST standards have converged in international investment law such that the level of protection offered by each is now essentially the same.²⁸ Dumberry rejects this thesis: “My analysis of case law shows that this ‘dichotomy’ is far from being simply a ‘misconception’. Tribunals do analyze stand alone FET clauses and provisions linked to the MST differently”.²⁹ This is a key and important finding that appears to be supported by Dumberry’s analysis.

However, it is also incomplete, and it is precisely here that Dumberry’s book would have benefited from greater analysis of outlier cases, as well as more precise references to allow for the verification of his findings. Thus, while he has clearly identified patterns in the interpretative practices of tribunals, he has not been able to explain why some tribunals deviated from the majority practice. For example, even where tribunals have examined stand-alone FET clauses, some have found that the FET clauses refer to MST and not to an independent standard. Similarly, where interpreting FET clauses referring to international law as a floor, some tribunals have declined to follow the approach adopted in *Vivendi* and found that reference to FET in those clauses must be references to MST. It is precisely this deviation that gives credence to the sociological challenge to internal investment arbitration. The outlying arbitrators, it would appear (although we lack the ability to completely verify

²⁷ *Ibid* at 154.

²⁸ *Ibid* at 156-57.

²⁹ *Ibid* at 156.

this claim) are still engaged in the practice of international investment law, even if their conclusions are outside the norm.

Additionally, although Dumberry flags the existence of these outliers,³⁰ he does not provide complete citations, making it impossible to identify the cases or verify his analysis. This is unfortunate, and sadly too common in legal writing (where norms about providing complete data sets, which are more common in other social scientific disciplines, do not prevail), and takes away from the strength of his argument.

Hopefully, in future work, Dumberry will provide an account of the tribunals which depart from the practices he identifies here. However, none of this is to take away from what is otherwise a pathbreaking work.

³⁰ See *supra*, fns 16 and 17.

JOINT VENTURE DISPUTES IN THE ENERGY AND NATURAL RESOURCE SECTORS

BY A. TIMOTHY MARTIN, JOHN GILBERT & PETER ROBERTS

*Reviewed by David Haigh KC**

Once in a generation or so, a fundamental work appears that becomes a standard reference source for a particular area of legal study or practice. This text is undoubtedly a candidate for that status.¹

The authors bring a wealth of experience from their diverse backgrounds to bear on their book. A. Timothy Martin, a past president of the Association of International Energy Negotiators (AIEN, formerly, the Association of International Petroleum Negotiators), has had an extensive career in international oil and gas legal management in a wide variety of international jurisdictions, and continues to act as an expert witness and arbitrator. Peter Roberts, a solicitor admitted to practice in England and Wales and Hong Kong, has more than thirty years' experience as a leading international oil and gas practitioner. Finally, John Gilbert, co-chair of Bracewell LLP's international arbitration practice, offers his great knowledge as a leading counsel in energy disputes related to oil and gas exploration and production.

This work will prove helpful both to the novice who seeks to understand the sometimes-surprisingly-complex subject of joint ventures, and to the seasoned expert. Over 400 cases from various jurisdictions are reviewed, and wide-ranging issues are covered in the book's section on Disputed Issues in Joint

* Independent international arbitrator, Calgary, Alberta.

¹ A. Timothy Martin, John Gilbert & Peter Roberts, *Joint Venture Disputes in the Energy and Natural Resource Sectors* (New York: Oxford UP 2023).

Ventures. The preponderance of legal authority is reflected in US jurisprudence, along with UK, Canadian, and Australian judgments. However, other jurisdictions receive their due in diverse references to experiences in Norway, New Zealand, Brazil, and Nigeria. In addition, the authors have included innumerable references to arbitration awards rendered under the whole range of arbitral institutions and settings. Notwithstanding these national and other disparate sources and the strong presence of the common law, the text tends to demonstrate the confluence of these sources and the significant standardization of these forms of business organization, thereby contributing to the literature on transnational legal concepts and the development of *lex petrolea*.

Best practices and industry standards are often described, and short historical references for their provenance are concisely included. Such context provides helpful guidance and supports the general derivation of applicable principles.

Topics covered include the scope of the joint venture, size of shares in the joint venture, approval of JV operations, JV operations conducted by fewer than all the parties in the JV, allocation of costs, accounting procedures, defaults, scope of the operator's duties and authority, limitation of liability and indemnities, removal of the operator, transfer rights, and termination of the JV. In each instance, the authors have provided a deep dive into leading cases that have considered these issues. The summaries of these cases are helpful guides to both good practices and the occasional outlier. All these sections are very practical and will ensure that this book will find a place on most law firm shelves, especially in the law departments of oil and gas and other extractive companies. It will also prove to be a convenient source for decision makers in hearing rooms and board rooms alike.

Treatment of these various topics is highlighted with helpful introductions and conclusions bookending the individual sections. Where applicable, cross-references are given routinely to decided cases or to findings in both commercial arbitration

and investor-state settings. Likewise, where no relevant precedent has been discovered, the authors reaffirm that there is indeed a lack of authority—a reassurance to researchers who might otherwise search in vain.

The book features a separate section on managing joint venture disputes, which reveals a mature and balanced review of the sort of practical considerations a seasoned litigator or arbitration counsel would advise clients to bear in mind. This is accomplished in a smooth narrative style without cumbersome lists. Common sense suggestions flow along with useful cross-references, for example, to the AIEN guidance on dispute resolution and other equally well-known models.² The reader is reminded of available options such as expert determination, mediation, arbitration, or court actions, along with some of the considerations leading to choosing one or another of them. Examples of recent cases illustrating some of the complexities of JV disputes are developed, including relatively recent instances of claims for *force majeure* arising from the COVID-19 pandemic, and the potential ineffectiveness of some dispute resolution mechanisms to resolve the gaps that may arise between granting instruments and joint venture operating agreements.

The hardcover presentation of this work will hopefully be succeeded over time with subsequent editions, in order to keep current with developments in this field. The joint venture business organization has proven to be durable in all parts of the world and will doubtlessly continue to be so. This book will serve to support and inform professionals who wish a practical and reliable guide to the basic principles and precedents governing such organizations. Whether drafting JV agreements or analyzing issues arising from a JV dispute, practitioners will find this text to be a convenient, practical, and thorough guide and source.

² Association of International Energy Negotiators, "AIPN Model Dispute Resolution Agreement and Guidance Notes" (2017), online: <www.aien.org>.

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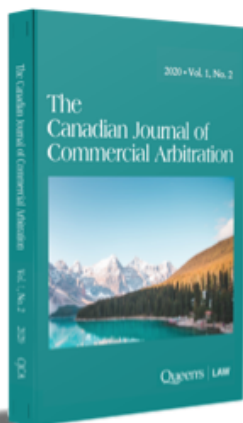
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