Urbas Arbitral 2020 Canadian Arbitration Year in Review

by

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Introduction

From January to December 2020, I shared one hundred and fifty-five (155) notes on recent Canadian court decisions, highlighting the most current reasoning and practical applications of arbitral rules and principles ("Notes"). Despite the Canadian source of those decisions, the reasoning and approaches touch on fundamental aspects of arbitration common to many jurisdictions.

Communicated in sets of five (5) through a series of thirty-one (31) releases, the Notes average between 1800-3000 words. Available online at Arbitration Matters, the Notes follow the same format:

1st - a mention of the jurisdiction from which the decision issued paired with a haiku headline of the decision's key contribution to the practice of arbitration. Jurisdiction lets readers decide if the decision has heightened relevance to their practice and also signals the variety of Canadian sources for the reasoning.

2nd - a full citation and active link to the decision along with a concise introductory paragraph on the essence of the decision. The link enables readers to skip the Note altogether and read the decision firsthand without any filter.

3rd - the full text of the Notes follows, with no editorial, identifying only that content relevant to putting the decision in its context, with active links to cited cases and legislation and administering institutions and their rules plus select excerpts from the decision.

4th - a closing section with two (2) or more comments stemming from the decision and further references, including earlier, related Arbitration Matters Notes.

5th - updates to certain Notes if and when leave to appeal is sought or an appeal decision issues.

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For a screen shot of the most recent release #81 issued December 30, 2020, see the final page of this paper along with information on how to subscribe to the free updates.

Make the most of the Notes with the least amount of time

Leading texts offer a coherent overview of the broad range of issues raised by arbitration[1] while comprehensive essay collections by leading practitioners,[2] peer-reviewed learned law reviews[3] and robust consolidations of case law and doctrine addressing updated legislation[4] make focused contributions to the practice and theory of arbitration. Each in its way can put the latest cases into the story of arbitration or, at least, perspective.[5]

In contrast, courts address only those disputes which litigants choose to put on their dockets. As a result, few expect that the ensemble of court decisions released in 2020 follow or create any overarching structure. As a related consequence, the Notes which track the most recent court decisions also resist disclosing any structure as a collection. Issuing one by one, the Notes are more like bulletins - regular, brief and topical. Read individually, the Notes resist making a single, overarching statement about the current status of Canadian arbitration in 2020.

Twenty (20) topics

This paper serves to re-sequence all the Notes and assign them a greater role in the story that was 2020. Having reviewed all the Notes, I identified twenty (20) topics raised by the Notes and I sorted each of the Notes by topic. Though some Notes cover two (2) or more court decisions and some decisions raise more than a single topic, I categorized each of the Notes only once and according to what I see as their most remarkable contribution to the year. Many decisions do cover the same ground. Many include the same elements, such as their analysis of the applicable standard of review, limits of court intervention, jurisdictional issues as well as nuances created by the *lex arbitri*.

Active links in the index at pages 18-27

At pages 18-27, this paper includes a list of the twenty (20) topics and all the related Notes grouped under the relevant topic. The index includes active links to every topic and note. A click on any topic or Note in the index will bring you directly to that topic or Note in the paper.

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[1] J. Brian Casey Arbitration, Law of Canada; Practice and Procedure 3rd ed. (New York: JurisNet, 2020); J. Kenneth McEwan and Ludmila Herbst, Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations (Toronto: Carswell, 2005).

[2] Marvin J. Huberman ed., A Practitioner's Guide to Commercial Arbitration, (Toronto: Irwin Law, 2017).

[3] Joshua Karton, Managing Editor, Canadian Journal of Commercial Arbitration.

[4] Alexander Gay, James Plotkin, Master Alexander Kaufman, The International Commercial Arbitration Legislation of British Columbia: A Commentary (Toronto: Thomson Reuters, 2020).

[5] For a recent overview of arbitration and mediation in Québec, with added mention of their application to intellectual property and information technologies, see the September 29, 2020 article "Arbitration and Mediation of IP and IT Disputes".

Short summaries at pages 4-17

For each topic, I generated a short summary to introduce the topic. If you want to read more, just visit the next section at pages 18-73 which list all the Notes relevant to that topic.

List of Notes grouped by topic at pages 18-73

After the section providing the short summaries, I include a section in which I group all the relevant Notes under a particular topic and then reproduce the highlights of each Note. If you want to read more, just click on the haiku headline and it will bring you to the full Note.

Do not read the entire paper unless you have insomnia issues, lack a meaningful hobby or expect a call from my parents. Grouping the Notes by topic intends to help you eliminate material which is not directly or yet relevant to your practice. For example, the Notes under 'topic #4 – drafting' may be of greater interest to solicitors drafting agreements to arbitrate whereas 'topic #7 – advocacy in arbitration' may interest the counsel representing parties in the hearings.

Conclusion

I hope that sorting all the Notes from 2020 offers a more structured context to the many valuable contributions made by Canadian courts throughout 2020 and by the advocacy of many talented practitioners which made those decisions possible.

Have a safe and healthy year throughout 2021.

Daniel Urbas
Urbas Arbitral

Topic #1 - promises of arbitration, endorsement of arbitration and mediation

Canadian courts demonstrated their continued support of arbitration's status as the nimble member of the dispute resolution crowd, remaining true to the comments of the Supreme Court of Canada in Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 ("Desputeaux v. Éditions Chouette") and Dell Computer Corp. v. Union des consommateurs, [2007] 2 SCR 801, 2007 SCC 34 ("Dell Computer v. Union des consommateurs").

In Desputeaux v. Éditions Chouette, 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.*"[6]

The Notes grouped under Topic #1 demonstrate that ongoing support. In a number of decisions the courts expressly noted the parties' lost opportunity to engage in arbitration and mediation, comment on the promised benefits of arbitration and urge the parties to mediate instead of litigating. The courts also reminded parties that their contracts included arbitration clauses and resisted unproven limitations of arbitration when urged to refer parties to a regulatory body instead of arbitration.

The courts endorsed arbitration as commercially reasonable to resolve ambiguous contractual provisions and that resort to arbitration to interpret contracting parties' rights and obligations is not oppressive. The courts support the parties' choice to engage in final offer arbitration, despite being an intentionally high-risk from of arbitration, and that final offer arbitration can also include offers which include agreements to arbitrate in the offer itself.

Topic #2 - virtual hearings

If your space shuttle back from Mars omitted in-flight news updates, a virus identified as COVID-19 impacted dispute resolution beginning in March 2020. For an in-depth look at how to manage virtual hearings and for some practice and advocacy observations, see the November 27, 2020 paper Julie G. Hopkins and I co-authored, "Virtual Practice Makes Virtually Perfect – Practical Considerations for Virtual Hearings Identified through Simulations with Experienced Counsel and Arbitrators".

As set out in that paper, the courts have already considered their own jurisdiction to authorize that parties conduct pre-hearing evidentiary phases and hearings on the merits through videoconferencing platforms. Few decisions have yet to address whether and when arbitrators can do so. The scarcity of decisions does not mean that arbitrators have refrained from doing

[6] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178, para. 41.

so. Rather, post-award challenges – from arbitral decision to reasoned decision from the courts on a post-award challenge – have a long tail.

To produce a court decision, one of two (2) arbitral parties, A and B, would have had to dispute conducting the hearing on the merits by videoconference. Assume A wanted a virtual hearing and B resisted. The arbitrator would have scheduled a case management conference, heard A and B and, then or soon after, issue a decision to hold the virtual hearing despite B's objections.

The virtual hearing would have had to be held, the matter taken under advisement, an award issued and then, within time allotted by the *lex arbitri*, an application to set aside the award. The decision would address the arbitrator's jurisdiction to impose a virtual hearing if (i) B, the party resisting the virtual hearing, lost and (ii) the set aside application raised the virtual hearing order as a ground to set aside. If B won, then it would not bring the matter to court and A, which sought the virtual hearing, would not raise it as a ground.

If B did lose and B did argue that the virtual hearing was a denial of natural justice, the hearing on B's set aside application would have to be readied for hearing, scheduled, pleaded and then a decision from the court released. The earliest such decision would be February 2021 unless a party wanted to make precedent and apply unsuccessfully to set aside an interim order setting the arbitration down for a virtual hearing.

The Notes identified a series of endorsements from the courts which modified their own approaches to dispute resolution. The courts quickly revisited earlier determinations and updated them. The court demonstrated their own flexibility which underlined the need for arbitration to keep pace with the courts.

Topic #3 - distinguishing between courts and arbitration dispute resolution

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*".[7] This '*private justice system*' is said to offer various benefits stated as contradistinctions to those associated with the court system.[8] Those benefits, better viewed as promises, include: neutral forum; neutral or customized procedural rules/process; neutral decision-maker (as opposed to impartial); decision-maker learned in the subject matter; faster decisions; privacy; confidentiality; one step resolution; cost savings; and, enforcement benefits.

Arbitration is parallel to the publicly funded judicial court system. The systems run parallel and offer their own solutions.

[7] Desputeaux v. Éditions Chouette (1987) Inc., 2003 SCC 17 (CanLII), [2003] 1 SCR 178 para. 40.
[8] 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.

In Dell Computer v. Union des consommateurs, the Supreme Court commented 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*".[9] Not only has the Supreme Court recognized that arbitration is outside the court system, not part of it, Canadian appellate courts have also endorsed arbitration as a valid, equal-tier option to dispute resolution. The Alberta Court of Appeal in Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, 2006 ABCA 18 commented that arbitration is not "*some lesser form of litigation than that being conducted in the courts*".[10] Distinct components of dispute resolution, litigation and arbitration are more like siblings running along parallel paths than parent-child trailing tandem.

That parallel path runs both ways. The courts identified how they too offer alternative paths to resolution, all within their own framework. Despite shared terms using 'arbitration' and 'mediation', the courts still distinguished between the public and the private nature of the parallel options.

Party autonomy remained key. Parties can opt between remaining in the public system as the default dispute resolution process or designing their own bespoke system with some or all of arbitration's promises. Despite that autonomy, the courts reasserted the source of their own authority to resolve disputes and also enforced prohibitions against imposing arbitration on parties in consumer contracts and individual contracts of employment. See the section on limits to arbitration which contain Notes on the interplay of class action legislation and agreements to arbitrate.

As further demonstrations of the courts' ongoing role despite agreements to arbitrate, the courts exercised their jurisdiction to issue urgent, interim measures notwithstanding agreements to arbitrate and identified those measures over which arbitration had no jurisdiction.

Independent of exercising their own inherent jurisdictions and to remind parties of the limits to party autonomy, the courts consistently assisted arbitration. They enjoined parties from terminating their contract thereby permitting the parties to pursue their dispute resolution by way of arbitration and issued injunctions preventing parties from engaging in litigation abroad in breach of agreements to arbitrate. The courts also agreed to suspend their own processes pending resolution by arbitration.

Despite their support for arbitration, courts did refuse to refer parties to arbitration if the party seeking referral had participated extensively in the courts, effectively waiving application of their agreement to arbitrate.

[9] Dell Computer Corp. v. Union des consommateurs, [2007] 2 SCR 801, 2007 SCC 34 para. 51.
[10] Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, 2006 ABCA 18 para. 42.

Topic #4 - drafting advice

Several disputes brought to court involved drafting decisions which provoked public discussions in the public courts, breaching several of arbitration's promises including confidentiality, informality, speed and decision maker knowledgeable in the subject matter.

The decisions covered by the Notes provide useful guidance on how and how not to draft agreements to arbitrate. The decisions disclose the inadvertent or intended strengths and weaknesses of different variations on an agreement to arbitrate.

Without express intention to do so, the decisions serve to caution or encourage innovative drafting, sometimes along the lines of 'don't try this at home'.

Party autonomy serves not only to include disputes but exclude them also. The issue becomes whether the parties intended the exclusion or not. The courts will not appoint an arbitrator if the agreement to arbitrate is defective or does not cover the dispute in issue. The courts hold the parties to the actual wording of their agreements, including narrow or specific definitions of 'disputes' subject to arbitration.

Party autonomy includes the ability to claim one of the key promises of arbitration, to name a decision maker learned in the subject matter. In one decision, the parties agreed to name a physician as the arbitrator for disputes involving medical disagreements. In that instance, capable drafting avoided a dead end which might have arisen if only a single expertise had been selected as the pool from which an arbitrator may be chosen. An agreement to arbitrate can anticipate that the arbitrator, as expert in one field can, in the award, identify someone more suitable for the next phase or a portion of the underlying dispute which lies beyond that first arbitrator's expertise.

Overly narrow definitions of what qualified as a "*dispute*" under the agreement to arbitrate underlined the need to anticipate what type of dispute would arise subsequent to entering into the main contract. Too narrow a definition may justify the court's refusal to appoint an arbitrator.

The Notes also identify a number of instances in which poorly worded settlement agreements lead to more disagreements. Despite best intentions to definitively resolve disputes, lack of clarity or precision in a settlement generated post-settlement dispute resolution.

When evaluating the validity and application of agreements to arbitrate, the courts emphasized that they are not there to imply terms and that parties should not assume that choice of law determines choice of forum.

Autonomy has its obligations. Party autonomy includes the right to risk loss of other rights granted by legislation by engaging in arbitration. The ability to craft one's own dispute resolution process includes agreeing to lose even the right to arbitrate. The courts will hold the parties to the timelines they themselves inserted into their agreements and refuse to

appoint an arbitrator if the parties do not comply with the terms of their own procedural condition precedents. Parties drafting their agreements should consider whether such results are intended or not because the courts will apply the agreements as written.

Topic #5 - appointment process

Breaches in the appointment process do not necessarily lead to a set aside of the resulting award.

Despite what is anticipated as the norm when parties cannot agree on the appointment of a particular arbitrator, the decisions include precedent where each of the parties petitioned the court to appoint the other party's candidate instead of their own. If the party applying for the appointment lacks assets in the jurisdiction or a reciprocating jurisdiction, the court may also require a party to pay security for costs before it engages in an appointment process.

Any agreement which puts one party in a privileged position to designate an arbitrator is null. Courts have asserted their jurisdiction to '*blue pencil*' provisions which are against fairness or natural justice. The court can sever such provisions following guidance set out by the Supreme Court of Canada in Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6 (CanLII), [2009] 1 SCR 157.

The courts will not appoint an arbitrator if the notice to arbitrate, on which applicant relies to obtain the appointment, expired under the terms of the agreement to arbitrate.

In referring the parties to arbitration, the court will pause its own involvement and suspend long enough to allow the parties to agree upon their own appointment. If the parties fail to agree, the court notifies them that it will reconvene with the parties and complete the process. In doing so, the court offers assistance but also room for the parties to retain control over their process.

Topic #6 - parties to the agreement to arbitrate

Consensual arbitration arises from an agreement between parties to submit their disputes to binding and final resolution through arbitration. The courts have no jurisdiction to impose arbitration on parties.

As more fully addressed in the section on statutory vs consensual arbitration, arbitration can also be imposed on parties by the nature of the activity in which they agree to engage, arising due to legislation or the terms of membership in a particular association. Arbitrators have jurisdiction to determine whether or not a particular person is governed by membership in an entity whose disputes among members are subject to arbitration.

Sophisticated parties are expected to review external documents which may include an agreement to arbitrate. Such parties cannot avoid the agreement even if the agreement to arbitrate was not brought specifically to their attention.

Non-signatories have an evidentiary burden to meet in order to qualify as a party to the agreement.

Topic #7 - advocacy in arbitration

The Notes identified a number of practice tips applicable to arbitration.

Despite the agreement to arbitrate binding the parties, some court rules require that one arbitral party name the other party to a court proceeding and the courts have determined that doing so does not breach or waive the agreement to arbitrate.

Common law settlement privilege applies to an arbitral party's settlement exchanges and can justify resisting disclosure to an access to information request.

A lawyer's duties under the rules of professional conduct apply to proceedings before arbitrators and mediators.

Evidentiary rules developed for admitting video surveillance stills and videos can guide those engaged in arbitration as the Canada Evidence Act, RSC 1985, c C-5 expressly applies to arbitration and matters within the jurisdiction of Parliament.

Non-parties to an agreement to arbitrate cannot enjoin a private arbitration from proceeding and third-party litigants can be impacted by a release granted between arbitral parties.

An insurer's duty to defend under a policy includes the right to select and add new counsel in the arbitration to defend that portion of the claims made by the third party in the arbitration covered by the policy.

Agreeing to an arbitrator's terms of appointment does not, without more, overwrite the process adopted by the parties in their agreement to arbitrate.

In assessing the impact of a notice of discontinuance in civil litigation, the court revisited one of its earlier decisions involving a withdrawal of claims made in an arbitration. In that earlier case, the court had evaluated whether an arbitral tribunal's decision to accept a partial withdrawal of claims in the arbitration qualified as a final decision and was subject to appeal under the applicable *lex arbitri*.

In granting an oppression remedy, the court can authorize a party to take control over litigation but excluding any control over the target corporation's operations.

Topic # 8 - limits on matters submitted to arbitration

The courts dismissed attempts to have them predetermine limits to arbitral jurisdiction. Unless the agreement to arbitrate or relevant context indicates a real intention to limit the scope of the agreement, an arbitral tribunal's jurisdiction extends to all disputes relating directly or indirectly to the contract in which the agreement to arbitrate is inserted.

