

## GUIDE TO ARBITRATION PLACES (GAP)

# CANADA

CHAPTER PREPARED BY

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### JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline any and all responsibility.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Canada is consistently recognised as an arbitration-friendly jurisdiction, and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the UNCITRAL Model Law on International Commercial Arbitration (1985) ("**Model Law**") and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("**New York Convention**"), and severely limits the ability of courts to intervene with decisions made by arbitrators. Secondly, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted in partial and final arbitral awards. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instill confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence. Finally, Canada has developed excellent arbitration-related infrastructure, which includes Arbitration Place (currently located in Toronto and Ottawa) and the newly-named Vancouver International Arbitration Centre ("**VaniAC**") (formerly the British Columbia International Commercial Arbitration Centre ("**BCICAC**") established in 1986.

Key places of arbitration in the jurisdiction?	Toronto, Vancouver, Montreal.
Civil law / Common law environment?	Common law, except the Province of Quebec which is a civil law jurisdiction.
Confidentiality of arbitrations?	Other than in Quebec and British Columbia, confidentiality is not addressed in the legislation. In the other Canadian jurisdictions, arbitral confidentiality is presumed through the "implied undertaking" rule from court practice. Moreover, confidentiality obligations flow from the arbitration rules adopted by the parties or express confidentiality agreements entered into by the parties. That said, the open-court principle applied in Canada means that the ability to maintain confidentiality if a party resorts to court to challenge an award or otherwise seek assistance is limited. A recent Quebec court decision upheld confidentiality by ordering that the arbitral award be filed under seal and that the documents supporting the award be withdrawn from the court record.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	There is no bar to evidence from parties or party officers in the legislation.
Ability to hold meetings and/or hearings outside of the seat and/or remotely?	Yes.
Availability of interest as a remedy?	Yes, generally.
Ability to claim for reasonable costs incurred for the arbitration?	Yes, which generally includes: <ul style="list-style-type: none"> <li>The fees and expenses of the arbitration includes those of the arbitrator and any administering institution;</li> </ul>

	<ul style="list-style-type: none"> <li>• The parties' reasonable legal fees and expenses, including witnesses and experts; and</li> <li>• More broadly, any other expenses incurred in connection with the proceedings.</li> </ul>
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements have long been accepted in Canada. Third-party funding is widely used but the jurisprudence on its acceptability is limited.
Party to the New York Convention?	<p>Yes, the New York Convention entered into force in Canada on 10 August 1986.</p> <p>Canada declared that it would apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the laws of Canada, except in the case of the province of Quebec, where the law did not provide for such limitation.</p>
Party to the ICSID Convention?	Yes.
Compatibility with the Delos Rules?	Yes.
Default time-limitation period for civil actions (including contractual)?	Varies by jurisdiction. Generally, 2, 6, or 10 years.
Other key points to note?	ϕ
World Bank Enforcing Contracts: <i>Doing Business</i> score for 2020, if available?	57.1 (100 <sup>th</sup> )
World Justice Project, Rule of Law Index: <i>Civil Justice</i> score for 2024, if available?	0.68 (25 <sup>th</sup> )

## ARBITRATION PRACTITIONER SUMMARY

Canada is a federal state with ten provinces and three territories. Legislative power for commercial arbitration falls primarily within provincial and territorial jurisdictions. Canada and its provinces and territories have adopted the UNCITRAL Model Law on International Commercial Arbitration (1985) ("**Model Law**")<sup>1</sup> and the New York Convention,<sup>2</sup> although with slight variations in the manner in which they were adopted.<sup>3</sup>

A number of provinces and territories, namely, British Columbia, Yukon Territory and Saskatchewan, have adopted the New York Convention under separate legislation specifically addressing the enforcement of foreign arbitral awards.<sup>4</sup> Those provinces and territories have also adopted the Model Law in their respective International Commercial Arbitration Acts ("**ICAA**").<sup>5</sup> Quebec, the sole civil law jurisdiction in Canada, incorporated the New York Convention and key aspects of the Model Law through amendments to the Civil Code of Quebec and the Code of Civil Procedure. The remaining provinces and territories have adopted the Model Law and the New York Convention into their ICAAs.<sup>6</sup>

Date of arbitration law?	International arbitration legislation was first introduced by the provinces in 1985/86. Domestic arbitration legislation goes further back in time. The dates of the current legislation across the provinces vary with British Columbia having most recently amended its international arbitration legislation in May 2018 to adopt the work of the Uniform Law Conference of Canada, which Ontario did in March 2017. Other provinces are considering similar amendments. British Columbia has also most recently repealed and replaced its domestic arbitration legislation in September 2020.
UNCITRAL Model Law? If so, any key changes thereto? 2006 version?	Yes. Canada and its provinces were among the first jurisdictions in the world to enact legislation expressly implementing the Model Law. It is incorporated into provincial legislation governing arbitration, in some cases in modified form.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.

<sup>1</sup> *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc. A/40/17 (1985) Annex 1.

<sup>2</sup> *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, June 10, 1958, 330 UNTS 3, 21 UST 2517, TIA No. 6997. The Federal Government of Canada has also enacted federal legislation pertaining to arbitration, the *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp) [Federal CAA], but it does not deal with international commercial arbitration.

<sup>3</sup> The Uniform Law Conference of Canada has approved its working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada. The proposed Act takes into account the 2006 revisions to the Model Law and aims to clarify inconsistencies in current legislation.

<sup>4</sup> *Foreign Arbitral Awards Act*, RSBC 1996, c 154; *Foreign Arbitral Awards Act*, RSY 2002, c 93; *Enforcement of Foreign Arbitral Awards Act*, SS 1996, c E-9.12; *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp) [UNFAACA].

