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# Arbitration and mediation of IP and IT disputes[*]

**Daniel Urbas**[**]

## Overview

To focus on themes inherent in the Barreau du Québec's November 13, 2020 conference on recent developments in arbitration and mediation of intellectual property ("IP") and information technologies ("IT"), this paper addresses the distinctions between and the promised benefits of arbitration and mediation as dispute resolution methods for IP and IT ("IP/IT") disputes with reference to the latest Québec case law.

The paper alerts counsel representing parties disputing IP/IT rights ("IP/IT Counsel") whether, how and when arbitration and mediation can serve as effective options to litigation. The paper does not purport to wordsmith the best terms for agreements to arbitrate, advocate for arbitration over litigation or inventory all opportunities to arbitrate IP/IT disputes. Rather, it informs IP/IT Counsel how to (i) identify which of the various dispute resolution processes qualify as genuine arbitration, (ii) determine if

[*] The paper accompanies the presentation given at the Barreau du Québec's November 13, 2020 conference "Les développements récents en propriété intellectuelle et en droit du divertissement 2020".

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arbitration is appropriate for the resolution sought, (iii) word the scope of the dispute, (iv) choose appropriate remedies to meet expectations, (v) anticipate the nature of post-award judicial intervention and (vi) pre-empt breaches of any promised benefits. After having explored the nature of arbitration, the paper then turns back to a short list of arbitration's key promised benefits and revisits them in light of specific issues raised by Québec cases.

Following the section on arbitration, the paper considers mediation in which parties can engage before, during and even after the arbitration process. With reference to applicable Québec legislation and cases framing the approach to negotiated settlements, the paper identifies how mediation differs from arbitration and where IP/IT Counsel ought to exercise care when opting to enter into transactions or consent awards when resolving disputes.

IP/IT Counsel must note that the paper comments on Québec legislation and cases. Not all jurisdictions have the same approaches as those reflected in Québec's legislation and cases. Any last-minute negotiation of terms to IP/IT agreements can undermine expectations and strategies. For example, in order to allow the parties to sign their contract, IP/IT Counsel might exchange Québec-based party A's preference for its substantive law for Ontario-based party B's choice of its seat of arbitration regarding a contract for performance in Canada.

Choosing one party's rules applicable to arbitration may expose an otherwise final arbitration award to lengthy, costly, non-confidential and successful post-award challenges to the merits of the award. Québec's and Ontario's respective arbitration laws, each internally coherent, do not offer the same post-award result. Québec provides no post-award appeals of the merits of an award whereas Ontario, for domestic arbitrations, permits appeals on questions of law, questions of fact and/or questions of mixed fact and law, depending on the parties' agreement.

Each jurisdiction's set of rules applicable to arbitration has its *raison d'être* and IP/IT Counsel can recommend choice between and changes to each. In doing so, they can knowing the trade-offs in their agreements based on the issues outlined in this paper.

## **Québec - a welcome harbour for arbitration**

Québec's rules applicable to arbitration, known as *lex arbitri*, are collected in the Civil Code of Québec, CQLR c CCQ-1991[1] ("C.C.Q.") and the Code of Civil Procedure, CQLR c C-25.01[2] ("C.C.P."). Québec's *lex arbitri* draws no practical distinction between international commercial arbitration or domestic arbitration, other than to nuance "*consideration*" of source authorities[3] for recognition and enforcement of awards issued in Québec and those issued outside.

[1] Articles 2638-2643 C.C.Q. See also articles 2892 and 2895 C.C.Q. regarding prescription. See articles 3121 and 3133 C.C.Q. regarding the law governing respectively the arbitration agreement and the arbitration proceedings.
[2] Articles 1-7 C.C.P. and articles 620-648 C.C.P. for general provisions regarding arbitration, appointment of arbitrators, conduct of arbitration, exceptional measures, awards, homologation and annulment of awards. See articles 649-651 C.C.P. for special provisions applicable to international commercial arbitration and articles 652-655 C.C.P. for recognition and enforcement of arbitration awards made outside of Québec.
[3] Article 640 C.C.P., including the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and its amendments.

Unlike other Canadian, common law jurisdictions which bifurcate between international commercial arbitration[4] and domestic arbitration,[5] Québec adopts a unified approach.[6] Québec's *lex arbitri* favours a one-step, final and binding process subject only to post-award challenges on those limited grounds familiar to lawyers experienced with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("New York Convention") and its recognition and enforcement procedures. The Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and its amendments ("Model Law") helps inform Québec's *lex arbitri*.

Québec case law regarding arbitration abounds with examples of Québec's courts' full support of consensual arbitration. Greenkey Ltd. v. Trovac Industries Ltd., 2017 QCCS 3270 ("Greenkey v. Trovac") granted a motion to homologate the final award and a dismissed a motion to annul the award resulting from an arbitration administered by a well-known Québec-based arbitration institution[7] in accordance with the C.C.P. and the institution's own rules. To do so, Greenkey v. Trovac adopted and applied the reasoning in Government of The Dominican Republic v. Geci Española 2017 QCCS 2619 when summing up a Québec court's post-award role when tasked with deciding whether to homologate an award:

> *[14] Courts have no jurisdiction to hear disputes covered by an arbitration agreement. They also cannot enquire into the merits of a dispute which was arbitrated and must not engage in a retrial of the dispute.*
>
> *[15] On a Motion to homologate or to annul an arbitration award, the analysis of the Court must be limited to the key prerequisites to the homologation or annulment of an arbitration award, which are enumerated in article 646 of the Code of Civil Procedure.* (emphasis added)

That reasoning reflects an approach followed consistently in a long line of cases affirming respect for arbitration's role in resolving disputes.

> *[45] On another note, the intervention of a court like the Superior Court falls under arts. 946.4 and 947.2 C.C.P. and is different from the intervention in a judicial review proceeding. The issue here is not whether the reasons or conclusions of the disputed awards are appropriate, apt, correct, just, fair, or reasonable, since art. 946.2 C.C.P. prohibits the court examining a motion for homologation or annulment from enquiring into the merits of the dispute. Rather, the issue is solely to ensure that these awards or the process leading to them contain none of the defects listed in art. 946.4 C.C.P. As we shall see, in the present case, subparagraphs 3 (breach of the rules of natural justice) and 4 (exceeding the scope of the arbitration agreement) of the first paragraph of this provision are in play. In the first case, only the arbitration process may be the subject of*

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[4] International Commercial Arbitration Act, RSA 2000, c I-5; International Commercial Arbitration Act, RSBC 1996, c 233; International Commercial Arbitration Act, 2017, SO 2017, c 2, Sch 5.

[5] Arbitration Act, RSA 2000, c A-43; Arbitration Act, SBC 2020, c 2; Arbitration Act, 1991, SO 1991, c 17.

[6] For the Federal approach, in line with Québec's, see Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp).

[7] The Canadian Commercial Arbitration Centre administered the arbitration in accordance with its General Commercial Arbitration Rules.

> *the ruling; in the second, we must [translation] "ignore the interpretation that led to the result, in order to focus on the latter".*[8] (emphasis added)

Along similar lines but in even briefer reasons, Centre Sheraton v. Canadian League of Gamers Inc., 2018 QCCS 1945 ("Centre Sheraton v. Canadian League of Gamers") homologated a final award which issued *ex parte* against non-participating defendants.[9] The case delivered on several of arbitration's promises, including reduced formalities, shorter timelines, arbitration's ability, similar to courts, to proceed *ex parte* and parties' facility to have a final award homologated as a judgment of a court unless one of a limited number of grounds is proven to the court's satisfaction. The apparent simplicity of the process listed in the reasons in Centre Sheraton v. Canadian League of Gamers downplays the contribution of several key components necessary to deliver on those promises: Québec's C.C.Q. and C.C.P. provisions, an experienced arbitrator, an established administering institution and its rules and a court supportive of arbitration as an alternative route to dispute resolution.

In addition, 9302-7654 Québec inc. (Team Productions) v. Bieber, 2017 QCCS 1100 ("Team Productions v. Bieber") commented on how arbitration serves as an alternative to litigation and offers certain benefits. The court endorsed expansive statements supportive of arbitration made by the Québec Court of Appeal in Laurentienne-vie, Cie d'assurances inc. v. Empire, Cie d'assurance-vie, 2000 CanLII 9001:

> [informal translation] *[80] Arbitration is a fundamental right of citizens and is a form of expression of their contractual freedom. It should not be considered as an attack on the state's justice monopoly. Arbitration should actually be perceived as an alternative dispute resolution form which responds, according to circumstances, to certain goals – speed, a decision by one's peers, cost saving, etc. - sought by the parties.*[10] (emphasis added)

IP/IT parties can look favorably on arbitration as a viable alternative to court litigation to resolve some aspects of their disputes. As set out below, arbitration does offer benefits, such as confidentiality, tailored procedures and enforcement benefits, but those benefits can come with limits. Parties engaging in arbitration must accept, for example, that their private dispute resolution process binds only them and cannot offer certain key remedies reserved otherwise for the courts such as rectification to government-managed registers for the relevant IP/IT rights.

**Consensual arbitration is part of no state's judicial system**

To consider whether one should arbitrate disputes involving IP/IT rights instead of litigating them, IP/IT Counsel must know the key elements distinguishing arbitration from other forms of dispute resolution and decision making and, measured against those elements, whether a proposed process qualifies as arbitration.

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[8] Coderre v. Coderre, 2008 QCCA 888 para. 45:

[9] 9220-7414 Québec inc. v. 9325-3722 Québec inc., 2018 QCCS 1628 provided a different result. Defendants provided sufficient evidence that the notice given did not meet the terms set out in the rules and defendants denied receipt of any documents initiating the arbitration. The court determined that proper notice had not been given and dismissed the application to homologate the award.

[10] Laurentienne-vie, Cie d'assurances inc. v. Empire , Cie d'assurance-vie, 2000 CanLII 9001 para. 81. See also Quintette Coal Ltd. v. Nippon Steel Corp., 1988 CanLII 2923 paras 1 and 39.

Fortunate for a paper designed to address arbitration of IP/IT with a focus on Québec law, a leading Supreme Court of Canada decision combines all those elements. Canada's Supreme Court decision in Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 ("Desputeaux v. Éditions Chouette") dealt with a dispute which arose from the courts of Québec and involved arbitration of copyright. The Supreme Court affirmed that arbitration is a form of dispute resolution, distinct from others, including the court system funded by the government and is "*in a broader sense, a part of the dispute resolution system the legitimacy of which is fully recognized by the legislative authorities.*"[11]

Québec's Court of Appeal in Bard v. Appel, 2017 QCCA 1150 ("Bard v. Appel") recently drew attention to another similar endorsement of arbitration in Québec by the Supreme Court in Dell Computer Corp. v. Union des consommateurs, [2007] 2 SCR 801, 2007 SCC 34 ("Dell Computer v. Union des consommateurs"). In that case, the Supreme Court wrote about the neutrality of arbitration, commenting that "*(a)rbitration is part of no state's judicial system*" and that "*arbitration is a creature that owes its existence to the will of the parties alone*".[12]

The Supreme Court has recognized that arbitration is outside the court system, not part of it. Arbitration is not "*some lesser form of litigation than that being conducted in the courts*".[13] Distinct components of dispute resolution, litigation and arbitration are more like siblings running parallel than parent-child trailing tandem.

The separation of arbitration and the court system appears straightforward. Both the C.C.Q. and the C.C.P. emphatically enforce that separation. Each stipulates that the courts have no jurisdiction if parties have chosen to submit their dispute to arbitration and courts must rebuff attempts to disregard valid undertakings to submit qualified disputes to final and binding arbitration:

| | |
|---|---|
| *Article 3148, al. 2 C.C.Q. However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.* | *Article 3148 al. 2 C.c.Q. Cependant, les autorités québécoises ne sont pas compétentes lorsque les parties ont choisi, par convention, de soumettre les litiges nés ou à naître entre elles, à propos d'un rapport juridique déterminé, à une autorité étrangère ou à un arbitre, à moins que le défendeur n'ait reconnu la compétence des autorités québécoises* |

[11] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178, para. 41.
[12] Dell Computer Corp. v. Union des consommateurs, [2007] 2 SCR 801, 2007 SCC 34 para. 51.
[13] Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, 2006 ABCA 18 para. 42.

*Article 622 C.C.P. Unless otherwise provided by law, the issues on which the parties have an arbitration agreement cannot be brought before a court even though it would have jurisdiction to decide the subject matter of the dispute.*

*A court seized of a dispute on such an issue is required, on a party's application, to refer the parties back to arbitration, unless the court finds the arbitration agreement to be null. The application for referral to arbitration must be made within 45 days after the originating application or within 90 days when the dispute involves a foreign element. Arbitration proceedings may be commenced or continued and an award made for so long s the court has not made its ruling.*

*The parties cannot, through their agreement, depart from the provisions of this Title that determine the jurisdiction of the court or from those relating to the application of the adversarial principle or the principle of proportionality, to the right to receive notification of a document or to the homologation or the annulment of an arbitration award.*

*Article 622 C.p.c. Les questions au sujet desquelles les parties ont conclu une convention d'arbitrage ne peuvent être portées devant un tribunal de l'ordre judiciaire, alors même qu'il serait compétent pour décider de l'objet du différend, à moins que la loi ne le prévoie.*

*Le tribunal saisi d'un litige portant sur une telle question est tenu, à la demande de l'une des parties, de les renvoyer à l'arbitrage, à moins qu'il ne constate la nullité de la convention. La demande de renvoi doit être soulevée dans les 45 jours de la demande introductive d'instance ou dans les 90 jours lorsque le litige comporte un élément d'extranéité. Néanmoins, la procédure d'arbitrage peut être engagée ou poursuivie et une sentence rendue tant que le tribunal n'a pas statué.*

*Les parties ne peuvent par leur convention déroger aux dispositions du présent titre qui déterminent la compétence du tribunal, ni à celles concernant l'application des principes de contradiction et de proportionnalité, le droit de recevoir notification d'un acte ou l'homologation ou l'annulation de la sentence arbitrale.*

(emphasis added)

**Arbitration as private justice**

Desputeaux v. Éditions Chouette observed that "*[b]oth Parliament and the provincial legislatures, however, have themselves recognized the existence and legitimacy of the private justice system, often consensual, parallel to the state's judicial system*".[14]

This '*private justice system*', involving a decision maker colloquially referred to as '*private judge*',[15] is said to offer various benefits stated as contradistinctions to those associated with the court system.[16] Those benefits, better viewed as promises, include: (1) neutral forum; (2) neutral or customized procedural rules/process; (3) neutral decision-maker (as opposed to impartial); (4) decision-maker learned in the subject matter; (5) faster decisions; (6) privacy; (7) confidentiality; (8) one step resolution; (9) cost savings; and, (10) enforcement benefits.

These benefits can be sought by engaging in either *ad hoc* arbitration or arbitration administered by an institution with its own rules.[17] Most institutions which administer arbitrations are typically agnostic to the content of the disputes they administer, provided they are commercial.[18] Certain institutions are industry or activity specific. For example, the Sport Dispute Resolution Centre of Canada ("SDRCC"), the International Air Transportation Association ("IATA") and the Fruit and Vegetable Dispute Resolution Corporation ("DRC") each provide for private dispute resolution of disputes broadly related respectively to sports, air transportation and agricultural goods.

Many of the benefits of arbitration address intangible interests valued by IP/IT rights holders. Those intangibles include an ongoing business relationship, the ability to resolve global issues without engaging in multiple venues with the same contracting party, avoiding disclosure of the dispute to the market, preserving the confidentiality of proprietary information, and avoidance of precedents to influence other parties bound to it by similar contractual terms. One or more such intangibles motivate

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[14] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 para. 40.

[15] Quintette Coal Ltd. v. Nippon Steel Corp., 1988 CanLII 2923 para. 39.

[16] Daniel Urbas, "Proportionality, Flexibility and Cooperation: Litigation's Support of Arbitration Keeps Getting Better" in Hon. Justice Todd Archibald ed., 2010 Annual Review of Civil Litigation (Toronto: Thomson Reuters, 2010) 367-443.

[17] ADR Chambers, ADR Institute of Canada ("ADRIC"), Canadian Commercial Arbitration Centre ("CCAC"), China International Economic and Trade Arbitration Commission ("CIETAC"), CPR Institute for Conflict Prevention and Resolution ("CPR"), International Chamber of Commerce ("ICC"), International Centre for Dispute Resolution Canada ("ICDR Canada"), London Court of International Arbitration ("LCIA"), Singapore International Arbitration Centre ("SIAC"), Vancouver International Arbitration Centre ("VANIAC", formerly the B.C. International Commercial Arbitration Centre "BCICAC") and World Intellectual Property Organization ("WIPO"). For investor-state disputes which can include IP/IT disputes, see the International Centre for Settlement of Investment Disputes ("ICSID").

[18] The Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 and its amendments footnote 2, offers its view of the term "*commercial*": "*The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road*".

IP/IT rights holders to consider arbitration despite certain limitations stemming from the consensual nature of arbitration.

Despite promises such as procedural informality, cost-saving and speed, arbitration is not a lesser form of justice than that being conducted in the courts.[19] Judicial standards are expected, failing which the resulting award may be invalid.[20] Arbitration tribunals are not expected or authorized to reduce the protections of natural justice in order to meet promised benefits. In Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, 2006 ABCA 18, the court held that arbitration is not an inferior form of dispute resolution. The principles of procedural fairness, even tempered by flexibility, still remain. Limiting the procedural rights of parties is not justified by considering that arbitration is inferior. In British Columbia Lottery Corporation v. Skelton, 2013 BCSC 12, the court held that a failure to consider a relevant, admissible expert's report is a breach of natural justice and the decision may be set aside.

The potential scope for such '*private justice*' is wide and courts are reluctant to close off the type of disputes available for resolution. Capital JPEG inc. v. Corporation Zone B4 ltée, 2019 QCCS 2986 ("Capital JPEG v. Corporation Zone B4") held that the Business Corporations Act, CQLR c S-31.1 ("BCA") did not expressly exclude an arbitrator's jurisdiction to decide an application to liquidate a corporation.[21] The Court of Appeal in Investissement Charlevoix inc. v. Gestion Pierre Gingras inc., 2010 QCCA 1229 held that the liquidation of a corporation was not necessarily a question of public order.

The courts resist attempts to limit an arbitration tribunal's jurisdiction by way of presumption that statutory recourses are excluded unless expressly included. In Groupe Dimension Multi Vétérinaire Inc. v. Vaillancourt, 2020 QCCS 1134 ("Multi Vétérinaire v. Vaillancourt"), the court held that a liberal interpretation must be given to such agreements to arbitrate and legislative policy favouring development of consensual arbitration.[22]

In that case, all parties agreed that plaintiff's recourses were contractual and that several of defendant's claims were based on the oppression recourse set out in the BCA.

The court distinguished case law[23] which purported to establish a rebuttable presumption that an agreement to arbitrate did not apply to a statutory remedy unless the parties expressly intended it to apply. The court concluded that there was no fixed precedent established in the case law confirming the restrictive approach submitted as a rule by the party resisting arbitration. Multi Vétérinaire v.

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[19] Papiers de publication Kruger inc. v. Syndicat canadien des communications, de l'énergie et du papier (SCEP), sections locales 136, 234 et 265, 2016 QCCA 1821; Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, 2006 ABCA 18.

[20] Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, 2006 ABCA 18 para. 42; Xerox Canada Ltd. v. MPI Technologies Inc., 2006 CanLII 41006 (ON SC) para. 110; Quintette Coal Ltd. v. Nippon Steel Corp., 1988 CanLII 2923 (BC SC) para. 1.

[21] Capital JPEG inc. v. Corporation Zone B4 ltée, 2019 QCCS 2986 para. 37.

[22] The court referred to Desputeaux v. Éditions Chouette (1987) inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 paras 68-69, Morrissette v. St-Hyacinthe (Ville de), 2016 QCCA 1216 para. 36 and the recent Khalilian v. Murphy, 2020 QCCS 831 paras 21-23.

[23] Camirand v. Rossi, 2003 CanLII 74899 (QC CA); Acier Leroux inc. v. Tremblay, 2004 CanLII 28564 (QC CA); Acier Leroux inc. v. Tremblay, 2004 CanLII 76436 (QC CA); Ferreira v. Tavares, 2015 QCCA 844; Plourde v. Faltour inc., 2016 QCCS 1410; AEC Symmaf inc. v. Poirier, 2018 QCCA 916; and, Jack v. Jack, 2018 QCCS 3230. In addition to those submitted to Bachand J., see Heeg v. Hitech Piping (HTP) Ltd., 2009 QCCS 4043 cited in AEC Symmaf inc. v. Poirier, 2018 QCCA 916.

Vaillancourt noted that the absence of such a consensus was a good thing because such a rule would be hard to reconcile with the general principles governing consensual arbitration.

Endorsing a robust scope of disputes eligible for arbitration, the court concluded that an arbitration tribunal's jurisdiction extends to all disputes relating directly or indirectly to the contract in which the agreement to arbitrate is inserted unless the terms of that agreement or relevant contextual elements indicate a real intention of the parties to limit its scope.

**The courts' judicial intervention is not judicial review**

The separation of the court system and arbitration into parallel, distinct components of dispute resolution creates an important dynamic regarding how the courts intervene in arbitration. Understanding arbitration requires parties to identify and accept limits to court intervention.

Aside from assisting parties to engage in arbitration by naming arbitrator(s) or staying court litigation, the courts have a role in enforcing awards and, if need be, setting them aside. The latter role varies in scope depending on whether the parties engage in consensual or statutory arbitration. Even for consensual arbitrations, the court's role can vary if the parties' arbitration is subject to *lex arbitri* permitting appeals as of right or with leave under domestic arbitration legislation in common law provinces. Such intervention must not attempt a judicial review of administrative action but limit itself to the more limited involvement imposed on courts by a jurisdiction's *lex arbitri*.

Multi Vétérinaire v. Vaillancourt referred to key passages in Desputeaux v. Éditions Chouette which have fresh relevance following the recent decision in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 ("Vavilov"). The passages anticipated attempts to apply judicial review to consensual arbitrations. Multi Vétérinaire v. Vaillancourt remarked on conflicting lines of authority in the Québec case law regarding the limits of judicial intervention in cases involving applications for homologation or annulment of arbitration awards governed by the C.C.P.[24]

A broad view tends to confuse judicial intervention with judicial review, ignoring the limits placed by legislation on courts' involvement designed to "*preserved the autonomy of the arbitration system*".[25] Supporting the narrower version of judicial intervention, consistent with the C.C.P., Multi Vétérinaire v. Vaillancourt addressed the limits of intervention.

> *It recognizes that the remedies that may be sought against arbitration awards are limited to the cases set out in arts. 946 et seq. C.C.P. and that judicial review may not be used to challenge an arbitration decision or, most importantly, to review its merits (Compagnie nationale Air France, supra, at pp. 724-25; International Civil Aviation Organization v. Tripal Systems Pty. Ltd., [1994] R.J.Q. 2560 (Sup. Ct.), at p. 2564; Régie intermunicipale de l'eau Tracy, St-Joseph, St-Roch v. Constructions Méridien inc., [1996] R.J.Q. 1236 (Sup. Ct.), at p. 1238; Régie de l'assurance-maladie du Québec v. Fédération des médecins spécialistes du Québec, 1987 CanLII 901 (QC CA), [1987] R.D.J. 555 (C.A.), at p. 559, per Vallerand J.A.; Tuyaux Atlas, une division de Atlas Turner Inc. v. Savard, 1985 CanLII 2959 (QC CA), [1985] R.D.J. 556 (C.A.)). Review of the correctness of arbitration decisions jeopardizes the autonomy intended by the legislature, which cannot*

[24] Groupe Dimension Multi Vétérinaire Inc. v. Vaillancourt, 2020 QCCS 1134 para. 68.
[25] Groupe Dimension Multi Vétérinaire Inc. v. Vaillancourt, 2020 QCCS 1134 para. 68.

> *accommodate judicial review of a type that is equivalent in practice to a virtually full appeal on the law.* [26] (emphasis added)

**Arbitration is not expert determination, expert opinion, appraisal**

Before delving further into arbitration, IP/IT Counsel advising IP/IT rights holders must distinguish what arbitration is not. In addition to not being an inferior version of litigation or a part of the court system, arbitration is also not expert determination, expert opinion,[27] appraisal, conciliation, mediation or transaction.[28] Expert determination does bind the parties who agree to it. Courts readily enforce the binding effect unless the expert fails to comply with the parties' agreement.[29] Canadian case law recognizes the use of expert determination in lieu of arbitration.[30]

Legislation and contracts may label several types of decision making or dispute resolution processes as '*arbitration*' despite the processes qualifying more as administrative decision making, expert determination or appraisal.[31] That observation does not suggest any distinction in the quality of the processes, but only cautions about differences in the resulting applicable rules, the parties' expectations and the courts' roles.