The courts remined parties that they cannot use an agreement to arbitrate to exclude application of public order legislation. Despite this, parties should be too quick to avoid arbitration because of an imagined breach of public order. Though public order does prevent parties from arbitrating certain disputes, parties ought to consider closely if the dispute actually qualifies as beyond limits. In one instance, parties obtained an order referring them to arbitration but then desisted from an appeal from that decision. Then, after proceeding in court, the same parties learned that their dispute was still arbitrable and that submitting it to arbitration did not breach any rule of public order.

Updating earlier statements on how courts must approach jurisdictional challenges, the Supreme Court of Canada in Uber Technologies Inc. v. Heller, 2020 SCC 16 introduced a new, third exception to its rule that courts ought to refer a jurisdictional challenge to first determination by an arbitrator. The exception included those scenarios in which validity of the arbitration agreement might not be determined if arbitration is too costly or inaccessible due to costs, distance or even a choice of law clause circumventing mandatory local policy.

In the lead up to the Supreme Court of Canada decision in Uber Technologies Inv. v. Heller, courts acknowledged the Ontario Court of Appeal reasoning in Heller v. Uber Technologies Inc., 2019 ONCA 1 but distinguished its application from the facts or legislation arising in the record before them. Resisting allegations of unconscionability, one court also held that any alleged pressure, invoked by a party to resist application of the agreement to arbitrate, was market driven, due more to competing purchasers and not to the other contracting party.

Not all provinces allow employees to arbitrate individual contract of employment disputes. A court in Québec held that doing so in Québec violates a rule of public order.

Topic #9 - stay orders, waiver/acquiescence

Before considering a stay in favour of arbitration and independent of whether the agreement to arbitrate is valid, the courts have reiterated that a dispute must exist between parties subject to the dispute resolution, whether by statute or otherwise.

The delays in which to apply for a stay can be extended at the discretion of the court provided the court rules do not deem that the delays are strictly interpreted.

A party must actually apply for a stay before the court will engage in the analysis. An applicant applying for a stay on the basis of duplicative proceedings has an evidentiary burden to establish the overlap and status of those proceedings. The courts provide helpful guidance on

the nature of such evidence relevant to meeting such burdens. Before the court will stay an action, the party seeking the stay must demonstrate that the arbitration was active. A stay will not be granted if, after ample time, the arbitration had not been formalized and the limitation period in which to do so had expired.

Even with the consent of the parties and an ostensibly validly worded agreement to arbitrate, parties cannot by consent give jurisdiction to a court which exceeds the court's own jurisdiction. The courts' jurisdiction is a matter of public order and not a function of the parties' consent. Parties can agree to submit to the existing jurisdiction of a court but cannot create jurisdiction in order to then submit.

Courts are to apply the "*arguable case*" test whereby jurisdictional issues relating to the scope of the arbitration agreement are to be resolved in first instance by the arbitrator. Respecting competence-competence, even where the court identifies issues affecting jurisdiction, the court will defer their first determination to the arbitrator. Even if the court acknowledges the "*real prospect*" that a U.S. arbitrator (i) could decide that such claims were not available under U.S. substantive law and (ii) might lack jurisdiction to award the claimed damages, those were not sufficient to hold that the arbitration agreement was void, inoperative or incapable of performance.

The courts also emphasize the distinction between a stay and a dismissal. A stay simply holds court proceedings in abeyance until the arbitrator completes the work which the parties agreed should be arbitrated. A risk of any "*procedural complexity*" or delays is insufficient to refuse a stay when presented with a valid agreement to arbitrate.

The nature and subject matter of a dispute, assessed on the facts giving rise to it, determine jurisdiction, and not a party's legal characterization of its cause of action. Interpretation of the scope of an agreement to arbitrate can qualify as a question of mixed fact and law, not a question of law.

Where one party's claims are subject to statutory arbitration and the other party's claims for breach of contract are not covered by arbitration, the courts can stay the action to allow an arbitrator to make a first determination. The court reasoned that some of the claims could not be resolved without recourse to questions that lay within the agreement's exclusive scope.

A court may pre-empt an arbitrator's competence-competence to determine jurisdiction if it can decide that an applicable limitation period has expired.

Even after a stay has been granted, parties can consent to have the decision quashed on appeal even if no one argues that the decision suffered any flaws. Meaningful participation in the court process prior to a stay application will result in a deemed waiver of the mandatory agreement to arbitrate.

Where the court determines it has no jurisdiction in light of the parties' contracts, it will stay litigation in favour of the parties' agreement to litigate or arbitrate in another country but

refrain from determining the role or mandatory nature of the agreement to arbitrate, leaving those issues to be determined by the courts of another jurisdiction.

The court may refer parties to arbitrate under domestic arbitration legislation rather than international commercial arbitration legislation where the remedy flows from provisions in provincial corporate legislation.

Topic #10 - role of appeal courts on stay application decisions

Ontario's Court of Appeal clarified and reiterated a distinction it drew in Huras v. Primerica Financial Services Ltd., 2000 CanLII 16892 (ON CA) regarding its role on appeals of decisions in first instance on leave to appeal arbitral awards. Though it adhered to the legislation confirming it lacked jurisdiction to hear an appeal of such orders, the Court of Appeal distinguished between (i) leave to appeal decisions which mistakenly decline jurisdiction and (ii) leave to appeal decisions which decide the merits of the application for leave to appeal.

Saskatchewan's Court of Appeal endorsed the "*very solid line of authority*" and "*significant body of case law from other provinces*", originating from Huras v. Primerica Financial Services Ltd.

Topic #11 - interim orders not appealable

Part of the courts' support of arbitration involves resisting a party's invitation to interfere once the arbitral process starts. The courts will engage in their limited intervention post-award but not prior to a final determination. Even if the parties' agreement confers on the courts a role to review interim decisions, the courts refuse to oversee procedural awards independent of or prior to considering valid post-award challenges to the awards. The decisions in these notes provide meaningful guidance to distinguish between interim and final determinations.

Topic #12 - confidentiality of arbitration

Confidentiality of the arbitral process is often presumed but not necessarily an automatic feature of arbitration. Parties can agree to keep their arbitration confidential by virtue of stipulating to it in their agreement to arbitrate. Applicable *lex arbitri* or the rules of a particular arbitration institution can also stipulate to the confidentiality of the proceedings. In 2020, the courts respected confidentiality and added significantly to how to best handle and protect that confidentiality.

Despite the agreement to maintain confidentiality, securities legislation can require arbitral parties subject to disclosure obligations to disclose the existence of arbitration as a material change but also allows securities commissions to exempt filers from funding litigation funding agreements in certain circumstances.

Topic #13 - mediation and settlement

Settlement can arise during the course of arbitration, either assisted by a mediator or directly between the parties. The Notes record different ways in which the courts approach the settlements.

Unilateral efforts to mediate or arbitrate are insufficient to qualify as efforts justifying bona fide efforts to advance dispute resolution.

Parties should consider the differing treatments given to the same resolution but confirmed by different means. Courts might have jurisdiction to examine the merits of the contract confirming the agreement to settle but lack jurisdiction to examine the merits of the same bargain confirmed by consent award.

Parties can be bound to settlements negotiated on their behalf by authorized agents.

Mediation need not arise only by agreement of the parties. Legislation creates the opportunity to mediate, applicable to specific industries deemed vital to a jurisdiction and benefitting from legislated pauses in the dispute resolution pending the mediation.

Mediation need not be reserved by legislation for key industry activity or endorsed by court-run mediation. The courts also support attempts for the parties to arrive at their own resolutions instead of those imposed by the courts. Mediation is lawful even where the subject matter in dispute may involved alleged unlawful activity.

When documenting their settlement, parties must take care not to generate new, further disagreements. Drafting an accurate record of the agreement can save time and expense and avoid a turnstile effect on the parties' attempts to resolve their disputes.

Courts will of their own initiative prevent parties from breaching the confidentiality of the mediation process where all of the parties and the mediator have not agreed post-mediation to disclosure. Exceptions to confidentiality exist if disclosure is necessary to prove (i) that an agreement resulted from mediation or (ii) the scope of the agreement which the parties acknowledged making.

Settlement agreements are contracts. As with other contracts, settlement agreements can be rescinded on the basis of one party's innocent misrepresentation regarding a fact material to other party's decision to settle. The courts will allow parties to adduce confidential exchanges made in a mediation to prove the existence or scope of a transaction.

Despite an initial unsuccessful attempt at mediation, the parties can still agreement to name that mediator as a future arbitrator to resolve disputes arising out of a settlement developed post-mediation and during arbitration before another professional serving as arbitrator.

An arbitrator's interpretation of such settlements can raise extricable questions of law and created jurisdictional issues if the arbitrator exceeds the scope of the settlement.

Topic #14 - post-award challenges, set asides, appeals

The courts enforced time limits in which to initiate a post-award challenge, dismissing claims that use of the title "Partial Award" created uncertainty, thereby giving petitioner additional time to initiate the challenge.

The courts remind challengers that an application to recognize and enforce an award is not a hearing on merits of the arbitrated dispute. Some inconsistencies in an award, such as using a different form of name to identify an arbitral party, may be obvious but do not warrant remitting the award to the arbitrator.

The courts distinguish between using the same arguments to seek leave and to set aside an award. The courts can refuse to set aside an award on the basis of legal error but still rely on the alleged error of law to grant leave to appeal, merely screening arguable errors to be determined later on appeal.

The courts considered the role of 'new' evidence in a pair of cases. Evidence inadmissible as new evidence might still be adduced if offered to demonstrate fraud. Filing additional evidence is not as of right, as the courts limit their approach to a review and not a trial *de novo*. Dispute resolution is best served by requiring parties to make their best case the first time before the arbitral tribunal and not modify the record on a subsequent, post-award application to the court.

The Notes identified two (2) challenges involving inadequate reasons. The courts explained the role and purpose of reasons. Reasons justify the result, explain it to the losing party and satisfy that justice has been served. 'Adequate' does not mean long and perfect but parties should avoid agreeing to only summary reasons as too little can sometimes be not enough. The court demonstrated its own willingness to reframe its earlier orders in which it provided directions when remitting an award to the arbitrator.

Topic #15 - standards of review, consensual vs statutory arbitration

The courts must state the standard of review applicable, distinguishing between appeals from statutory arbitrations and from consensual arbitrations. Mere use of the term "*arbitration"* is not enough to convert an administrative proceeding into a consensual arbitration.

For consensual arbitrations, the court affirmed that the standard of review is "*very high*" due to the choice arbitral parties have made to resolve their disputes without a court's intervention. The courts will refuse to follow even a joint submission that the standard tracks those in judicial review applications and underlines that an arbitrator in a consensual arbitration is not an administrative tribunal subject to the court's control and supervision.

Questions of mixed fact and law by their definition involve aspects of law. Even where the standard is reasonableness, sometimes only a single reasonable answer exists.

Following the release of Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, the courts considered its application to both statutory and consensual arbitration. The majority considered that the decision did not alter the standard of review for consensual arbitrations. Some courts noted that it was not reasonable to conclude that the Supreme Court would overrule its own earlier, recent, leading cases dealing with consensual arbitration without making any reference to them.

Even for statutory arbitration, the statute must first apply to the party before the arbitration provisions can govern resolution of the dispute. The courts expressed willingness and ability to address facts which fell within a statute and while disregarding facts involving breach of contract subject to consensual arbitration and only ancillary to the judicial review applications.

Topic #16 - natural justice, procedural fairness

Natural justice comprises a dynamic set of expectations which can vary from dispute to dispute. Decision makers may have discretion to choose their own procedure but doing so creates legitimate expectations. Deviating from the declared procedure may breach a duty of fairness.

Deference is owed "*generally*" to procedural issues provided discretion is exercised judicially and sufficient weight given to all relevant considerations.

Reliance on a legal theory not advanced or argued by the parties is an error of law. The courts do not purport to agree or disagree with the result but only the process by which the arbitral tribunal arrived at the result.

Topic #17 - costs

One key distinction between the public courts and consensual arbitration is that parties directly pay the fees for the arbitrator. Paying those costs raises the issue of whether a prevailing party can later recover its costs, in whole or in part. Attribution of costs is therefore a common issue to address unless the parties have agreed to bear their own costs of legal representation and to share evenly those of the arbitrator and any administering institution.

Cost recovery can involve the costs associated with the arbitrator's services and related expenses as well as the fees paid to the institution administering the arbitration. Costs can also include the fees paid by a party to its legal counsel.

Parties sometimes challenge cost awards. Awarding costs is considered discretionary, involving a question of mixed fact and law. If the discretion is not exercised judicially, the award may raise a question of law. Provided the arbitrator has jurisdiction to award costs and there is no evidence of improper considerations, costs awards should not be set aside.

The courts do not require that arbitrators have detailed time summaries prior to allocating costs. The courts resist characterizing arbitral costs awards as taxation by court officials. B.C.'s

newly adopted Arbitration Act (Bill 7 – 2020: Arbitration Act), in effect September 1, 2020, expressly authorizes an arbitrator to summarily determine the amount of costs.

An arbitrator need not provide reasons when not departing from the normal rule of costs following the success. A party's communication of privileged settlement offers after the award and before the costs award is insufficient to meet the high threshold required to find real or perceived bias.

Preserving the independence of the judicial and arbitral streams of dispute resolution, the court has declined to defer awarding its own court costs pending a final determination by the arbitrator of parallel disputes.

Topic #18 - effect of awards, use of arbitral work product

The courts continued to support the binding and final nature of arbitral awards. Attempts to evade awards were deemed abusive. The courts relied on awards to prohibit parties from relitigating past disputes or reframing their contractual disputes as tort claims in order to relitigate them.

The courts are vigilant, willing to void transactions by arbitral parties which serve to delay, hinder or defeat arbitral award creditors.

The courts in Québec treat an award as a judgment subject to ten (10) year prescription (limitation) period. The court exercised its discretion not to summarily dismiss an arbitral party's late application for enforcement when the delay was attributable to its attorneys' failure to finalize and file the pleadings.

The courts will readily homologate (recognize and enforce) awards but not beyond the terms of the original award. If interest was not included in the award, the court will not the interest despite the contract clearly providing for payment of interest.

Courts will recognize an award with which a party has already complied. In doing so, the courts distinguish between recognition and enforcement, each serving its own purpose.

Some gaps do exist to enforcing certain awards between provinces, such as costs awards. Such gap decisions may require a longer two (2) step process of first recognition and enforcement in one jurisdiction and then enforcement by the courts in the next jurisdiction.

Enforcement or execution is not the sole post-award use of the arbitral process work product. The courts allowed parties to repurpose arbitral award findings of facts. Courts agreed to repurpose findings made in arbitral awards and use them in the court process, including relying on post-trial arbitration award to determine the value in dispute at trial to calculate court costs under a court tariff.

Topic #19 - investor-state

Few investor-state arbitrations found their way to Canadian courts in 2020 and resulted in decisions. In one, the court distinguished between an objection to jurisdiction involving the authority of a tribunal to hear a dispute and an objection to admissibility which refers to the characteristics of the claim. The court determined that it had jurisdiction to review the former but not the latter.

In another, the court declined to intervene in a decision by Canada's legal representative refusing to remove a member from the legal team representing Canada in an investor-state arbitration. The court held that (i) the staffing decision did not qualify as a public decision made by an entity subject to judicial review and (ii) Applicants had not demonstrated the arbitral tribunal's lack of jurisdiction to deal with the issue.

Topic #20 – bankruptcy and insolvency

In the context of bankruptcy and insolvency proceedings, the courts issued some notable decisions. The court held that mandatory provisions of provincial arbitration legislation do not prevent courts from exercising their inherent jurisdiction to refuse to stay court proceedings when federal Bankruptcy and Insolvency Act, RSC 1985, c B-3 ("BIA") applies.

Acknowledging the special status of a court-appointed receiver under the BIA and combining it with the doctrine of separability, the courts held that a court-appointed receiver can disclaim an agreement to arbitrate while still claim the benefit of the main contract in which the agreement to arbitrate is contained.

The court agreed to lift a stay imposed under the BIA by the appeal filed by the losing arbitral party against the order putting it in bankruptcy. By lifting the stay, the court enabled the trustee to exercise powers ordinary creditors do not have and to thereby assist in the post-award process by collecting relevant information.

The Supreme Court upheld a decision in first instance which authorized third-party litigation funding in court-monitored insolvency proceedings and granted the funders a super priority charge and security.

Notes on topic #1 - promises of arbitration, endorsement of arbitration and mediation

Alberta – protracted costly litigation highlights "perils of not having a dispute resolution mechanism built into a contract" - #400

In North Pacific Properties Ltd v. Bethel United Churches of Jesus Christ Apostolic of Edmonton, 2020 ABQB 791, Madam Justice Anna Loparco determined that the parties to an existing contract had not entered into a binding agreement to (i) extend a key date for performance or (ii) arbitrate disagreements under that extension. Loparco J. opened and closed her reasons noting the parties' lost opportunity to engage in less costly, less protracted dispute resolution. "*In the end, this is an unfortunate tale of two well-meaning parties who had no means of resolving their disputes prior to the Closing; the result was protracted and costly litigation. It highlights the perils of not having a dispute resolution mechanism built into a contract*".

Québec - parties urged to mediate/arbitrate to '*avoid bogging down*' in 'complex and costly judicial procedures' - #279

In Équipements de gardien de but Michel Lefebvre inc. v. Sport Maska inc., 2020 QCCS 44, Mr. Justice Frédéric Bachand 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 '*to avoid bogging themselves down in complex and costly judicial procedures*'. Bachand J. also urged the parties to engage in less formal exchanges of information which may allow them to find a faster solution to their dispute.

Alberta – court acknowledges litigants' commercial interest in arbitration as alternative to court litigation - #378

In Hannam v. Medicine Hat School District No. 76, 2020 ABCA 343, Alberta's Court of Appeal assessed the practical significance of its earlier five (5) judge panel decision in Weir-Jones Technical Services Incorporated v Purolator Courier Ltd, 2019 ABCA 49 which considered the benefits of summary judgment set out in Hryniak v. Mauldin, 2014 SCC 7, [2014] 1 SCR 87. In doing so, the majority and dissent both commented on the promised benefits of arbitration in contrast to court litigation. The note highlights those passages to illustrate contemporary comments by the courts.

Alberta - different levels of court urge the parties before them to mediate instead of litigating - #388

In separate cases, the Court of Appeal in Iyad Al-Qishawi Professional Corporation v. Alexander C. Yeh Professional Corporation, 2020 ABCA 372 and the Court of Queen's Bench in Soloniuk Estate v. Huyghe, 2020 ABQB 616 each urged the different groups of parties before them to consider mediation as a dispute resolution. Each level of court dutifully undertook and completed the task assigned to it by the parties under the applicable Alberta Rules of Court,

Alta Reg 124/2010 and, having done so, paused before closing to urge that the parties consider other forms of dispute resolution.

Québec - parties prompted to consider consent award, not litigate whether settlement occurred - #297

In Syndicat de la copropriété Marché St-Jacques v. 9257-3302 Québec inc., 2020 QCCS 975, Mr. Justice Sylvain Lussier 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. Lussier J. 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 judicial/arbitral proceeding settled, a release or payment.

Alberta - alleged limitations of arbitration unproven/insufficient to grant jurisdiction to regulator - #362

In FortisAlberta Inc v. Alberta (Utilities Commission), 2020 ABCA 271, Mr. Justice Jack Watson refused leave to appeal from a regulator's decision that it lacked jurisdiction over costs otherwise subject to arbitration. Watson J. held that a "*harmonious reading*" of legislation governing the regulatory environment created jurisdiction for both regulator and arbitration tribunals. He resisted appellant's alleged efforts to "*confect*" a "*solemnly commercial sounding term*" to bring the dispute within the regulator's jurisdiction. Watson J. also determined that any alleged limitations in the arbitration process were insufficient to empower the regulator to "*effectively override*" the parties' contracts. As appellate gatekeeper, Watson J. concluded that a full panel was unlikely to find the claim of inadequacy of arbitration anything more than just a claim supported only by appellant's own say so.

Ontario - resort to arbitration commercially reasonable to resolve ambiguous non-compete clause - #393

In Way v. Schembri, 2020 ONCA 691, Ontario's Court of Appeal set aside a decision granting summary judgment which, among other determinations, had held that it was "*commercially unreasonable*" to consider that arbitration was suitable to resolve disputes over an ambiguous non-competition clause. As part of his reasoning, the judge in first instance had observed that one party's "*suggestion that the answer to the ambiguities and lack of details in [non-competition clause] would be resolved by an arbitrator is commercially unreasonable and something that no businessperson would agree to*". The Court of Appeal disagreed, noting that "*[g]iven the presence of arbitration provisions in countless business agreements, it cannot be that their existence alone is commercially unreasonable*".

Ontario – majority shareholder referring contract interpretation to arbitration is not oppressive conduct - #275

In Richcraft Homes Ltd. v. Urbandale Corporation et al., 2020 ONSC 411, Mr. Justice Robert J. Smith dismissed a minority shareholder's action which alleged oppression based on a majority shareholder requesting a legal opinion favourable to its interests and then submitting the interpretation to arbitration. Smith J. held that any party to a commercial agreement, including a majority shareholder, is entitled to seek a legal opinion concerning interpretation its rights under a contract and, instead of acting illicitly on any interpretation, refer interpretation of the contract to arbitration.

Ontario - Mareva injunction and increased costs ordered where arbitral award funds were core of dispute - #363

In awarding costs on a substantial indemnity basis in Ndrive v. Zhou, 2020 ONSC 4568, Mr. Justice John R. McCarthy drew attention to a defendant's conduct which "*unnecessarily extended and complicated*" *Mareva* injunction proceedings in which arbitral award funds were the "*core of the dispute between the parties*". McCarthy J. underlined the importance of *Mareva* injunctions as a tool in civil litigation "*to address the problem posed when a defendant utilizes the time lag between a claim being prosecuted and a plaintiff's attainment and execution upon a judgment to divest itself of assets which would otherwise be available to satisfy that judgment in whole or in part*". Also, see notes regarding an arbitrator's jurisdiction under the Arbitration Act, 1991, SO 1991, c 17 to issue *ex parte* preservation orders against arbitral parties and an arbitrator's lack of jurisdiction to issue *Mareva* injunctions against non-parties.

Federal - successful offer in all-or-nothing final offer arbitration can include agreement to arbitrate - #392

In Canadian National Railway Company v. Gibraltar Mines Ltd., 2020 FC 1034, Mr. Justice Michael D. Manson held that, in final offer arbitration, the absence of reasons in a decision qualified the decision as reasonable and correct. Though one party objected to the other's final offer including an agreement to arbitrate, Manson J. held that the arbitrator had to accept either offer "*in its entirety*" based on which offer the arbitrator considered more reasonable. Final offer arbitration's "*all-or-nothing*" approach prevents an arbitrator from extracting reasonable terms from one offer for inclusion in the other and the Canada Transportation Act, SC 1996, c 10 prohibited the arbitrator from explaining the choice made.

Federal – final offer arbitration characterized as "*an intentionally high-risk form of arbitration*" - #260

Madam Justice Ann Marie McDonald in Canadian National Railway Company v. Gibraltar Mines Ltd, 2019 FC 1650 demonstrated that the "*unique nature*" of final offer arbitration distinguished it from "*ordinary commercial arbitration*" and informed expectations of procedural

fairness. The dissatisfied party objected to the administering institution's decision to dismiss a preliminary application but provide reasons only after the arbitration concluded. McDonald J. held that the decision was not part of the final offer arbitration process under challenge and did not affect the fairness of the process. McDonald J. also issued a permanent order declaring certain documents, created for the arbitration, to remain confidential.

Notes on topic #2 - virtual hearings

Alberta – videoconferencing for cross-examination on affidavit authorized, despite objection, because "It's 2020" - #334

In Sandhu v. Siri Guru Nanak Sikh Gurdwara of Alberta, 2020 ABQB 359, Mr. Justice Michael J. Lema concluded that, despite no express mention in the applicable rules, the court has authority to direct remote questioning on affidavits despite a party's resistance. In his reasons, Lema J. referred to Alberta case law from 2000 and Ontario case law from 2009 which clearly supported the use of videoconferencing for cross-examination on affidavit as "*a normal process*" in modern international litigation or arbitration. Lema J. also cited from the May 1, 2020 decision in Arconti v. Smith, 2020 ONSC 2782 authorizing videoconferencing because "*It's 2020*". Lema J.'s reasons include extensive references to key cases discussing the evolution of technology while acknowledging concerns for irritants and mischief.

Ontario - court accommodates litigant in China impacted by coronavirus measures - #288

In his January 24, 2020 reasons Paul Sun v. Duc-Tho Ma, 2020 ONSC 505, Mr. Justice Calum MacLeod accommodated a litigant whose ability to attend in court in Ontario was constrained by now-familiar government measures to control the coronavirus. Those measures impacted travel and communication for the litigant located in China, obliging the litigant to participate by conference call to finalize the terms of a November 2019 trial decision. Despite flexibility in accommodating for COVID-19, Macleod J. declined to engage further in requests made for intervention. He emphasized the "*very narrow*" scope of his intervention due to an earlier Superior Court determination that other disputes between the parties were subject to exclusive resolution by arbitration in Taipei.

Ontario - Zoom technology for court hearing to accommodate 500 members of the public - #306

For those interested in just how Canadian courts initially organized procedural hearings and maintained the public nature of those hearings in the new normal, read the brief endorsement issued April 1, 2020 by Mr. Justice David L. Corbett in Nation Rise v. Minister of the Environment, 2020 CanLII 25863 (ON SCDC). The details involved a virtual hearing scheduled for April 17, 2020 using Zoom technology organized through Arbitration Place.

Notes on topic #3 - distinguishing between courts and arbitration dispute solution

Alberta - parties can agree to be bound by coin flips, Ouija boards and bespoke judicial resolution processes - #397

In Keeder v. AlGendy, 2020 ABCA 420, Madam Justice Jolaine Antonio denied leave to appeal consent orders which issued from a binding judicial dispute resolution process by which the parties had agreed to either resolve the issue themselves or be bound by the determination of the judge presiding the process. Antonio J.A. held the parties to their contract, applying precedent which held that such decisions are imposed on the parties as a result of their contract rather than the court's authority. If the settlement falls apart, the parties must sue on their contract. Though the judge issues a determination, the decision is imposed as a result of their contract and not the court's authority.

B.C. – court's own "alternate and free" dispute resolution procedures co-exist with private mediation-arbitration - #374

In Otte v. Otte, 2020 BCSC 1408, Mr. John J. Steeves refused to eliminate the court's own judicial case conference ("JCC") in favour of enforcing the parties' contractual agreement to mediate-arbitrate. Observing that the court's own JCC served as an "*alternate and free procedure*", Steeves J. refused to relieve the parties from participating in that procedure, reasoning that parties can "*use both, either or neither of arbitration-mediation or a JCC*".

Ontario – fundamental differences between party-appointed arbitrator and court-appointed referee - #311

Despite their "*superficial similarities*", Mr. Justice Ian F. Leach in Belanger v. Harwood et al., 2020 ONSC 1883 identified fundamental differences between an arbitrator and a referee. An arbitrator, appointed by parties, engages in "*an autonomous, self-contained and self-sufficient process, presumptively immune from judicial intervention … operating outside the court system*" whereas a referee, appointed by the court, works "*within the court system, and presumptively subject to the court's supervision, control and substantive disagreement*". Leach J. also determined that the parties had clearly subjected any third-party decision making to a condition precedent which had not yet been realized and the undertaking to engage in that process was "*neither binding nor enforceable*".

B.C. – precedents acknowledged for parties to constitute sitting judge as private tribunal without appeal - #349

In Gourlay v. Crystal Mountain Resorts Ltd., 2020 BCCA 191, B.C.'s Court of Appeal acknowledged precedents in which litigants constituted a judge/panel of judges as arbitrator(s) but, on the facts, held that no such agreement existed in the action. Such an agreement, if established, also entailed consequences, familiar to arbitration, such as an inability to appeal unsatisfactory orders. The Court's reasons omit the Court's own consideration of whether

consent to have a judge sit as arbitrator could validly be given or enforced. Rather, it limited its reasons to acknowledging that it had been done in the past but that the agreement in the case did not support its application.

Ontario – court's jurisdiction "not an elastic concept" – it either has or has not jurisdiction - #389

In George v. Wang, 2020 ONSC 6175, Mr. Justice James F. Diamond dismissed a defendant's challenged to the court's jurisdiction, determining that defendant had effectively waived the application by conduct in court. Having participated in case conferences and motions, including seeking relief on separate cross-motions, Diamond J. determined that defendant had effectively waived the application of the otherwise-valid agreement to arbitrate. Diamond J. also underlined that the court's jurisdiction arose from plaintiff's application as originating document and not from an earlier court order in the action.

Québec - forum selection clause does not eliminate courts' jurisdiction to issue provisional measures - #338

In Associated Foreign Exchange Inc. v. 9189-0921 Québec Inc. (MBM Trading), 2020 QCCS 1823, Mr. Justice Michel A. Pinsonnault determined that the courts of Québec had jurisdiction to issue a Mareva injunction over assets located in Québec despite the parties' prior, uncontested agreement that the courts of Ontario had exclusive jurisdiction over the merits of their dispute. Pinsonnault J. found support for that determination based on the clearer result, set out expressly in Québec's substantive and procedural codes, confirming the Québec courts' jurisdiction to issue provisional measures despite a final and binding agreement to arbitrate binding the parties and excluding the courts.

Ontario - summary judgment granted despite intersection with contract subject to arbitration - #286

In P and A Holdings Inc. v. Kim, 2020 ONSC 546, Mr. Justice Paul R. Sweeny dismissed Defendant's attempt to pause the litigation pending arbitration and, instead, granted summary judgment in Plaintiff's favour. Sweeny J. acknowledged that the promissory note, on which the court litigation was based, had been mentioned in a unanimous shareholders agreement which was subject to arbitration. Despite that mention, (i) failure to pay on the note was not addressed as an obligation between the shareholders and (ii) the shareholders agreement provided no mechanism for recovery on the note.

Québec – plaintiff's choice to pursue small claims despite arbitration delays dispute resolution - #290

The Court of Québec in CMAT Marketing inc. v. Gars de Saucisses Inc., 2019 QCCQ 7976 granted Defendant's application to dismiss based on the parties' agreement to arbitrate, a full year after CMAT Marketing inc. v. Gars de Saucisse Inc., 2018 QCCQ 7514 referred the application to a

hearing on the merits. Despite the Court of Québec vigilant defence of access to justice initiatives in small claims division and despite the Court of Québec's support of arbitration, their combined efforts resulted in delays uncommon in Court of Québec but occasioned by Plaintiff's own decision to initiate court litigation and then resist referral to arbitration.

Québec - court could enjoin contract termination to preserve arbitral jurisdiction to determine merits of termination - #313

Despite dismissing the application for provisional injunction, Madam Justice Élise Poisson in Groupe Sidney Santé Inc. v. Centre intégré de santé et de services sociaux de Lanaudière, 2020 QCCS 1068 did determine that applicant demonstrated urgency related to the arbitrator's jurisdiction and the merits of the dispute. Poisson J. agreed that respondent's notice to resiliate (terminate) the parties' contract would affect the *status quo* and impact on the scope of the arbitrator's jurisdiction to determine the merits of the notice of termination. The decision is a rare illustration of a court accepting it could intervene to preserve for arbitration a fuller scope of dispute on the merits.

Alberta – decision to initiate litigation rather than mandatory arbitration qualifies as "*injury*" - #317

In HOOPP Realty Inc v. Emery Jamieson LLP, 2020 ABCA 159, Alberta's Court of Appeal underlined the importance of initiating arbitration instead of litigation when bound by a mandatory arbitration agreement. In considering appeals from motions for summary disposition of actions filed by a client against two (2) law firms, the Court held that a lawyer's omission to serve the notice to arbitrate qualified as an "*injury*" to the client within the meaning of section 1(e) of the Limitations Act, RSA 2000, c L-12. The Court further held that the current law firm's knowledge of the omission by the former law firm could be imputed to the client in order to trigger the commencement of the limitation period and that the Limitations Act focused on knowledge of facts and not applicable law or chances of success.

Québec – court suspends own process, requires parties take arbitration-related steps prior to decision on stay - #365

In Syndicat de la copropriété Clark et Fleury v. Généreux, 2020 QCCS 1835, Mr. Justice Mark Phillips issued a sequence of orders regarding the parties' to exhaust the steps related to each of their competing dispute resolution procedural approaches. Without pre-determining either party's rights either to pursue freshly filed litigation or to obtain referral to arbitration, Phillips J. suspended his own involvement in a referral application and, during that suspension, imposed steps to complete procedural arguments for/against arbitration in two (2) court files. His orders included 'recommending' the parties exercise certain rights in their agreement to arbitrate prior to a later but near-in-time date at which he would resume involvement. Phillips J. limited his involvement to ensuring completion of all steps necessary to (i) the agreement to

arbitrate and (ii) contesting the court's jurisdiction, under reserve of any upcoming decision that the agreement to arbitrate applied to the disputes.

Ontario – anti-suit injunction restrains party bound by Ontario arbitration award from pursuing parallel U.S. litigation - #368

In Borschel v. Borschel, 2020 ONSC 4395, Mr. Justice Lorne Sossin issued an anti-suit injunction restraining a party to arbitration awards subject to Ontario law from pursuing parallel proceedings in a U.S. jurisdiction. Sossin J. also dismissed arguments challenging enforcement of the awards based on legislative provisions requiring parties to sign any agreement reached as part of the court process. Sossin J. held that the provisions did not serve to invalidate awards which had issued on consent and where consent of the parties had been communicated by counsel.