For example, arbitration legislation applies to arbitration and not to expert determination. If one agrees to expert determination they cannot then expect to apply to the court for remedies applicable only to arbitration. In Meade v. Echelon, 2020 ONSC 4431, the court identified critical distinctions between expert determination and arbitration. In addition to offering drafting advice, the court also warned about the consequences of choosing between arbitration and expert determination:

> *[112] The choice between expert determination and arbitration can lead to drastically different consequences. Unless agreed otherwise by contract (express or implied), in an expert determination there are no fixed or default procedures for the determination; no jurisdiction in the decision maker to determine his or her jurisdiction; the potential for greater limitations on jurisdiction to decide questions of law or mixed law and fact; no requirement on the expert to give reasons; and no rights of appeal or judicial review of the decision. Also, Alberta law provides that parties can compel witnesses to testify in an arbitration, whereas there is no similar compulsion in an expert determination.*[32]
> (emphasis added)

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[26] Groupe Dimension Multi Vétérinaire Inc. v. Vaillancourt, 2020 QCCS 1134 para. 69.
[27] Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564 para. 95.
[28] Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564.
[29] Smiechowski v. Preece, 2015 ABCA 105 (CanLII) para. 5 ; Saputo Inc v. Dare Holdings Ltd, 2012 ONSC 4981 (CanLII) paras 4-8; Re Ivaco, 2007 ONCA 746 (CanLII) para. 3; Shinkaruk Enterprises Ltd and Mr Klean Enterprises Ltd v. Commonwealth Insurance Company et al, 1990 CanLII 7738 (SK CA), 1990 CanLII 7738 (SKCA) para. 15. See also two (2) U.K. cases: Veba Oil Supply & Trading GmbH v. Petrotrade Inc, [2001] EWCA Civ 1832, [2002] 1 All ER 703 para. 26; Jones v. Sherwood Computer Services plc (1989), [1992] 2 All ER 170 (CA) p. 179.
[30] See Sport Maska Inc. v. Zittrer, [1988] 1 SCR 564, 1988 CanLII 68 paras 61-62; Cummings v. Solutia SDO Ltd, 2008 CanLII 42017 (ON SC) paras 18, 24-25, appeal dismissed Cummings v. Solutia SDO Ltd., 2009 ONCA 510; Preload Company of Canada v. Regina (City), 1953 CanLII 209 para. 20; Pfeil v. Simcoe & Erie General Insurance Co. and McQueen Agencies Ltd., 1986 CanLII 2922 para. 11.
[31] Meade v. Echelon, 2020 ONSC 4431.
[32] Meade v. Echelon, 2020 ONSC 4431 para. 112.

The judicial nature of arbitration distinguishes it from other dispute resolution and impacts on other benefits of arbitration. For example, an arbitrator, relied on for her skill and knowledge, cannot apply that skill and knowledge without prior notice to the parties. An arbitrator cannot conduct an *ex parte* investigation and must rely on evidence adduced by the parties at the hearing.[33]

Confusion can arise when an arbitrator assumes that her skill and expertise in a particular area gives her the role of expert determination. Expert determination allows for decision making independent of evidence tested in an adversarial process or subject to competing submissions. As set out below, the arbitrator exposes her award to being set aside if she violates natural justice by introducing a new theory or deciding on evidence not shared with or tested by the parties.

**Loose use of 'arbitration', 'arbitrate' and 'arbitrator'**

Even when a process is labelled 'arbitration' by the parties, legislation or rules, the substance of the process might indicate some other type of resolution or decision making. Lax use of the terms 'arbitration', 'arbitrate' and 'arbitrator' can refer to forms of decision making and decision makers which do not qualify as such. Despite ready access to definitions, many dispute resolution processes borrow loosely on the terms '*arbitration*', '*arbitrate*' and '*arbitrator*'. The loose use misdirects attention and can result in missed expectations. IP/IT Counsel must look beyond labels to determine if their clients are genuinely engaged in arbitration.

Canadian Air Line Pilots Association et al. v. Canadian Pacific Air Lines Ltd. et al., 1966 CanLII 458 (BC CA) held that titles do not matter but substance does. Genuine arbitration arises from the function performed.

> *With respect I agree with the statement of Riley, J., in Re Gainers Ltd. and Local 319, United Packinghouse Workers of America (1964), 47 W.W.R. 544 at pp. 549-50, as follows:*
>
> *(1) In the first place, there is no magic in the word "arbitration." The term itself is simply descriptive. People can agree upon many other kinds of arbitration completely different from the specific commercial arbitration. Arbitration of any kind is a creature of contract. The parties by their contract can agree upon whatever mode or procedure they desire, even to the flipping of a coin to decide any issue.*[34] (emphasis added)

If the term 'arbitration' lacks genuine magic, it certainly offers sufficient misdirection in its use. '*Arbitration*', '*arbitrate*' and '*arbitrator*' are not just labels. Their proper use flows from the nature of the functions. Those functions disclose the expectations of how parties, subject to the process, expect their disputes to be resolved. Those performing judicial functions must act in a judicial manner.[35] One who acts in a judicial manner cannot "*improperly entered into the fray*".[36] In arbitration, the parties expect that the arbitrator will invite them to call evidence and make submissions concerning the key

[33] Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564 para. 69.
[34] Canadian Air Line Pilots Association et al. v. Canadian Pacific Air Lines Ltd. et al., 1966 CanLII 458 (BC CA) pp. 431-432.
[35] Construction Workers Union, Local 151 v. Saskatchewan Labour Relations Board and Technical Workforce Inc., 2017 SKQB 197 paras 39, 41, 52-56, 62-66.
[36] Malton v. Attia, 2016 ABCA 130 para. 52.

issues in disputes and the theories. A failure to admit relevant evidence may render the procedure unfair, resulting in a denial of justice.[37]

Alert to the judicial nature of arbitration, even courts refer to their own roles as '*arbitrator*'.[38] They use '*arbitrate*' as a verb, referring to their own ability to '*arbitrate*' various issues litigated before them. Use of the term arbitrate to explain the decision-making role extends also to administrative tribunals.[39]

In Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc., 2020 QCCS 2251, the court observed that "*[f]urthermore, it is recognized that a judge has discretion to "arbitrate* damages*"*".[40] In Saint John Recycling v. Ferodominion, Et al., 2020 NBQB 127, the court mentions that it "*must remain as an independent arbitrator of the matters address[ed] (sic) by the parties in their pleadings, and not enter into the fray on behalf of a party appearing before it; in particular, one who is well-represented by experienced counsel*."[41]

Despite loose use of the terms, only some dispute resolution qualifies as arbitration. Beware of the use of the terms '*arbitration*', '*arbitrate*' and '*arbitrator*' which does not mirror the substance of the process. Certain forms of dispute resolution styled as '*arbitration*' may actually be subject to judicial review and not the more limited roles given to courts in matters of consensual arbitration. IP/IT Counsel must focus on the functions assigned to the decision maker to know whether their clients are agreeing to arbitration or something else.

When drafting dispute resolution processes, evaluating applicable dispute resolution procedures or advising clients on their existing obligations to resolve disputes, IP/IT Counsel must examine closely the nature of the decision making, the procedure available, and the functions assigned to the decision maker.

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[37] British Columbia Lottery Corporation v. Skelton, 2013 BCSC 12 paras 67-72; Sautner v. Saskatchewan Teachers' Federation, 2017 SKCA 65 paras. 34-37.

[38] Karounis v. Procureur général du Québec, 2020 QCCS 2817 para. 8 citing Bellefleur v. Québec (Procureur général), 1993 CanLII 4067 (QC CA) p. 59 in which the Court of Appeal acknowledging the courts' limited role in judging the merits of decisions taken by administrative entities established by the government: "*Ils ne peuvent et ne doivent pas s'ériger en arbitres de l'opportunité, de la rationalité, de la prudence ou de la sagesse des décisions politiques ou administratives*".

[39] Parhas v. Régie du logement, 2020 QCCS 2362 paras 36 and 50.

[40] Hengyun International Investment Commerce Inc. v. 9368-7614 Québec Inc., 2020 QCCS 2251 para. 135. See also Société du Parc des Iles v. Renaud, 2004 CanLII 25747 (QCCA) para. 26 in which the Court of Appeal noted that a judge would have to resolve disputes over quantum established with competing expert reports:"*Ce faisant, le juge arbitrait les dommages et intérêts comme il se devait de le faire dans les circonstances*". Mansour v. Fatihi, 2020 QCCA 965 para. 70: "*Vu ces éléments, la compétence d'un juge d'arbitrer les dommages en fonction des éléments de la preuve et, puisque l'octroi des dommages par le tribunal de première instance exige la déférence en appel, il n'y a pas lieu d'intervenir sur cet aspect*". The use of the term '*arbitrate*' as a verb is not limited to Québec. See Dostal v McLeod, 2020 BCSC 1145 para. 94: "*Accustomed as I am to hearing expert medical evidence, I am not well positioned to arbitrate a question of clinical judgement between two highly qualified hip surgeons who have sufficient regard for each other's ability that they refer patients back and forth*". (emphasis added)

[41] Saint John Recycling v. Ferodominion, Etal., 2020 NBQB 127 para. 34.

**Arbitration has judicial function**

If no magic exists in applying the term 'arbitration', certain principles do help determine whether a process merits the term. The Supreme Court's discussion of immunity in Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564 ("Sport Maska v. Zittrer") helps identify those principles.

Sport Maska v. Zittrer held that consensual arbitration provides immunity to the arbitrators. That immunity arises from the terms of the mandate given to the decision maker. The courts look to the parties' intention, including the judicial nature of the proceedings. The Supreme Court noted that the criterion to establish the immunity of arbitrators stems from their status, functions and tasks. The status, functions and tasks justify immunity and the title, not the reverse.

In discussing the arbitrator's immunity, the Supreme Court referred to Arenson v. Casson Beckman Rutley & Co., [1975] 3 All E.R. 901. In that case, when reversing the Court of Appeal, the House of Lords "*repeated the requirement of a present dispute as an essential condition for the existence of arbitration*".

> *There may well be other indicia that a valuer is acting in a judicial role, such as the reception of rival contentions or of evidence, or the giving of a reasoned judgment. But in my view the essential prerequisite for him to claim immunity as an arbitrator is that, by the time the matter is submitted for him for decision, there should be a formulated dispute between at least two parties which his decision is required to resolve. It is not enough that parties who may be affected by the decision have opposed interests--still less that the decision is on a matter which is not agreed between them.*[42](emphasis added)
>
> *This intent can be demonstrated in various ways. The courts and academic analysts have looked at certain indicia in this connection, such as the terminology used by the parties (Re Premier Trust Co. and Hoyt and Jackman (1969), 1969 CanLII 480 (ON CA), 3 D.L.R. (3d) 417 (Ont. C.A.), at p. 419), the fact that a decision is final and binding (Sutcliffe v. Thackrah, supra, at p. 877), the judicial nature of the proceedings (Re Carus-Wilson and Greene, supra, at p. 9) and the professional status of the third party (Pfeil v. Simcoe & Erie General Insurance Co., supra, at p. 97).*
>
> *[62] Lord Wheatley gives a brilliant summary of the state of the common law in this area in Arenson, supra, at pp. 914, 915-16:*
>
> *(1) It is clear from the speeches of Lord Reid, Lord Morris of Borth-Y-Gest and my noble and learned friend, Lord Salmon, in Sutcliffe v. Thackrah that while a valuer may by the terms of his appointment be constituted an abritrator [sic] (or quasi-arbitrator) and be clothed with the immunity, a valuer simply as such does not enjoy that benefit.*
>
> *(2) It accordingly follows that when a valuer is claiming that immunity he must be able to establish from the circumstances and purpose of his appointment that he has been vested with the clothing which gives him that immunity.*

[42] Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564 para. 58; Arenson v. Casson Beckman Rutley & Co., [1975] 3 All E.R. 901 p. 912.

*(3) In view of the different circumstances which can surround individual cases, and since each case has to be decided on its own facts, it is not possible to enunciate an all‑embracing formula which is habile to decide every case. What can be done is to set out certain indicia which can serve as guidelines in deciding whether a person is so clothed. The indicia which follow are in my view the most important, though not necessarily exhaustive.*

*...*

*The indicia are as follows: (a) there is a dispute or a difference between the parties which has been formulated in some way or another; (b) the dispute or difference has been remitted by the parties to the person to resolve in such a manner that he is called on to exercise a judicial function; (c) where appropriate, the parties must have been provided with an opportunity to present evidence and/or submissions in support of their respective claims in the dispute; and (d) the parties have agreed to accept his decision.*[43] (emphasis added)

Other Canadian common law jurisdictions share that expectation of fairness arbitration and its sources. For example, Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd., 2011 BCCA 75 ("Premium Brands") cited with approval Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corpn. [1981] 1 All. E.R. 289. Though dissenting, Lord Scarman wrote persuasively that the right to a fair arbitration is an implied term. The right arises "*necessarily*" from the "*nature and purpose*" of the agreement to arbitrate. Parties do not have to state an expectation of fairness because it flows from the nature of the agreement.

*I turn now to consider the contractual position. Where parties agree to refer present or future differences to arbitration, they enter into a contract, an implied term of which is that each has a right to a fair arbitration. The implication arises necessarily from the nature and purpose of their agreement, which is to submit their dispute (or disputes) to the arbitrament of an independent and impartial arbitrator of their choice. I do not understand the appellants to challenge the existence of the term. Such a contract is often to be found as an arbitration clause in a commercial, industrial, or other type of contract. Where so found it is, in strict analysis, a separate contract, ancillary to the main contract: see Heyman v. Darwins Ltd. [1942] A.C. 356. It follows that obstruction of the right will be a breach of contract and may be a repudiatory breach; and that frustration of the right, i.e. conduct of a party making the fair arbitration of a dispute impossible, will be a repudiatory breach at least of the agreement to refer that dispute to arbitration*"[44] (emphasis added)

The B.C. Court of Appeal went on to endorse and adopt doctrine which affirmed that arbitration, like any other tribunal performing judicial functions. has the duty of acting in accordance with the essential rules of natural justice. [45] Arbitral error based on breach of the rules of natural justice is case-specific.[46]

[43] Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564 paras 61-62.
[44] Bremer Vulkan Schiffbau Und Maschinenfabrik v. South India Shipping Corpn. [1981] 1 All. E.R. 289 p. 998.
[45] Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd., 2011 BCCA 75 paras 40-41.
[46] MSI Methylation Sciences, Inc. v. Quark Venture Inc., 2019 BCCA 448 paras 32-49 and 60.

**Arbitration – key components of a valid agreement**

Parties have autonomy to draft their agreements to arbitrate but those agreements must contain core components. Failing to include them risks vitiating the agreement to arbitrate. The following sections highlight some of the core components.

**(1) arbitration is not litigation**

Arbitration is not sit-down litigation. The distinction between arbitration and litigation is conceptual, best described as a difference in mindset or frame of mind. Premium Brands drew on the distinctions made in Crawford v. AEA Prowting Ltd. [1972] 1 All E.R. 1199 (Q.B.) ("Crawford v. AEA Prowting") which noted "*the differences both conceptual and procedural between actions and private arbitrations*". [47] The B.C. Court of Appeal noted that the Crawford v. AEA Prowting drew a key distinction between courts and arbitration flowing from the parties' respective duties and burdens of initiative.

> *My Lords, I have already drawn attention to a fundamental difference between action at law and arbitration. The submission of the defendant to the jurisdiction of the High Court to determine a dispute that has arisen between him and the plaintiff is compulsory. If he wants to resist the claim he had no other choice. The plaintiff has a choice whether or not to bring an action in a court of law to enforce a disputed claim against the defendant, but if he does want to enforce it the only forum in which he can do so is a court of law, unless he and the defendant mutually agree to submit their dispute about the plaintiff's claim for determination in some other way. As plaintiff and defendant in an action the parties assume no contractual obligations to one another as to what each must do in the course of the proceedings; their respective obligations as to procedure are imposed on them by the rules and practice of the court. In contrast to this, the submission of a dispute to arbitration under a private arbitration agreement is purely voluntary by both claimant and respondent. Where the arbitration agreement is in a clause forming part of a wider contract and provides for the reference to arbitration of all future disputes arising under or concerning the contract, neither party knows when the agreement is entered into whether he will be claimant or respondent in disputes to which the arbitration agreement will apply. If it creates any contractual obligation to proceed with reasonable dispatch in all future arbitrations held pursuant to the clause ... the obligation is, in my view, mutual: it obliges each party to co-operate with the other in taking appropriate steps to keep the procedure in the arbitration moving, whether he happens to be the claimant or the respondent in the particular dispute.* (emphasis added)

IP/IT counsel should take note of the distinctions made, with the emphasis being on the parties' shared burden or onus for initiative in arbitration.

> *[Bridge J.] saw "a fundamental difference" between the duties of parties in relation to "interlocutory progress" in a court action as compared to an arbitration. In an action, he noted, the whole "pattern of behaviour" is conditioned by the rules, which place the onus squarely on the plaintiff to keep the litigation moving. From this it follows that a*

[47] Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd., 2011 BCCA 75 para. 37.

> *defendant may sit back and do nothing and later, if he is prejudiced by the delay, may apply to have the action dismissed. Not so in an arbitration, where it is for both parties, having agreed that the arbitrator will resolve their differences, to secure such interlocutory directions from him or her as are appropriate to enable the matter to proceed to determination.*[48] (emphasis added)

Litigation punishes the inactive plaintiff with exposure to dismissal for want of prosecution and tolerates the passive defendant unwilling to engage. Arbitration requires collaboration to perform the agreement to arbitrate and limits attempts to thwart moving towards a merits hearing.

**(2) an agreement for disagreements**

A core concept is that arbitration is consensual. If arbitration arises by agreement, tit is a particular one, if not a peculiar one. First, the agreement is typically inserted in or applicable to other contracts. Second, the agreement to arbitrate exists expressly for only those instances in which the parties anticipate they might one day disagree about the other contract. Third, the agreement may arise before or after a dispute arises between parties. Fourth, the agreement can arise by virtue of one's status or membership in an industry or market activity. Fifth, even when legislation imposes arbitration on parties, the courts do consider certain types of such arbitration as being consensual.

Defining an agreement to arbitrate is, in theory, straightforward. Parties have great autonomy in describing the scope of their "*dispute*", subject to certain limits on subject matter imposed by legislation and on remedies reserved exclusively to the courts. Despite the ease in drafting an agreement to arbitrate, not all disputes qualify for arbitration or merit it. Some disputes, identified below, are not eligible for arbitration, either by express mention of the C.C.Q. or excluded by public order.

Other disputes do not justify engaging in arbitration. Arbitration may be an effective option for resolving disputes but unsuitable as a proxy for day-to-day managerial decision making needed to run a business. Arbitration is a dispute resolution process, not a management tool. Naimer v. Naimer, 2018 QCCS 5210 rejected a post-trial solution by certain litigants to impose arbitration as a way to avoid future deadlock in the day-to-day operation of the litigants' business. The litigants proposed arbitration in answer to the court's invitation to provide a lasting solution once the safeguard orders expired after the trial decision issued. Despite the litigants' good intentions, the court held that arbitration was not appropriate to resolve conflicts regarding day-to-day business decisions. The court considered that the lack of any basis for arbitrators to decide on business initiatives, the non-arbitrable nature of business decisions and the anticipated delay in instituting arbitration for each disputed business decision justified dismissing the proposal.

**(3) agreement to arbitrate - nominate contract**

Because arbitration is consensual, litigants cannot be forced to participate in arbitration unless they have consented that their dispute be submitted to that process, to the exclusion of the courts. Articles 1-6 and 19 C.C.P. reflect litigants' opportunity to access arbitration in lieu of the courts, provided the parties agree to do so.

[48] Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd., 2011 BCCA 75 para 34.

The C.C.Q. identifies an arbitration agreement as a discrete form of contract, qualifying it for membership among the limited membership of nominate contracts such as sale and lease[49] Article 2638 C.C.Q. briefly states the type of contract which qualifies as an agreement to arbitrate, namely "*a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts*".

As with many other jurisdictions, Quebec considers such agreements to be independent of the main contract in which they are found or to which they apply.[50] As a result, where the main contract is found to be null, the arbitration agreement is not, for that reason, rendered null.

While courts no longer fuss and fret over the exact wording, they do refuse to imply terms which legislation requires to be express in order to have a valid arbitration agreement.[51] Courts can imply terms into a contract following the principles and approach set out in Pacific Hotels Ltd. v. Bank of Montreal, 1987 CanLII 55 (SCC) but, where legislation has mandated express terms, courts cannot imply terms to produce a binding agreement to arbitrate compliant with that legislation.

Amusements Extra Inc. v. DEQ Systems Corp., 2018 QCCS 3198 ("Amusements Extra v. DEQ System") readily held that the arbitration agreement presented a valid, complete undertaking. The court cited articles 2638 and 2642 C.C.Q. as well as Zodiak International v. Polish People's Republic, [1983] 1 SCR 529, 1983 CanLII 24 ("Zodiak International v. Polish People's Republic") which identified the few, minimum requirements for a valid undertaking:

> *A complete undertaking to arbitrate, described variously as true, real or formal, is that by which the parties undertake in advance to submit to arbitration any disputes which may arise regarding their contract, and which specifies that the award made will be final and binding on the parties.*

The court dismissed argument that the agreement was not complete as it failed to mention expressly that it excluded the courts' jurisdiction. Such exclusion can be inferred by the parties' stated intention to refer their dispute to arbitration and to consider that the resulting award is final and binding.[52]

Article 2640 C.C.Q. imposes a modest level of formality on agreements to arbitrate, namely that they be evidenced in writing, but specifies that the writing requirement is met if "*contained in an exchange of communications which attest to its existence*". A party can also allege that exchanges in proceedings

[49] 9338-3941 Québec inc. v. 9356-2379 Québec inc., 2019 QCCS 1221.

[50] Article 2642 C.C.Q. Ontario's Arbitration Act, 1991, SO 1991, c 17 section 5(1) that stipulates that an arbitration agreement may be an independent agreement or part of another agreement.

[51] Magotiaux v. Stanton, 2020 ONSC 4049 denied to stay court proceedings, having determined that the parties' otherwise detailed agreement to arbitrate was subject to, but did not comply with all of, certain formal requirements required by the Family Law Act, RSO 1990, c F.3 and the Family Arbitration, O Reg 134/07, the sole regulation made to the Arbitration Act, 1991, SO 1991, c 17. T

[52] See also Collines-de-l'Outaouais (MRC des) v. Cascades Inc., division récupération, 2007 QCCS 1960 at paras 34-37. In 108 Media Corporation v. BGOI Films Inc., 2019 ONSC 880, the court applied the "*ordinary and grammatical meaning*" of the expression "*final and binding*" to refuse leave to appeal, adding that a party's subjective view of that expression is irrelevant to interpreting it.

which, if not contested, also satisfied the writing requirement.[53] Note that in some other Canadian jurisdictions, arbitrations subject to their domestic arbitration legislation do not require a writing.[54]

The courts in Québec have determined that litigants were bound by an arbitration agreement even if one had not personally signed the arbitration agreement. Team Productions v. Bieber footnoted references to key Québec Court of Appeal decisions in Groupon Canada inc. v. 9178-2243 Québec inc., 2015 QCCA 645 and Storex Industries Corp. v. Dr Byte USA, l.l.c., 2008 QCCA 100 which also followed the same approach. In contrast, though AtriCure, Inc. v. Meng, 2020 BCSC 341 recognized the courts' willingness to consider whether a litigant qualifies as a non-signatory party to an agreement to arbitrate, the court held that the applicant seeking the stay filed no evidence justifying such a status. The case documented a series of contracts signed between plaintiff and overseas corporations controlled by a single individual but for which plaintiff agreed to a variety of different substantive laws and dispute resolution processes.

The agreement to arbitrate need not be in the actual main contract. The agreement can form part of the agreement by way of incorporation by reference. In Hydro Hawkesbury v. ABB Inc., 2020 ONCA 53, the Ontario Court of Appeal enforced an undertaking to arbitrate despite the undertaking being contained in terms which had not been specifically brought to the resisting party's attention or provided in materials exchanged. Those terms were readily available and specifically referred to in documents creating the contractual relationship and a "*fairly sophisticated corporate consumer*" doing business with a foreign supplier in international markets would reasonably be expected to expect and to review the terms.