Notes on topic #4 - drafting advice

Québec - no second opinion on issue determined by award issued by physician arbitrator - #408

In Rivain v. La Capitale assureur de l'administration publique Inc. (La Capitale, assurances et services financiers), 2020 QCCS 3936, Mr. Justice Christian Immer declined to order parties to re-arbitrate an issue determined by a physician arbitrator under an insurance policy. That policy submitted medical disputes to arbitration before a physician and subjected awards to the typical three (3) post-award options available to arbitral parties: compliance, homologation, annulment. Immer J. did determine that the policy anticipated a 4th option, namely a subsequent arbitration before another medical specialist if the 1st arbitrator determined that the medical dispute fell within that other medical speciality. Immer J. also noted that, despite the complexity of the facts, a court was better placed to determine the jurisdictional issue, rather than defer to a first determination by the arbitrator, as the request to refer the parties to arbitration raised principally a question of law.

Ontario - agreement to arbitrate disputes involving "*construction, meaning or effect*" does not cover "*enforcement*" - #278

In Illumina Holdings Inc. v. Brand Alliance Inc. et al, 2020 ONSC 1053, Mr. Justice Cory A. Gilmore gave effect to an agreement to arbitrate disputes involving "*construction, meaning or effect*" of an agreement and refused to stay litigation based on enforcement of the agreement. Gilmore J. held that the claims involved "*a straightforward contract case*" and that breach of an enforceable agreement was not the same as the meaning of that agreement. Demonstrating the courts' own readiness and flexibility to provide resolution of disputes, Gilmore J. then went on to determine that the disputes did not warrant a trial and issued orders on the merits of the claims made.

Québec - narrow definition of '*dispute*' in agreement to arbitrate justifies refusal to nominate arbitrator - #303

In Municipalité de Caplan v. Arpo Groupe-Conseil Inc., 2020 QCCS 885, Madam Justice Michèle Lacroix refused to nominate an arbitrator due to the limited scope the parties gave to the definition of dispute in the agreement to arbitrate. She held that when an agreement to arbitrate uses imprecise terms, access to the courts must be favoured over enforcement of such clauses.

Ontario - consent order prompts agreement to arbitrate to complete it and fresh litigation over vague term - #326

In Lokhandwala v. Khan et. al., 2020 ONSC 3209, Mr. Justice William M. LeMay determined that an offer received for a property qualified as "*reasonable*" according to a consent order agreed to by the parties in an earlier hearing. That consent order also included an agreement to arbitrate, if need be, the choice of real estate agent to list the property. LeMay J.'s reasons illustrate the care needed by parties to disputes when drafting terms to resolve their disputes so that today's resolution does not inadvertently sow seeds for future, new disputes. The reasons also include helpful references to case law on judicial notice and the pandemic.

Ontario - courts cannot imply terms which legislation requires be express to have valid arbitration agreement - #354

In Magotiaux v. Stanton, 2020 ONSC 4049, Madam Justice Jennifer Mackinnon 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. Mackinnon J. recognized that courts can imply terms into a contract following the approach 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.

Québec – choice of law does not determine choice of forum - #355

In Corner Brook Pulp and Paper Limited v. Valmet Ltd., 2020 QCCS 2136, Mr. Justice Gregory Moore dismissed a defendant's argument that choice of Ontario law in its contracts with another entity required application of Ontario's Arbitration Act, 1991, SO 1991, c 17. Moore J. held that choice of governing law did not determine choice of forum and that Québec's Civil Code of Québec, CQLR c CCQ-1991 provides that the law of the court seized of the matter governs procedure. Defendant's procedural decision to force intervention of its contracting party as defendant-in-warranty to the principal claim yielded to the choice of forum clause indicating a clear intention to remove jurisdiction.

N.L. – agreement to arbitrate renewal option's financial terms ensures lease is enforceable - #369

In Copper Stop Limited v. Parkland Fuel Corporation, 2020 NLSC 114, Madam Justice Kendra J. Goulding had to resolve a lease dispute which arose when the lessee sought to exercise an option to renew but for which the lease provided no specific term governing the method or time within which to exercise that option. Despite lessor's argument that the lease was enforceable, Goulding J. held that the option to renew was enforceable as the financial terms of the renewal option were capable of being made definite through imposition by the arbitrator. The ability to arbitrate if negotiations failed made the lease's renewal option more than just "*an agreement to agree*".

Québec - party autonomy to design arbitration includes right to risk loss of statutory construction lien rights - #401

In 9221-2323 Québec inc. v. Excavation L. Martel inc., 2020 QCCS 4363, Mr. Justice Martin F. Sheehan enforced the parties' agreement to arbitrate contractor's claims for additional sums even if doing so might result in loss of the contractor's right to publish (register) its legal hypothec (lien) within the statutory delay. Sheehan J. recognized that the arbitration award might issue only after the end of the construction work and, by mere lapse of time, extinguish the contractor's right to publish its legal hypothec. Party autonomy included the ability to require arbitration as a condition precedent to exercising statutory rights to protect claims and thereby give notice to third parties of that claim. Sheehan J. determined that the contractor had agreed that its legal hypothec could be published only after arbitration, knowing that the award might issue too late.

Nunavut – non-compliance with clear deadlines in contract eliminates ability to arbitrate - #267

In Comren Contracting Inc. v Bouygues Building Canada Inc., 2020 NUCJ 2, Mr. Justice Paul Bychok held that non-compliance with clear and unambiguous deadlines in a stepped dispute resolution clause extinguished claimant's right to pursue arbitration. Respondent's eventual agreement to engage in mediation and arbitration, subject to its rights to raise that non-compliance as "*technical or procedural defences*", did not waive its right to litigate or estop it from refusing arbitration.

Notes on topic #5 - appointment process

Federal – appointing authority's breach of appointment provisions raise no reasonable apprehension of bias - #382

In Grey v. Whitefish Lake First Nation, 2020 FC 949, Madam Justice Cecily Y. Strickland dismissed challenges to an arbitrator's decision, applying correctness as the standard of review for questions of procedural fairness, including those which encompass issues of bias. Despite the appointing authority's breach of the "*clear and unambiguous*" regulations for appointing

the arbitrator, the breach was not raised on appeal and did not affect the procedural fairness of the arbitration. The arbitrator's previous appointment did not give rise to a reasonable apprehension of bias.

Ontario - applicant seeking court appointment of arbitrator ordered to pay security for costs - #323

In Rayman Tiger Inc. v. Unger Tiger Inc., 2020 ONSC 691, Master Michael P. McGraw ordered that an arbitral party, applying for the appointment of an arbitrator, file security for costs related to its application. Having insufficient assets in Ontario or any reciprocating jurisdiction, the party had to post security in order to engage the court's assistance for its arbitration. In ordering $15,000.00 rather than the $37,714.01 sought by respondents, Master McGraw distinguished the complexity of issues and facts of the eventual arbitration from those raised by the narrower application to appoint an arbitrator.

Ontario - each party argues to have the other party's candidate appointed arbitrator instead of their own - #345

Still seized of the appointment process following his earlier decision to refer the parties to arbitration, Mr. Justice Jonathan Dawe in King Valley Estates Inc. v. Wong et al., 2020 ONSC 3950 accepted to grant Defendants' application to appoint a candidate initially proposed, but now resisted, by Plaintiff. Despite months of opportunity and diligent efforts by Defendants, the parties returned before Dawe J. each proposing that the other's candidate be named. Both candidates were "*eminently qualified*", acceptable to both parties and not under "*any disqualifying conflict*". Due to advantages perceived by Plaintiff's candidate's lower rate and cap on fees, Dawe J. expressed readiness to appoint that candidate at Defendants' request subject to (i) re-confirmation of his interest and (ii) a schedule acceptable to Defendants.

Québec - agreement giving one party privileged position to designate arbitrator subject to "blue-pencil" severance - #383

In Caron v. 7834101 Canada inc. (Triviom à Charlemagne), 2020 QCCS 2859, Mr. Justice Stéphane Lacoste severed a portion of an agreement to arbitrate which violated the rule against placing one party in a privileged position with respect to the designation of the arbitrator. Rather than declare null the entire agreement to arbitrate, as had an earlier court when faced with the same agreement, Lacoste J. struck the provision, likening the relief to the "*blue-pencil*" severance explained and applied in Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6 (CanLII), [2009] 1 SCR 157. To do so, Lacoste J. combined articles 2641 and 1438 of the Civil Code of Québec, CQLR c CCQ-1991 and, having done so, referred the parties to arbitration.

Nova Scotia – court refuses to appoint arbitrator because notice to arbitrate not acted upon had expired - #386

In Site 2020 Incorporated v. Campbell, 2020 NSSC 305, Mr. Justice Jamie S. Campbell declared invalid a notice of arbitration subject to strict time limits set by the parties' own agreement to arbitrate. Because the parties had not acted upon the notice to arbitrate in the time agreed upon, he dismissed claimant's request to appoint an arbitrator for the otherwise ongoing dispute. Campbell J. also dismissed respondent's request to have the court resolve the parties' dispute, determining that the dispute was subject to the agreement to arbitrate. The facts did not mention that any limitation period applied yet and Campbell J. urged the parties to either arbitrate or negotiate.

Québec - court refers parties to arbitration but grants adjournment permitting parties to agree on arbitrator - #396

In Proservin Inc. v. Investissements Toro Inc., 2020 QCCS 3561, Mr. Justice Stéphane Lacoste demonstrated the Québec courts' ready support of arbitration and their practical approach to assisting parties to appoint their own arbitrators. Citing the applicable legislative provisions in Code of Civil Procedure, CQLR c C-25.01 and principles issuing from key cases, Lacoste J. readily dismissed objections to the court referring the parties to arbitration. Having granted the application to nominate, Lacoste J. nonetheless granted the parties an adjournment to a specific date prior to which they were ordered to exchange on the nomination and informed that, failing agreement, he would resume the hearing and nominate an arbitrator from the competing choices.

Ontario - omission to stipulate language of arbitration and then require bilingual arbitrator creates delays - #406

In Hodder v. Eouanzoui, 2020 ONSC 7905, Mr. Justice Robert N. Beaudoin asserted jurisdiction under section 16(3) of Arbitration Act, 1991, SO 1991, c 17 to appoint a substitute arbitrator in an administered arbitration where neither the parties' agreement to arbitrate nor the administering institution's rules provided a process to appoint a substitute. The institution temporarily lacked a sufficient number of bilingual arbitrators on its roster and, during that period, Applicant applied to the court for assistance. The requirement that the arbitrator be bilingual did not appear in the agreement to arbitrate, arising after service of the notice to arbitrate, and appeared to result by consensus, combining the parties' respective positions on the appropriate language of the arbitration. When confirming his orders, Beaudoin J. also formalized the bilingual status of the arbitration.

Notes on topic #6 - parties to the agreement to arbitrate

Alberta - court has no authority to impose private arbitration absent parties' consent or an agreement - #405

In Stuve v. Stuve, 2020 ABCA 467, Alberta's Court of Appeal upheld a chambers judge's refusal to order the parties to engage in binding arbitration, agreeing that a judge has no jurisdiction to impose private arbitration without consent of the parties or an agreement to that effect. The Court held that "*[s]pecific legislative language would be required for the court to have the power to require parties to participate in an extra judicial private process such as arbitration*". Neither the Alberta Rules of Court, Alta Reg 124/2010 or the Arbitration Act, RSA 2000, c A-43 empowered the judge to do so. "*The parties commenced litigation in the publicly funded courts, and are entitled to access to court processes to resolve their dispute. Citizens have a right to access to the court, which is the public dispute resolution institution*".

Ontario – "*sophisticated corporate consumer*" expected to review external undertaking to arbitrate - #268

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. Also, in first instance, the applications judge also accepted that the application to stay was timely despite being filed well after the defence.

B.C. - applicant claiming status as non-signatory party to arbitration clause fails to meet evidentiary burden - #289

In AtriCure, Inc. v. Meng, 2020 BCSC 341, Mr. Justice Dennis K. Hori recognized the courts' willingness to consider whether a litigant qualifies as a non-signatory party to an agreement to arbitrate but held that the applicant seeking the stay filed no evidence justifying such a status. The case also 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.

Ontario - arbitrator determines complainant's status as member of respondent and eligible to arbitrate dispute - #346

In Cricket Canada v. Alberta Cricket Council, 2020 ONSC 3776, Mr. Justice Markus Koehnen upheld an arbitrator's determination that she had jurisdiction over both the complainant and the dispute, consistent with not only the applicable dispute resolution rules but also the

administering institution's enabling legislation. Koehnen J. held that the arbitrator had not taken it upon herself the power to determine membership in a private corporation, had not undertaken any corporate reorganization or attempted any unjustified removal of a right to self-determine membership. Rather, the arbitrator was correct in her determination that claimant's status and the nature of the dispute fell within her jurisdiction and that of the administering institution which adopted the dispute resolution rules.

Alberta – challenge to validity of agreement to arbitrate cannot evade application of Arbitration Act - #367

In Aldred Estate (Re), 2020 ABQB 469, Mr. Justice Craig M. Jones held that a court's discretion to refuse a stay under section 7(2) of the Arbitration Act, RSA 2000, c A-43 was limited to specific circumstances and a potential for inefficiency did not empower courts to disregard a statutory imperative. Despite challenges to the validity of the arbitration agreement, a court may grant the stay and allow the arbitrator to determine allegations of invalidity. Jones J. dismissed as "*insupportable*" the argument that the Arbitration Act did not apply if a party challenged the validity of agreement to arbitrate. Referring to sections 7(2)(b) and section 17(3), Jones J. held that these provisions would make no sense if an invalid arbitration agreement rendered the Arbitration Act inapplicable.

Notes on topic #7 - advocacy issues in arbitration

Federal – court rules require ship owner as party in admiralty proceedings despite arbitration agreement - #257

In Norstar Shipping and Trading Ltd. v. The Rosy (Ship), 2019 FC 1572, parties to an arbitration disputed the amount of bail to be paid into court to free a ship arrested as security for the claims made in the parties' arbitration. The ship's arrest was authorized by the Federal Courts Rules, SOR/98-106 which further required the seizing party to name its other arbitral party, the ship owner, as a party to the litigation. Naming the other party did not qualify as waiver of the arbitration agreement and the parties' argument before Madam Justice E. Susan Elliott was not considered a breach of any confidentiality agreement regarding the arbitration.

B.C. – settlement privilege applies to arbitration and justifies refusal of access to information request - #356

In White Rock (City) (Re), 2020 BCIPC 25, Ian C. Davis, 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. Dismissing argument that arbitration was not a "*litigious dispute*", Adjudicator Davis also held that settlement privilege is jointly held between parties to settlement negotiations and concluded that procedural fairness

required that he consider the other arbitral party's submissions on settlement privilege even if that other arbitral party was not a party to the access request.

Ontario - lawyer's duty of candour not limited to appearances in court, extends also to arbitration - #314

To address a scheduling issue in court, Mr. Justice Marvin Kurz in Haaksma v. Taylor, 2020 ONSC 2656 relied on rules of professional conduct which expressly stipulate that a lawyer's duty of candour in *ex parte* proceedings applies not just to courts but also to arbitrators, mediators and others who resolve disputes, regardless of their function or the informality of their procedures. Kurz J. emphasized that an exchange can qualify as *ex parte* even if the other party is aware of the exchange but, due to circumstances, cannot adequately respond or make submissions due, for example, to insufficient notice. The duty of candour requires lawyers to take particular care to be accurate, candid and comprehensive in presenting a client's case so as to ensure that the decision-maker is not misled.

Alberta - evidentiary rules for adducing videos/video stills applicable also in arbitration - #390

In R. v. Brar, 2020 ABCA 398, Alberta's Court of Appeal analysed the Canada Evidence Act, RSC 1985, c C-5's application to bank records including video surveillance stills and videos captured at automatic teller machines. The Court explored the reasoning behind the Canada Evidence Act's evidentiary rules applicable to records held by financial institutions and requirements for adducing such evidence. The Canada Evidence Act expressly applies to arbitration and matters within the jurisdiction of Parliament. While the Court's analysis applied to a criminal proceeding with its heightened standard of '*beyond a reasonable doubt*', it still serves to guide arbitration practitioners. Subject to any adjustments occasioned by the standard of '*balance of probabilities*' applicable in civil matters, the Court's analysis offers arbitration practitioners meaningful insights.

Ontario - non-parties seek injunction to stop private arbitration from proceeding - #269

In City of Toronto v. Resource Productivity & Recovery Authority, 2020 ONSC 599, Madam Justice Katherine E. Swinton dismissed an attempt by non-parties to enjoin a private arbitration from proceeding. Though one of the arbitral parties exercised duties under Ontario legislation, the dispute stemmed from a bilateral agreement and involved no exercise of statutory power of decision subject to judicial review. Swinton J. observed that the non-parties argued the arbitrator lacked authority but neither of the arbitral parties challenged the arbitrator's jurisdiction.

Saskatchewan - court approves arbitral parties' Pierringer agreement in litigation against third party - #294

Upon application, Madam Justice Brenda R. Hildebrandt in Rosetown (Town) v. Bridge Road Construction Ltd., 2020 SKQB 3 approved an agreement between two (2) arbitral/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, Hildebrandt J. approved its application and amendments to the pleadings in court to implement it.

Ontario - insurer's duty to defend in arbitration includes right to select/add new counsel and control defence - #308

In Panasonic Eco Solutions Canada Inc. v. XL Specialty Insurance Company, 2020 ONSC 1502, Mr. Justice Markus Koehnen granted in part an arbitral defendant's application to enforce its insurer's duty to defend. That duty also included the right under the policy to select and add new counsel in the arbitration to defend that portion of the claims made by the third party in the arbitration. The insured and insurer were bound by the allegations of fact made in the arbitration and not the legal characterization made by the third party about those facts.

Ontario - parties' signature of arbitrator's terms does not overwrite appeal process in original agreement - #331

In 547131 Ontario Limited v. MPI Torgan, 2020 ONSC 3186, Madam Justice Carole J. Brown disagreed that terms submitted by the arbitrator and signed by the parties overwrote the parties' initial agreement in their main contract regarding appeals of any arbitral award. The arbitrator's terms covered conflicts, compensation, the services of an arbitral secretary, cancellation policy, confidentiality, immunity and administration issues. Brown J. identified no indicia that the arbitrator's terms altered the initial agreement that the award would be "*final and binding*" and not subject to appeal, even on a question of law with leave of the court.

Saskatchewan – availability and final nature of partial discontinuance of claims in arbitration considered - #342

In Poffenroth Agri Ltd. v Brown, 2020 SKCA 68, Saskatchewan's Court of Appeal held that a notice of discontinuance filed in a civil action was interlocutory, not final, in nature and required leave to appeal. Observing the limited number of precedents, the Court referred to but distinguished the reasoning and result in Ontario First Nations (2008) Limited Partnership v. Aboriginal Affairs (Ontario), 2013 ONSC 7141 which considered whether an arbitral panel's decision to accept a claimant's partial withdrawal of its notice of arbitration was final or not and, if subject to appeal, permitted under Ontario's Arbitration Act, 1991, SO 1991, c 17.

Ontario – professional negligence claims stem in part from arbitration agreement's procedural options - #364

In HQIC and Circlemed Inc. v. Hamdani, 2020 ONSC 3403, Madam Justice Cynthia Petersen considered allegations made by clients against their former counsel of record in an arbitration and the negotiations which resolved the arbitration. Though her reasons focus on whether the record was sufficient/appropriate to allow her to grant summary judgment (no, it was not), Petersen J.'s analysis disclosed certain risks inherent for counsel in commercial arbitration when (i) stepping into a new brief and (ii) responding post-resolution to a client's alleged dissatisfaction over the conduct and settlement of the arbitration. The record also highlights the opportunities for preliminary skirmishing created by inserting procedural options into an agreement to arbitrate which can be triggered merely by how either party frames its action.

Ontario – oppression remedy grants party control of dispute resolution covered by funding agreement - #336

In 1515474 Ontario Inc. v. Soocellus Ontario Inc., 2020 ONSC 270, Ontario's Divisional Court upheld an order granting a shareholder control of the conduct of ongoing dispute resolution. Post-sale of G's shares in F Co., G retained non-voting shares in F Co. with a right to receive net proceeds in F Co.'s litigation so long as G provided litigation funding and met other financial terms. F Co.'s eventual decisions to reduce activity in the litigation, to seek an end to it and to mediate so as to "*accept the best reasonable offer we are able to negotiate*" combined to qualify as oppression justifying the grant of litigation control. The order sought to rectify for breach of G's reasonable expectations created by the sale of G's shares in a company engaged in litigation but, unlike other oppression remedies, limited the grant of control to the conduct of litigation and not overall operations of F Co.

Notes on topic #8 - limits on matters submitted to arbitration

Québec – default is all disputes subject to broadly-worded arbitration agreement unless expressly excluded - #309

In Groupe Dimension Multi Vétérinaire Inc. v. Vaillancourt, 2020 QCCS 1134, Mr. Justice Frédéric Bachand dismissed attempts to limit an arbitral tribunal's jurisdiction by way of presumption that statutory recourses were excluded unless expressly included. He held that the reverse approach was supported by a liberal interpretation which must be given to such agreements to arbitrate and legislative policy favouring development of consensual arbitration. Bachand J. concluded that an arbitral 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.

Québec - parties renounce referral to arbitration but court later confirms issues not public order, still arbitrable - #347

In Gestion George Kyritsis Inc. v. Balabanian, 2020 QCCS 1806, Madam Justice Claude Dallaire asserted public order limits to the arbitrability of certain disputes but, on the facts, held that the dispute did not pass those limits. Dallaire J. 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.

Québec - agreement to arbitrate cannot exclude parties from court's jurisdiction over breach of public order legislation - #318

In Bois Marsoui GDS Inc. v. Directeur des poursuites criminelles et pénales, 2020 QCCS 1327, Mr. Justice Carl Thibault 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. Thibualt J. held 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 would 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.

Supreme Court – courts should not refer jurisdiction challenge to arbitrator if real prospect that challenge might never be resolved - #344

In Uber Technologies Inc. v. Heller, 2020 SCC 16, the Supreme Court of Canada introduced a third exception to its general rule that jurisdiction challenges should be referred first to the arbitrator. The exception contemplates scenarios in which validity of the arbitration agreement might not be determined if arbitration is too costly or inaccessible due to costs, distance or even a choice of law clause circumventing mandatory local policy. Staying an action in favour of arbitration would deny relief for claims made under the agreement and insulate disputes from resolution. The Court also asserted that unconscionability involves both inequality and improvidence but does not require intention. The Court further confirmed that employment disputes are not "*commercial*" for the purpose of the International Commercial Arbitration Act, RSO 1990, c I.9.

Ontario – consumer contract arbitration clauses resist unconscionability/undue influence challenges - #266

Master Karen E. Jolley in Evans v. Mattamy Homes Limited, 2019 ONSC 3883 and Master Robert A. Muir in Wang v. Mattamy Corporation, 2019 ONSC 6675 each dismissed Plaintiffs' attempts

to resist application of an arbitration agreement based on arguments that the agreements were invalid due to unconscionability and undue influence. Both concluded that Plaintiffs failed to demonstrate any of the elements required to invalidate the agreements. Any alleged pressure was market driven, due more to Plaintiffs vying to purchase a property from a finite number being sold by Defendant and subject to ongoing sales efforts to other prospective purchasers.

B.C. – court acknowledges but declines to follow reasoning in Heller v. Uber Technologies Inc. - #271

In A-Teck Appraisals Ltd. v. Constandinou, 2020 BCSC 135, Madam Justice Mary A. Humphries expressly noted but declined to follow the reasoning in Heller v. Uber Technologies Inc., 2019 ONCA 1 (at the date of her decision, the Supreme Court of Canada had granted leave to appeal in Uber Technologies Inc., et al. v. David Heller, 2019 CanLII 45261 (SCC), and was under advisement following the November 6, 2019 hearing). Recognizing the Ontario Court of Appeal as a persuasive authority whose judgments merit respect, Humphries J. held it was "*not obvious*" that its reasoning applied to B.C. legislation and the unfairness informing that result did not arise on the facts before her. She refused to void an arbitration agreement in an employment contract and, in doing so, granted a stay.

Québec - rule shielding employee with Québec residence/domicile from litigating outside province applies to arbitration - #277

In Chung v. Merchant Law Group, 2020 QCCS 398, Mr. Justice Sylvain Lussier 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 Civil Code of Québec, CQLR c CCQ-1991. 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.

Notes on topic #9 - stay orders, waiver/acquiescence

Saskatchewan - referral to statutory arbitration requires a dispute between parties subject to legislation - #293

In Antoniadou v. Saskatchewan Government Insurance, 2020 SKCA 20, Saskatchewan's Court of Appeal reiterated a basic premise in dispute resolution that a dispute must exist between parties subject to the dispute resolution, whether by statute or otherwise. Though the dispute resolution involved naming an umpire under a statutory scheme, the Court's reasons apply equally to commercial arbitration and remind parties that not all disagreements over a set of facts falls within the scope of the dispute resolution.

B.C. - application for stay required for court to consider role of arbitration at certification stage - #333

Tasked with deciding whether or not to certify an action as a class proceeding, Madam Justice Veronica Jackson in Matthews v. La Capitale Civil Service Mutual, 2020 BCSC 787 declined to consider whether to stay the proceedings on the basis of mandatory arbitration agreements contained in several of the agreements. Despite contesting certification, Jackson J. noted that Defendants had not filed an application for a stay under section 15 of the Arbitration Act, RSBC 1996, c 55 and therefore the issues "*were not squarely before me and were not argued on this application*". "*At this time*", she could not conclude arbitration of disputes involving potential class members was required. See the earlier Arbitration Matters note "Stay granted despite anticipation that arbitrator applying U.S. law might not be able to grant claims".

Ontario - failing to file application to stay and taking significant steps in litigation justifies refusal of stay - #282

In Paulpillai v. Yusuf, 2020 ONSC 851, Madam Justice Judy A. Fowler Byrne refused to stay litigation despite no challenge being made to the validity of the arbitration agreement. Rather, she held that the parties requesting the stay had not only omitted to bring a motion to stay but had waived the benefit of the agreement by having taken significant steps in the litigation to date.

Alberta – stay application lacks evidence required to demonstrate overlap/status of duplicative proceedings - #371

To decide whether to exercise her discretion to stay duplicative proceedings involving administrative action taken in two (2) provinces, Madam Justice Susan L. Bercov in Mema v. Chartered Professional Accountants of Alberta, 2020 ABQB 486 drew on principles stated in UCANU Manufacturing Corp v. Calgary (City), 2015 ABCA 22 which considered whether to issue a stay when the duplicative proceedings involved a court action and an arbitration. Bercov J. declined to exercise her discretion due to applicant's failure to meet his evidentiary burden to establish the overlap and status of the duplicative proceedings. Her comments on applicant's evidence help guide arbitration practitioners invoking overlap with arbitration. The note also lists recent Alberta cases applying those principles to stays involving arbitration.

Québec - lacking jurisdiction over Plaintiff's claim, court declines to address whether claim subject to arbitration - #361

In Consultants en environnement Eutrotech Inc. v. Bacon, 2020 QCCQ 1727, Mr. Justice Daniel Lévesque dismissed a claim made Plaintiff for monies allegedly owing from an arbitration award which recorded Defendant's consent to render an accounting. Lévesque J. stated that jurisdiction was a matter of public order and, in dismissing the claim, declined also to rule on Defendant's challenge that the claim was subject to arbitration. The authorities referred to also

note that parties cannot by consent give jurisdiction to a court because jurisdiction is a matter of public order.

B.C. – a stay is not a dismissal - #315

In Clayworth v. Octaform Systems Inc., 2020 BCCA 117, B.C.'s Court of Appeal held that interpretation of the scope of an agreement to arbitrate is a question of mixed fact and law, not a question of law. As such, the courts are to apply the "*arguable case*" test whereby jurisdictional issues relating to the scope of the arbitration agreement are to be resolved in first instance by the arbitrator. The Court also emphasized the distinction between a stay and a dismissal. A stay simply holds proceedings in abeyance until the arbitrator completes the work which the parties agreed should be arbitrated. If the arbitrator determines the dispute is not one referred to arbitration or there are matters which remain unresolved after arbitration, a stay could be lifted upon application.

Québec - attorney's lack of knowledge of arbitration clause justifies late request for referral to arbitration - #319

In 9107-7719 Québec Inc. v. Constructions Hub Inc., 2020 QCCQ 1706, Madam Justice Johanne Gagnon readily extended defendant's delay to apply for referral to arbitration. The 45-day delay 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 that the contract contained an agreement to arbitrate. Gagnon J. accepted defendant's application filed 77 days after service of the action and, having considered it, granted it but declined to declare plaintiff's action abusive.

Ontario – facts determine jurisdiction and not the characterization of those facts - #270

In Stegenga v. Economical Mutual Insurance Company, 2019 ONCA 615, the Ontario Court of Appeal held that the nature and subject matter of a dispute, assessed on the facts giving rise to it, determine jurisdiction. The legal characterization of a cause of action does not determine whether a claim falls within the jurisdiction of the court or an alternative dispute process created by legislation. Though an insured raised an independent cause of action of alleged bad faith in the handling of statutory benefits and sought remedies which the statutory tribunal could not grant, litigation was barred. The legislation used broad phrase of "*in respect of*" to link "*dispute*" and "*entitlement*" and capture the facts alleged.

Ontario - litigation stayed to permit arbitrator to determine jurisdiction and issues subject to arbitration - #295

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, Mr. Justice Lorne Sossin 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, Sossin J. 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 lay within the agreement's exclusive scope. To identify the dispute, he included vendor's claims and those raised by each buyer.

Ontario – decision maker's position in judicial hierarchy justifies no reason for different review standard - #262

In ATS Automation Tooling Systems Inc. v. Chubb Insurance Co., 2019 ONSC 5073, Madam Justice Sandra Nishikawa upheld a Master's decision to dismiss plaintiffs' motion to stay their own litigation. The facts did not confirm that the arbitration was active and, as of the date of the appeal hearing, arbitration had not been formalized and the limitation period in which to do so had expired. Nishikawa J. agreed with earlier case law there was "*no compelling reason for adopting differing standards of review on appeal depending solely on the place in the judicial hierarchy occupied by the decision maker whose decision is under appeal*".

Québec – appeal court quashes otherwise valid stay order due to defendants' subsequent acquiescence - #264

On the basis of Defendant's acquiescence, the Québec Court of Appeal 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.

Alberta - participation in court proceedings prior to stay application waives mandatory arbitration - #273

In Agrium, Inc. v. Colt Engineering Corporation, 2020 ABQB 53, Master J.T. Prowse held that he had discretion to refuse a stay in favour of mandatory arbitration and could do so on the basis of unfairness to plaintiff stemming from the applicants' participation in court proceedings. That participation, though minimum, coupled with two (2) years of delay, lead Master Prowse to conclude that it would be unfair to plaintiff to allow defendants to "*go back on their choice to participate in this litigation*".

B.C. - stay granted despite anticipation that arbitrator applying U.S. law might not be able to grant claims - #283

In Williams v. Amazon.com, Inc., 2020 BCSC 300, Madam Justice Karen Horsman 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. Respecting competence-competence, Horsman J. recognized several issues affecting jurisdiction but deferred them to the arbitrator. She acknowledged the "*real prospect*" that a U.S. arbitrator (i) could decide that such claims were not available under U.S. substantive law and (ii) might lack jurisdiction to award the claimed damages but those were not sufficient to hold that the arbitration agreement was void, inoperative or incapable of performance. In addition, Horsman J. held that the agreement to arbitrate overcame any unconscionability concerns raised in Heller v. Uber Technologies Inc., 2019 ONCA 1.

Ontario - expired limitation period pre-empts need to decide stay application - #291

Ontario's Court of Appeal in Glen Schnarr & Associates Inc. v. Vector (Georgetown) Limited, 2019 ONCA 1012 asserted jurisdiction to decide a claim's viability rather than defer the decision to an arbitrator as mandated by section 7(1) of the Arbitration Act, 1991, SO 1991, c 17 and Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34 (CanLII), [2007] 2 SCR 801. A court may pre-empt an arbitrator's competence-competence to determine jurisdiction if it can decide that an applicable limitation period has expired. This approach is presented as a second exception, independent to the "*superficial consideration of the documentary evidence in the record*" for questions of law or mixed fact and law. The approach addresses viability of claims and not the interplay of the arbitration agreement and the dispute.

B.C. – stay issued despite procedural complexity, further legal proceedings prohibited without leave - #301

In Houm Services Inc. v. Lettuce Eatery Development Inc., 2020 BCSC 430, Madam Justice Heather MacNaughton stayed claims filed by plaintiff against defendant and its employees, pending resolution of claims which did fall within the agreement to arbitrate. She held that the agreement was valid and compliant with B.C.'s Franchises Act, SBC 2015, c 35 and any further relief, beyond the scope of the agreement to arbitrate, could be pursued in court after arbitration despite any "*procedural complexity*" or delays. She also issued an order under the Supreme Court Act, RSBC 1996, c 443 prohibiting plaintiff and its representative from instituting further legal proceedings against defendant and/or its employees without leave of the court.

Ontario - agreement to either litigate or arbitrate in another country justifies stay - #312

In Best Theratronics Ltd. v. The ICICI Bank of Canada, 2020 ONSC 2246, Mr. Justice Robert Riopelle stayed litigation in favour of the parties' agreement to litigate or arbitrate in South Korea but refrained from determining the role or mandatory nature of the agreement to arbitrate. Riopelle J. determined only that the courts of Ontario had no jurisdiction and omitted commenting on the primacy of litigation or arbitration in the parties' agreement. By his

omission, he deferred those issues for the parties to argue, if need be, at a later date before the courts in South Korea.

Québec - crossclaim triggers arbitration though agreement to arbitrate silent in that regard - #327

Relying on the contracts and the parties' respective claims, Mr. Justice Éric Dufour in Kolinar Real Estate Inc. v. Cadieux, 2019 QCCQ 7183 determined that Defendants' crossclaim triggered the parties' particular agreement to arbitrate unless the claim fell within the $15,000.00 level for Small Claims division's jurisdiction. Defendants' crossclaim exceeded that level and Dufour J. held it was not dilatory. Without express mention of Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34 (CanLII), [2007] 2 SCR 801, Dufour J. effectively determined jurisdiction first by "*only superficial consideration of the documentary evidence in the record*" and applied the approach, familiar in many court rules, which allows a crossclaim to impact jurisdiction set by amount of claim.