MRC Total Build Ltd. v. F&M Installations Ltd., 2019 BCSC 765 determined that it was arguable that parties to one contract intended to incorporate by reference the arbitration provisions set out in another contract. Relying on the actual wording of the contract between the parties, the court identified the court's role as discerning the intention of the parties. The court resisted applying a technical rule to interpreting contracts or categorizing contracts into one type or another as a proxy for intention.

**(4) agreement to arbitrate vs. submission to arbitrate**

Parties without an agreement to arbitrate are not prevented from pursuing the benefits of arbitration and can negotiate to do so after a dispute arises. A competitor or infringer may agree to arbitrate in order to benefit from the confidentiality of the process. Parties to a litigation can agree to suspend or even terminate litigation in favour of arbitration. For example, investor-state arbitration results when an investor, alleging a dispute, effectively accepts a state's standing offer to submit to arbitration. The investor and the state have no prior commercial agreement in which they agreed to arbitrate. Parties to a contract without a forum selection clause may, once a dispute arises, agree to arbitrate. Investors in the North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289

[53] Article 2640 C.C.Q.

[54] Arbitration Act, 1991, SO 1991, c 17, section 5(3).

"(NAFTA") proceeding are deemed to be in a commercial relationship for the purpose of New York Convention post-award process.[55]

To capture this situation, the case law distinguishes an "*agreement to arbitrate*" and "*a submission to arbitrate*". In Sport Maska v. Zittrer, the Supreme Court distinguished between them, observing that changes to the C.C.P. at that era were not intended to merge the "submission" and "undertaking to arbitrate" into a single concept.[56] The Supreme Court provided the following distinction.

> *[45] Before proceeding further, it is perhaps best to explain the concepts of submission and of undertaking to arbitrate.*
>
> *[46] Based on the definition of the submission in the 1867 Code of Civil Procedure, applicable to the 1965 revision and so in effect at the time the agreement was concluded between the parties, and in light of art. 951 C.C.P., introduced in the 1965 revision, it can be said that the undertaking to arbitrate applies to a potential dispute which, if it occurs, will require a submission. When the submission has been made, we can speak of arbitration. There is thus no arbitration without an existing dispute. This is what Chouinard J. said in Zodiak, supra, at p. 534:*
>
> *A submission applies only to existing disputes, while an undertaking to arbitrate also extends to future disputes*".[57] (emphasis added)

The availability of submissions agreements can assist IP/IT Counsel to engage in arbitration and claims some of its benefits once a dispute arises.

**(5) agreement to arbitrate by nature of activity**

Arbitration can be imposed on parties by the nature of the activity in which they agree to engage, such as buying a new home subject to home warranty, engaging in amateur sports, trading in fruit and vegetables, buying a condominium or reinsuring another insurance company. The imposition can occur due to statute or the terms of membership in a particular association.

In Garantie des bâtiments résidentiels neufs de l'APCHQ v. Desindes, 2004 CanLII 47872, the court confirmed that a regulation imposing arbitration on arbitration of new home warranty disputes is of public order.[58]

HZPC Americas v. Skye View Farms, 2018 PESC 47[59] involved a contractual dispute between HZPC Americas Corp. ("HZPC") Americas Corp. and Skye View Farms Ltd. ("Skye View") regarding the sale of a category of commercial seed potatoes. HZPC is an agent dealing exclusively with facilitating the sale of potato growers' seeds to third-parties. Skye View grows potatoes in P.E.I. and has a dealer license and an export license.

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[55] North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 "(NAFTA"), Chapter II, section B article 1136(7).
[56] Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564 paras 35-37.
[57] Sport Maska Inc. v. Zittrer, 1988 CanLII 68 (SCC), [1988] 1 SCR 564 para. 45.
[58] Garantie des bâtiments résidentiels neufs de l'APCHQ v. Desindes, 2004 CanLII 47872 para. 11.
[59] Affirmed on appeal, HZPC Americas v. Skye View Farms & Ano, 2019 PECA 25.

HZPC and Skye View were both members of the Fruit and Vegetable Dispute Resolution Corporation ("DRC").[60] Membership in the DRC is voluntary. Membership could nonetheless be required by others with or through which some might want to do business. For example, the P.E.I. Potato Marketing Board ("Board") required dealers, brokers and exporters of table stock or seed potatoes from P.E.I. to have a license issued by the Board. A pre-requisite for obtaining a license from the Board is to first become a member of the DRC. The application for membership at section 11 contains a consent to arbitration, with a reference to the "Mediation and Arbitration Rules of the DRC" (the "Rules").

The membership category for which HZPC applied defined by DRC on the application form as being for buyers, sellers, brokers and commission merchants of "*fresh fruits and vegetables*". Immediately below that definition of status, the same form stipulated that the definition of fresh fruits and vegetables "*includes all fresh and chilled fruits and vegetables, fresh cuts, edible fungi and herbs, but excludes any fresh fruit and vegetable that is frozen or sold for seed.*"

HZPC and Skye View undertook arbitration resulting in an award in which the arbitrator determined that the parties had a valid contract for seed potatoes and ordered HZPC to pay Skye View for the seed potatoes. HZPC then applied to the court under section 12(2) of P.E.I.'s Arbitration Act, RSPEI 1988, c A-16 for an order to set aside or vary the award.

Among the grounds, HZPC argued that the arbitrator did not have jurisdiction to arbitrate the dispute, had failed or refused to apply the DRC Rules that defined his jurisdiction and the principles that were to be applied to resolve the arbitration and had made fundamental errors of law relating to whether he had jurisdiction.

The case involved an application by DRD to intervene but, in considering the application, the court had to determine the contracts in issue. The use of the terms "*contract*" and "*Contract*" vary in the excerpts but appear to both refer to the membership contract HZPC and Skye View each signed with DRC.

In Sokolov v. The World Anti-Doping Agency, 2020 ONSC 704, the court granted summary judgment on a jurisdictional issue, dismissing a tort claim made by athletes denied entry to Rio's 2016 Olympic Games. The athletes had applied for entry to the 2016 Olympic Games by signing "*Conditions of Participation – National Olympic Committee*" form ("Entry Form") which contained an arbitration clause.[61] Though it considered the arbitration agreements to be more like arbitration imposed by statute or adhesion contracts but still binding. The court expressly considered the impact on international sports if it signalled a willingness of domestic courts to resolve matters otherwise reserved for more specialized tribunals. In dismissing the litigation because the dispute had been covered by binding arbitration, the court held that the athletes sought to litigate the same factual matrix which they had unsuccessfully arbitrated before the Court of Arbitration for Sport and that the "*essential character*" of the dispute was within the scope of the arbitration agreements.

[60] A non-profit corporation, based in Ottawa and created in 1999 under a provision of NAFTA providing for the creation of private commercial dispute resolution organizations for agricultural goods.

[61] Sokolov v. The World Anti-Doping Agency, 2020 ONSC 704, para. 105.

**(6) different types of arbitration created by statute**

Though arbitration can arise in the absence of a contract between two parties when governments assign powers or functions directly to arbitrators to resolve certain categories of disputes,[62] it can still be considered consensual and not statutory. Desputeaux v. Éditions Chouette expressly distinguished between two (2) types of statutory arbitration: those to which parties could renounce, such as the Act respecting the professional status of artists in the visual arts, arts and crafts and literature, and their contracts with promoters, CQLR c S-32.01 and those to which parties cannot, such as grievance arbitration in collective agreements.[63] Quintette Coal Ltd. v. Nippon Steel Corp., 1988 CanLII 2923 addressed the distinction when considering the constitutional validity of newly-introduced B.C.'s International Commercial Arbitration Act, S.B.C. 1986, c. 14.

> *[32] Broadly speaking, there are two kinds of arbitral tribunals. One is statutory to which and its jurisdiction by statute parties must resort. The other is private. Neither party can be compelled to resort to it, nor can either party unilaterally commence proceedings before it and compel the other to appear. Their resort to it and their submission to its jurisdiction are and can only be a consequence of their agreement. Indeed the private tribunal must be created by their agreement and its members appointed by them. The fact that in the territory within which a private arbitral tribunal functions there is a statute providing a procedural structure does not convert it into a statutory tribunal.*[64] (emphasis added)

The distinction is important. Desputeaux v. Éditions Chouette held that a consensual commercial arbitration was not subject to judicial review like administrative decisions.[65] Counsel for parties engaged in arbitration of IP/IT should note that their arbitration, even if imposed by statute, can still be considered consensual and subject to limited post-award judicial intervention.

In Conseil d'arbitrage des comptes des avocats du Barreau du Québec v. Marquis, 2011 QCCA 133 ("Conseil d'arbitrage des comptes v. Marquis"),[66] the Court of Appeal considered a pair of awards issued by different arbitration tribunals ('councils') constituted for different disputes over attorneys' accounts following an arbitration procedure established under article 88 of the Professional Code, CQLR c C-26. That article 88 requires self-governing professional orders like the Barreau du Québec to create, by regulation, an arbitration procedure for use by persons to whom the members of the order charge fees. Issued as a regulation under Québec's Act respecting the Barreau du Québec, CQLR c B-1, section 4, the Regulation respecting the conciliation and arbitration procedure for the accounts of advocates, CQLR c B-1, r 17 ("Regulation") created an arbitration process for clients disputing fees charged by attorneys.

The Court determined that arbitration of attorneys' accounts was consensual despite being created by statute. As a result, the court was prevented from undertaking judicial review. The Court distinguished between (i) consensual arbitration subject to annulment proceedings on limited grounds familiar to those practising in international commercial arbitration and (ii) administrative proceedings subject to

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[62] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 para. 41.
[63] Desputeaux v. Éditions Chouette (1987) inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 para. 47.
[64] Quintette Coal Ltd. v. Nippon Steel Corp., 1988 CanLII 2923 para. 32.
[65] Desputeaux v. Éditions Chouette (1987) inc., [2003] 1 SCR 178, 2003 SCC 17 paras 47, 48 and 64.
[66] Leave to appeal to Supreme Court of Canada dismissed Jacques Marquis v. Conseil d'arbitrage des comptes des avocats du Barreau du Québec, 2011 CanLII 46393 (SCC).

judicial review. The first involves private law, the second, administrative law and access to the courts differed for each. The Court expressly held that there was no hybrid or middle ground which borrowed from both, one which would be both conceptually and practically difficult to implement.

The Regulation provides that the arbitration process is available to the client but is not obligatory. Once the client initiates the process, the Regulation stipulates that the client's application for arbitration can be withdrawn only in writing and with the attorney's consent. The Court held that the dispute resolution process created by statute may still be consensual if it allows a party to renounce to it once the dispute arises. The client's and the attorney's opportunity to renounce was not identical. Nonetheless, for the Court, the opportunity to renounce to the arbitration imposed by statute qualified the arbitration as consensual. An asymmetrical opportunity to renounce was not enough to disqualify the arbitration from being consensual.

Citing Conseil d'arbitrage des comptes v. Marquis, Patti v. Hammerschmid, 2012 QCCA 627 held that arbitration of attorneys' accounts remained "*arbitration by agreement*" rather than statutory arbitration. Despite existing by virtue of statute, such arbitration is "*best characterized as consensual given that the proceedings remain subject to the will of the parties who can, in defined circumstances, opt out of arbitration*".[67]

IP/IT Counsel should note that the reasoning and the result in Conseil d'arbitrage des comptes v. Marquis may still differ in other jurisdictions where the *lex arbitri* might require that both parties be given equal or like opportunities to renounce. IP/IT Counsel advising their clients in disputes subject to resolution by processes imposed by statute must consider the above distinctions drawn by the courts. As noted, the distinction has its consequences. The distinction controls the courts' intervention.

> *With respect for the trial judge's contrary view, the arbitral award is therefore not subject to judicial review, as the arbitration council is not a statutory tribunal in the strict sense. As a form of arbitration by agreement, the two recourses for having the award set aside are the contestation of homologation (article 946.1 C.C.P.) and the motion to annul the award. In proceedings before the Court of Quebec, the appellant chose the first of these two paths.*[68] (emphasis added)

Courts are not authorized to engage in a study of the 'correctness' or 'reasonableness' of an arbitration award as would a court sitting in judicial review of an administrative tribunal. For consensual arbitration, courts are constrained to decide whether or not the award can be homologated.[69]

The distinction between the two has renewed relevance following the Supreme Court's recent decision in Vavilov which refreshed the standard of review of administrative tribunal's decision making.

Cove Contracting Ltd v. Condominium Corporation No 012 5598 (Ravine Park), 2020 ABQB 106 held that Vavilov had not changed the standard of review for commercial arbitrations from reasonableness to correctness and denied leave to appeal. In contrast, Buffalo Point First Nation et al. v. Cottage Owners Association, 2020 MBQB 20 held that Vavilov had changed the standard and granted leave to appeal. The former court postponed its hearing to give the parties the opportunity to argue the role of

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[67] Patti v. Hammerschmid, 2012 QCCA 627 para. 16.
[68] Patti v. Hammerschmid, 2012 QCCA 627 para. 17.
[69] Patti v. Hammerschmid, 2012 QCCA 627 para. 18.

Vavilov. The latter court issued its decision on leave to appeal without hearing from the parties but invited them to submit argument for the merits of the appeal.

More recently, Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation, 2020 ONSC 1516 held that Vavilov does not refer to either Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 (CanLII), [2014] 2 SCR 633 or Teal Cedar Products Ltd. v. British Columbia, 2017 SCC 32 (CanLII), [2017] 1 SCR 688 and that it is not reasonable to conclude that the Supreme Court meant to overrule its own decisions without making any reference to them or to the area of law to which they relate. Well before Vavilov, the courts have resisted importing judicial review in consensual commercial arbitration.[70] In contrast, insurance arbitration mandated by legislation is statutory and not consensual. As a result, Allstate Insurance Company v. Her Majesty the Queen, 2020 ONSC 830 held that Vavilov had altered judicial intervention on appeals from award issuing from that process.

Recent Québec cases such as Raymond Chabot Administrateur provisoire inc. (Garantie Abritat inc.) v. A à Z Construction-rénovation inc., 2018 QCCS 2061, Garantie Habitation du Québec inc. v. Groupe Faguy inc., 2018 QCCQ 2763 and Garantie habitation du Québec inc. v. Quirion, 2018 QCCQ 1549 reflect the courts' straightforward enforcement of arbitration as the exclusive legislated way in Québec to resolve disputes over guarantee plans for new residential constructions. Parties must either resolve their disputes by arbitration or forever accept that no dispute exists and that certain facts are either uncontested or uncontestable. The decisions remind parties that a failure or refusal to engage in arbitration has consequences on any subsequent flexibility to defend litigation. The Québec Court of Appeal has confirmed that the arbitration process stems from a regulation issued pursuant to legislation from which is of public order.[71]

**Autonomy to agree requires compliance with agreement**

If parties have the autonomy to word their agreement, they also have the obligation to adhere to it. Often, parties negotiate stepped or tiered clauses which provide sequentially for negotiation, mediation and then arbitration. The steps are intended to prompt parties to negotiate but can suffer distortion by a party which, resisting resolution, insists on overly formal compliance with steps prior to arbitration.

Capital JPEG v. Corporation Zone B4 enforced the express terms of the shareholders' agreement to mediate before they arbitrated, staying court litigation pending the result of the mediation. The court litigation sought dissolution of a corporation. Despite considering that dissolution could be arbitrated, the court refrained from referring the parties to arbitration as that stage had not yet been reached or requested.

The court noted that the shareholder agreement contained three (3) distinct dispute prevention and resolution processes: negotiation, mediation and arbitration. The court observed that, despite each being a separate process, each brings a supplementary element to the overall resolution process. A

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[70] Canada (Attorney General) v. S.D. Myers Inc., 2004 FC 38 (CanLII), [2004] 3 FCR 368 paras 35-36. Boisvert v. Selvaggi, 2019 QCCS 1673 dismissed an attempt at judicial review of an award issuing from arbitration imposed by statute, relying on the reasoning and result in Conseil d'arbitrage des comptes des avocats du Barreau du Québec v. Marquis, 2010 QCCA 1143, that such arbitrations remain consensual if the legislation allows opportunity to renounce to its application.

[71] Garantie des bâtiments résidentiels neufs de l'APCHQ v. Desindes, 2004 CanLII 47872 para. 11.

reading of the shareholder agreement in its entirety indicated that each process was subject to its own sequence and served also a condition precedent to progressing to the next.[72]

Comren Contracting Inc. v Bouygues Building Canada Inc., 2020 NUCJ 2 held that non-compliance with clear and unambiguous deadlines in a stepped dispute resolution clause extinguished claimant's right to pursue arbitration. Constructions 3P Inc. v. Construction Demathieu & Bard (CDB) Inc., 2019 QCCS 2070 refused to stay litigation in favour of arbitration despite willingness to consider evidence pre- and post-contract of an agreement to arbitrate. The court determined that (i) the existing agreement to arbitrate had not been followed and (ii) no new agreement post-dispute had been made despite contractual undertakings to explore dispute resolution options. The court referred to Acier Leroux Inc. v. Tremblay 2004 CanLII 28564 (QCCA) ("Acier Leroux v. Tremblay"), stating that where parties to an arbitration agreement do not follow the process to which they agreed, they cannot exclude the courts' jurisdiction with regard to third parties.[73]

The court noted that the evidence adduced before it demonstrated that the parties had discussed but failed to agree to an arbitration protocol. The parties were free to agree to another form of dispute resolution, including arbitration, but had only discussed it. A party's willingness to explore a three-party arbitration did not qualify as renouncing to its rights to litigate before the courts. The court reiterated the basic premise that an agreement to arbitrate was necessary before a court could refer parties to arbitration.[74]

By evaluating the exchanges between attorneys at the time of drafting the contracts and afterwards, the court demonstrated its willingness to consider evidence alleged to demonstrate an agreement to arbitrate. That analysis confirms that the burden to demonstrate the agreement is not unusual or high, but nonetheless must include sufficient evidence to support the allegation that an agreement had been entered into.

IP/IT Counsel must be careful not to presume that disputes can be combined in arbitration just because the parties are the same. Courts will not order consolidation of arbitrations unless the agreements to arbitrate speak to the consolidation and permit it. Consolidation can be refused also if the procedures or jurisdiction granted to the arbitrator are incompatible.[75] Unlike joinder of actions in the courts, consolidation requires either legislative authorization or the parties' consent.

**Arbitration must be mandatory - "must" and "shall"**

In Quebec, the courts use the terms "*perfect*" or "*complete*" as their phrasing for a valid, mandatory agreement to arbitrate.[76] 9283-7459 Québec inc. v. Anfossi Tassé d'Avirro inc., 2018 QCCS 2548 ("9283-

[72] Labrador-Island Link Limited Partnership v. General Cable Company, 2019 NLSC 6 examined the sufficiency of steps taken in a dispute resolution process to determine whether steps served as mandatory conditions precedent which a party had to complete prior to commencing litigation. In doing so, the court provided remarkable guidance to arbitration practitioners grappling with identical issues in their arbitration clauses.

[73] See also Camirand v. Rossi, 2003 CanLII 10224 (QC CA), [2003] R.J.Q. 1081 (C.A.)., leave to appeal refused October 9, 2003, case number 29810.

[74] Placements GNP inc. v. Kuen, 2007 QCCS 4855; Lahaye-Abenhaïm v. Association des copropriétaires du Lowney 1, 2018 QCCS 3215 para. 16.

[75] Liberty Reinsurance Canada v. Qbe Insurance And Reinsurance (Europe) Ltd., 2002 CanLII 6636 (ON SC) para. 25.

[76] Zodiak International v. Polish People's Republic, [1983] 1 SCR 529, 1983 CanLII 24 (SCC); Forecam Golf Ltd. v. Elliott, 2010 QCCS 5283.

7459 Québec inc. v. Anfossi Tassé d'Avirro") held that parties' reference to arbitration in their contract was neither sufficient nor clear enough to eliminate recourse to the courts. By adding the mention of '*by agreement of the parties*' in their undertaking to arbitrate, the parties had imposed a post-dispute requirement for fresh agreement to go to arbitration. Referring to Zodiak International v. Polish People's Republic, the court observed that a valid undertaking excludes access to the courts and is not optional.

That approach is consistent with the earlier C.C.I.C. Consultech international v. Silverman, 1991 CanLII 2868 in which the Québec Court of Appeal reiterated the principle that an arbitration agreement which is not mandatory and uses optional language in not a complete undertaking.

A similar result occurred in Great-West Life Insurance Company v. Cohen, 1993 CanLII 3978 in which the Court of Appeal held that, when the wording is imprecise, the interpretation favouring access to the courts should prevail. Applying that case, Villeneuve v. Pelletier, 2010 QCCS 320 held that, when faced with a vaguely worded arbitration agreement, one must favour the courts at the expense of such agreements. The Superior Court also stated that the language must be '*unconditional, mandatory and not optional*', relying on C.C.I.C. Consultech international v. Silverman.[77]

For a recent analysis of the role of wording such as "*may*", "*shall*" and "*must*" in the parties' arbitration agreement, see Lashchuk v. Zambito, 2018 QCCS 4553. The court accepted that parties' use of the term "*may*" can nevertheless unconditionally grant each other the right to undertake arbitration without rendering their agreement unenforceable or otherwise less obligatory. The use of "*may*" still allowed the court to hive off part of a complex dispute and exclude it from the litigation going forward.[78]

In Prométal inc. v. Maxim Construction inc., 2019 QCCS 1207, the court refused to refer the litigants to arbitration, holding that they had failed to agree in a clear and unequivocal way to exclude the resolution of their disputes from the courts.

IP/IT counsel in Québec are familiar with having to consider both the French and English terms of rules, legislation and contracts. Construction Larivière Ltée v. Pomerleau Inc., 2019 QCCS 5410 held that the word French word "*peut*" ("*may*" in English), when read in context with the word "*exiger*" ("*require*" in English), justified qualifying the agreement to arbitrate as mandatory rather than a possibility. The French word "*exiger*" did not appear in the English equivalent of the same standard form contract.[79] The court also held that the delay in which to initiate arbitration was a strict one. Though the undertaking was mandatory, the arbitration party willing to proceed was too late in doing so and the

[77] See also 9283-7459 Québec inc. v. Anfossi Tassé d'Avirro inc., 2018 QCCS 2548.

[78] See Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc., 2001 CanLII 24728, paras 7,16 18-22 and 27-41 and, at para. 35, its reliance on the Ontario Court of Appeal reasoning in Canadian National Railway Company v. Lovat Tunnel Equipment Inc., 1999 CanLII 3751, paras 11-14. Labrador-Island Link Limited Partnership v. General Cable Company, 2019 NLSC 6.

[79] The contract is footnoted as a reference to the CCA 1 2008 Stipulated Price Subcontract ("SPC"). The SPC at Part 8 sets out a stepped dispute resolution clause. The court excerpts paragraphs from the SPC and provided the official French text of the SPC. For an equivalent in English, see pp 46-48 for full text of the CCA 1 2008 SPC included in the commented guide produced by the National Trade Contractors Coalition of Canada.

court denied the application to refer the parties to arbitration. The court did observe that the wording resembled the use of "*may*" had previously been considered mandatory in prior cases.[80]

The courts are willing to give a broad reading to agreements to arbitrate but the wording used must leave no ambiguity at to the obligation to submit to arbitration.[81] Svensson v. Groupe Ovo inc., 2019 QCCS 1278 ("Svensson v. Groupe Ovo") referred to case law[82] which held that arbitration agreements must be interpreted in a broad and generous manner.[83] Once the court determines that a clause appears valid and applies to the litigation, the matter must be referred to arbitration as the court has no discretion in that regard.

The wording of the agreement did not expressly state that the award would be final and executory, as required by Zodiak International v. Polish People's Republic and Elliott v. Forecam Golf Ltd., 2011 QCCA 1029. Other cases, such as Investissement Charlevoix inc. v. Gestion Pierre Gingras inc., 2010 QCCA 1229, have applied a less-rigid analysis to meet that standard. The latter decision held that such agreements need not contain the express mention of '*final and binding*' to be '*final and binding*'.[84]

**Agreeing on the scope of the "dispute"**

It is not enough for parties to be emphatic and clear about submitting to arbitration. The parties must also express agreement as to which types of disputes must be arbitrated.[85]

In IP/IT disputes, parties must also accept what can and cannot legally be submitted to arbitration. Depending on the jurisdiction, patent validity, at least *inter partes*, is arbitrable in some jurisdictions and prohibited in others. For some variants of IP, such as claims to domain names serving as distinctive elements coveted by more than one party, registrants agree to submit their top-level domain disputes to the Uniform Domain Name Dispute Resolution Policy ("UDRP") mandated by ICANN for registrants and administered by WIPO. Unlike other administrative resolution processes, the UDRP expressly styles its process as an administrative proceeding.