Manitoba – court uses provincial corporation legislation to order Canada/U.S. parties to arbitrate under domestic arbitration act - #359

In Silpit Industries Co. Ltd. v. Rady et al., 2020 MBQB 96, Mr. Justice Theodor Bock dismissed an attempt to appeal an award on a question of law under The Arbitration Act, CCSM c A120. The award resulted from a court-ordered arbitration which another Manitoba court, in prior litigation, imposed and subjected to the Arbitration Act. Despite the parties being located in different countries, the court did not subject the arbitration to The International Commercial Arbitration Act, CCSM c C151. The earlier court required the parties to arbitrate the value of shares which the court ordered be sold under sections 207 and 234 of The Corporations Act, CCSM c C225 to remedy a break down in the relationship between the two (2) groups of shareholders each holding a 50% interest.

Notes on topic #10 - role of appeal courts on stay application decisions

Ontario - exceptional case grants appeal court jurisdiction over single judge's decision mistakenly denying leave to appeal - #373

In McEwen (Re), 2020 ONCA 511, Ontario's Court of Appeal repurposed an exception, developed in its 1996 decision involving leave to appeal an arbitration award, which permitted a three (3) member panel to review the decision of a single judge denying leave to appeal. McEwen (Re) involved a panel's jurisdiction under Ontario's Courts of Justice Act, RSO 1990, c C.43 to review the decision of a single judge denying leave to appeal under the Bankruptcy and Insolvency Act, RSC 1985, c B-3. The Court's reasons highlighted the distinction between (i) leave to appeal decisions which mistakenly decline jurisdiction and (ii) leave to appeal decisions which decide the merits of the application for leave to appeal. Only the former qualifies for the exception to "*apparently absolute rule*".

Ontario - no appeal lies from an order refusing a stay whether order was made or not - #384

In Paulpillai Estate v. Yusuf, 2020 ONCA 655, Ontario's Court of Appeal held that it lacked jurisdiction to hear an appeal of a motion judge's order regarding a stay in favour of arbitration. No formal motion had been made to refer the dispute to arbitration, the motion judge's dispositive order was silent on the issue of arbitration and any comments on waiver of arbitration were merely *obiter*. Even assuming that an order might have been made, the Court held it lacked jurisdiction because section 7(6) of the Arbitration Act, 1991, SO 1991, c 17 stipulated no appeal lay from a decision under section 7. For a more in-depth look at how and whether section 7(6) applies to limit appeals, see the equally recent Court of Appeal decision in Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636, 2020 ONCA 612 and the related Arbitration Matters note "Appeal court reaffirms jurisdiction for appeal of stay decision where decision holds arbitration agreement does not apply".

Ontario – appeal court reaffirms jurisdiction for appeal of stay decision where decision holds arbitration agreement does not apply - #385

In Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636, 2020 ONCA 612, Ontario's Court of Appeal delivered a masterclass in judicial reasoning/drafting. It set out the role of judicial interpretation of statutes, observed how a wrong interpretation is never right, set out its approach to overruling its own precedents, acknowledged new guidance given in TELUS Communications Inc. v. Wellman, 2019 SCC 19 (CanLII), [2019] 2 SCR 144 on section 7(5) of Arbitration Act, 1991, SO 1991, c 17 but distinguished its impact from the Court of Appeal's well-accepted reasoning in Huras v. Primerica Financial Services Ltd., 2000 CanLII 16892 (ON CA) on section 7(6)'s application. Reasserting its interpretation on section 7(6), the Court held that it did have jurisdiction to hear an appeal of a motion judge's decision purporting to exercise discretion under section 7(5) to deny a stay. On the merits of the appeal, the Court then applied the Supreme Court's interpretation which overturned the Court of Appeal's interpretation on section 7(5).

Saskatchewan - appeal court endorses other appeal courts' approach to stay application appeals where arbitration agreement does not apply - #391

In Abbey Resources Corp. v. Andjelic Land Inc., 2020 SKCA 125, Saskatchewan's Court endorsed the Ontario Court of Appeal's reasoning in Huras v. Primerica Financial Services Ltd., 2000 CanLII 16892 (ON CA) to determine that, under section 8(6) of its The Arbitration Act, 1992, SS 1992, c A-24.1, the Court of Appel did have jurisdiction to hear an appeal of a decision in first instance which refused a stay if the decision held that that arbitration agreement did not apply. Identifying that case as the first in a "*very solid line of authority*" and a "*significant body of case law from other provinces*", the Court held that it did have jurisdiction to hear the

appeal. On the merits, the Court held that the trial judge made no error in deciding the issue of the arbitrator's jurisdiction because the case qualified as an exception to the "*methodic referral of matters to arbitration*" favoured by competence-competence. "*The leases would seem to be standard form contracts, the interpretation of which is of precedential value, and there appears to be no meaningful factual matrix specific to [the parties] that can inform their interpretation*".

Notes on topic #11 - interim orders not appealable

Ontario - interim procedural orders "*immune from review*" during arbitration even when titled "*award*" - #353

In Hristovski v. Hristovski, 2020 ONSC 4021, Madam Justice Francine Van Melle held she had no jurisdiction to hear an appeal of an arbitrator's pre-merits hearing denial of further document disclosure. Despite use of the term "*award*" to title the decision, Van Melle J. determined that the denial was an interim procedural order. Unlike an award which disposes of disputes between parties, the order was not eligible for appeal, being "*immune from review*" under the Arbitration Act, 1991, SO 1991, c 17. Van Melle J.'s reasons do not assert that interim decisions cannot later be challenged when appealing the final award if an interim decision impacts on the result. As neither party argued whether leave had to be sought/obtained, Van Melle J. made no comment on the issue.

Ontario - interpreting agreement to allow appeal of procedural orders is commercially unreasonable - #395

In Converaidem, Inc. v. Mulcahy, 2020 ONSC 6747, Madam Justice Breese Davies dismissed an attempt to appeal interim procedural orders. One section of the parties' agreement to arbitrate described rulings on procedural matters as "*awards*" and a later section allowed the parties to appeal "*awards*" on a question of law. Davies J. held that, as a general rule, the same word will be presumed to bear the same meaning throughout a contract but that the presumption of consistent expression may not apply if the resulting meaning is absurd or commercially unreasonable. Her reading of the various sections, individually and together, supported her conclusion that allowing appeals of the challenged procedural orders, despite being termed "*awards*", would be commercially unreasonable.

Notes on topic #12 - confidentiality of arbitration

Québec – judicial protection of parties' confidentiality promotes public interest in arbitration - #305

In homologating an award issuing from a consensual, administered arbitration, Madam Justice Marie-Anne Paquette in 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. Paquette J. also held

that the burden rests on the party seeking the disclosure of otherwise confidential information to demonstrate that the good effects of disclosure outweigh the bad effects of infringing on the confidentiality expectations of parties to an arbitration. Her approach emphasizes the public interest in arbitration and does not rely merely on the private interests peculiar to the parties.

B.C. – failure to disclose existence of arbitration over only material asset alleged to breach securities legislation - #350

In Arian Resources Corp. (Re), 2020 BCSECCOM 89, an alleged failure to disclose arbitration prompted B.C.'s Securities Commission to issue a notice advising that a hearing would be held at which the Executive Director would tender evidence, make submissions and apply for orders under the Securities Act, RSBC 1996, c 418 for failure to disclose material changes. The notice does not purport to assert determinations of fault or sanction but does remind that, despite the role and availability of confidentiality in arbitration, arbitration parties may still be required to share sufficient, timely information on arbitrations involving them and involving material change.

Ontario – securities commission exempts filer from filing even redacted copies of litigation funding agreements - #335

In Stans Energy Corp. (Re), 2019 CanLII 36437 (ON SEC), the Ontario Securities Commission granted an exemption to a filer from filing two (2) litigation funding agreements despite the documents qualifying as material contracts under Ontario's 51-102 – Continuous Disclosure Obligations. To issue the exemption, the Securities Commission relied on (i) prior disclosure of key information, (ii) privilege and confidentiality issues which would be violated if further disclosure was made as well as (iii) not compromising the filer's relationship with the funders.

Notes on topic #13 - mediation and settlement

Québec - parties can give court role to examine merits of settlement but not to examine merits of identical consent award - #358

In Gestion S. Cantin Inc. v. Emblème Canneberge Inc., 2020 QCCS 2259, Mr. Justice Daniel Dumais distinguished the leeway available to arbitral 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 (settlement agreement), arbitral 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 arbitral 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.

Saskatchewan – absent party bound by disputed settlement terms signed by authorized solicitor/agent - #352

In Bakken v. Bakken, 2020 SKQB 127, Madam Justice Brenda R. Hildebrandt held defendant to a mediated settlement regarding sale of land, holding that defendant authorized counsel to attend as her solicitor/agent and consulting her by telephone during the mediation prior to counsel's signature. Disagreement between the parties regarding the settlement lead to litigation to enforce purportedly unclear terms documented by the settlement. Litigation, filed May 20, 2010, was resolved ten (10) years later by trial judgment on May 7, 2020. Hildebrandt J.'s reasons explore possible, but unsuccessful, defenses to a breach of settlement claim, including frustration and three (3) types of contractual mistake: common mistake, unilateral mistake, mutual mistake.

Saskatchewan - legislation imposes mediation and stay of any proceedings upon application of farmer - #300

In HCI Ventures Ltd. v. S.O.L. Acres, 2020 SKCA 24, Saskatchewan's Court of Appeal dismissed two (2) appeals stemming from application of the province's Farm Debt Mediation Act, SC 1997, c 21 which imposes mediation between insolvent farmers and their creditors pending a stay of any proceedings. "*[D]esigned as a tool for farmers to work with creditors in order to keep the farming operation afloat during difficult financial times*", the mediation-and-stay applies to "*any proceedings or any action, execution or other proceedings, judicial or extra-judicial, for the recovery of a debt, the realization of any security or the taking of any property of the farmer*".

Québec - resourceful solution to confirm court-mediated settlement negotiated over videoconference - #404

In Claveau v. Distribution Jacques Cartier Inc., 2020 QCCQ 8376, Mr. Justice Pierre Simard confirmed a settlement arrived at through a court-assisted mediation conducted the day of trial despite Defendants participating by videoconferencing platform. Though the legislated process for confirming a court-mediated settlement requires litigants to sign and file in court either (i) a document confirming the settlement or (ii) the settlement agreement itself, Defendants were not present in court and unable to sign as required by legislation. In his brief judgment, Simard J. (i) recorded hearing from the mediator who reported the details of the settlement, (ii) confirmed the parties' agreement to be bound to the settlement and (iii) issued orders reflecting the terms of the settlement. In doing so, Simard J. permitted the parties to resolve their dispute without a trial, without attending in person and without breaching applicable legislation.

B.C. – Hells Angels' mediation is not unlawful even if subject matter may involve alleged unlawful activity - #337

In British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd., 2020 BCSC 880, Mr. Justice Barry M. Davies 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. In refusing to grant forfeiture of clubhouses used by the Hells Angels, Davies J. determined that use of the clubhouses as venues to resolve disputes did not constitute the use of property to engage in unlawful activity. He agreed that the Director of Civil Forfeiture had proven that mediation of disputes among Hells Angels' members/chapters plays a role in ensuring relative harmony within the Hells Angels so that internal discord is kept to a minimum but disagreed that the Director had proven that "*resolving these disputes maintains the Hells Angels brand so that members and associates of the club continue to benefit from the opportunity to monetize the brand through criminal means*".

Alberta - unilateral offers to mediate/arbitrate fail to resist dismissal of litigation under "drop dead rule" - #304

In McKay v. Prowse, 2020 ABCA 131, Alberta's Court of Appeal upheld the dismissal of Plaintiff's litigation despite Plaintiff's genuine but unilateral invitations to mediate or arbitrate, holding that unrequited overtures do not qualify as significant advances in a litigation. Using jurisdiction confirmed by the Alberta Rules of Court, Alta Reg 124/2010, the Court determined that Plaintiff had failed to take a significant step in three (3) years prior to the application made by Defendant. The Court cautioned that, absent a standstill agreement or a defendant's tactics to obstruct, stall or delay, if a defendant fails to accept invitations to engage in alternate dispute resolution mechanisms, plaintiff continues to bear the onus to advance its action or risk having it struck.

Québec - trial judge on own initiative quashes subpoena issued to mediator - #339

Without need for application by either the opposing party or the proposed witness, Madam Justice Céline Gervais in 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*, Gervais J. explained to the self-represented litigant that the mediator was not compellable and all that transpired during the mediation was confidential. Gervais J. also commented on the role/liability of lawyers in a client's own decision to engage in mediation and negotiate a settlement.

Québec - post-mediation dispute over existence/terms of agreement permits disclosure of confidential exchanges - #329

In Bisaillon v. Bouvier, 2020 QCCA 115, the Québec Court of Appeal applied the exception to confidentiality of mediation, confirmed in Union Carbide Canada Inc. v. Bombardier Inc., 2014 SCC 35, [2014] 1 SCR 800, allowing 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. **Update**: leave to appeal granted August 6, 2020 in Association de médiation familiale du Québec v. Isabelle Bisaillon, et al., 2020 CanLII 52976 (SCC).

B.C. - alleged breach of unclear settlement agreement requires lengthy trial to discern rights/obligations - #343

Following 18 days of proof and hearing, Mr. Justice J. Christopher Grauer in Great Corner Stone Ltd. v. Vancouver Cabinets Inc., 2020 BCSC 107 puzzled through a "*bewildering*" set of initial contracts and a "*poorly drafted*" settlement agreement purporting to "*reset*" the relationship. Grauer J. struggled to identify what the mediate resolved, concluding that the settlement agreement "*does not offer much guidance*". Overall, Grauer J. held that discerning what rights and obligations were placed on the parties "w*as not a problem of ambiguity, but rather one of inexpert drafting and lack of clarity*".

Québec – use of confidential mediation exchanges permitted to prove fraud vitiating settlement consent - #330

In Viconte inc. v. Transcontinental inc., 2020 QCCQ 1475, Madam Justice Céline Gervais 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 she 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. Gervais J. cautioned that her decision was only a preliminary one and did not consider the difficulty a party may have at trial to prove its allegations.

Ontario - settlement rescinded based on innocent misrepresentation of material fact unknown to Defendant - #332

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 settle. 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.

B.C. - alleged breach of unclear settlement agreement requires lengthy trial to discern rights/obligations - #343

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B.C. – from litigation to settlement to mediation to repudiation back to litigation on settlement - #372

In Park v. Mitchell, 2020 BCSC 1147, Mr. Justice Robert Johnston dealt with probate issues reserved exclusively to the courts but, in doing so, recorded how parties can move from court litigation, to negotiated settlement, to mediation agreement, to repudiation and back again, attempting to resolve their disputes. His reasons illustrate how court-ordered cross-examination in litigation can lead to information disclosure and/or meetings which occasion negotiated settlements. Those settlements may require mediation which generate agreements but, once repudiated, require the parties to return to their earlier settlement and then to court to enforce that settlement. The dispute resolution sequence prompted Johnston J. to question whether a litigant could enforce a settlement in probate proceedings or be obliged to sue on the settlement in a separate action.

Ontario – summary judgment enforces settlement issuing from arbitration - #299

In Furniture.com Inc. v. Leon's Furniture Ltd., 2019 ONSC 7451, Madam Justice Sandra Nishikawa granted summary judgment for breach of a settlement entered into after arbitration began. Nishikawa J.'s decision was the latest in a sequence of different dispute resolution options undertaken by the parties – arbitration, court application for leave to appeal an award,

private settlement and summary judgment to enforce settlement. Nishikawa's reasons also demonstrate that resolution went ahead despite defendant's evidentiary objections and other ongoing dispute resolution in the U.S.

Ontario – mediator appointed as arbitrator for disputes involving settlement negotiated during later arbitration - #403

Following an unsuccessful mediation phase before a mediator regarding disputes under a 2011 agreement, the parties in The Corporation of the Township of South Stormont v. The Kraft Heinz Company, 2020 ONSC 7641 engaged in arbitration before another professional during which the parties negotiated a 2017 settlement and agreed to arbitrate disputes before the mediator. When disputes arose over the settlement, one party sought to resume the earlier arbitration but to appoint a new arbitrator. The other party resisted, arguing that they had agreed to submit disputes regarding the settlement to the mediator. Mr. Justice James E. McNamara held that the dispute was not under the main 2011 agreement but fell within the express terms of the 2017 settlement. The dispute resolution in the parties' settlement arguably constituted a med-arb agreement.

Ontario – arbitrator's interpretation of settlement raises extricable question of law and jurisdictional issue - #370

In Camerman v. Busch Painting Limited et al., 2020 ONSC 5260, Mr. Justice Paul B. Schabas both varied and set aside a portion of an award due to the arbitrator's contractual interpretation of the scope of issues subject to arbitration under a settlement. Schabas J. determined that the parties, by their settlement, had "*reset the dial*" between them and the award breached the scope of disputes subject to arbitration. The arbitrator's award relied on his interpretation of the settlement and exceeded the terms of the settlement. That interpretation raised an extricable question of law identified by Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, qualifying that issue for leave to appeal under section 45(1) of Ontario's Arbitration Act, 1991, SO 1991, c 17. Schabas J. also held that the same facts demonstrated a jurisdictional error covered by section 46(1)3 and an order setting aside the same portion of the award.

Notes on topic #14 - post-award challenges, set asides, appeals

B.C. - period in which to appeal partial award runs from date of that award, not the later, final award - #263

In Milner v. Clean Harbors Industrial Services Canada, Inc., 2020 BCSC 68, Mr. Justice Anthony Saunders dismissed argument by a late-filing petitioner that the title "*Partial Award*" (i) created "*inherent uncertainty*" and (ii) justified calculating time to seek leave to appeal from the later, final award. Saunders J. held that the title "*Partial Award*" was not ambiguous and petitioner demonstrated no confusion as to his rights determined under that award. Saunders J. held

that, of all the factors applicable to exercising his discretion to extend that time, the interests of justice subsumed the others and did not favour petitioner.

B.C. - award's short-form reference to party insufficient to refuse recognition and enforcement - #380

Despite ambiguity in the award's use of a "*short-form reference*" to refer to the winning party, B.C.'s Court of Appeal in Macdonald Realty Ltd. v. Metro Edge Holdings Ltd., 2020 BCCA 272 declined to refer the parties back to the arbitration panel to clarify the name as doing so would be an "*unnecessary expense to the parties and would not change the result*". The Court held that, despite the variation in the legal name, the award and decision in first instance validly identified the winning party. The Court also readily dismissed post-award challenges, in first instance and on appeal, limited to contesting the facts in dispute. The court reminded challengers that such an approach is misdirected given that an application to recognize and enforce an award is not a hearing on merits of the arbitrated dispute.

B.C. - errors interpreting and applying the law eligible for appeal on questions of law but not for set aside - #407

In Spirit Bay Developments v. Scala Developments, 2020 BCSC 1839, Mr. Justice Robert Johnston granted leave to appeal for three (3) questions of law which he determined had arguable merit but dismissed the application to set aside the award. A pair of questions involved misinterpretation and application of applicable case precedents and a third arose from the "*arguably defective*" pleading made by the party resisting appeal of the award. Refusing to set aside the award on the basis of legal error, Johnston J. noted that the alleged error of law would be determined on appeal. "*Additionally, the parties clothed the arbitrator with the power to decide their dispute, and that includes the power to be wrong in interpreting and applying the law*".

B.C. - evidence of fraud need not be 'new' to be admissible on post-decision challenge - #261

The fact that evidence of fraud existed at the time of hearing might justify its rejection as *'new'* evidence on a post-decision challenge but cannot justify rejecting it as evidence of fraud. In McCallum v. Mooney, 2019 BCSC 1938, Madam Justice Nitya Iyer granted a defendant's application to set aside a default decision, even after having unsuccessfully challenged it by internal appeal, due to claimant allegedly withholding a key document during the initial hearing on the merits.

Ontario - court revisits/reverses prior decision which allowed new evidence on post-award jurisdictional challenge - #272

In The Russia Federation v. Luxtona Limited, 2019 ONSC 7558, Mr. Justice Michael A. Penny held that a party to a challenge of an arbitral tribunal's jurisdiction under articles 16 and 34 of the UNCITRAL Model Law on International Arbitration may not file fresh evidence as of right. A party must obtain leave to do so by providing a "*reasonable explanation*" for why new evidence is necessary, including why that evidence was not, or could not have been, put before the tribunal in the first place. Abiding by the Mexico v. Cargill, Incorporated, 2011 ONCA 622 approach restricting courts to a "*review*" and not a trial *de novo*, Penny J. held that *competence-competence* was best served by requiring parties to put their "*best foot forward*" before the arbitral tribunal and not re-try the jurisdictional issue with additional evidence informed by hindsight.

Ontario - adequate reasons serve to justify/explain result so losing party knows why it lost - #320

In Wawanesa Mutual Insurance Company v. Renwick, 2020 ONSC 2226, Ontario's Divisional Court determined that inadequate reasons fell short of their "*very important purpose*", namely that "*they justify and explain the result so that the losing party knows why they have lost and interested members of the public can satisfy themselves that justice has been done*". The Court prioritized that purpose, listing it ahead of the more oft-cited purpose of allowing for meaningful review by a court. Though not all parties prevail in their dispute resolution, they are entitled to know that their evidence and arguments were considered and why they did not prevail. As the Divisional Court added, "*[h]owever, this does not mean that the decision maker must refer to every bit of evidence or argument before him. To be adequate, reasons do not have to be long or perfect*".

B.C. - court qualifies parties' agreement to require only summary reasons as "penny-wise and pound-foolish" - #381

In Nolin v. Ramirez, 2020 BCCA 274, B.C.'s Court of Appeal set aside part of an arbitration award which rested on the arbitrator's dismissal of a party's evidence as suspicious in one context and reliance on it in another. The handling of the evidence was so inconsistent that the Court found it "*impossible to understand how the arbitrator came to his conclusion*" on the related issues and the arbitrator provided no justification in the summary reasons agreed to by the parties. Without more explanation in the brief reasons and unable to reconcile the findings and conclusions, the Court set aside that portion of the award related to the handling of that evidence.

Alberta – arbitration act informs court rules allowing court to clarify its order allowing appeal of award - #357

In Clark v. Unterschultz, 2020 ABQB 423, Madam Justice June M. Ross agreed to revisit her earlier decision in Clark v. Unterschultz, 2020 ABQB 338 which allowed an appeal in part, limited to the arbitrator having not provided adequate reasons for a lump sum award. In her follow up decision, Ross J. dismissed Applicant's application under Alberta Rules of Court, Alta Reg 124/2010 as a "*second kick at the can*", holding that any remedy Applicant may have lay with the Court of Appeal. Ross J. did agree to reframe her earlier order and, exercising her own options under the Arbitration Act, RSA 2000, c A-43, provided directions to the arbitrator. In doing so, Ross J. gave the arbitrator much broader scope than that which may have been read into her earlier decision and expressly confirmed his discretion to determine the procedure warranted to exercise that authority.

Notes on topic #15 - standards of review, consensual vs statutory arbitration

B.C. - "*standard to interfere*" with awards is "*very high*" to protect "*speedy and final*" resolution - #379

In Bosa Properties (Sovereign) Inc. v. The Owners, Strata Plan EPS2461, 2020 BCSC 1357, Madam Justice Neena Sharma reiterated that the "*standard to interfere*" with an arbitration award is "*very high*" because "*people who choose commercial arbitration have elected to resolve their disputes in a forum that is speedy and final, without the intervention of the courts*". Sharma J. observed that one of the purposes of the standard "is to discourage appeals to the court", referring to earlier Ed Bulley Ventures Ltd. v. Eton-West Construction Inc., 2002 BCSC 826 which held that "*[i]f leave were granted too readily, one of the beneficial and distinguishing features of arbitration (its finality) would be lost*".

Québec - court's intervention on challenge to award on jurisdiction is not judicial review - #296

In Khalilian v. Murphy, 2020 QCCS 831, Madam Justice Chantal Chatelain 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 Code of Civil Procedure, CQLR c C-25.01, leading doctrine and case law in Québec, she 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.

Québec - use of '*arbitration*' to label administrative proceeding no substitute for consent to statutory arbitration - #387

In Ville de Saint-Colomban v. Commission municipale du Québec, 2020 QCCS 3396, Mr. Justice Michel Yergeau dismissed judicial review of an administrative body's decision to decline

jurisdiction to conduct statutory arbitration where both parties had not expressly consented to arbitration as required by the statute. Despite the availability of arbitration before the administrative body and both parties using the term '*arbitration*' to refer to the administrative proceeding, the term did not change the nature of the proceeding. Applying judicial review standards of review refreshed by Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 Yergeau J. determined that the decision was reasonable and intervention was unwarranted.

B.C. - questions of mixed fact and law by definition involve aspects of law - #316

In Gormac Developments Ltd. v. Teal Cedar Products Ltd., 2020 BCSC 712, Madam Justice Elizabeth McDonald cautioned that great care be taken to distinguish between arguing that (i) a legal test has been altered in the course of its application and (ii) application of the legal test should have resulted in a different outcome. McDonald J. also acknowledged the need for caution when determining questions of law given that questions of mixed fact and law "*by definition, involve aspects of law*". In addition, an arbitrator is not required to refer to every submission, statutory provision or piece of jurisprudence in the award, there being no requirement to make specific findings on each constituent element for the award to be reasonable.

Ontario – sometimes only a single reasonable answer exists under reasonableness standard - #256

In Ontario (Finance) v. Echelon General Insurance Company, 2019 ONCA 629, the Ontario Court of Appeal held that, even when applying a standard of reasonableness, there are occasions in which there is only a single reasonable answer. The Court also considered the role of accumulated decisions issuing by arbitrators under a statutory process in which the decisions are either published or not confidential and whether those decisions bound other parties in ater arbitrations.

Alberta & Manitoba – courts take different paths to different outcomes following same S.C.C. case - #276

In Cove Contracting Ltd v. Condominium Corporation No 012 5598 (Ravine Park), 2020 ABQB 106, Mr. Justice Grant S. Dunlop held that Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 had not changed the standard of review for commercial arbitrations from reasonableness to correctness and denied leave to appeal. In Buffalo Point First Nation et al. v. Cottage Owners Association, 2020 MBQB 20, Mr. Justice Chris W. Martin held that Vavilov had changed the standard and granted leave to appeal. Dunlop J. postponed his hearing to give the parties the opportunity to argue the role of Vavilov. Martin J. issued his decision on leave to appeal without hearing from the parties but invited them to submit argument for the merits of the appeal.

Ontario - Vavilov standard applies to statutory insurance arbitration but not private commercial arbitration - #298

In Allstate Insurance Company v. Her Majesty the Queen, 2020 ONSC 830, Madam Justice Breese Davies held that Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 altered judicial intervention on appeals from insurance arbitration mandated by legislation. Davies J. held that legislation which includes a statutory appeal mechanism signals legislative intent that courts are to perform an appellate function in respect of the administrative decision and apply appellate standards of review. Davies J. distinguished between appeals of statutory arbitrations and private commercial arbitrations, the latter being seen as autonomous, self-contained process in which courts should "*generally*" not intervene.

Ontario – Vavilov does not overrule Teal Cedar or Sattva Capital - #302

In Ontario First Nations (2008) Limited Partnership v. Ontario Lottery And Gaming Corporation, 2020 ONSC 1516, Mr. Justice Glenn A. Hainey held that Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65 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.

Ontario – Appeal Court questions why arbitrate under a statute if statute does not apply to both parties - #341

In Travelers Insurance Company of Canada v. CAA Insurance Company, 2020 ONCA 382, Ontario's Court of Appeal set aside an award which issued following a statutory arbitration because the Ontario statute did not apply to the defendant. The Court questioned how did Ontario statutory accident benefits for a Nunavut accident come to be arbitrated under Ontario's Insurance Act, RSO 1990, c I.8 if that legislation's priority rules only apply if both insurers are subject to those rules. The Court identified as a "*serious*" error the arbitrator's determination that the Insurance Act applied to the defendant insurer. Despite that error, the Court is silent on (i) how/when parties can consent by contract to submit to statutory arbitration under a statute which does not apply to one of them and (ii) why apply the standard of review applicable to statutory arbitrations, recently restated in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65, to an appeal from a consensual arbitration.

Manitoba – facts raising claim subject to arbitration, but common to judicial review, disregarded - #366

Despite overlap in facts, Mr. Justice James G. Edmond in Ladco Company Limited v. The City of Winnipeg, 2020 MBQB 101 declined to include an alleged breach of contract issue as an issue

ancillary to judicial review applications, observing only that, if valid, that alleged breach should be determined by another procedural mechanism such as arbitration provided in the parties' agreements. The facts in the record involved both (i) a 2016 exercise of a city's statutory powers and the constitutionality of a by-law and resolution and (ii) a breach of contract issue arguably subject to an agreement to arbitrate. Despite acknowledging that certain facts in the record overlapped with issues properly raised for judicial review, Edmond J. held that he would disregard those facts involving breach of contract and would "*leave that issue to another day*".

Notes on topic #16 - natural justice, procedural fairness

Ontario – reliance on theories not pleaded/argued are errors and have ripple effects throughout award - #274

In Tall Ships Landing Devt. Inc. v. City of Brockville, 2019 ONSC 6597, Madam Justice Sally Gomery held that deference for arbitrators and discretion over procedural matters do not displace the imperatives of fairness and reliability which underpin arbitration. Despite a standard of reasonableness applicable to commercial arbitration awards, reliance on a legal theory not advanced or argued by the parties is an error of law and leads to conclusions outside the arbitrator's mandate. Errors early in the award undermined later, otherwise reasonable determinations made in the same award but which rested on those earlier determinations. Rather than vary, set aside or remit the awards with directions, Gomery J. solicited submissions to determine the appropriate remedy at a future hearing. See the follow up decision in Tall Ships Landing Devt. Inc. v. City of Brockville, 2020 ONSC 5527 regarding the appropriate remedy.

Alberta – refusal to adjourn hearing respects due process if recognition/enforcement conditions present - #351

In Pearson v. Pearson, 2020 ABCA 260, Alberta's Court of Appeal distinguished between discretion to grant/refuse an adjournment and discretion which raises issues of procedural fairness. Deference is owed "*generally*" to the former, provided discretion is exercised judicially and sufficient weight given to all relevant considerations. The latter raises the question of whether due process was followed and attracts no deference. Despite disagreement whether a party had counsel of record and that party's choice not to be 'present', the Court held that the party seeking adjournment suffered no prejudice because all the conditions in section 49 of the Arbitration Act, RSA 2000, c A-43 were 'present' and "*there was no reason to think the outcome would have been different had an adjournment been granted*".

Nova Scotia - umpire owes duty of procedural fairness, breaches it when deviating from own procedure - #321

In New Dawn Enterprises Limited v. Northbridge General Insurance Corporation, 2020 NSSC 150, Mr. Justice Joshua M. Arnold agreed that an umpire's failure (i) to share information

obtained and relied on or (ii) to give a party the opportunity to respond breached the principle of *audi alteram partem*. Acknowledging that an umpire does not conduct an arbitration or provide an adjudicative process, Arnold J. determined that the umpire's exercise of discretion in choosing his own procedure had created legitimate expectations and that, by deviating from that procedure, breached the duty of fairness.

Notes on topic #17 - costs

Alberta – unambiguous wording on arbitration costs in standard contract does not merit court intervention - #377

In K-Rite Construction Ltd v. Enigma Ventures Inc, 2020 ABQB 566, Madam Justice Donna L. Shelley dismissed challenges to a costs award, holding that awarding costs is discretionary and generally will be a question of mixed fact and law. Shelley J. held that, absent some form of improper consideration, arbitrators have full discretion as to costs, may not be bound by traditional rules regarding the award of costs and using their discretion does not amount to an error of law. Shelley J. also dismissed Applicants' challenges to the arbitration agreement's costs provisions contained in an industry-specific contract. Despite the potential importance that standard forms may arguably have in an industry, unambiguous wording does not merit the court's intervention.

Alberta - costs are discretionary, not a discrete legal issue submitted to arbitrator, must be exercised judicially - #281

In Allen v. Renouf, 2020 ABQB 98, Mr. Justice C. Scott Brooker held that an arbitral party which ignores an opportunity to present its case cannot argue that it was treated manifestly unfairly. Brooker J. dismissed Applicant's attempt to challenge a costs award which he categorized as a discretionary decision but equally disagreed with Respondent's argument that costs were a discrete legal issue expressly submitted to the arbitrator and shielded from appeal under section 44(3) of Alberta's Arbitration Act, RSA 2000, c A-43. He did acknowledge that costs awards may raise a question of law if the discretion was not exercised judicially.

New Brunswick - detailed time summaries not a condition precedent to arbitrator's ability to award costs - #340

In Jammin Rock Resources v. Dowd & Associates, et al., 2020 NBQB 102, Mr. Justice Daniel J. Stephenson denied leave to appeal a cost award which issued in favour of respondents further to their successful pre-hearing motion to determine that claimants' arbitration was statute-barred. Stephenson J. refused to characterize the arbitrator's discretion on costs as equivalent to a taxation. Despite objections to the summary evidence provided to and relied on by the arbitrator, Stephenson J. wrote that he was not aware of any jurisprudence mandating that arbitrators must have detailed time summaries as a condition precedent to their ability to award costs and that no provision of the Arbitration Act, RSNB 2014, c 100 mandates that an

arbitrator must have detailed computer-generated time summaries prior to allocating costs. The facts also confirmed the arbitrator's authority to make a determination with final effect prior to the merits hearing and on documentary evidence.

B.C. - no need to give reasons when not departing from normal rule on costs - #287

Though arbitrators should give reasons for departing from the "*normal*" costs rule, Madam Justice Lisa A. Warren in Goel v. Sangha, 2019 BCSC 1916 held that it does not follow that arbitrators must provide reasons for not departing from the normal rule. Warren J. also held that an arbitrator cannot be faulted for following a process adopted by agreement of the parties and that, on appeal, absent further evidence, the court had no role in revisiting an arbitrator's finding that such an agreement existed in fact.