Despite some aspects of IP/IT being off-limits to arbitration and even to the courts of the provinces, such as amendments to the registers for IP/IT rights, most commercial aspects between parties in their IP/IT

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[80] Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc., 2001 CanLII 24728 (QC CS) paras 27-33. See also Kingsway Financial Services Inc. v. 118997 Canada Inc., 1999 CanLII 13530 (QC CA) para. 29 and Syndicat National du cinéma v. Gilles Ste-Marie & Associés, [1996] R.D.J. 564.

[81] Villeneuve v. Pelletier, 2010 QCCS 320 para. 47.

[82] Desputeaux v. Éditions Chouette (1987) inc., [2003] 1 SCR 178, 2003 CSC 17, Viandes du Breton inc. v. Notre-Dame-du-Lac (Ville de), 2007 QCCA 651 para. 3; Acier Leroux Inc. v. Tremblay, 2004 CanLII 28564 (QC CA) para. 30; and Laurentienne-vie, Cie d'assurances inc. v. Empire , Cie d'assurance-vie, 2000 CanLII 9001 (QC CA) para. 23.

[83] Compagnie d'assurance Standard Life v. Boulianne, 1999 CanLII 13694, Condominiums mont Saint Sauveur Inc. v. Lese, 1990 CanLII 2867 and Mousseau v. Société de gestion Paquin ltée, 1994 CanLII 3745,

[84] Investissement Charlevoix inc. v. Gestion Pierre Gingras inc., 2010 QCCA 1229 para. 42.

[85] Lalli v. Gravel, 2018 QCCS 3927 accepted that a meeting conducted by a Mafia leader to resolve opposing interests and claims between two individuals over a particular piece of real estate validly qualified as an arbitration. Though unconventional, the constituent elements of the meeting – two individuals with opposing interests or claims summoned to appear before the Mafia leader who, after having heard each, decided in favour of Plaintiff - justified characterizing the meeting as an arbitration.

can be subject to arbitration. The courts have agreed to include extracontractual claims if the wording of the agreement to arbitrate supports doing so.[86]

In light of such limitations, the discussion regarding scope and the right wording becomes crucial if IP/IT Counsel want to meet expectations. Amusements Extra v. DEQ Systems focused on the use of the phrase "*relating to*" in the agreement, drawing attention to Nowegijick v. The Queen, [1983] 1 SCR 29, 1983 CanLII 18. Though the latter decision concerned wording adopted to address whether income tax exemptions were applicable to aboriginal peoples, the reasoning supported the court's statement that certain phrases conveyed a broad connection:

> *The words "in respect or' are, in my opinion, words of the widest possible scope. They import such meanings as "in relation to", "with reference to" or "in connection with". The phrase "in respect of" is probably the widest of any expression intended to convey some connection between two related subject matters.*[87]

Team Productions v. Bieber also considered whether the wording was broad enough to include extracontractual liability, asking "*[d]o we have here such a connection between the content of the arbitration clause and the nature of the lawsuit?*" The court concluded that the defamatory message, contained in a tweet, was linked to breach of contract and "*a liberal interpretation of this broad clause conducts to the existence of a link between the contract and what is written in the tweet.*"[88]

Even if courts lack discretion to refer parties to arbitration when faced with a valid agreement to arbitrate, they will not do so if the agreement does not cover the dispute before the court. Since arbitration is consensual, the courts are there to enforce the agreement but only the agreement. In Acier Leroux v. Tremblay, referring to Desputeaux v. Éditions Chouette, Québec's Court of Appeal emphasised the consensual nature of arbitration and the need to identify and respect the scope of disputes which the parties agreed to submit to arbitration.[89]

The case law is full of disagreements over which disputes qualify as disputes subject to the agreement to arbitrate. In Lahaye-Abenhaïm v. Association des copropriétaires du Lowney 1, 2018 QCCS 3215, a tenant and condo unit landlord successfully resisted their condo association's motion to refer them to arbitration on the grounds that the arbitration agreement did not apply to the dispute before the court and that the agreement did not bind the tenant. The court held that even a broad and liberal interpretation of arbitration clauses still has to meet the parties' intention to submit to arbitration as stated in their agreement. Compliant with Dell Computer v. Union des consommateurs and Société du port ferroviaire de Baie-Comeau—Hauterive v. Jean Fournier Inc., 2010 QCCA 2161,, the court held that the three (3) conditions must be met: the parties must have entered into an arbitration agreement for the question in dispute; the litigation must not have been inscribed (scheduled) for trial; and, the court must not have ruled that the arbitration agreement is null.

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[86] Sokolov v. The World Anti-Doping Agency, 2020 ONSC 704 granted summary judgment on a jurisdictional issue, dismissing a tort claim made by athletes denied entry to the 2016 Olympic Games in Rio.

[87] Nowegijick v. The Queen, [1983] 1 SCR 29, 1983 CanLII 18 p. 39.

[88] 9302-7654 Québec inc. (Team Productions) v. Bieber, 2017 QCCS 1100 para. 72.

[89] Acier Leroux Inc. v. Tremblay, 2004 CanLII 28564 para. 40. See also Camirand [v. Rossi, 2003 CanLII 10224 (2003 CanLII 10224 (QC CA), [2003] R.J.Q. 1081 (C.A.), leave to appeal to refused October 9, 2003, case number 29810.

IP/IT Counsel willing to negotiate terms for arbitration ought to be careful not to overly-confine the scope of what is agreed to be a "*dispute*" subject to binding arbitration.[90] Citing Great-West Life Insurance Company v. Cohen, 1993 CanLII 3978 (QC CA), Villeneuve v. Pelletier, 2010 QCCS 320 and 9283-7459 Québec inc. v. Anfossi Tassé d'Avirro, the court held that the wording in an agreement to arbitrate must leave no room for ambiguity regarding the obligation to submit to arbitration. Municipalité de Caplan v. Arpo Groupe-Conseil Inc., 2020 QCCS 885 refused to nominate an arbitrator due to the limited scope the parties gave to the definition of dispute in the agreement to arbitrate. The court held that when an agreement to arbitrate uses imprecise terms, access to the courts must be favoured over enforcement of such clauses.

Julien et Assurances Jones inc., 2018 QCCS 35 dealt with an insurance contract which provided for arbitration limited to disputes involving the nature, extent and amount of damages or the sufficiency of the replacement or repairs. By implication, the wording excluded litigation involving the right to the indemnity and arbitration. Arbitration would determine only quantity and leave intact the insurer's other rights to contest the insureds' entitlement to indemnification.

**Public order and subject matter of dispute**

Of key interest to IP/IT rights holders, the C.C.Q. further distinguishes what can and cannot be subject to arbitration. Article 2639 C.C.Q. stipulates that disputes over the status and capacity of persons, family matters as well as "*other matters of public order*" may not be submitted to arbitration but an agreement to arbitrate "*may not be opposed on the ground that the rules applicable to settlement of the dispute are in the nature of rules of public order*".

The courts have accepted that parties can arbitrate rights granted under statute. AEC Symmaf Inc. v. Poirier, 2018 QCCA 916 ("AEC Symmaf v. Poirier") determined that the wording in the parties' arbitration agreement did not explicitly mention an intention to waive access to the courts for the statute-based oppression remedy. The judge agreed that parties could waive their access to the courts for their oppression remedy and submit to arbitration, but flagged instances in which the courts had required that the waiver be explicit. Camirand v. Rossi, 2003 QCCA 74899,[91] Acier Leroux v. Tremblay [92] and Ferreira v. Tavares, 2015 QCCA 844[93] provide guidance on the scope of public order in arbitration and the manner in which parties can waive remedies that are not of public order.[94] Other considerations involve whether the statute remedy is too intertwined and cannot be reasonably separated from statute remedy, in this case oppression remedy.[95]

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[90] 9096-0105 Québec Inc. v. Construction Cogela Inc., 2003 CanLII 546 (QC CS) held that the conclusions of the litigation were relevant to determining whether the litigation falls within the terms of the agreement to arbitrate.
[91] Camirand v. Rossi, 2003 QCCA 74899 paras 26, 30-31.
[92] Acier Leroux Inc. v. Tremblay, 2004 QCCA 28564 paras 30, 35, 39-42.
[93] Ferreira v. Tavares, 2015 QCCA 844 para. 29.
[94] See also Heeg v. Hitech Piping (HTP) Ltd., 2009 QCCS 4043. Johnson v. Kensington Capital Partners Ltd., 2009 QCCS 1861 paras 19-21 which held that the arbitration agreement contained adequate wording to justify dissociating an unjust dismissal claim from a dispute over the employee's shareholding.
[95] For Québec, see: Garage Technology Ventures Canada, s.e.c. (Capital St-Laurent, s.e.c.) v. Léger, 2012 QCCA 1901 para. 91; Laviolette v. Prud'homme, 2008 QCCS 5108 paras 100-101; and, Sychterz v. Bouchard, 2015 QCCS 1215 paras 36-40. For an Ontario, see: 2082825 Ontario Inc. v. Platinum Wood Finishing Inc., 2009 CanLII 14394 para 42.

However, not all issues subject to statute can be removed from the courts. Bois Marsoui GDS Inc. v. Directeur des poursuites criminelles et pénales, 2020 QCCS 1327 held that an agreement to arbitrate contained in a contract signed with a government entity/agency did not allow merchants to exclude themselves from application of public order environmental legislation such as the Sustainable Forest Development Act, CQLR c A-18.1. The court reasoned that public order provisions aimed at protecting public well-being would lose their utility if parties could derogate from them by contract. Though not stated, the reasons also support the conclusion that a government entity/agency lacks sufficient authority to contract out of the court's jurisdiction to resolve disputes involving penal provisions related to laws of public order.

Parties ought not to rule out arbitration if the dispute is still arbitrable despite agreement of the parties that it might only fall within the court's jurisdiction. In Gestion George Kyritsis Inc. v. Balabanian, 2020 QCCS 1806, the court asserted public order limits to the arbitrability of certain disputes but, on the facts, held that the dispute did not pass those limits. The court held that where a declaration of improbation (annulment) is required to annul an authentic act received before a notary and registered in the land registry office, only a Superior Court could issue that declaration. Challenge to the validity of a notarial act alleging a notary's non-compliance with the mission given by legislation is a matter involving public order. In the circumstances, because the nullity of the act could issue on grounds which did not require improbation, an arbitrator could have decided the matter.[96]

Of particular interest to IP/IT rights holders is the decision in Chung v. Merchant Law Group, 2020 QCCS 398 ("Chung v. Merchant Law Group"). In that case, the court held that a clause, removing jurisdiction from the courts of Québec for an employment dispute, had no effect because it violated a rule of public order in Québec's C.C.Q. Though the case dealt with a clause by which the parties submitted any issues to the exclusive jurisdiction of Saskatchewan's Court of Queen's Bench, the rule has application to related attempts to submit similar employment relationships to arbitration.

The court highlighted, as a departure point, the components in civil law for a contract of employment, set out at article 2085 C.C.Q., flagged the elements identified by the Supreme Court in Cabiakman v. Industrial Alliance Life Insurance Co., 2004 SCC 55 (CanLII), [2004] 3 SCR 195, and cited a "*useful list of criteria*" from Leclerc v. Constructions Louis-Seize & Associés inc., 2012 QCCS 5885.

Having considered those elements, Chung v. Merchant Law Group concluded,[97] on a *prima facie* basis for the purpose of the declinatory motion, that the "*sum of these elements convinces the Court that the*

[96] The parties had appeared earlier before the Court of Appeal which, on the basis of Defendant's acquiescence, in Association des copropriétaires du 10355 Ave Bois-de-Boulogne v. Balabanian, 2019 QCCA 2165 agreed to quash the decision in first instance which referred the parties to arbitration. Despite flagging, without deciding, whether a particular aspect of the claims sought could be granted in arbitration, the Court summarily agreed to annul that earlier decision and no argument was made that the decision suffered any flaws.

[97] The analysis relies on the closing words of article 3148 C.C.Q. which refers to agreements to submit disputes "*to a foreign authority or to an arbitrator*". The reasoning and result applies to situations in which the employee and consumer, having either a residence or domicile in Québec, has signed a contract containing a clause submitting disputes, present or future, "*to an arbitrator*". The wording of that clause does not require the word "*foreign*" to modify "*arbitrator*" as the preposition "*to*" appears before "*arbitrator*". The rule thus applies to prevent employees, with a residence or domicile in the province of Québec, from being bound by contracts they sign which contain requirements to arbitrate their disputes.

*relationship of the parties was that of a contract of employment*"[98] and that it had no discretion to exercise and dismissed the declinatory exception.

Courts are not bound by identification or qualification given by the parties to the contractual agreement. Rather, a court will analyse the contract's terms and the parties' conduct to qualify the nature of the agreement. The determination of the sum of those elements removes all discretion from the court once the sum convinces the court, on a *prima facie* basis, that a party to such a contract is an employee and therefore not bound by such clauses.

As IP/IT Counsel know, many employees can be bound by both employment contracts and shareholding or share option contracts involving IP/IT rights. It is also common that both the employment status and shareholding may be, by their respective contracts, submitted to arbitration. Despite such agreements and willingness to consolidate such arbitrations if and when need be, the result of article 3149 C.C.Q. can be that part of an ex-employee's dispute is subject to determination by the courts and part by arbitration.

**Limitations shared with other courts in IP/IT matters**

Particular to IP/IT, certain disputed IP/IT rights owe their value to registration on a public registers, such as patents, trademarks and copyright. Many IP/IT statutes strike a bargain with the rights holders, granting them exclusivity in some respects which the statute imposes on third parties. Inherent in the bargain to obtaining registration is that others are impacted by that registration and therefore have standing in the status of the register. Any decisions to rectify the register bind more than just the party obtaining registration. A decision maker with such authority to rectify the register serves a broader public function. In contrast, an arbitrator binds only those who have agreed by contract to submit to arbitration and accept the decision as binding and final.

Due to the impact on those parties, the legislatures have imposed certain corresponding controls on who can impose changes to the registers. Other than requests made with the approval of the registered rights holder, the register can only be modified by decision maker such as the court identified in the legislation.

The Federal Court has exclusive jurisdiction to order changes to or rectifications of the registers for patents,[99] copyrights,[100] trademarks[101] and integrated circuit products.[102] Still other remedies associated with the commercial value in registered IP, such as establishing royalties for use of patents for international humanitarian purposes to address health problems, are reserved to the Federal Court.[103]

As well, the Federal Court has exclusive jurisdiction to order that any entry in the register be struck out or amended on the ground that at the date of the application the entry as it appears on the register does not accurately express or define the existing rights of the person appearing to be the registered owner of the trademark. In other cases, federal legislation expressly acknowledges the Federal Court's

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[98] Chung v. Merchant Law Group, 2020 QCCS 398 para. 84.
[99] Patent Act, RSC 1985, c P-4, sections 52 and 60(1).
[100] Copyright Act, RSC 1985, c C-42, section 57(4).
[101] Trademarks Act, RSC 1985, c T-13, section 57(1).
[102] Integrated Circuit Topography Act, SC 1990, c 37, section 24(1).
[103] Patent Act, RSC 1985, c P-4, section 21.08(4) in regard to section 21.01.

concurrent jurisdiction with superior courts but, nonetheless, that jurisdiction is not fully extended to arbitration tribunals.[104]

In addition to those limitations noted above, certain remedies are even beyond many of the courts. Some exclusivity for remedies applies not only to arbitration but to many of the superior courts of the provinces and territories. For example, the Québec Superior Court cannot order changes to the registers. Thus, the decision to engage in arbitration shares a limitation which would exist even if one went to a superior court instead of Federal Court.

This exclusivity over the registers of some IP/IT does not, however, shield IP/IT disputes from arbitration. Parties can still agree to arbitrate disputes involving interpretation and performance of licenses, sale of IP/IT assets, royalty disputes and SaaS and PaaS. Given the autonomy of the parties to draft the scope of disputes subject to arbitration, IP/IT Counsel ought to be able to develop an appropriate strategy with their clients to obtain many of the promised benefits of arbitration. IP/IT Counsel can determine which rights may be eligible for arbitration and to draft their dispute resolution agreements accordingly.

**No pre-dispute arbitration imposed on consumers**

A clearly worded, mandatory agreement to arbitrate rights not otherwise reserved by law for the courts does not bind all parties. IP/IT Counsel representing clients with IP/IT rights often review contracts destined for signature by a number of categories of clients including consumers. Québec's Consumer Protection Act, CQLR c P-40.1 ("CPA") prohibits imposing arbitration agreements in contracts for consumers.

> *11.1. Any stipulation that obliges the consumer to refer a dispute to arbitration, that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.*

This prohibition is regularly tested by merchants and readily enforced by the courts. Recent Court of Québec decisions demonstrate merchants' persistence in inserting mandatory arbitration clauses into their contracts with consumers and the court's corresponding vigilance in guarding against violation of Québec's public order CPA legislation regarding mandatory arbitration. Despite merchants' reliance on those arbitration clauses as part of their defenses in court, Poirier v. RSH Travel Ltd.(CheapOair.ca), 2018 QCCQ 2753 and Gauthier v. Détection thermique JD Québec inc., 2018 QCCQ 2198 demonstrate how courts make brief work of such reliance.

Québec is not alone in using consumer protection legislation to disallow arbitration with consumers. Pearce v. 4 Pillars Consulting Group Inc., 2019 BCSC 1851 declined to allow a class action waiver to override the mandatory provisions of B.C.'s Class Proceedings Act, RSBC 1996, c 50. In contrast to cases enforcing parties' agreements to arbitrate and thereby resist class action certification, the court determined that the waiver's only purpose was to avoid a class action. The Supreme Court of Canada in TELUS Communications Inc. v. Wellman, 2019 SCC 19 held that section 7(5) of Ontario's Arbitration Act, 1991, SO 1991, c 17 does not give courts discretion to refuse to stay claims dealt with by an otherwise valid arbitration agreement. Though Ontario's Consumer Protection Act, 2002, SO 2002, c 30, Sch A

[104] Copyright Act, RSC 1985, c C-42 section 41.24; Integrated Circuit Topography Act, SC 1990, c 37, section 23.

invalidates arbitration agreements to the extent they prevent consumers from pursuing claims in court, that policy choice does not extend to non-consumers who remain bound by their agreements to arbitrate. Courts are to interpret legislation and not re-write it.[105]

Parties seeking to anticipate whether their client agreements will be subject to the CPA should consider a line of cases from the Court of Québec distinguishing when a franchisee contracts as a consumer rather than a merchant. Najah v. Desatrais, 2019 QCCQ 3143 held that an individual who contracts with the goal of becoming merchant is, at that time, a consumer within the meaning of Québec's Consumer Protection Act, CQLR c P-40.1 ("CPA"). As a result, the arbitration clause in the first-time franchisee's contract did not apply because it restricted his right to go to court.

In similar fashion, the Court of Québec, Small Claims Division Khalil v. Nordic Maintenance Inc., 2017 QCCQ 5540 held that an arbitration clause did not apply in a maintenance franchise dispute, concluding on those facts that the franchisee was a consumer at the initial phase of investing with a view to get his first start in business. Only at the start, the individual contracts to become a merchant. At the time of entering the contract of franchise, and payment of the initial fees from his own personal bank account, the acts are those of a consumer. Paraphrasing the Court of Appeal in eBay Canada Ltd. v. Mofo Moko, 2013 QCCA 1912, the court was not convinced that the individual acted as a merchant seeking profit by way of a transaction seeking to guarantee the individual a revenue.

For wording which resisted challenge for non-consumers, see Williams v. Amazon.com, Inc., 2020 BCSC 300 which stayed a proposed class proceeding for non-consumer claims seeking damages under Canada's Competition Act, RSC 1985, c C-34 based on a standard form contract which submitted those claims to arbitration administered in the U.S. and subject to U.S. laws.[106] Defendants' stay applied in regard to all the relief sought by Plaintiff except the relief available under section 172 of the Business Practices and Consumer Protection Act, SBC 2004, c 2. They did so as compliance with/concession to Seidel v. TELUS Communications Inc., 2011 SCC 15 (CanLII), [2011] 1 SCR 531 which the court referred to as the "*backdrop*" to their application when analysing it. A-Teck Appraisals Ltd. v. Constandinou, 2020 BCSC 135 expressly noted, but declined to follow the reasoning in Heller v. Uber Technologies Inc., 2019 ONCA 1.[107]

**Equal treatment of the parties**

Parties are said to have "*virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding*"[108] but limits do exist.[109] Québec's *lex arbitri* prevents parties from contracting out of specific provisions.

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[105] See also Seidel v. TELUS Communications Inc., 2011 SCC 15 (CanLII), [2011] 1 SCR 531; Griffin v. Dell Canada Inc., 2010 ONCA 29, leave to appeal refused, Dell Canada Inc. v. Thaddeus Griffin, 2010 CanLII 27725 (SCC); and, Uber Technologies Inc. v. Heller, 2020 SCC 16.

[106] Horsman J. held that the agreement to arbitrate overcame any unconscionability concerns raised in Heller v. Uber Technologies Inc., 2019 ONCA 1.

[107] At the date of that decision, the Supreme Court of Canada had not yet issued Uber Technologies Inc. v. Heller, 2020 SCC 16. The decision referred to in was subject only to leave to appeal granted by Uber Technologies Inc., et al. v. David Heller, 2019 CanLII 45261 (SCC).

[108] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17, [2003] 1 S.C.R. 178 para. 22

[109] Noble China Inc. v. Lei, 1998 CanLII 14708 (ON SC).

As noted earlier, article 622 C.C.P. prevents parties from departing from those provisions which determine the court's jurisdiction or those relating to homologation of annulment of awards. Article 622 C.C.P. also prevents parties from departing from the adversarial principle or the principle of proportionality and notice of documents.

The C.C.Q. reinforces and adds to those C.C.P. limits. Article 2639 C.C.Q. prohibits submitting certain types of disputes to arbitration. Article 2641 C.C.Q. which prohibits a stipulation which puts one party in a privileged position with respect to the designation of the arbitrator.

AEC Symmaf v. Poirier agreed with the applications judge[110] that the arbitrator's appointment for an oppression remedy could not be given exclusively to the Board of Directors of the corporation which is the object of the oppression remedy.

> *Such arbitration shall be conducted by a single arbitrator. The arbitrator shall be appointed by Board Approval. The choice of arbitrator is final and binding on the Parties hereto and is not capable of being arbitrated or heard by or appealed to any Court or any other administrative, judicial, quasi-judicial or other decision making body. Unless otherwise agreed to by the parties, the arbitration shall be held in the City of Toronto*.

Doing so would improperly submit the dispute to an arbitrator chosen by only one party to the dispute.

> *[24] Notwithstanding this, it is not reasonable to infer that the respondents intended to refer matters of oppression to an arbitrator appointed by AEC Property's board of directors – the very persons, it should be emphasized, who stand accused of abusive and oppressive conduct in the present case. Since questions of oppression go to the very heart of the relationship between a corporation's shareholders and directors, it is reasonable to conclude that the parties to the USA did not intend to refer such sensitive and divisive questions to an arbitrator who would be unilaterally appointed by one of the likely parties to the dispute.*

For a recent illustration of the court's objection to an unfair appointment process reserved to only one party, see Caron v. 7834101 Canada inc. (Triviom à Charlemagne ), 2020 QCCS 2859.

Other jurisdictions have the same approach, determining that the parties cannot confer authority to conduct the arbitration in a manner contrary to public policy.[111] Such prohibitions provide the courts express grounds to ensure equal treatment of the parties to arbitration.[112] Parties can contract out of certain provisions[113] but cannot confer powers to conduct an arbitration in a manner contrary to public order.[114]

Once the parties have done their job and negotiated a valid agreement to arbitrate compliant with the applicable *lex arbitri* and equal treatment, the courts expect the tribunals to do their job as well. Doing

[110] Poirier v. AEC Symmaf Inc., 2018 QCCS 2946.
[111] Popack v. Lipszyc, 2015 ONSC 3460 para. 44.
[112] Bayview Irrigation District #11 v. United Mexican States, 2008 CanLII 22120 (ON SC) paras 13-15.
[113] Noble China Inc. v. Lei, 1998 CanLII 14708 (ON SC) p. 35 which confirmed that article 34 of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments is not a mandatory provision and parties can exclude the right to set aside the award under this article.
[114] Popack v. Lipszyc, 2015 ONSC 3460 para. 44.

so means ensuring equal treatment of the parties as recently asserted in Bayview Irrigation District #11 v. United Mexican States, 2008 CanLII 22120 (ON SC).

> *[14] While there is great deference shown to arbitral tribunals, the Tribunal has the obligation, pursuant to Articles 18 and 34 of the [Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments], to ensure equal treatment of the parties, that minimum procedural standards are observed and that their decision does not offend public policy. Academic commentators have addressed the issue of due process and the minimum procedural standards that should be fulfilled by an arbitral tribunal. If an arbitral tribunal falls short of those standards a court can set its decision aside. Redfern and Hunter made the following comments:*
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> *Certain minimum procedural standards must be observed if international commercial arbitrations are to be conducted fairly and properly. These procedural standards are designed to ensure that the arbitral tribunal is properly constituted; that the arbitral procedure is in accordance with the agreement of the parties… and that the parties are given proper notice of proceedings, hearings and so forth. In short, the aim is to ensure that the parties are treated with equality and are given a fair hearing, with full and proper opportunity to present their respective cases.*
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> *[Redfern and Hunter, Law and Practice of International Commercial Arbitration, 4th ed. (London: Sweet and Maxwell, 2004) p. 413].*
>
> *[15] C.L. Campbell, J. for this Court, interpreting the provisions of the [Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments ("Model Law")] in relation to an award by an arbitral panel, accepted the proposition advanced by the applicant that once a breach of principles of fundamental justice is established, the entire resulting decision is invalid. [Xerox Canada v. M.P.S. Technologies, unreported decision of C.L. Campbell, J., November 30, 2006, para. 110].*[115] (emphasis added)

The court reviewed the record of the arbitration proceedings and determined that there was no breach of the principles of fundamental justice in the arbitration tribunal's conduct. Applicants had been provided a full opportunity to know the case they had to meet and to present their case.

In Popack v. Lipszyc, 2015 ONSC 3460, the court accepted Noble China Inc. v. Lei, 1998 CanLII 14708 (ON SC) but also mentioned that the agreement to arbitrate cannot confer authority to conduct an arbitration contrary to public policy. Wording that purports to do this would be invalid.

> *Similarly, with respect to the second part of Article 34, the Court concluded that an arbitration agreement may not confer powers on a tribunal to conduct an arbitration in a manner contrary to public policy. These findings are all different ways of showing that parties cannot effectively contract out of Article 34 for all purposes.* [116](emphasis added)

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[115] The case has since be posted online: Xerox Canada Ltd. v. MPI Technologies Inc., 2006 CanLII 41006 (ON SC), para. 110.

[116] Popack v. Lipszyc, 2015 ONSC 3460 para. 44.

Independent of the benefits promised by arbitration, arbitration also entails certain clear, non-negotiable minimums which define the process as arbitration: treat the parties equally,[117] fairly,[118] respect rules of natural justice, do not imply terms to the contract. Even if granted right to act as an *amiable compositeur* or *ex aequo et bono*, the arbitrator has to respect the contract as written.[119] There are not degrees of fairness and unfairness. A process is either fair or unfair in the circumstances.[120]

Breach of the fairness has decisive consequences. Once a party establishes a breach of the principles of fundamental justice, of natural justice, the "*entire resulting decision is invalid*".[121] The UNCITRAL Arbitration Rules provide express reference to key rules of natural justice.

> *Article 17(1) 1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute*. (emphasis added)

**Arbitrator has no inherent jurisdiction**

Because an arbitrator's jurisdiction arises from agreement, a privately appointed arbitrator has no inherent jurisdiction.[122] Relying on Desputeaux v. Éditions Chouette, Advanced Explorations Inc. v. Storm Capital Corp., 2014 ONSC 3918 stated a "*privately-appointed arbitrator has no inherent jurisdiction. His or her jurisdiction comes only from the parties' agreement*".[123] Dominion of Canada General Insurance Company Co. v. Certas Direct Insurance Co., [2009] CanLii 37348 (ONSC) also held that an arbitrator had no inherent jurisdiction and was expressly confined within the four corners of the instrument that created the arbitrator's jurisdiction.

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[117] Bayview Irrigation District #11 v. United Mexican States, 2008 CanLII 22120 (ON SC) para. 14.
[118] In the Matter of the International Commercial Arbitration Act, R.S.A. 2000, C. I-5, 2005 ABQB 509 para. 18.
[119] Coderre v. Coderre, 2008 QCCA 888 in which the Court of Appeal explored the limits of an arbitrator's jurisdiction to act as *amiable compositeur*. See article 620 C.C.P. See also SMART Technologies ULC v Electroboard Solutions Pty Ltd, 2017 ABQB 559 paras 13-19, 27-29, 90-92 and 98.
[120] ENMAX Energy Corporation v. TransAlta Generation Partnership, 2019 ABQB 486 para. 86 (leave to appeal granted ENMAX Energy Corporation v. TransAlta Generation Partnership, 2020 ABCA 68).
[121] Xerox Canada Ltd. v. MPI Technologies Inc., 2006 CanLII 41006 (ON SC) para. 110.
[122] Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd., 2010 BCSC 749 para. 15; Advanced Explorations Inc. v. Storm Capital Corp., 2014 ONSC 3918 para. 57; The Piazza Family Trust v. Veillette, 2011 ONSC 2820 para. 63; Dominion of Canada General Insurance Company Co. v. Certas Direct Insurance Co., [2009] O.J. No. 2971 (S.C.J.) [2009 CanLii 37348 (ONSC)] paras 21-23.
[123] Advanced Explorations Inc. v. Storm Capital Corp., 2014 ONSC 3918 para. 57. See also The Piazza Family Trust v. Veillette, 2011 ONSC 2820 para. 63.

If an agreement to arbitrate is the source of the arbitration tribunal's jurisdiction, exceeding its terms qualifies as a jurisdictional error. Article 646(b) C.C.P. acknowledges this excess as a ground for refusing homologation.[124] As stated in Desputeaux v. Éditions Chouette:

> *[22] The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. As we shall later see, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform, subject to the applicable statutory provisions. The primary source of an arbitrator's competence is the content of the arbitration agreement (art. 2643 C.C.Q.). If the arbitrator steps outside that agreement, a court may refuse to homologate, or may annul, the arbitration award (arts. 946.4, para. 4 and 947.2 C.C.P.).*[125] (emphasis added)

Inherent jurisdiction is synonymous with superior courts. On a basic level, the absence of any inherent jurisdiction means that an arbitration tribunal lacks authority to grant remedies not included by the applicable *lex arbitri* and/or granted by the parties' agreement. The seat of the arbitration (sometimes called the location) imports application of the *lex arbitri*.

A related issue involves the limits placed on the authority which parties can impose on the courts. Parties can attempt to limit court intervention but, in doing so, may infringe certain rules which the legislatures deem are off limits. Coderre v. Coderre, 2008 QCCA 888 reminded that the rules of natural justice are of public order. [126] These rules dovetail with the court's limited intervention regarding the fairness of the arbitration process which are mandatory or non-negotiable provisions of Québec's *lex arbitri* and beyond the parties' ability to opt out.

Parties have autonomy to grant a tribunal a variety of authority. Despite that autonomy, limits do exist. Parties cannot ignore limits imposed by the l*ex arbitri*. For example, the C.C.P. identifies those provisions from which parties cannot, even by agreement, derogate.[127] Some rules are deemed to be of public order and, as such, are beyond the scope of any agreement between the parties. The courts will not defer to the parties' agreement, despite support for and respect for otherwise valid exercises of the parties' autonomy to craft their own rules.

For further example, in Québec, arbitration tribunals do not have authority to grant equitable relief such as injunctions though interim measures and orders for specific performance are recognized. Article 638 C.C.P. acknowledges the arbitration tribunal's authority to issue exceptional measures to safeguard the parties' rights but requires homologation of such decisions by the court[128] to give it the same force and effect as a judgment of the court. An arbitration tribunal can order parties to do or not do but that order is not the equivalent of an injunction subject to contempt proceedings if breached.[129]

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[124] In similar fashion, errors of jurisdiction are reviewable under Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp) and the Ontario International Commercial Arbitration Act, 2017, SO 2017, c 2, Sch 5 on a standard of correctness. See The Piazza Family Trust v. Veillette, 2011 ONSC 2820 para. 60.

[125] Desputeaux v. Éditions Chouette (1987) inc., 2003 SCC 17 [2003] 1 S.C.R. 178 para. 22.

[126] Coderre v. Coderre, 2008 QCCA 888, para. 46.

[127] Cite article 940 C.C.P. provisions and Ontario, B.C.

[128] Articles 527, 528 and 645-647 C.C.P.

[129] Pierre J. Dalphond, Article 638, Le Grand Collectif – Code de procédure civile : Commentaires et annotations, Volume 2 (Articles 391 à 836), 4e édition, L. Chamberland (dir.), 2019 (Éditions Yvon Blais, Thomson Reuters).

Regarding an application to set aside an arbitral award granting a *Mareva* injunction, see Farah v. Sauvageau Holdings Inc., 2011 ONSC 1819 in which the court determined that arbitrators have no jurisdiction to grant *Mareva* injunctions affecting the rights of third parties and explored the circumstances in which an arbitrator can proceed *ex parte*.[130]

In contrast, some jurisdictions have adopted arbitration legislation which expressly acknowledges or implicitly does not prohibit arbitrators issuing injunctions.[131] IP/IT counsel should therefore choose carefully the *lex arbitri* when negotiating their agreements to arbitrate or submission agreements if they seek or avoid that type of remedy from their arbitrators.

**Agreement to arbitrate binds only parties to the agreement**

Arbitration is consensual and binds only the parties to it. The agreement to arbitrate does not bind others.

Much of the value of IP/IT rights resides in the ability to enforce those rights against third parties and any unauthorized use, including registered and unregistered rights. Third parties are characterized as such because they have no contract with the IP/IT rights holder.

This privity of contract leads to a key distinction between courts and arbitration. A court litigant has the ability to cluster together in a single proceeding all those "*necessary*" for the complete solution. In courts, subject to their rules, a plaintiff can include in its originating proceeding a variety of defendants, bound or not by contract and a defendant can involve yet other entities by way of action-in-warranty. In addition, third parties can involve themselves by way of application for voluntary forced intervention.[132]

None of that inclusiveness is permitted in arbitration. Unlike common procedural options allowing involvement of third parties in litigation, arbitration parties cannot involve even "necessary" parties. Being consensual, only those who have agreed to engage in arbitration are valid parties. Little prevents others from joining in, provided all the arbitration parties agree, but nothing obliges any one of them to join in. Arbitration does not permit forcing third parties into the arbitration.

This constraint occasions many court hearings in which litigants, arguing efficiency, attempt to ignore the role of their agreements and plead to bundle their disputes and resolutions in a single court proceeding.

The court in Loan Away Inc. v. Western Life Assurance Company, 2018 ONSC 7229 stayed plaintiff's litigation in favour of arbitration and refused to consolidate that arbitration with an ongoing one between defendant and a third party. In Ts'kw'aylaxw First Nation v. Graymont Western Canada Inc. (2018) BCSC 2101, the court held that an arbitration agreement is not inoperative simply because a plaintiff advances intertwining claims against multiple defendants including non-parties to the arbitration agreement.

[130] Farah v. Sauvageau Holdings Inc., 2011 ONSC 1819 paras 50-73 and 74-85.

[131] See B.C.'s Arbitration Act, SBC 2020, c 2 section 25(4) which expressly confirms that an arbitral tribunal may grant relief or remedies under the applicable law, including orders of specific performance, injunctions, declarations or other equitable remedies available under that law.

[132] Daniel Urbas, "*"Old Ways Won't Open New Doors" Approaching Interventions from an Access to Justice Point of View*" in Hon. Justice Todd Archibald ed., 2016 Annual Review of Civil Litigation, (Toronto: Thomson Reuters, 2016) 288-378.

TransAlta Generation Partnership v. Balancing Pool, 2018 ABQB 932 held that a creature of statute with duties under a statutory contract between other parties had the right to initiate arbitration if neither of the main parties to the contract chose to do so. That statutory creature, the Balancing Pool, was introduced when Alberta adopted its Electric Utilities Act, SA 2003, c E-5.1 ("EUA") and related regulations such as the Balancing Pool Regulation, Alta Reg 158/2003 ("BPR"). The EUA and BPR combined to set certain key terms and conditions regarding the generation, transmission, purchase and resale of electricity. The EUA introduced the PPA, a standard form long term contracts for the purchase and sale of electricity and created BP, a corporation. A PPA may have the appearance and function of a private bilateral contract, but is in fact a statutory enactment with pre-determined terms and conditions which tolerates limited variations. A PPA provides for a mandatory arbitration process by which disputes are resolved. Though not a party to the transactions covered by the PPA in dispute, the Balancing Pool had obligations of indemnity which justified its involvement in the arbitration.

**Decision on jurisdiction to be taken first by arbitrator**

In case of doubt, the courts refer the issue of jurisdiction for first determination by the arbitrator. In doing so, the courts merely agree that the decision will be the first, but not the last. The preferred approach/sequence would be first to give the arbitrator the opportunity to determine the jurisdictional issues and, following same, then allow the parties apply to the Superior Court to review that determination or decide the issue itself.[133] The court in that case resisted the reverse approach of submitting all issues to the court on the '*pretext*' that some exceed the arbitrator's jurisdiction. The court explained its preferred sequence as stemming from its understanding of the teachings in Dell Computer v. Union des consommateurs.

Team Productions v. Bieber concluded that if the validity and applicability of the arbitration agreement are in issue and the contestation requires a review of evidence, the matter must be referred to the arbitration tribunal to rule on its jurisdiction. In doing so, the court followed Dell Computer v. Union des consommateurs and Rogers Wireless Inc. v. Muroff, [2007] 2 SCR 921, 2007 SCC 35 and their strong endorsement of the competence-competence principle. The latter reserves to the arbitration tribunal the jurisdiction to first rule on its jurisdiction. Only if the contestation involves a question of law and can be answered by a superficial examination of documents should and can the court make the determination. Doing so, the court observed, "*allows to avoid the possibility of a double debate (i.e. the losing party before the arbitrator, on the question of competence, asks the Court to review the decision. It is more efficient and observes the principle of proportionality.*"

9338-3941 Québec inc. v. 9356-2379 Québec inc., 2019 QCCS 1221 referred the parties to arbitration despite the possibility that some of relief sought might not be covered by the arbitration agreement. The court preferred to have the arbitrator rule first on jurisdiction and then allow the parties to apply to the court for review or decision, rather than the reverse sequence. Doing so would respect the parties'

[133] Dell Computer Corp. v. Union des consommateurs, [2007] 2 SCR 801, 2007 SCC 34, Rogers Wireless Inc. v. Muroff, [2007] 2 SCR 921, 2007 SCC 35 and Groupon Canada inc. v. 9178-2243 Québec inc., 2015 QCCA 645 as well as 7847866 Canada inc. v. Gree Electric Appliances Inc. of Zhuhai, 2017 QCCS 1723 and Fondacaro v. Syndicat des copropriétaires Prince Consort, 2018 QCCQ 4050. Jan-Pro Canada Est inc. v. Bourgeois, 2017 QCCS 2151

autonomy to choose how to resolve their disputes. The arbitration must be active and not simply available.[134]

That approach applies in other Canadian jurisdictions too. In a pair of decisions, Deco Homes (Richmond Hill) Inc. v. Mao, 2019 ONSC 6223 and Deco Homes (Richmond Hill) Inc. v. Li, 2019 ONSC 7501, the court acknowledged overlap of buyers' claims subject to statutory arbitration and vendor's claims for breach of contract not covered by arbitration. Respectful of competence-competence, the court stayed the actions to allow an arbitrator to make a first determination, reasoning that vendor's claims could not be resolved without recourse to questions that fell within the agreement's exclusive scope.

In Cineplex Entertainment v. Compagnie France Film inc., 2018 QCCS 2133 ("Cineplex Entertainment v. Compagnie France Film"), the court resisted defendant's claim that the court could decide its jurisdictional challenge on the basis that doing so required only a superficial review of the facts. The court acknowledged that the parties' contract contained clearly worded delays regarding arbitration but held that the parties' post-dispute conduct removed them from the narrow exception, mentioned in Dell Computer v. Union des consommateurs, to the general rule of 'challenge first before arbitrator'. The parties' numerous exchanges about extending delays in their contract renewal had blurred their contract's clear wording. Because those exchanges resisted easy factual analysis, the court referred the parties to their arbitrator to decide the jurisdictional issue on more fulsome facts and sealed the sensitive information prepared for the court's jurisdictional hearing.

**Some courts may lack jurisdiction to refer parties to arbitration**

In Québec, some courts have asserted that they lack jurisdiction to refer the parties to arbitration. The Court of Québec, Small Claims Division[135] in Medeiros v. Jan-Pro Canada Est, 2019 QCCQ 663 held that it had no jurisdiction to refer the parties to arbitration because an arbitration tribunal did not qualify as a 'court' under article 547 al. 2(2) of Québec's Code of Civil Procedure, CQLR c C-25.01 governing the options available to parties. Instead of a referral, the court suspended the court proceedings in Small Claims Division pending an arbitration tribunal's determination of the validity of the arbitration clause.

The same judge in Guillette v. Jan-Pro Canada Est, 2016 QCCQ 7186 had refused to refer the parties to arbitration because article 547 al. 2(2) C.C.P. did not provide referral as an option. Rather, on the facts before him in that case, the court declared the nullity of the arbitration clause. He did so on the basis that the contract, being an adhesion contract, failed to meet the principle of proportionality in violation of article 622 al. 3 C.C.P.

On application for judicial review of that earlier decision, the court in Jan-Pro Canada Est inc. v. Bourgeois, 2017 QCCS 2151 granted the application but only in part. The court agreed with Court of Québec's analysis of article 547 al. 2(2) C.C.P. but disagreed with the decision to declare the nullity of the arbitration clause.

The court considered the express wording of article 547 al. 2(2) C.C.P. and, in light of the earlier Court of Appeal decision in Fédération des producteurs acéricoles du Québec v. St-Pierre, 2005 QCCA 839,

[134] ATS Automation Tooling Systems Inc v. Chubb Insurance Company of Canada, 2018 ONSC 6139 refused a stay of litigation involving a non-party to overseas arbitration because that arbitration was only "*invoked*" but not instituted and the issues in both proceedings were not inextricably linked.

[135] Claims under $15,000.00.

determined that an 'arbitration tribunal' did not fall within the 'courts' (or 'tribunals') mentioned in article 547 al. 2(2) C.C.P. As a result, the Court of Québec, Small Claims Division had no jurisdiction to refer the parties to arbitration.

The terms used at article 8 C.C.P. and article 1 of the Courts of Justice Act, CQLR c T-16 provide only for those 'courts' expressly identified therein and make no mention of or provision for arbitration tribunals. The Act respecting administrative justice, CQLR c J-3 limits its application to "*a decision to be made by the Administrative Tribunal of Québec or by another body of the administrative branch charged with settling disputes between a citizen and an administrative authority or a decentralized authority*", thereby excluding arbitration tribunals. The court held that arbitration tribunals do not settle disputes between a citizen and an administrative authority. As a result, the Superior Court held that the Court of Québec's decision to interpret article 547 al. 2(2) C.C.P. as excluding arbitration tribunals was reasonable and justified.

**Sequential and parallel roles for courts and arbitrators**

The courts will stay their proceedings so that part of the dispute can be settled by arbitration to the extent covered by the agreement to arbitrate. Québec's Court of Appeal in Lavoie v. Maltais, 2018 QCCA 777 upheld a Superior Court case management decision staying court litigation involving five parties in favour of arbitration between two of the litigants. The arbitration would serve to first resolve a specific list of disputes tied to the contract containing the arbitration clause, followed by the revival of the court litigation to involve all five parties on the remainder of the issues.

Litigation and arbitration can run in parallel to resolve disputes over IP/IT rights. Counsel representing parties disputing IP/IT rights must be aware that different rights can be disputed in different venues for different remedies, purposes and strategies. The case law records instances in which court litigation and the arbitration process run along side each other, allowing each to resolve different disputes within the courts and the arbitrator's respective jurisdiction.

Even when the arbitration is created by legislation, the scope is not necessarily complete. Québec's Court of Appeal in 3223701 Canada inc. v. Darkallah, 2018 QCCA 937 distinguished between statutory arbitration and court litigation for disputes stemming from the construction and sale of new residential homes in Québec. The Court agreed with the trial decision in Darkallah v. 3223701 Canada inc., 2016 QCCS 3245 which declared that arbitration of issues covered by Québec's Regulation respecting the guarantee plan for new residential buildings, CQLR c B-1.1, r 8 ("Regulation") does not oust the courts' jurisdiction for other issues such as disputes over the contract of sale and the legal guarantee for latent defects.[136] The Court agreed that the arbitration and litigation are independent recourses providing

[136] See Gagnon v. Développement Hamavi inc., 2017 QCCQ 5269 which also determined that the arbitration procedure set out in legislation for new residential constructions concerned rights granted in supplement to the Civil Code of Québec, CQLR c CCQ-1991. The Court of Québec refused to dismiss litigation between parties who had already undertaken arbitration of some of their differences and sent the parties on to trial so that a trial judge could determine the overlap, if any, between the prior arbitration award and the court litigation.

different remedies and can be pursued either in isolation or in tandem, at the option of the home owner.[137]

Section 19 of the Regulation which specifies that arbitration is for a dispute regarding the guarantee. It reads, in part, that the "*beneficiary or contractor who is dissatisfied with a decision of the manager shall, in order for the guarantee to apply, submit the dispute to arbitration within 30 days following receipt by registered mail of the manager's decision*". In first instance, the judge determined that the procedure was limited to exercising rights under the guarantee and did not free the Contractor from the legal guarantee for latent defects set out in the C.C.Q. The trial judge held that she had jurisdiction to order the cancellation of the sale if warranted. The Regulation covered repairs and certain categories of expenses and not damages for breach of the legal guarantee.

On appeal, the Court followed its own earlier analysis in Consortium MR Canada ltée v. Montréal (Office municipal d'habitation de), 2013 QCCA 1211 at paras 17 and following which determined that an arbitration under the Regulation had a '*distinct vocation*' separate from court litigation.

The Court considered that the Superior Court litigation had a completely different purpose than Regulation arbitration contesting a manager's decision. The Superior Court action concerned the contract of sale and the claims for latent defects set out in Québec's C.C.Q. whereas the complaint filed to the manager was based on the guarantee plan provided by the Regulation. The complaint concerned defective work existing at the time of sale but non-apparent and discovered in the year following the sale with a reference to articles 2113-2120 C.C.Q.

Julien et Assurances Jones inc., 2018 QCCS 35 recognized that the parties" arbitration was limited to the narrow issue of indemnification and, as such, was a precondition to litigation before the courts. Referring the parties to arbitration imposed a two-step process involving first arbitration over quantum and then court litigation over the entitlement to that indemnification. The two-step process was implicit in their arbitration agreement which he enforced.

**Agreement to exclude the courts**

As noted above, parties bound to a valid agreement to arbitrate must go to arbitration. If a party files an action in court, the parties to the agreement to arbitrate can apply for referral to arbitration. The delay for such making the application is not strict. [138]

Courts in Quebec limit their intervention to those set out in the C.C.P, refraining from taking a judicial review approach. Khalilian v. Murphy, 2020 QCCS 831 resisted the parties' joint submission that her intervention on a challenge to an arbitrator's award on jurisdiction was a judicial review subject to administrative law standards of review. Instead, referring to Québec's C.C.P., leading doctrine and case

[137] The approach is not limited to Québec. See Eyelet Investment Corp. v. Li Song, 2018 ONSC 3980 and Grandfield Homes (Kenton) Ltd. v. Chen, 2020 ONSC 5230 regarding the Ontario equivalent legislated by the Ontario New Home Warranties Plan Act, RSO 1990, c O.31.

[138] 9107-7719 Québec Inc. v. Constructions Hub Inc., 2020 QCCQ 1706readily extended defendant's delay to apply for referral to arbitration, determining that the delay to do so was not a strict one and extending it was justified by explanations given by defendant's attorney, including attempts to settle, an intervening holiday break and being unaware the contract contained an agreement to arbitrate. See also Mr. Justice Pierre J. Dalphond in Luc Chamberland, Jean-François Roberge, Sébastien Rochette, et al., Le grand collectif: Code de procédure civile: commentaires et annotations, volume 2, Cowansville, Éditions Yvon Blais, 2015, at p. 2466.

law in Québec, the court emphasized that an arbitrator in a contractual arbitration does not qualify as a tribunal subject to a court's control and supervision. A court can intervene on errors of law committed by the arbitrator when deciding jurisdiction because an arbitrator cannot attribute jurisdiction by incorrectly evaluating the facts and the law.