B.C. – upcoming legislation overrides determination that summary assessment of costs is arbitral error - #348

In Appleton & Associates v. Branch MacMaster LLP, 2020 BCCA 187, B.C.'s Court of Appeal held that a court's discretion to refuse to set aside an award under section 30(1) of the Arbitration Act, RSBC 1996, c 55 upon a finding of arbitral error is "*constrained by the parameters*" in section 30(2). The arbitral error consisted of making a summary assessment to determine costs. However, going forward, section 50(2)(d) of B.C.'s new Arbitration Act (Bill 7 – 2020: Arbitration Act), in effect September 1, 2020, expressly authorizes an arbitrator to summarily determine the amount of costs. In debating whether to set aside or remit the award, the Court observed that it is doubtful that a party can constrain the court's discretion under section 30(1) to set aside the award or remit by limiting the requested relief to only one of the remedies.

Ontario – court declines to defer costs determination but orders information sent to non-party/arbitrator in related arbitration - #255

In her post-trial costs decision in G.E.X.R. v. Shantz Station and Parrish & Heimbecker, 2019 ONSC 5192, Madam Justice Catrina D. Braid declined to defer determination of court costs in litigation involving GEXR and P&H until a related, ongoing arbitration between GEXR and CN was complete. Ostensibly to pre-empt any potential for double recovery of costs once the arbitration concluded and determined its costs, she also directed that P&H's cost submissions filed in the court litigation and her reasons on costs be given (i) to CN which was not a party to the court litigation and (ii) to the arbitrator.

Alberta - communication of privileged offers after award but before clarification/costs insufficient to raise bias - #328

In Clark v. Unterschultz, 2020 ABQB 338, Madam Justice June M. Ross dismissed a challenge to an award on the merits, holding that one party's communication of privileged settlement offers

after the award and before the costs award were insufficient to meet the high threshold required to find real or perceived bias. Ross J. determined that a reasonable person, viewing the matter realistically and practically, and knowing that the hearing had concluded and the substantive award had issued, would be unlikely to conclude that the arbitrator would not decide the remaining matters fairly.

Notes on topic #18 - effect of awards, use of arbitral work product

Québec - court litigation deemed abusive attempt to evade *res judicata* of homologated award - #292

In Papadakis v. 10069841 Canada inc., 2020 QCCS 32, Madam Justice Judith Harvie held that a litigant cannot avoid application of an arbitral award's *res judicata* by litigating new arguments on old facts. Harvie J. held that the litigant ought to have raised its new arguments in arbitration and that it would be against public interest and stability of social relations to allow it to raise new arguments to plead the same cause of action. Harvie J. further declared the proceeding abusive and ordered the litigant to pay some but not all of the other litigant's legal fees.

Ontario - Olympic athletes cannot relitigate sports arbitration dispute as tort action - #280

In Sokolov v. The World Anti-Doping Agency, 2020 ONSC 704, Mr. Justice Mario D. Faieta granted summary judgment on a jurisdictional issue, dismissing a tort claim made by athletes denied entry to the 2016 Olympic Games in Rio. Faieta J. 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. Though he considered the arbitration agreements to be more like arbitration imposed by statute or adhesion contracts, he expressly considered the impact on international sports if he signalled a willingness of domestic courts to resolve matters otherwise reserved for more specialized tribunals.

B.C. – land transfer made during arbitration later voided as fraudulent attempt to defeat creditors - #258

In Balfour v. Tarasenko, 2019 BCSC 2212, knowledge of a pending but unfinished arbitration qualified as one of the facts relevant to a declaration under B.C.'s Fraudulent Conveyance Act, RSBC 1996, c 163 to void a land transfer made during the arbitration and before the final award issued. Though hampered by an incomplete evidentiary record presented by self-represented litigants, Mr. Justice Dennis K. Hori did identify the land transfer as having the effect of delaying, hindering or defeating creditors.

Québec – award treated as "*judgment*" subject to ten (10) year prescription (limitation) period - #259

In Société générale de Banque au Liban SAL v. Itani, 2019 QCCS 5266, Madam Justice Dominique Poulin held that the longer, ten (10) year prescription (limitation) 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 based on two (2) of its leading cases originating from Québec, Poulin J. reasoned that, to be coherent, the provisions in the Civil Code of Québec, CQLR c CCQ-1991 should be read to treat an arbitration award as a "*judgment*", thereby qualifying it for longer prescription (limitation) period.

Québec - tardy litigation, due to attorneys' failure to file post-award proceedings, resists dismissal - #325

Acknowledging Plaintiffs' eventual challenges at trial with a lapsed prescription (limitation) period, Mr. Justice Martin Castonguay in Truong v. Brunelle, 2020 QCCS 55 refused to dismiss procedures stemming from a June 23, 2009 arbitral award. Filed June 25, 2019, Plaintiffs' litigation sought both homologation and damages stemming from non-compliance with aspects of the award, but the motion to dismiss eventually focused on only the damage action. Castonguay J. held that Plaintiffs' attorneys' failure to finalize and file relevant pleadings justified exercising discretion to allow their case to proceed. His reasoning applies equally to late applications to homologate awards.

Québec - award homologated against arbitral party and non-party held solidarily liable for award amount - #284

In GGL Avocat v. Dumont, 2020 QCCQ 597, Mr. Justice Daniel Lévesque homologated (recognized and enforced) an arbitral award against a party to the arbitration and ordered a third party to be solidarily liable for payment of the award amount. Lévesque J. acknowledged that the legal matrix was "*particular*" but was prompted to issue the tandem orders because (i) the amount fell within the jurisdiction of small claims court which favours access to justice and debt recovery and (ii) the invoice underlying the award issued against both the arbitral party and the non-party.

Québec - award homologated but interest rate in contract not added as award omitted mention - #285

In BMLEX Avocats inc. v. Sahabdool, 2019 QCCQ 3552, Mr. Justice Luc Huppé agreed to homologate (recognize and enforce) an arbitral award but declined to modify the terms of the interest owing on the amount because the arbitral award did not mention it. In the same decision, Huppé J. also ordered a third party to be solidarily liable for payment of the award amount. Unlike a similar result in GGL Avocat v. Dumont, 2020 QCCQ 597, Huppé J. made no

mention of the special vocation of the small claims court to favour access to justice and debt recovery.

Québec – recognition granted for international award with which respondent had already complied - #307

In Metso Minerals Canada Inc. v. Arcelormittal exploitation minière Canada, 2020 QCCS 1103, Madam Justice Marie-Anne Paquette issued an order recognizing an international commercial arbitration award despite prior compliance with the payment obligations in the award. She 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. She 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.

B.C. – pending update to B.C. legislation, enforcing Alberta arbitral awards in B.C. subject to two-step process - #310

In Z v. M, 2020 BCSC 568, Mr. Justice Leonard S. Marchand declined to enforce in B.C. costs awards which issued from an arbitration conducted in Alberta under Arbitration Act, RSA 2000, c A-43. Instead, he directed the applicant to obtain first an order from the courts in Alberta recognizing and enforcing those awards and then apply to the B.C. courts under B.C.'s Court Order Enforcement Act, RSBC 1996, c 78. By express provision in their arbitration legislation, some other provinces do away with this two-step process and B.C. will do so also in its soon-to-be-in-force updated legislation.

Ontario - trial judge and appeal court rely on litigants' agreement to repurpose arbitral award findings of fact - #402

In dismissing appellant's claims that the trial judge erred in interpreting a common form of insurance contract used in the construction industry, the Court of Appeal in Sky Clean Energy Ltd. (Sky Solar (Canada) Ltd.) v. Economical Mutual Insurance Company, 2020 ONCA 558 noted that the litigants had agreed that findings of fact made in an arbitration award would bind the trial judge. Though plaintiff had unsuccessfully challenged that same award and defendant had not been a party to the arbitration, both accepted not to relitigate the findings of fact when litigating their own dispute regarding those facts.

Manitoba – court relies on arbitral award to qualify award amount as debt surviving bankrupt's discharge - #322

Relying on findings made in an arbitral award, Madam Justice Colleen Suche in Bannerman Lumber Ltd. et al. v. Goodman, 2020 MBQB 76 declared that a bankrupt's debt disputed in arbitration survived his discharge because the debt resulted from "*obtaining property or services by false pretences or fraudulent misrepresentation*". Though the arbitration proceeded

without pleadings and the issue of fraud was not advanced in the arbitration, the arbitrator's findings permitted Suche J. to determine that the bankrupt "*lacked an honest belief in the truth of his statements*" which were reckless and qualified as false pretences under section 178(1)(e) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3.

Québec – court relies on post-trial arbitration award to determine value under dispute at trial - #375

In Langlois v. Langlois, 2020 QCCS 2959, Mr. Justice Éric Hardy endorsed the court's reliance on an arbitration award, which issued after a trial decision, to determine the amount of the value under dispute in court at trial. Hardy J. accepted that the court could use the award to calculate court costs according to a court tariff. The court trial had ordered a buyback of Plaintiffs' shares due to oppression but also ordered the parties to engage in arbitration to determine the narrower issue of share valuation, as agreed to in their shareholders agreement.

Ontario – court denies tenant relief from forfeiture where tenant disregards arbitration - #376

In Hunt's Transport Limited v. Eagle Street Industrial GP Inc., 2020 ONSC 5768, Mr. Justice David A. Broad refused to exercise his discretion to grant a commercial tenant relief from forfeiture given tenant's refusal to abide by its obligation to continue performance during arbitration of its disputes with the landlord. Broad J. held that tenant's conduct qualified as "*wilful*" self-help and justified the court in holding tenant to its obligations pending resolution of issues exclusively reserved for arbitration. Tenant's unilateral decision to withhold payments, prior to their determination exclusively reserved in the lease to the arbitrator, played a key role in Broad J.'s reasons.

Notes on topic #19 - investor-state

Ontario – states' legal submissions can qualify as "subsequent practice" in investor-state arbitration - #360

In The United Mexican States v. Burr, 2020 ONSC 2376, Madam Justice Bernadette Dietrich accepted that legal submissions by parties to the North America Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No 2 can qualify as "*subsequent practice*" under article 31(3) of the Vienna Convention on the Law of Treaties Can TS 1980 No 37 but that the facts fell short of meeting the standard in Mexico v. Cargill, Incorporated, 2011 ONCA 622 of a "*clear, well-understood, agreed common position*". Dietrich J. also distinguished between an objection to jurisdiction which relates to the authority of a tribunal to hear a dispute and an objection to admissibility which refers to the characteristics of the claim, determining that she had jurisdiction to review the former but not the latter. She dismissed a challenge to an award on jurisdiction in which the tribunal found that investors had properly given notice of their intention to arbitrate by filing powers of attorneys authorizing legal counsel to initiate arbitration and to act on their behalf. Dietrich J. held that non-compliance with the formal

requirements of Articles 1119 did not vitiate the state's consent to arbitrate under Article 1122(1).

Federal - court declines to intervene regarding counsel's alleged conflict of interest in investor-state arbitration - #398

In Geophysical Service Incorporated v. Canada (Attorney General), 2020 FC 984, Madam Justice Martine St-Louis declined to intervene in a decision by Canada's legal representative refusing to remove a member from the legal team representing Canada in an investor-state arbitration. St-Louis J. held that (i) the staffing decision did not qualify as a public decision made by an entity subject to judicial review under the Federal Courts Act, RSC 1985, c F-7 and (ii) Applicants had not demonstrated the arbitral tribunal's lack of jurisdiction to deal with the issue. Applicants raised concerns regarding an individual newly assigned to the legal team representing Canada in the arbitration. Applicants alleged a conflict based on that individual's recent, prior employment relationship with the third-party funder with which Applicants had signed an agreement regarding its investor-state claim against Canada. Though St-Louis J. declined to intervene, in *obiter* she considered "*there is little unambiguous evidence that [the individual] received information that would cause a conflict of interests*".

Notes on topic #20 - insolvency

B.C. – court asserts inherent jurisdiction under insolvency legislation to override arbitration clauses - #254

In Petrowest Corporation v. Peace River Hydro Partners, 2019 BCSC 2221, Madam Justice Nitya Iyer held that mandatory terms of B.C.'s Arbitration Act, RSBC 1996, c 55 do not prevent courts from exercising their inherent jurisdiction to refuse to stay court proceedings where provisions of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 apply. Iyer J. lists a number of factors to consider when exercising that jurisdiction. The reasons and result mark an innovation in how courts balance respect of party autonomy endorsed by arbitral legislation with interests recognized in other legislation. Iyer J. also held that a trustee in bankruptcy is a party to an arbitration agreement when the trustee institutes litigation to enforce the terms of the main contract in which the arbitration agreement appears.

B.C. – doctrine of separability allows receiver to disclaim agreement to arbitrate while litigating main contract - #399

On appeal, the Court upheld Iyer J.'s decision but for different reasons. In Petrowest Corporation v. Peace River Hydro Partners, 2020 BCCA 339, B.C.'s Court of Appeal identified the particular status and powers of a court-appointed receiver exercising its jurisdiction under the Bankruptcy and Insolvency Act, RSC 1985, c B-3 and set out the doctrine of separability applicable to agreements to arbitrate. Their combined application supported the Court's conclusion that a court-appointed receiver can sue on a contract and also disclaim application

of the agreement to arbitrate contained in that contract. The Court held that doing so did not allow the receiver to "*pick and choose*" terms in a contract but instead merely recognized that the receiver had the option to pursue or disclaim two (2) separate contracts.

Alberta - stay of BIA order lifted, enabling trustee to investigate transactions preventing execution of award - #324

On application by a successful arbitral party, Mr. Justice Brian O'Ferrall in Pacer Holdings Construction Corporation v. Richard Pelletier Holdings Inc, 2020 ABCA 47 lifted a stay imposed by the appeal filed by the losing arbitral party against the order putting it in bankruptcy. The successful arbitral party challenged certain transactions by the losing arbitral party which "*stripped*" the latter of all its assets. O'Ferrall J.A. was "*not yet convinced*" to interpret the Bankruptcy and Insolvency Act, RSC 1985, c B-3 to mean that a "*dormant shell*" corporation was not a "*debtor*" or "*insolvent person*". Lifting the stay enabled the trustee to exercise powers ordinary creditors do not have, including collection of information relevant to ordering transferees of property of the bankrupt arbitral party to pay to the difference between the value of the consideration the bankrupt gave and the value transferees received.

Supreme Court - litigation funding agreement approved in insolvency proceedings without need to submit to creditors - #265

The Supreme Court of Canada in 9354-9186 Québec inc. v. Callidus Capital Corp., 2020 CanLII 5612 reinstated a decision in first instance which authorized third-party litigation funding in court-monitored insolvency proceedings and granted the funders a super priority charge and security. The decision was announced with reasons to follow. Until the release of those reasons, paras 74-86 of the decision by Mr. Justice Jean-François Michaud in Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) -and- Ernst & Young Inc., 2018 QCCS 1040 disclosed the facts and Michaud J.'s reasoning and paras 100-109 set out the dispositive order.

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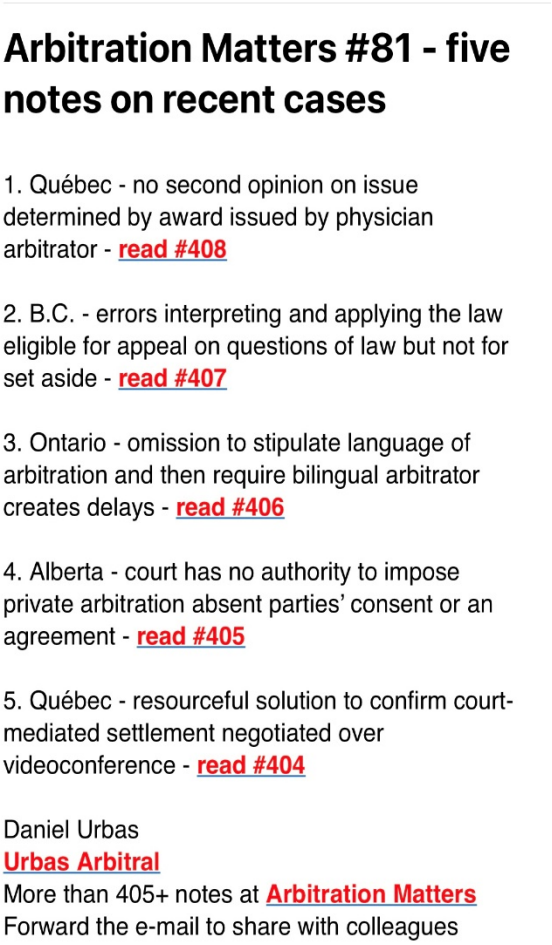

Arbitration Matters #81 - five notes on recent cases

1. Québec - no second opinion on issue determined by award issued by physician arbitrator - **read #408**

2. B.C. - errors interpreting and applying the law eligible for appeal on questions of law but not for set aside - **read #407**

3. Ontario - omission to stipulate language of arbitration and then require bilingual arbitrator creates delays - **read #406**

4. Alberta - court has no authority to impose private arbitration absent parties' consent or an agreement - **read #405**

5. Québec - resourceful solution to confirm court-mediated settlement negotiated over videoconference - **read #404**

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