In Gestion PMOD Inc. v. 9e Bit (2015) Inc., 2019 QCCS 1154 ("Gestion PMOD Inc. v. 9e Bit"), the court referred to 9101-0983 Québec Inc. v. 9051-4076 Québec Inc., 2012 QCCS 724 and Hachette Distribution Services (Canada) Inc. v. 2295822 Canada Inc., 2018 QCCS 1213 and reiterated the court's limited role when homologating awards and underlining that homologation was not judicial review.

When the arbitration results from legislation, different approaches have been taken. For statutory arbitration which may be optional, the courts have considered it to be consensual and have resisted judicial review approach.

As noted, in Québec, disputes over lawyers' fees can be submitted to conciliation and then to arbitration under Québec's Regulation respecting the conciliation and arbitration procedure for the accounts of advocates, CQLR c B-1, r 17 which is issued pursuant to the Act respecting the Barreau du Québec, CQLR c B-1. Demers v. Conseil d'arbitrage des comptes d'avocats du Barreau du Québec, 2017 QCCS 1084 ("Demers v. Conseil d'arbitrage") held that a consensual arbitration tribunal had the jurisdiction to consider the existence and effect, if any, of any alleged settlement in deciding its own jurisdiction. The court wrote that article 632 C.C.P. was not for judicial review but an independent action. Relying on the Québec Court of Appeal in Conseil d'arbitrage des comptes v. Marquis, the court reiterated that the arbitration provided in the Regulation was consensual and not statutory.

In contrast, for new home warranty arbitration, see Garantie de construction résidentielle (GCR) v. Ewart, 2019 QCCS 40 in which the court considered its role as judicial review. The litigation involved a motion by La Garantie de construction résidentielle ("GCR") for judicial review of an award issued against it under Québec's Regulation respecting the guarantee plan for new residential buildings, CQLR c B-1.1, r 8 ("Regulation") adopted under Québec's Building Act, CQLR c B-1.1.

In Gagnon v. Développement Hamavi inc., 2017 QCCQ 5269, the court's review of the case law disclosed that the buyer is not bound by the Regulation, only the builder. The court determined that the arbitration procedure set out in legislation for new residential constructions was mandatory for the builder and not by the buyer.

**Promised benefits of arbitration**

As noted above, arbitration promises many benefits and has certain limits. Those limits are either inherent to the nature of a consensual agreement or shared with superior courts which are excluded by legislation from rectifying IP/IT registers.

It has been said and sung that you cannot always get what you want, but if you try you get what you need.[139] IP/IT Counsel can meet their clients' needs and expectations by understanding what is available and by not being misdirected by labels and misunderstandings about what is and is not offered by a particular dispute resolution process.

[139] Thank you for visiting this footnote but you know who said and sung it.

Informed by the discussion above, the following sections narrow in on some of those promises to flag issues which IP/IT Counsel should consider in advising clients whether and how to engage in arbitration. Such advice must include how to best word valid agreements to arbitrate in order to meet expectations.

**(1) Neutral forum**

In investor-state arbitration, an IP/IT rights holder which qualifies as an "investor" can file a notice of intent to refer to arbitration under NAFTA's investor-state dispute resolution provisions. Alleging breach of certain provisions in Chapter 11,[140] the investor can claim damages for breaches of the NAFTA.

The wording in NAFTA discloses the intention to offer a neutral forum, independent of the defending state's own court system. Section B article 1115 entitled "*Purpose*" states that "*this Section establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties in accordance with the principle of international reciprocity and due process before an impartial tribunal*". Section B article 1121 entitled "*Conditions Precedent to Submission of a Claim to Arbitration*" requires that disputing investors consent to arbitration and waive their right to initiate/continue litigation in court or administrative tribunals relating to the breach other than non-monetary equitable relief.

Despite the list of benefits claimed for arbitration, investor-state arbitration does not purport to exchange a neutral forum for any of the other benefits promised by opting for arbitration such as cost savings, speed or informality. Rather, the parties expect a process nearing the formality and procedures offered by superior courts. The resulting interim decisions and final awards are public and third-party interventions are possible. IP/IT Counsel ought to know that their clients can initiate such arbitrations but not to expect to realise much of the other benefits claimed by arbitration.

Such arbitration is similar to Québec's approach, limiting post-award judicial intervention to those identified in the Model Law.[141]

**(2) Neutral or customized procedural rules/process**

Arbitration is often chosen for its flexibility of process. Parties can opt for either ad hoc or administered arbitration. The freedom of the former is offset by the internal consistency of the latter.

In deciding competing applications to homologate and to annul two arbitration awards and an interim safeguard order, Hachette Distribution Services (Canada) Inc. v. 2295822 Canada Inc., 2018 QCCS 1213 set out the standard of review applicable to alleged procedural defects committed during an arbitration and the extent to which an arbitration tribunal can issue orders having an injunctive effect. The analysis started with the Court of Appeal in Rhéaume v. Société d'investissements l'Excellence inc., 2010 QCCA 2269 ("Rhéaume v. Société d'investissements l'Excellence").

> *[52] In Quebec, as is the case elsewhere in Canada, there is a distinct jurisprudential trend affirming the existence of a residual discretion not to grant contestations of*

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[140] See article 1102, article 1103 and article 1105.

[141] Mexico v. Cargill, Incorporated, 2011 ONCA 622; Canada (Attorney General) v. Clayton, 2018 FC 436 (CanLII), [2018] 4 FCR 394; The United Mexican States v. Burr, 2020 ONSC 2376. August 18, 2020 Notice of Appeal filed August 24, 2020 by The United Mexican States.

*motions to homologate or to annul arbitral awards for what appears to be a procedural defect.*

Rhéaume v. Société d'investissements l'Excellence decision drew on Holding Tusculum, b.v. c. Louis Dreyfus, s.a.s. (SA Louis Dreyfus & Cie), 2008 QCCS 5904 in which the Superior Court refused to rely on inconsequential irregularities to annul the award. In doing so, the court relied on expert testimony on international commercial arbitration and recognized that judicial intervention was narrowly defined and that intervention was reserved for extreme cases in order to prevent flagrant denials of due process.

In Carpenter v. Soudure Plastique Québec inc., 2019 QCCS 321 ("Carpenter v. Soudure Plastique"), the court refused to annul an award merely because delays in the arbitration agreement had been exceeded or that the arbitrator had reserved jurisdiction on certain issues. The court held that the delays had not only been waived but were insufficient to undermine the award and that arbitrators had jurisdiction to reserve issues for later determination. The court further held that the delays were not *de rigueur* and that, for some time, even in the absence of agreement, such delays were not valid grounds for depriving an arbitrator of jurisdiction or for contesting homologation.[142]

Garantie de construction résidentielle (GCR) v. Ewart, 2019 QCCS 40 held that one party's omission to deal with all components of the other's claims did not deny the arbitrator jurisdiction to deal with all issues raised in the dispute.[143] Despite the label used by one party to characterize its claim, the court held that the arbitrator had correctly dealt with the true nature of the claims in the hearing administered by the Canadian Commercial Arbitration Centre.

Limitations do exist. The Court of Appeal in Garantie des bâtiments résidentiels neufs de l'APCHQ v. Desindes, 2004 CanLII 47872 (QC CA) confirmed an arbitrator's jurisdiction to order completion of the work despite a formal demand identifying the claim as one for reimbursement. The Court had determined that, despite the label applied to the claim, it was its nature that counted.

Despite the flexibility, some relief sought by the parties is beyond the parties' agreement to give to an arbitrator and involve the limits of an arbitrator's jurisdiction. In Rhéaume v. Société d'investissements l'Excellence, respondents argued that only a superior court could issue a safeguard order with a *Mareva* effect. In Service Bérubé ltée v. General Motors du Canada ltée, 2011 QCCA 567, the Court of Appeal recognized that an arbitrator could issue an order for specific performance and in Nearctic Nickel Mines Inc. v. Canadian Royalties Inc., 2012 QCCA 385 it held that an arbitration clause granting powers to an arbitrator must be interpreted in a broad manner and that an arbitrator can, if authorized by the parties, issue an order with an injunctive effect.

The court's review of the case law and doctrine lead it to conclude that an arbitrator can issue orders having an injunctive effect as a provisional or safeguard measure but doing so must be linked to the arbitrator's mandate which must be interpreted in a broad manner. The arbitrator's jurisdiction to issue provisional and safeguard measures is implicit in article 646 C.C.P. which mentions a court's discretion to refuse to homologate arbitration awards and such measures on the limited grounds listed in article 646

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[142] See Marquis v. Patel, 2014 QCCA 97 para. 4, Société en commandite Tafisa Canada v. 157498 Canada Inc., 2004 CanLII 8689 (QC CS) and Bissonnette v. Comité d'arbitrage des comptes des avocats du Barreau du Québec, 2009 QCCS 3198 referred to by the court.

[143] The litigation involved a motion for judicial review of an award issued against it under Québec's Regulation respecting the guarantee plan for new residential buildings, CQLR c B-1.1, r 8 adopted under Québec's Building Act, CQLR c B-1.1.

C.C.P. The court held that an arbitrator's minor violation of a rule of natural justice cannot result in a court's refusal to homologate the award and, as a corollary, a serious violation can result in the rejection of the whole or part of the award.

**(3) Neutral decision-maker (as opposed to impartial)**

In Leduc v. Ayoub, 2019 QCCS 457 ("Leduc v. Ayoub"), relying on the tests stated in Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 SCR 369, 1976 CanLII 2, C.U.P.E. v. Ontario (Minister of Labour), [2003] 1 SCR 539, 2003 SCC 29 and Oiknine v. Rosenberg-Solny, 2009 QCCS 5106, the court held that respondents failed to meet their heavy burden to prove a reasonable apprehension of bias and dismissed the challenge.

**(4) Decision-maker learned in the subject matter**

A much-favoured benefit of arbitration is the ability of parties to choose their decision maker. Parties get to choose their decision maker but they also have to pay for her.[144] Payment of their share of the arbitrator's fees, and the costs of any institution, may appear as an additional cost since litigants in court do not directly pay for the judges' and court officials' involvement. Payment of those fees and costs[145] can be offset by savings in omitted procedural steps, simplicity of procedure and more efficient hearings. Any steps taken may be further shortened by having the same decision maker be involved in each case management conference and motion.

A decision maker knowledgeable about a particular industry, contract type or legal issue may have added insights to offer to the parties when designing the timetable to prepare the dispute for hearing on the merits. Such insights may help eliminate work on unnecessary issues and focus time and effort on the issues material to the dispute and its resolution.

Familiarity with a subject matter provides comfort to the parties that their dispute will raise issues known to and valued by the decision maker. For example, decision making in insurance disputes.

The ability to identify what actually is in dispute assists in limiting documentary discovery and focusing in on a more precise dispute. Issues that might distract a novice in the area are given less weight due to the knowledge or experience that the issue is either not material or determinative.

Beware the decision maker with too much knowledge. An arbitrator sought after for her command of a subject may actually prove to be so knowledgeable that she effectively does need not to hear the parties as she 'knows the result', based on experience. This may or may not be true in particular

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[144] Proposition de 2295822 Canada Inc., 2018 QCCS 3862 treated the costs of arbitration the same as court costs and applied the case law issuing in different Canadian jurisdictions to exclude the costs of arbitration from qualifying as a claim provable under the Bankruptcy and Insolvency Act, RSC 1985, c B-3. Though the parties' agreement to arbitrate, entered into prior to the debtor filing a notice of intention, mentioned the recovery of the costs of the arbitration, the agreement did not quantify them or impose them without condition on the losing party. Rather, the agreement merely gave the arbitrator jurisdiction to award them should the court so decide and to do so in an amount subject to its determination.

[145] To identify the scope of those fees and costs to which clients can be exposed, IP/IT Counsel can consult the various definitions provided by institutions. For example, see articles 37 and 38 of CCAC's International Arbitration Rules, Rule 5.3.1 of ADRIC's Arbitration Rules and articles 34 and 35 of ICDR Canada's Canadian Dispute Resolution Procedures. These are subject to variations made by the parties in their own agreements to arbitrate.

circumstances[146] but violates the expectation that the arbitrator will decide on facts and arguments made to her and not on elements not submitted to the parties to be tested. The sequence is important. The error involves the decision maker importing new material into the decision and not that the merits of the decision itself is wrong because of the material imported.[147]

A less common but possible variation is the arbitrator who, with extra initiative, undertakes her own line of argument or fact collection. A breach of natural justice can occur if the arbitrator introduces a legal theory not advanced or argued by the parties.[148] The issue is not that the arbitrator is wrong. Rather, if a theory is important enough to be decisive, it ought to have been presented to the parties during the hearing and not for the first time in the award.[149] In many instances, the court does not even analyse the merits of the new theory introduced by the arbitrator. The court's analysis typically ends when the court determines that the theory is new and does not examine the alternative scenarios.

When deciding if the new theory breach rules of natural justice, the court seeks to determine if the documentary evidence and testimony and emphasis in argument, might have been different[150] but is not expected to then second-guess outcomes.[151] In A-C-H International Inc. v. Royal Bank of Canada, 2005 CanLII 17769 (ON CA) ("A-C-H International v. Royal Bank"), the Ontario Court of Appeal identified its inability to determine what "*might*" have changed had the judge not "*appears on his own initiative to have shifted the ground for liability to a new theory, not pleaded or argued at trial*". The Court noted that the trial judge had dismissed a claim based on conspiracy and "on his own initiative *on his own initiative to have shifted the ground for liability to a new theory, not pleaded or argued at trial, namely, conversion supported by a decision to pierce the corporate veil.*"[152]

The Court of Appeal relied on its earlier observations in Rodaro v. Royal Bank of Canada, 2002 CanLII 41834 (ON CA) ("Rodaro v. Royal Bank") wherein it questioned not only the fairness of introducing a new theory but questioned its reliability because it had not been tested in the adversarial process.

> *[62] In addition to fairness concerns which standing alone would warrant appellate intervention, the introduction of a new theory of liability in the reasons for judgment also raises concerns about the reliability of that theory. We rely on the adversarial process to get at the truth. That process assumes that the truth best emerges after a full and vigorous competition amongst the various opposing parties. A theory of liability that emerges for the first time in the reasons for judgment is never tested in the crucible of*

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[146] In Graham Design Builders LP v. Black & McDonald Limited, 2019 SKQB 161, the court denied leave to appeal on a question of law because the arbitrator's repeat mention of "*in my experience*" did not qualify as taking notice of a practice in the relevant market. Rather, the remarks were "*mere passing comments*" which did not affect the award based on the factual matrix in evidence and relevant contractual provisions.
[147] Contract Policy Committee v. FortisAlberta Inc., 2012 ABQB 653.
[148] Rodaro v. Royal Bank of Canada, 2002 CanLII 41834 (ON CA); Tall Ships Landing Devt. Inc. v. City of Brockville, 2019 ONSC 6597 paras 47-50; Tsp-Intl Ltd. v. Mills, 2006 CanLII 22468 (ON CA) paras 34-35; Long v. Van Burgsteden, 2014 SKCA 115 paras 20-21; Malton v. Attia, 2016 ABCA 130 paras 52-54; Moore v. Sweet, 2017 ONCA 182 paras 30 and 39.
[149] Papiers de publication Kruger inc. v. Syndicat canadien des communications, de l'énergie et du papier (SCEP), sections locales 136, 234 et 265, 2016 QCCA 1821 paras 43-45.
[150] Hawkeye Power Corporation v. Sigma Engineering Ltd., 2012 BCCA 414 paras 54-57.
[151] Lahnalampi v. Canada (Attorney General), 2014 FC 1136 paras 38, 50-51, citing Cardinal v Director of Kent Institution, 1985 CanLII 23 (SCC), [1985] 2 SCR 643 at p. 661.
[152] A-C-H International Inc. v. Royal Bank of Canada, 2005 CanLII 17769 (ON CA) para. 15.

*the adversarial process. We simply do not know how [the trial judge's] lost opportunity theory would have held up had it been subject to the rigours of the adversarial process. We do know, however, that all arguments that were in fact advanced by Mr. Rodaro and were therefore subject to the adversarial process were found wanting by [the trial judge].*

*[63] [The trial judge] erred in finding liability on a theory never pleaded and with respect to which battle was never joined at trial. This error alone requires reversal.*

Addressing its own case, the Court of Appeal in A-C-H International v. Royal Bank could only guess at how the judge's new theory "*would have fared, had it been exposed to the rigours of the adversarial process*".[153]

*[17] Had Mr. Courtney and his counsel known that they were required to meet a case based on the tort of conversion and the court's equitable jurisdiction to pierce the corporate veil, they might well have conducted their preparations for the case, and their handling of the case at trial, differently. They might have conducted the cross-examination of RBC's witnesses on a broader basis. They might have decided to call a defence, generally. In particular, they might well have decided to call Mr. Courtney in his own defence (perhaps to provide the explanation that the trial judge felt was necessary in the context of the conversion claim, but that was apparently not necessary in the context of the conspiracy claim).*

*[18] Because the appellant and his counsel did not know they were facing a case about conversion and personal liability based on corporate veil principles, they were not in an informed position to make the foregoing decisions. As a result, we do not know how these theories of liability would have survived, had the battle been joined, as Doherty J.A. said in Rodaro.* (emphasis added)

IP/IT Counsel advising parties disputing IP/IT rights should note that, when following the principle stated in Rodaro v. Royal Bank, the courts do state their disagreement with the result. Rather, the courts assert their objection to the process. The courts do not try to avoid quashing an award if they agree with the result. Instead, they set aside the award because they simply do not know whether the result would have been the same. If the conclusion is central but is not anchored in the pleadings, evidence, positions or submissions of the parties, introducing it is unfair.[154]

IP/IT Counsel should not expect to salvage the award on appeal by convincing the court of the soundness of the new theory. In ENMAX Energy Corporation v. TransAlta Generation Partnership, 2019 ABQB 486,[155] the court cautioned against asking courts to speculate.

*[91] It is not necessary for the alleged manifestly unfair or unequal treatment to have had a foreseeable impact on the outcome of the arbitral panel's award. Sections 6, 19, & 45(1)(f) of the Arbitration Act guarantee that the parties to an arbitration will be entitled to a certain standard of procedural fairness. They make no reference to the effect of*

[153] A-C-H International Inc. v. Royal Bank of Canada, 2005 CanLII 17769 (ON CA) para. 17.
[154] Labatt Brewing Company Limited v. NHL Enterprises Canada, L.P., 2011 ONCA 511 para. 5.
[155] Leave to appeal granted ENMAX Energy Corporation v. TransAlta Generation Partnership, 2020 ABCA 68.

> *unfair or unequal treatment on the outcome of the arbitration. Parties' entitlements to procedural fairness do not depend on speculation as to what the panel's decision on the merits would have been had natural justice not been denied them: Syndicat des employés professionels de l'Université du Quebéc à Trois-Rivières v l'Université du Quebéc à Trois-Rivières; Alain Larocque et al, 1993 CanLII 162 (SCC), [1993] 1 SCR 471("Syndicat") at para 52.* (emphasis added)

Not all newly-introduced theories prove fatal. A court may decide that the record is complete enough to decide the issue *de novo* on the record.[156] Only where the evidentiary record is complete can the award withstand scrutiny.[157] The court may also refuse to set aside the award if the objecting party cannot point to what it would have done differently had it known the theory to be adopted[158] or if the record left it open to the arbitrator to adopt another interpretation.[159]

Despite the opportunity to choose the decision maker, parties should not expect to have a veto. Relying on its inherent powers and without reference to the provisions applicable to arbitration, the court in 9338-3941 Québec inc. v. 9356-2379 Québec inc., 2019 QCCS 4226 ordered the parties (i) to appoint an arbitrator from a list of five (5) sent earlier by plaintiff rather than appoint one itself and (ii) to complete their arbitration by year's end.

Disputes over choice of the arbitrator arise often in the case law. In Gestion PMOD Inc. v. 9e Bit, the court demonstrated its efforts to assist arbitration parties advance with their chosen form of dispute resolution. The court not only clarified the nature of each parties' position to their dispute before granting plaintiff's motion to appoint an arbitrator but placed a pair of telephone calls during the court hearing to a pair of candidates of the court's own choosing and, confirming the second candidate's acceptance and rate, appointed him as arbitrator.

**(5) Faster decisions**

In principle, resolution by arbitration should be faster than resolution by the courts. The rules are less formal and tailored for the dispute. An arbitrator, in accepting the mandate, confirms not only her interest and lack of conflicts but her availability. Being available can be urgent if the parties' agreement to arbitrate, institutional rules and/or nature of activity imposes short tail timelines.

Like a Master who case manages a court action, an arbitrator soon becomes familiar with the issues and, carrying them forward with her to each new case management conference or motion, shortens the duration of each and, arguably, makes 'better' decisions informed by experience in the file.

Certain approaches popular in arbitration can shorten the overall timeline. Such approaches include elimination of discoveries or requiring authorization to conduct them on terms limiting their number, duration and scope. Such measures reduce timelines without compromising either party's prosecution or defense of its case. Availability of the arbitrator to hear objections during discoveries and reduced documentary discovery shorten the pre-hearing phase and the use of 'will say' or sworn statements as

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[156] Mercury XII (Ship) v. MLT-3 (Belle Copper No. 3), 2013 FCA 96 paras 21-22.
[157] Long v. Van Burgsteden, 2014 SKCA 115 para. 21.
[158] Oakdale Village Homes Inc., 2013 ONSC 1051 paras 33-36.
[159] The Society of Energy v. Ontario Power Generation, 2015 ONSC 167 para. 18; Oakdale Village Homes Inc., 2013 ONSC 1051 para. 36.

evidence-in-chief further shortens the length of the merits hearings. A shorter merits hearing is easier to schedule than a longer one and, in and of itself, allows the parties to reach the hearing date earlier than the courts.

Another benefit of arbitration is the ability, from the earliest case management conference, to set a hearing date and then work towards it. Court litigants are required to do the reverse. Litigants can only ask for a court date once they declare they have completed the steps available (and, in most court rules, the steps are many and more than in arbitration). Once that date of readiness arrives, the only service left to litigants is to ask for a date and wait.

Even for arbitration enthusiasts, some speed is too fast. Final offer arbitration ("FOA"), sometimes called baseball arbitration, has been styled as "*an intentionally high risk form of arbitration*" if only to indicate its decisive results. FOA is provided for in Canada under the Federal Canada Transportation Act, SC 1996, c 10 at section 161 et seq.

> *Final offer arbitration has been described as "an intentionally high risk form of arbitration" that encourages settlement and tempers final positions. The arbitration resolves isolated disputes over rates to be charged by a carrier for a period of one year when the parties are unable to agree. The arbitrator's task is to select the more reasonable of the two offers submitted. As is indicated in paragraph 165(6)(a) of the Act, the arbitrator's decision is intended to bring finality to the dispute. The limited duration of the decision's binding effect on the parties is closely linked to the limited timeframe within which the arbitration process occurs.*[160] (emphasis added)

Even the courts readily acknowledge some of the benefits inherent in arbitration. In Équipements de gardien de but Michel Lefebvre inc. v. Sport Maska inc., 2020 QCCS 44, the court dismissed an application for a provisional injunction but, in doing so, prompted the parties to seize the opportunity, already consented to in their contract, to undertake mediation and arbitration 't*o avoid bogging themselves down in complex and costly judicial procedures*'. The court also urged the parties to engage in less formal exchanges of information which may allow them to find a faster solution to their dispute.

The courts, however, rightly resist accepting general statements, unsupported by evidence, that proceeding in court is *per se* an irreparable harm. In Clyde Bergemann Canada Ltd. v. Lorneville Mechanical Contractors Ltd., 2018 NSCA 14, Nova Scotia's Court of Appeal disagreed with a determination made in first instance regarding a stay of court proceeding based on the alleged efficiencies of arbitration. The party seeking a stay had argued that it would suffer irreparable harm if it had to litigate because the court process had substantial documentary disclosure and the litigation would be lengthy. The Court held that it cannot be assumed that a civil litigant will suffer irreparable harm if it is required to litigate in the courts rather than arbitrate.[161]

**(6) Privacy**

Privity of contract corresponds to privacy of arbitration. The consensual nature of arbitration as an agreement between parties results in private hearings being held in closed-door boardrooms to the

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[160] Canadian National Railway Company v. Gibraltar Mines Ltd., 2019 FC 1650 para. 35, cited by Canadian National Railway Company v. Gibraltar Mines Ltd, 2019 FC 1650 para. 35.
[161] Clyde Bergemann Canada Ltd. v. Lorneville Mechanical Contractors Ltd., 2018 NSCA 14 paras 52-53.

exclusion of third parties to the contract. IP/IT Counsel need to distinguish between privacy and confidentiality. A boardroom may be private, but not necessarily confidential. Privacy may exclude others from accessing the boardroom, but confidentiality prevents those in the boardroom from sharing information once they leave it.

In a similar manner, privacy, like privity of contract, limits who is entitled or bound to participate in the arbitration. Only those bound by the agreement to arbitrate can enforce it. Privacy thus also has procedural impacts if and when the parties to the agreement to arbitrate find themselves in court involved in a dispute with third parties. Parties to an agreement to arbitrate are bound to respect the agreement as between themselves and cannot impose it on others.

Svensson v. Groupe Ovo illustrates how the agreement to arbitrate prevented a party to it from applying for certain procedural measures otherwise available in court. The court refused a defendant's motion to implead its contracting party as a third party as defendant-in-warranty. The court held that defendant's agreement to arbitrate with that other party had priority over the court's rules of procedure at least between the parties to the agreement. The court's rules allow defendants to join their proposed action-in-warranty to an existing litigation but are suppletive. The court's rules give no jurisdiction to the court to override the primacy of an agreement to arbitrate.

Metso Minerals Canada Inc. v. BBA inc. 2017 QCCA 1544 ("Metso Minerals v. BBA") demonstrates that parties to agreements to arbitrate must bear any inconveniences occasioned by respecting their agreements. The Court of Appeal resolved irreconcilable procedural demands created when only some of the litigants had agreed to submit to arbitration. The judge in first instance in ArcelorMittal Exploitation minière Canada v. SNC-Lavalin inc. 2017 QCCS 574 had considered the inconvenience Metso would experience having to litigate substantially the same facts in court and in arbitration. The court weighed it against the inconvenience to BBA not having Metso present in the principal litigation and having a separate, later litigation before a different judge.

The court in first instance noted that the choice to bind itself to arbitration was Metso's and it could have anticipated this result. The clause had effect only between the parties to it and could not apply to BBA. The court also dismissed Metso's reliance on GreCon Dimter inc. v. J.R. Norman Inc.,[2005] 2 SCR 401, 2005 SCC 46 holding that situation was different because it involved two parties to the same contract. Alert to the risk of contradictory decisions in either scenario, the court still opted to oblige Metso to incur the inconvenience because it had bargained for that very possibility.

On appeal, the Court agreed that BBA was not a party to the arbitration clause and had not accepted being bound by it. The parties could have agreed to impose arbitration on others in the delivery of the project but chose not to do so. Metso would have to bear the inconveniences of its decision to arbitrate and accept the consequences of litigating over similar facts in separate venues.

If sophisticated parties in complex projects wish to consolidate their disputes either in court or in arbitration, the choice is theirs to negotiate beforehand — not the court's to invent afterwards.

**(7) Confidentiality**

Despite mention as a key benefit in arbitration, confidentiality is one of the benefits lost at the beginning and at the end of arbitration. Parties breach it when obliged go to court for an order to appoint an arbitrator. That breach can also occur at the last moment when the parties apply post-award

to the court to challenge an award or to homologate it. Court orders can name arbitrators if a party resists doing so or stay litigation if one of the parties disregards the agreement to arbitrate. In such cases, the existence and nature of the dispute is revealed, in whole or in sufficient part, in the court record.

One way to avoid an early first breach of confidentiality is to adopt rules of an institution. In the event of disagreement over nominations or lack of one party's involvement, the institution's rules often anticipate a private, confidential appointment process by the institution.

At the other end of the timeline, parties can limit post-award challenges by parties dissatisfied with the result. In Québec, such attempts are limited to grounds of jurisdiction or errors in the conduct of the arbitration which may have breached rules of fairness and equal treatment. The lack of other grounds serves to discourage unnecessary challenges on the merits.

For those jurisdictions offering domestic or international commercial arbitration streams, parties may have the right under the domestic legislation to appeal the award on questions of fact, questions of mixed fact and law and/or questions of law. Even if the agreement to arbitrate is silent on the nature of the challenge, that silence can be interpreted as permitting a challenge at least on a question of law provided the court is satisfied that the questions warrants leave to appeal. In those cases, post-award litigation occurs and often involves the parties disputing whether the question raised qualifies as one authorized by either the parties' agreement or the legislation. In those cases, the parties oblige the court to issue reasons which effectively expose the essential elements of their disputes in the public record. Parties can eliminate these unfortunate breaches of confidentiality by expressly excluding any post-award challenges involving the merits.

IP/IT Counsel should note that, when negotiating contracts, trading one party's substantive law for the other's *lex arbitri* may appear like a balanced give-and-take. In doing so, parties may inadvertently point their disputes to the courts.

If parties genuinely need the thoroughness of a larger panel or a post-award re-think, similar to an appeal, the parties have options. They can opt at the outset for a full three (3) member panel to decide the dispute or adopt the rules of one of the institutions which provide for appeals internal to the institution and ostensibly remain private and confidential.[162]

If a court application is necessary or inevitable, recent decisions offer solutions to limit the court's impact on confidentiality. In homologating an award issuing from a consensual, administered arbitration, 79411 USA Inc. v. Mondofix Inc., 2020 QCCS 1104 ordered that the award be kept confidential because (i) doing so encourages the use of arbitration as a dispute resolution mechanism and (ii) the public interest favors confidentiality orders to promote arbitrations and protect the expectations of the parties to the arbitration. The court also held that the burden rests on the party seeking the disclosure of otherwise confidential information to demonstrate that the positive effects of disclosure outweigh the negative effects of infringing on the confidentiality expectations of parties to an arbitration. Its approach emphasizes the public interest in arbitration and does not rely merely on the

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[162] SMART Technologies ULC v Electroboard Solutions Pty Ltd, 2017 ABQB 559 para. 7. An appeal to a three (3) member arbitration panel, internal to the administering institution, provides confidentiality for a second consideration. The appeal does not and did not prevent parties from challenging the resulting appeal award before the courts and, in doing so, explore the dispute and competing positions in reasons posted online. See also Liberty Reinsurance Canada v. Qbe Insurance And Reinsurance (Europe) Ltd., 2002 CanLII 6636 (ON SC).

private interests particular to the parties. In its own dispositive, the court issued an order which recognized the award and declared that it had the same force and effect of a judgment of the court.

In SNC-Lavalin Inc. v. ArcelorMittal Exploitation minière Canada, 2018 QCCS 3024 ("SNC-Lavalin Inc. v. ArcelorMittal") the court maintained the confidentiality of materials prepared for use in an arbitration limited to two parties and prevented communication of those materials to other parties involved in litigation involving related, overlapping disputes. By maintaining the arbitration parties' objections based on the confidentiality of arbitration as established by legislation and the arbitration parties' agreement, the court held that third parties seeking access to those materials must demonstrate necessity and not merely relevance and convenience of obtaining access. The legislated protection applied only to what is "*said, written or done during*" arbitration and did not shield access to relevant, admissible documents which existed independent of the arbitration.[163]

In the arbitration, the parties had agreed that the applicable law would be Québec's, that the arbitration proceeding would be subject to the International Chamber of Commerce's Arbitration Rules, 2012,[164] and agreed expressly that their arbitration would be confidential. The arbitration tribunal issued an order to that effect.

The court agreed there was a distinction between a document's confidentiality and its privileged nature. The court referred to Tate & Lyle North American Sugars v. Somavrac Inc., 2005 QCCA 458 which held that confidentiality in and of itself did not shelter a relevant document from communication in a civil matter.[165] The court relied on Ontario's Adesa Corp. v. Bob Dickenson Auction Services Ltd., 2004 CanLII 45491 which drew the same distinction.[166]

> *[56] I am satisfied that there was an expectation of confidentiality in the Arbitration. The arbitration relationship generally benefits greatly from the element of confidentiality. The confidentiality of arbitration proceedings should be fostered to maintain the integrity of the arbitration process. I do not regard confidentiality as essential to the arbitration process. In my view, "sedulously" is perhaps a somewhat strong adverb for these circumstances. In balancing the interests served by confidentiality against the interests served in determining the truth and disposing correctly of the litigation, I do not think the confidentiality of arbitration proceedings should be elevated to the status of a privilege such as solicitor-client or spousal privilege or, on occasion, doctor-patient or spiritual adviser-penitent. I am not persuaded that the confidentiality of the arbitration process, including the need to encourage the truth of the evidence therein, is so important as to outweigh the need in this court for justice if that requires the disclosure.*

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[163] In White Rock (City) (Re), 2020 BCIPC 25, an adjudicator with the B.C. Information and Privacy Commissioner held that common law settlement privilege applied to access to information requests, despite omission to include express mention of that privilege as a ground to resist disclosure, and that the privilege applied to arbitration.
[164] Those rules have since been updated, effective March 1, 2017.
[165] The Court of Appeal noted Hassneh Insurance co of Israel v. Mew, [1993] 2 Lloyd's Rep. 243, p. 250 which affirmed that, in English law, there was no principle which protected documents from discovery by reason of confidentiality alone. The Court also noted Auction Finance Group Ltd. v. Bob Dickenson Auction Service Ltd. [2000] O.J. No. 3384 (Ont. C.S.) which held that relevance is insufficient to override confidentiality and must be necessary.
[166] See the contemporaneous handling of Adesa Corp. v. Bob Dickenson Auction Services Ltd., 2004 CanLII 45491in ABCO One Corporation v. Pomerleau Inc., 2018 ONSC 4480.

> *The principle to be protected by such a privilege does not go to the heart of our adversarial system of justice or to Canadian Charter of Rights and Freedoms or other societal values. The recognized privileges are based on the need for frank disclosure of potentially prejudicial information for the purpose of obtaining proper advice or the need to preserve a socially important relationship. Even these privileges are limited in scope and subject to exception where the party entitled to the privilege puts the advice or the contents of the disclosure in issue or where other paramount considerations based on justice prevail.*[167] (emphasis added)

The court referred also to Québec's Minister of Justice's comments regarding article 4 C.C.P. which mention that confidentiality is an essential element of the arbitration process. Any exceptions to confidentiality have to be limited because preserving confidentiality was 'primordial'.

Parties to an arbitration have a legitimate expectation that the process be confidential and can exercise their autonomy to exclude or reduce judicial intervention before and during their arbitration.[168] The Court agreed that breaching confidentiality required more than just convenience or an economy of time and expense.[169]

Cineplex Entertainment v. Compagnie France Film agreed to follow the parties' joint application and ordered a sealing order to the exhibits and a specific affidavit containing sensitive information as well as the contents of the parties' current negotiations. In issuing its sealing order, the court acknowledged Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 SCR 522, 2002 SCC 41 but held that it complied with its guidance while enabling the litigants to maintain the confidentiality of the arbitration process as much as possible.

**(8) One step resolution**

Aside from seeking court assistance to enable arbitration and to recognize and enforce awards, arbitration strives to deliver one step, one stop dispute resolution. The courts do not tolerate unwarranted challenges or non-compliance with the awards, especially after the award has been homologated.

In SDC Habitations Saint-Maurice phase III v. Raymond Chabot Administrateur, 2019 QCCS 636, the court summarily dispensed with a party's persistent refusal to abide by an award which had been recognized and enforced as a judgment of the Québec Superior Court. The application to the court prompted a seldom needed level of court intervention in support of arbitration. The court's brief reasons reflect that respect for a resolution of disputes is rooted in a respect for the rule of law.

The parties had undertaken arbitration which produced a March 2017 award which was later homologated in June 2018 by the Superior Court. Despite homologation, defendant had not complied and plaintiff applied for an order enjoining compliance.

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[167] Adesa Corp. v. Bob Dickenson Auction Services Ltd., 2004 CanLII 45491 para. 56.

[168] The court referred to an excerpt of then-Prof. Frédéric Bachand's text L'intervention du juge canadien avant et durant un arbitrage commercial international, (Cowansville, Éditions Yvon Blais, 2005), no 485, pp. 335-36. Telesat v. Boeing, 2010 ONSC 22.

[169] Brian J. Casey, Arbitration Law of Canada: Practice and Procedure, 2$^{nd}$ ed., New York, JurisNet LLC, 2011, p. 223.

The court did not have to cite case law, balance competing doctrinal analyses of applicable standards of review, or reconcile gaps left by the intersection of arbitration practice and court orders. After having set the table, the court referred directly to article 657 C.C.P. which pointed to the courts' authority to "*facilitate execution*" of court judgments.

> [informal translation] *[10] Le court observes that defendant is not in agreement with the March 22, 2017 arbitral decision. That decision has been homologated by the Superior Court June 28, 2018 and now has executory force.*
>
> [informal translation] *[11] Is it necessary to point out that Canada is a state of law? That implies the obligation to respect the laws, the regulations and the judgments which flow from them whether one is in agreement with them or not. It is at the homologation of the decision that defendant and the third-party impleaded could have made their arguments to prevent the arbitral decision from becoming executory.*
>
> [informal translation] *[12] The facts giving rise to this decision go back to 2014, being about five years. It is time that this saga ends. There is now* res judicata*. The court will thus grant the request.* (emphasis added)

Applying Québec's C.C.P., the court in Leduc v. Ayoub declared that respondents' challenges to a final arbitration award were manifestly unfounded and abusive, exposing respondents to damages. The court determined that respondents' challenges amounted to an indirect appeal of the award and would require the court to exceed the limited role given to it when recognizing and enforcing awards.

**(9) Cost savings**

In court, litigants do not pay directly for the decision maker. Funded through the state, the decision maker serves independent of the parties' ability to pay her to hear their case. The downside can be that the parties may be assigned, for free, a decision maker without the expertise, interest, inclination or ready availability necessary to engage meaningfully in resolving the dispute in a timely manner.

Efficiency is not bought at the expense of procedural fairness. In the Matter of the International Commercial Arbitration Act, R.S.A. 2000, C. I-5, 2005 ABQB 509 adopts a broad statement of what procedural "*fairness*" involves and its tension with adjudicative efficiency. Dealing with documentary discovery, the court commented about the "*inherent conflict between procedural fairness and adjudicative efficiency*" and endorsed doctrine's broad statement about "*attributes*" and "*aims*".

> *Fairness is at once an attribute and an aim of our common law judicial system. In this context I use fairness in its broadest sense. It includes the rules and procedures built up over centuries which govern the way in which cases are to be conducted.*[170]

**(10) Enforcement benefits**

The enforcement benefits of a commercial arbitration are well known. Applying for recognition and enforcement of an award under the New York Convention is one of the oft-cited benefits of an award

[170] In the Matter of the International Commercial Arbitration Act, R.S.A. 2000, C. I-5, 2005 ABQB 509 para. 18, citing "Considerations of Fairness in the Context of International Commercial Arbitrations" (1996), 34 Alta. L.Rev. 509, E.D.D. Tavender, Q.C.

and contrasted with more bespoke, irregular approaches taken to recognizing and enforcing court judgements issued abroad.

In Québec, homologation is limited to the award's actual dispositive and not an opportunity to upgrade or refine terms.[171] That said, if parties agree to be bound by a final resolution of their dispute, the award's dispositive determining that resolution must be clear. In Carpenter v. Soudure Plastique, the court referred to Québec (Régie de l'assurance maladie) v. Fédération des médecins spécialistes du Québec, 1987 CanLII 901 (QC CA) which refused to homologate an award because, in that case, the award omitted to state exactly what had to be done. This approach had been applied in the past.[172]

The court viewed the issue in the context of homologating the award and making it an order of the court. Doing so raised a conflict between what had been clear in the arbitration and what might be unclear if the court homologated an award. In homologating the award, a court has to consider if the dispositive would also meet the court's own criteria. Though aware that Defendant knew the scope of the payment obligations, the court was bound by the provisions of its own rules, namely article 328 C.C.P., which required that judgments must be capable of being executed. In the circumstances, the court chose to homologate the award but only in part, convinced by defendant's arguments that certain payment orders were not capable of being executed, despite evidence of defendant's understanding of them.

In Gestion PMOD Inc. v. 9e Bit, the court homologated an award despite one of the dispositive orders omitting mention of the exact amounts due by respondent. Contrary to the opposite result in Carpenter v. Soudure Plastique in which the court refused to homologate an order which did not liquidate damages. The court held that the award was capable of being executed. The award referred to an exhibit listing the amounts due as well as respondent's admission that they were due.

Awards enjoy the longer, ten (10) year prescription for enforcement, thereby putting awards on equal footing with court judgments. The Court of Appeal in Barreau du Québec v. Greenbaum, 2002 CanLII 41232 (QC CA) ("Barreau du Québec v. Greenbaum") determined that homologation of a disciplinary body's decision was subject to ten (10) year prescription. The Court considered such applications to be the exercise or execution of a right already recognized by a judgment, similar to article 2924 C.C.Q., and not to enforce a personal right as under article 2925 C.C.Q. The Court considered that the right had already been determined by a judicial authority even though the disciplinary body was not formal court.

Société générale de Banque au Liban SAL v. Itani, 2019 QCCS 5266 held that the ten (10) year prescription period applied to recognize and enforce an arbitration award made outside of Québec. Notwithstanding comments to the contrary in Yugraneft Corp. v. Rexx Management Corp., 2010 SCC 19 (CanLII), [2010] 1 SCR 649 ("Yugraneft Corp. v. Rexx Management"), the court reasoned

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[171] In BMLEX Avocats inc. v. Sahabdool, 2019 QCCQ 3552, the court greed to homologate (recognize and enforce) an arbitration award but declined to modify the terms of the interest owing on the amount because the arbitration award did not mention it.

[172] Coopérative des techniciens ambulanciers de l'Outaouais v. Régie régionale de la santé et des services sociaux de l'Outaouais, 2002 CanLII 63143 (QC CS); Association des abattoirs avicoles du Québec inc. v. Québec (Régie des marchés agricoles et alimentaires), 2000 CanLII 19214 (QC CS), para. 13; Grunbaum v. Grunbaum, 2002 CanLII 27914 (QC CS), para. 14; and, Coop services et recherches santé 3ième millénaire (S3M) inc. v. Confection médicale D.R. inc., 2005 CanLII 45380 (QC CS), para. 13.

that, to be coherent based on its leading cases originating from Québec, C.C.Q. provisions should be read to treat an arbitration award as a "*judgment*", thereby qualifying it for longer prescription period.

Mouhadi v. Fiducie famille Eusanio, 2017 QCCS 3570 demonstrated the economy inherent in Québec's approach to the court's post-award intervention by briskly considering and dismissing four challenges to a final arbitration award. Unlike other Canadian provinces and territories, Québec arbitration law makes no distinction between international and domestic arbitration, applying a single standard familiar to international commercial arbitration practitioners. Defendants failed to meet their burden of establishing any one of the few grounds available to resist homologation. Relying on the Court of Appeal's recent iteration of the burden of proof in Endoceutics inc. v. Philippon, 2015 QCCA 1346, the court noted that the burden of establishing that one or more grounds in article 646 C.C.Q. have been met rests on the party invoking its provisions.

9143-0439 Québec inc. v. OAM Aluminium distributeur inc., 2017 QCCQ 1364 dismissed defendant's attempts to characterize its challenges as valid grounds involving non-observance of applicable arbitration procedure or matters beyond the scope of the arbitration agreement. The court determined that the homologation stage was not an appeal of the award or an opportunity to challenge the merits.

Even awards which have been complied with can still merit recognition. In Metso Minerals Canada Inc. v. Arcelormittal exploitation minière Canada, 2020 QCCS 1103, the court issued an order recognizing an international commercial arbitration award despite prior compliance with the payment obligations in the award. The court underlined that recognition and enforcement were distinct aspects: although an award will not be enforced if it is not recognized, it can be recognized without being enforced. The court further noted that the award once recognized could serve other purposes between the same parties, including their other ongoing arbitrations regarding the same grinding mill. The court observed that recognition and enforcement are refused only in exceptional cases, underlining in particular that recognition and enforcement were distinct aspects of the proceeding, being "*distinguishable and independent terms*".

The Court of Appeal in Bard v. Appel dismissed an appeal from a Superior Court decision in Bard v. Appel, 2015 QCCS 4752 which held that enforcement of a 2002 Florida final arbitration award was prescribed at the time its beneficiaries applied in 2014 in Québec to homologate and enforce.

Bard did not challenge the Superior Court's decision that an arbitration award could be assimilated to a "*judgment*" subject to article 2924 C.C.Q.'s ten (10) year prescription. The Superior Court in first instance summed up principles drawn from the caselaw and applied by analogy the Court of Appeal decision in Barreau du Québec v. Greenbaum. The Superior Court also relied on Yugraneft Corp. v. Rexx Management to determine that Québec's prescription rules were intended to apply under the New York Convention. In that case, the Supreme Court of Canada had decided that local limitation periods were intended to apply to recognition and enforcement as a "*rule of procedure*" within the meaning of that term in the New York Convention.

The Court of Appeal only agreed to accept that the ten (10) year prescription would apply because Bard did not challenge that finding on appeal. The Court of Appeal did not expressly endorse this conclusion that an arbitration award was a "*judgment*."

In Lakah v. UBS, 2019 QCCA 1869, the Québec Court of Appeal denied leave to appeal a Superior Court decision[173] ordering an arbitration party, resisting recognition and enforcement in Canada of an award made in the U.S., to post $1 million as suretyship in Canada pending U.S. annulment proceedings. On appeal, referring to Lavigne v. 6040993 Canada Inc., 2016 QCCA 1755, the Court of Appeal held that a stay of proceedings is a case management measure and, in principle, cannot be appealed.

Appellant had applied under article 654 C.C.P. to stay the Québec enforcement proceedings until a final decision issued on the U.S. motion to vacate. Appellant argued that allowing the U.S. enforcement proceedings to continue would be contrary to the interests of justice because it would waste resources and lead to a patently unfair result if the U.S. District Court granted the motion to vacate.

The Superior Court acknowledged that a stay should be granted only exceptionally "*because it impedes one of the key goals of arbitration, which is to avoid protracted litigation*". In the circumstances, the grounds alleged in the U.S. annulment proceedings "*appeared serious*" on their face and merited a stay of the Québec recognition and enforcement proceedings but, in light of the $150 million ordered in the challenged arbitration award, a suretyship of $1 million was "*relatively modest*".

The Superior Court had held that a right to a stay is not automatic and that a court has discretion to refuse a stay. Exercising that discretion had to balance the "*competing concerns on each side of the debate*" which the court contrasted as one party's reliance on the principle of proportionality and the other's reliance on the guiding principles set out at articles 1-7 C.C.P. and the interests of justice.[174] Despite being urged that it was not bound by the New York Court's decision on the motion to vacate, the Superior court held that "*it will certainly be inclined to show it great deference, particularly as it involves the application of a US statute, the Federal Arbitration Act*".[175]

In Instrubel N.V. v. Republic of Iraq, 2019 QCCA 78, Québec's Court of Appeal upheld a successful arbitration claimant's attempt to garnish funds owed by a third party to respondent pending an application to recognize and enforce its award.[176] The Court determined that, independent of the location of the bank in which the funds were deposited, garnishee was domiciled within the jurisdiction of the courts of Québec and could be the subject of a garnishment when it is a debtor of a personal right owed to respondent. In reversing Instrubel, N.V. v. Ministry of Industry of The Republic of Iraq, 2016 QCCS 1184, the Court of Appeal provided meaningful, informed guidance for arbitration practitioners striving to preserve assets in anticipation of executing on successful arbitration awards.

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[173] UBS AG and als. v. Michel Lakah, S.C. Quebec, N° 500-11-056733-195, 11 September 2019.

[174] The Superior Court considered UBS et al.'s submission that a party can "*exceptionally*" apply to enforce an arbitration award that had been annulled in the jurisdiction in which it was rendered, referring to the decision of the United States Court of Appeal, Second Circuit in Europcar Italia, S.p.A. v. Maiellano Tours, Inc. [1998] USCA2 379 docket no. 97-7224 (September 2, 1998). The Superior Court expressed caution and deference to the court seized with the annulment proceedings, preferring to wait for the U.S. District Court to determine the merits of such arguments.

[175] Para. 26.

[176] Appeal dismissed, International Air Transport Association v. Instrubel, N.V., 2019 SCC 61. For the majority's reasons, the Supreme Court majority confined its reasons to a single paragraph, stating that "*[a] majority of this Court is of the opinion to dismiss the appeals with costs throughout, substantially for the reasons of the Court of Appeal save for the matters addressed in obiter*". In dissent, Madam Justice Côté provided separate reasons.

**Mediation**

Before, during and even after arbitration, parties can engage in negotiation and mediation. Mediation can be voluntary or court-ordered, mandatory or available to be imposed by the court, either upon application or *propio motu*. Mediation often appears as part of a stepped or tiered dispute resolution clause, to be taken prior to initiating arbitration. Disputes arise as to whether the requirement to mediate is a true condition precedent or a nice-to-have measure which does not postpone access to arbitration.

Subject to the comments made in the preceding section, parties can agree to mediate a variety of disputes.[177] Parties disputing rights and obligations involving IP/IT rights can also engage in voluntary mediation. This mediation is unlike the mediation offered or imposed, according to rules, in the courts as part of the state system. By contract, parties can bind themselves to pause before more formal arbitration or litigation.

The agreement to mediate is part of their contract. It can be a stand alone agreement, without further agreement to arbitrate, or be part of the rules of an organization or association in which the parties have membership. It can be part of the agreement, styled as a stepped or tiered clause in which the parties undertake to talk before disputing more formally before a third-party decision maker such as the courts or litigation. Beware if the mediation step appears as a genuine condition precedent to arbitration.[178]

Parties often engage in mediation without the need for a written undertaking to prompt them. The mention of mediation has its value in that it gives cover or opportunity to a party to request negotiation without giving the impression they are reluctant to dispute the issue for want of resources or confidence in their case.

Many institutions, note above, offer mediation services independent of their arbitration services. Each offers a range of services which it administers without obligation that the parties engage in the arbitration phase failing settlement.

Quebec stipulates terms for the mediation. Article 147 C.C.P. invites defendants, in answer to a plaintiff's summons, to propose mediation or a settlement conference.[179] Article 158 C.C.P. authorizes, but does not oblige, the court to act on its own initiative or at the request of a party to convene the

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[177] In British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd., 2020 BCSC 880, the court determined that mediation of disputes by or between Hells Angels' members/chapters is not an unlawful activity under B.C.'s Civil Forfeiture Act, SBC 2005, c 29 even if the subject matter of the disputes may involve unlawful activity.

[178] Capital JPEG Inc. v. Corporation Zone B4 Ltée, 2019 QCCS 2986.

[179] In small claims matters, which can also include disputes involving IP, article 544 C.C.P. requires plaintiffs to specify whether they "*might consider*" mediation and defendants are given the option, at article 547 C.C.P. to ask that the dispute be referred to mediation. The court, through its clerk, can informs the parties "*at the earliest opportunity*" that they may "*at no additional cost*" submit their dispute to mediation. Article 556 C.C.P. provides that, upon consent of both parties to mediation, the dispute is referred to a mediation presided over by a lawyer or notary certified as a mediator by their respective professional order. The mediator files a report with the court office giving an account of the facts, the parties' positions and the points of law raised. If the parties reach a settlement, they file with the court office either a notice that the case has been settled or the signed settlement agreement. Such settlement agreements, once confirmed by the special clerk or the court, is equivalent to a judgment.

parties to a settlement conference or encourage them to use mediation. Quebec's C.C.P. devotes an entire section to mediation, as Title I to Book VII "Private Dispute Prevention and Resolution Processes", articles 605-615 C.C.P.[180]

In private mediation, as opposed to that offered or imposed by court rules, the parties by mutual agreement choose the mediator. The mediator is required to draw the parties' attention to facts which may create doubt as to the mediator's impartiality or otherwise demonstrate a conflict of interest.

The mediator's role is to assist the parties in developing a resolution to their dispute. Unlike an arbitrator, the mediator imposes no resolution and is not given that role. Capital JPEG v. Corporation Zone B4 identified a key difference between mediation and arbitration, pointing out that, unlike arbitration, mediation does not involve confiding to a third party the task of deciding a dispute according to the law. Article 605 C.C.P. specifies that mediators help parties "*to engage in dialogue, clarify their views, define the issues in dispute, identify their needs and interests, explore solutions and reach, if possible, a mutually satisfactory agreement*". An arbitrator can, with the parties' express consent, attempt to reconcile the parties and, if unsuccessful, continue with the arbitration process. Despite those distinctions, interest and experience has grown in offering mediation and arbitration through the same individual, referred to as med-arb.[181]

The distinctions with arbitration are several. Mediation begins "*without formality*"[182] whereas arbitration requires a notice, notified much like a procedure under the C.C.P., which states that the party sending it submits a dispute to arbitration and specifies the subject matter of the dispute.

The process can end with equal informality. A mediator can withdraw at any time, at her own discretion, without giving reasons. Mediation can terminate with an agreement or at the determination by the mediator that the process "*is doomed to failure or is likely, if continued, to cause serious prejudice to one of the parties*".

The mediator is expected to inform the parties of her role and duties and determine with them the rules applicable and the length of the process. Despite confidentiality of such negotiations, article 609 C.C.P. recognizes that third parties may participate with the consent "*even tacitly*" of the parties, provided those third parties "*may be useful for the orderly progress of the mediation process and helpful in resolving the dispute*". In addition, because the purpose is to strike a bargain which affects the parties'

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[180] Chapter IV, articles 616-619 C.C.P., includes special provisions applicable to family mediation.
[181] Colm Brannigan and Conor Brannigan, Med-Arb: The Third Alternative, ADR Perspectives Vol.7. No.1, March 2020; Colm Brannigan and Conor Brannigan, Med-Arb: An Innovative Use of ADR to Meet Our Client's Needs. OBA – ADR Section Newsletter, February 2020.
[182] Article 608 C.C.P. For the formality expected and required under certain rules, see South Coast British Columbia Transportation Authority v. BMT Fleet Technology Ltd., 2018 BCCA 468, leave to appeal refused, South Coast British Columbia Transportation Authority formerly known as Greater Vancouver Transportation Authority dba TransLink, et al. v. BMT Fleet Technology Ltd., et al., 2019 CanLII 50899 (SCC). In that case, claimant initiated arbitration under two (2) contracts by sending a single notice which, upon challenge, the court in first instance in South Coast British Columbia Transportation Authority v BMT Fleet Technology Ltd., 2017 BCSC 1683 held was merely an irregular document and curable *nunc pro tunc*. On appeal, the Court of Appeal held that B.C.'s Arbitration Act, RSBC 1996, c 55 contemplates the arbitration of disputes arising under an individual contract. Absent consent to multi-party, multi-contract arbitration, the notice sent was not recognized by the Arbitration Act and was a nullity.

rights and obligations, the parties are required to ensure those with authority to settle be either present or reachable "*in sufficient time*"[183] to give consent.

In terms of the procedure mandated by Québec, the provisions for mediation are informal. At a minimum, the mediator is expected to treat the parties fairly and "*must see that each party has an opportunity to argue its case*".

A key distinction between mediation and arbitration as a means to resolve disputes occurs in the dynamic expected. Though arbitration requires that all exchanges to and from the arbitrator be copied to all the parties and that the submissions and information be shared, mediation anticipates that some information be shared with the mediator but not the other party. Article 611 C.C.P. stipulates that the mediator may communicate with each party separately, is required to inform the parties in doing so and that no information relevant to the mediation received by the mediator from a party may be disclosed to the other party without the disclosing party's consent. Arbitrators performing adjudicative functions are precluded from *ex parte* fact finding[184] or relying on information obtained without disclosing it to either of the parties.[185]

As part of the interest in preserving resources, parties to a court action who undertake mediation are required to agree to a stay of proceedings for the duration of the mediation, provided the applicable law or court involved in the dispute permits such stays. In voluntary mediation, undertaken in the course of arbitration, this stay is not imposed as a condition precedent.

If the parties enter into an agreement, it must contain the undertakings of the parties and terminate the dispute, the agreement will constitute a transaction under article 2631 C.C.Q. only if the matter and the circumstances and clearly disclose the parties' wishes regarding that effect.[186] The mediator is tasked with ensuring that the parties understand the agreement.[187] The C.C.P. does not require that the mediator give a legal opinion on the validity of the agreement, ensure its enforceability or draft its terms.

The courts do strive to respect resolution of disputes in arbitration which impact litigation. Upon application, Rosetown (Town) v. Bridge Road Construction Ltd., 2020 SKQB 3 approved an agreement between arbitration/litigation parties T and BR to release BR from litigation involving a third party S which did not participate in that agreement. The agreement, known as a Pierringer agreement, left S open to its proportionate share of responsibility in the litigation pursued by T. Having examined the Pierringer agreement in light of its impact on S, the court approved its application and amendments to the pleadings in court to implement it.

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[183] Article 609 C.C.P.

[184] Construction Workers Union, Local 151 v. Saskatchewan Labour Relations Board and Technical Workforce Inc., 2017 SKQB 197 para. 52.

[185] Construction Workers Union, Local 151 v. Saskatchewan Labour Relations Board and Technical Workforce Inc., 2017 SKQB 197 para. 54.

[186] Article 613 C.C.P.

[187] Article 613 C.C.P. para. 2.

**Post-mediation disputes**

Parties are limited post-mediation in adducing evidence of what occurred during the mediation.[188] The cases in which courts upheld objections to filing proof of confidential exchanges are abundant.[189] Article 4 C.C.P. underlines the principle of confidentiality, which Bisaillon v. Bouvier, 2020 QCCA 115 ("Bisaillon v. Bouvier")[190] observed was a codification of Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35 (CanLII), [2014] 1 SCR 800 ("Union Carbide v. Bombardier"). The latter confirmed that the privilege formed part of Québec law and recalled the importance of respecting the parties' freedom of contract once they chose to undertake mediation.

Bisaillon v. Bouvier applied the exception to confidentiality of mediation which allows disclosure of confidential exchanges necessary to prove (i) that an agreement resulted from mediation or (ii) the scope of the agreement which the parties acknowledged making. The parties could but did not tailor their mediation to eliminate that exception. Absent a clear, express statement of their intention to prevent subsequent disclosure, the exception applied to permit disclosure. The mediator's summary of the agreement was only a simple writing, reflected his understanding of the agreement's terms and did not bind the parties unless signed by them.

Bisaillon v. Bouvier recognized the parties' right to broaden the terms of the privilege and that mediation remains a "*creature of contract*", allowing parties to "*tailor their confidentiality requirements to exceed the scope of that privilege and, in the case of breach, avail themselves of a remedy in contract*".

The Court of Appeal held that that the mediation process was confidential. The parties as much as the mediator are held to respect the secret nature of the exchanges which occur. This confidential character flowed from a rule of evidence issuing from Common Law known as settlement privilege. Protecting both written and verbal exchanges, the privilege promotes frank and open discussion by reassuring parties that their exchanges cannot be used against them if they do not arrive at an agreement.[191]

Any changes to that general approach must be express. A change may be made to set aside an exception to confidentiality which is made in order to allow the parties to prove the existence of an agreement. If the parties had not excluded the exception to confidentiality, nothing prevented either

[188] For a recent and more significant, complex case involving the role of lawyers in mediation and a commensurate analysis, see Alliance v. Gardiner Roberts, 2020 ONSC 68 and the related, subsequent costs decision in Alliance v. Gardiner Roberts, 2020 ONSC 1580.

[189] K.I. v. J.H., 2019 QCCA 759; Thibault v. Ouellette, 2014 QCCA 1258; Milunovic v. Bélanger, 2015 QCCA 282; Kosko v. Bijimine, 2006 QCCA 671; Caux et Fils inc. v. 9215-4012 Québec inc., 2016 QCCS 4553; and, Dr Élise Shoghikian inc. v. Syndicat des copropriétaires du Clos St-Bernard, 2015 QCCA 1445. See 9156-3817 Québec inc. v. Presse-Café inc., 2012 QCCS 3549 as precedent for permitting proof of facts necessary to define the object of the transaction entered into during a court-managed settlement conference ("CRA") given that the parties disputed the object of the transaction. In that case, the parties had agreed to terms during a CRA but never signed a written agreement due to disputes over what had been agreed to. Evidence of communications post-mediation was permitted to demonstrate confirmation of a transaction but not re-open discussions which purportedly lead to an agreement.

[190] Leave to appeal granted August 6, 2020 in Association de médiation familiale du Québec v. Isabelle Bisaillon, et al., 2020 CanLII 52976 (SCC).

[191] See Globe and Mail v. Canada (Attorney General), 2010 SCC 41, [2010] 2 SCR 592 and Gesca ltée v. Groupe Polygone Éditeurs inc. (Malcom Média inc.), 2009 QCCA 1534.

party from making evidence of exchanges during the mediation so long as they were necessary to demonstrate that an agreement had arisen during the mediation.

A mediator's notes or summary is not a binding contract. The notes do not qualify as a writing admissible in Québec under articles 2813 C.C.Q. et seq. and articles 2826 and 2831 C.C.Q. In that case, the notes were not an authentic or semi-authentic act, did not bear the signature of either party, did not issue from them and was not a document produced in the normal course of the activities of an enterprise. The notes were only a simple writing, drafted by the mediator, reflecting his understanding of the elements regarding which the parties said that they agreed. The agreement to mediate even stated that such a document was not binding. Once signed by the parties, the notes could be a contract. If not signed, the notes were only a tool. Parties must sign the agreement if they wish it to have binding effects.

Viconte inc. v. Transcontinental inc., 2020 QCCQ 1475 recognized that that the exception to settlement privilege applies to permit a party to adduce confidential exchanges made in a mediation to prove the existence or scope of a transaction, but the court saw no principle under which that exception did not also apply if a party challenged the validity of a transaction and not its existence or scope. The party resisting homologation of a settlement sought to prove that the other party had given false information or allowed it to be retained, thereby vitiating consent and justifying annulment of the settlement. The court cautioned that its decision was only a preliminary one and did not consider the difficulty a party may have at trial to prove its allegations.

The court reproduced, respectively, key terms from the parties' agreement to mediate and the parties' attorneys' own undertaking of confidentiality.[192] The parties' agreement included, among other provisions, text confirming that neither the judge nor the parties could be compelled as witnesses to disclose to anyone the information exchanged during the settlement conference. The attorneys' undertaking contained, among other provisions, (i) acknowledgement that anything said or written during the mediation was done without prejudice and was inadmissible in evidence and (ii) recognition that information useful and necessary to demonstrating the existence of an agreement entered into during the mediation or its scope could be admitted in evidence, subject to the choice made by the parties in their mediation agreement.

The court set out the applicable principles, referring to the guidance given in Union Carbide v. Bombardier and Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37, [2013] 2 SCR 623 in particular.[193]

The court observed that the privilege applicable to settlement exchanges originated from the Common Law but applied in Québec as well, as confirmed by Union Carbide v. Bombardier Inc. and that it applied whether or not the parties arrived at a settlement. Settlement privilege did have its exceptions, with the burden resting on the party asserting that an exception applied. The exception considered by the court was the rule that protected communications may be disclosed in order to prove the existence or scope of a settlement.

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[192] Viconte inc. v. Transcontinental inc., 2020 QCCQ 1475 paras 18-19.

[193] Viconte inc. v. Transcontinental inc., 2020 QCCQ 1475 paras 22-28, citing Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35, [2014] 1 SCR 800 para. 35 para. 35 and Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37, [2013] 2 SCR 623 para. 19.

Without need for application by either the opposing party or the proposed witness, PC Avocats inc. (Perras Couillard Avocats) v. Perreault, 2020 QCCQ 1972 quashed a subpoena sent to the attorney who served as mediator in court-supported mediation. In quashing it *proprio motu*, the court explained to the self-represented litigant that the mediator was not compellable and all that transpired during the mediation was confidential. The court also commented on the role/liability of lawyers in a client's own decision to engage in mediation and negotiate a settlement.

**Transaction**

In Quebec, a "*transaction*" has particular effects. Defined as a nominate contract at article 2631 C.C.Q., in Chapter XVII "Transaction", such a contract serves to prevent a future contestation, put an end to a lawsuit or settle difficulties arising in the execution of a judgment, by way of mutual concessions or reservations. It is indivisible as to its subject.

Syndicat de la copropriété Marché St-Jacques v. 9257-3302 Québec inc., 2020 QCCS 975 refused to homologate a transaction (settlement agreement) and reminded the parties that their contract contained an agreement to arbitrate further to which they could obtain a consent award recording their settlement. The court reviewed the purported settlement and determined that it lacked most of the essentials to qualify as a transaction such as a mention of the exact disputes, the parties' respective claims made leading up to the settlement, any arbitration/litigation proceeding settled and a release or payment.

Article 2632 C.C.Q. prevents parties from entering into transactions which involve the status or capacity of persons "*or to other matters of public order*". The latter should not be meant to exclude otherwise valid agreements involving rights in or to registered rights in IP/IT as between the parties.[194]

Contrast this type of end goal with a consent order in arbitration. In mediation, the goal is to resolve by agreement of the parties. In arbitration, the goal is to deliver an enforceable resolution of the dispute. Despite that goal, arbitration expressly agrees to have consent orders issued, provided the arbitrator agrees with the terms. An arbitrator is not obliged to issue an award, even on consent.

A transaction has special effects. As between the parties, it has the authority of r*es judicata* but is not subject to forced execution until homologated.[195] Though otherwise valid, a transaction resolving a lawsuit is null if one or all the parties was unaware that final judgment issued terminating the litigation.[196]

Carpenter v. Soudure Plastique refused to refer the homologation of the transaction to the arbitrator for two (2) reasons. First, the arbitrator has no jurisdiction to do so under Québec law. By the express, combined terms of article 2633 C.C.Q. and article 528 C.C.P., only a court can "*homologate*" an article 2631 C.C.Q. transaction. Even if the transaction stemmed from a dispute related to the award, the arbitrator lacks jurisdiction to deal with the dispute.[197]

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[194] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178.
[195] Article 2633 C.C.Q.
[196] Article 2636 C.C.Q.
[197] Bédard v. Centre d'accueil relais jeune Est inc., 1995 CanLII 5109 (QC CA) para. 12 and 9056-1457 Québec inc. (Construction Beauchamp Ouellet inc.) v. Descoteaux, 2008 QCCA 1164.

The provisions in the C.C.Q. seek to prevent further disputes following settlement. Error of law cannot serve to annul the transaction but, because it is a contract, other causes for annulment remain available.[198] Article 2637 C.C.Q. addresses a broad category of unsuccessful challenges to transactions. The case law distinguishes between roles assigned to the court when presented with settlements, transactions and consent awards. A recent case in Quebec reminded parties that a court cannot review awards, but can review transactions.

In Gestion S. Cantin Inc. v. Emblème Canneberge Inc., 2020 QCCS 2259, the court distinguished the leeway available to arbitration parties to agree, subsequent to a settlement arrived at during arbitration, if/how to grant the court jurisdiction to examine the merits of the resolution of their dispute. On a transaction, arbitration parties can give the court jurisdiction to examine the merits. On a consent award recording that same settlement, parties cannot give the courts jurisdiction to examine the merits. The arbitration parties had negotiated a settlement agreement and obtained a consent award recording it but, disputing performance post-settlement, were allowed to dispute only the merits of the agreement but not the award, despite being identical in terms.

A dispute arose between two (2) groups of shareholders which lead to one group initiating court litigation in October 2018. Their shareholders agreement contained an agreement to arbitrate and the shareholders agreed to arbitrate their dispute. The arbitrator recorded the transaction as an April 1, 2019 award and ordered the parties to abide by it. Alleging breach of the transaction, plaintiffs filed an application in Superior Court seeking: (i) homologation of the transaction and (ii) homologation of the award.

Regarding the transaction, the court noted that the parties had expressly agreed that they could debate performance of the transaction during the homologation phase and only questioned whether, despite agreement, it was legal to do so. Referring to article 528 C.C.P., the court held that the parties could give and had given the court jurisdiction to do both and that doing so was legal.

> *Article 528 C.C.P. Homologation is approval by a court of a juridical act in the nature of a decision or of an agreement. It gives the homologated act the same force and effect as a judgment of the court.*
>
> *The homologating court only examines the legality of the act; it cannot rule on its advisability or merits unless a specific provision empowers it to do so.*

> *Article 528 C.p.c. L'homologation est l'approbation par un tribunal d'un acte juridique de la nature d'une décision ou d'une entente. Elle confère à l'acte homologué la force exécutoire qui se rattache à un jugement de ce tribunal.*
>
> *Le tribunal chargé d'homologuer un acte ne vérifie que la légalité de cet acte; il ne peut se prononcer sur l'opportunité ou le fond de l'acte, à moins qu'une disposition particulière ne lui attribue cette compétence.*

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[198] Article 2634 C.C.Q. In Deschenes v. Lalonde, 2020 ONCA 304, Ontario's Court of Appeal upheld rescission of a settlement on the basis of Defendant's innocent misrepresentation regarding a fact material to Plaintiff's decision to settlement. Defendant's actual or constructive knowledge that the representation was false was unnecessary. The Court distinguished rescission based on innocent misrepresentation from rescission based on unilateral mistake. Despite the strong presumption favouring finality of settlements, the Court reiterated that the ways to "*upset*" a settlement are the same as those applicable to other contracts, including fraud, misrepresentation, duress, undue influence, unconscionability, or mutual or unilateral mistake.

The court then turned to the role of the agreement as having been recorded in the award.

*Article 645 C.C.P. A party may apply to the court for the homologation of an arbitration award. As soon as it is homologated, the award acquires the force and effect of a judgment of the court.*

*The court seized of an application for the homologation of an arbitration award cannot review the merits of the dispute. It may stay its decision if the arbitrator has been asked to correct, supplement or interpret the award. In such a case, if the applicant so requires, the court may order a party to provide a suretyship.*

*Article 645 C.p.c. Une partie peut demander au tribunal l'homologation de la sentence arbitrale. Cette sentence acquiert, dès qu'elle est homologuée, la force exécutoire se rattachant à un jugement du tribunal.*

*Le tribunal saisi d'une demande en homologation ne peut examiner le fond du différend. Il peut surseoir à statuer s'il a été demandé à l'arbitre de rectifier, de compléter ou d'interpréter la sentence. Il peut alors ordonner à une partie de fournir un cautionnement, si la partie qui demande l'homologation le requiert.*

Referring back to article 622 C.C.P., the court emphasized that the prohibition against examining the merits was public order. The third paragraph of article 622 C.C.P. prevented arbitration parties from contracting out of the terms relating to homologation.

As a result of the above, the court concluded that the homologation sought by plaintiffs could not allow for debate on the merits despite agreement by the parties. The court observed that it would up to the judge at the merits hearing to decide, if necessary, whether to homologate an arbitration award which does not settle the existing dispute.

Based on the above, when parties dispute IP/IT and enter into agreements to settle, they must balance their post-settlement options in order to decide whether they prefer to (i) sign a transaction or (ii) have their agreement endorsed by a consent award.

Regarding *res judicata*, Demers v. Conseil d'arbitrage held that a consensual arbitration tribunal had the jurisdiction to consider the existence and effect, if any, of any alleged settlement in deciding its own jurisdiction.[199] The court framed its task as having to determine if article 632 C.C.P. allowed it to review the arbitration tribunal's decision on the ground that it had mistakenly assumed jurisdiction by concluding there was no *res judicata* on the fees.

The litigation stemmed from a disagreement over the amount of fees alleged to be owing by a client to her lawyer. The lawyer had represented her client in litigation against the client's sibling in which the siblings disputed terms for the care of their parent. At one point in the litigation, the court issued an order homologating an agreement between the siblings. The court order included terms on the division and payment of legal fees. The siblings agreed that each pay 50% of the legal fees, with one

[199] On a similar issue of the role of settlements, see Lithium One Homes Ltd. V. Abakhan & Associates Inc., 2017 BCSC 2189.

sibling drawing her payment from the assets of the parent up to a maximum of $17,500.00. The lawyer subsequently issued an invoice which her client disputed.

The client invoked the procedure for arbitration of lawyers' accounts provided by the Regulation. The lawyer responded, raising a preliminary objection. She claimed that that agreement, endorsed by the court, represented a binding transaction between her and her client on the payment of her legal fees and that her client could not question the amount owing to her. She applied to have the arbitration tribunal decline jurisdiction.

The arbitration tribunal reviewed the facts and heard the parties. It decided that it did have jurisdiction. Its understanding of the order led it to conclude that the amounts to be paid to the lawyer were to be discussed further. Given that the amounts had not been adjudicated by the court, the arbitration tribunal had jurisdiction to resolve the dispute.

The lawyer applied to the Québec Superior Court under article 632 C.C.P. The court held that the issue of *res judicata* and the effect of the transaction fell within the jurisdiction of the arbitration tribunal and were accessory to the issue it had to decide. Whether the existence of the transaction was a question of mixed fact and law or a question of fact, the court determined that the conditions for the transaction were set out in article 2631 C.C.Q. and had a binding effect as provided by article 2848 C.C.Q.

## **Conclusion**

The above sets out the most recent guidance regarding how arbitration and mediation can serve parties disputing IP/IT rights. The paper does not strive to list all the sources of IP/IT arbitration and mediation but does identify those key concepts which should be considered when deciding whether and how to engage in arbitration and mediation. With a better appreciation of the promised benefits and limits inherent in arbitration and mediation, parties disputing IP/IT rights can make better dispute resolution choices.