<sup>5</sup> *International Commercial Arbitration Act*, RSBC 1996, c 233; *International Commercial Arbitration Act*, RSA 2000, c I-5; *International Commercial Arbitration Act*, RSY 2002, c 123; *International Commercial Arbitration Act*, SS 1988-198, c I-10.2.

<sup>6</sup> *International Commercial Arbitration Act*, RSA 2000, c I-5; *International Commercial Arbitration Act*, RSNL 1990, c 1-15; *International Commercial Arbitration Act*, RSPEI 1988, c I-5; *International Commercial Arbitration Act*, RSNS 1989, c 234; *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Schedule 5, s 15; *International Commercial arbitration Act*, RSNB 2011, c 176; *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c 1-6; *International Commercial Arbitration Act*, CCSM, c C151.

Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.
Courts' attitude towards the competence-competence principle?	Highly respected.
May an arbitral tribunal render a ruling on jurisdiction (or other issue) with reasons to follow in a subsequent award?	Yes.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	None.
Do annulment proceedings typically suspend enforcement proceedings?	Yes.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Courts will approach this issue on a case-by-case basis. Courts in the past have recognised the permissive nature of this issue under the New York Convention and, in certain circumstances, may enforce an award that has been set aside at the seat. However, Canadian courts will certainly consider the status of an award at the seat, including whether a challenge to it has not yet been determined.
If an arbitral tribunal were to order a hearing to be conducted remotely (in whole or in part) despite a party's objection, would such an order affect the recognition or enforceability of the ensuing award in the jurisdiction?	Risk is low, assuming the party had an opportunity to be heard at a meaningful time and in a meaningful manner. Before conducting a virtual hearing, the arbitral tribunal must be satisfied that the technical arrangements will not compromise the integrity of the proceeding.
Key points to note in relation to arbitration with and enforcement of awards against public bodies at the jurisdiction?	<p>The Federal Court has jurisdiction over commercial arbitration awards that fall within the purview of applicable federal legislation where one of the parties is a Crown or federal government agency or the subject matter is within exclusive federal jurisdiction such as maritime law and patent law.</p> <p>The New York Convention was incorporated into the federal United Nations Foreign Arbitral Awards Act, which functions to govern foreign awards that are within the jurisdiction of the federal government.</p>
Is the validity of blockchain-based evidence recognized?	Canadian courts have not yet opined on blockchain evidence.
Where an arbitration agreement and/or award is recorded on a	Canadian courts have not yet opined on blockchain arbitration agreements. However, a blockchain agreement may be valid if it

blockchain, is it recognized as valid?	conforms with the respective provincial laws regarding formal requirements.
Would a court consider a blockchain arbitration agreement and/or award as originals for the purposes of recognition and enforcement?	Canadian courts have not yet opined on blockchain arbitration agreements or awards. Canadian laws on enforcement of arbitral decisions do not enumerate the media on which an award may be recorded.
Other key points to note?	ϕ

## JURISDICTION DETAILED ANALYSIS

### 1. The Legal Framework of the Jurisdiction

Canada is a federation composed of ten provincial governments and a federal government. The federal government also delegates powers to the governments of Canada's three territories. Legislative powers are divided under sections 91 and 92 of Canada's Constitution Act, 1867; federal jurisdiction is generally reserved only for matters of national concern such as banking, insolvency, and telecommunications.

Arbitration legislation exists in each of the provinces and territories of Canada, and at the federal level. British Columbia, Alberta, Manitoba, Saskatchewan, Ontario, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, Yukon, the Northwest Territories and Nunavut have separate statutes for both domestic arbitration (Arbitration Act or Commercial Arbitration Act) and international arbitration (International Commercial Arbitration Acts ("**ICAA**")). The New York Convention and Model Law are incorporated into international legislation either wholesale or in modified forms as set out in the respective statutes. Domestic provincial legislation is also generally based on the Model Law. In Quebec, Canada's only civil law jurisdiction, arbitration is governed by the Civil Code of Quebec (relevant sections in Books 5 and 10) and the Quebec Code of Civil Procedure (Book 7). Federal legislation governs only domestic arbitration with limited scope (Federal Commercial Arbitration Act), also based on the Model Law. Federal legislation governs arbitrations involving a department of the federal government, a Crown corporation, and issues of maritime or admiralty law. In general, per section 93(13) of the Constitution Act, 1867, commercial disputes are within provincial jurisdiction.

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process and a high-level of predictability for parties to international arbitrations in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada ("**ULCC**") commenced a review of the existing model ICAA, which established the framework for the provinces' respective ICAAs. In its 2011 review, the ULCC aimed to develop reform recommendations for a new model statute based on the 2006 Model Law amendments. The process also sought to reflect changes to international arbitration law and practice in the past three decades and to enhance the uniformity and predictability with which international commercial arbitral awards may be enforced in Canada. In 2014, the ULCC approved the working group's final report, which included a proposed new uniform ICAA.

Among other things, the new statute establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The new model statute would become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. A number of provincial governments across Canada have begun consultations with a view, hopefully, to implementing legislation in the near future. In March 2017, the Province of Ontario adopted a new ICAA, adopting most of the ULCC's recommendations in the proposed uniform act. British Columbia also amended its ICAA in May 2018, establishing the 10-year limitation period through its Limitations Act.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, the Vancouver International Arbitration Centre ("**VaniAC**"), Arbitration Place, ICC Canada's Arbitration Committee, the ADR Institute of Canada ("**ADRIC**"), the International Centre for Dispute Resolution Canada ("**ICDR Canada**") and the Canadian Commercial Arbitration Centre ("**CCAC**").

These organisations provide parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators and meeting facilities.

ADRIC (1 January 2014) and ICDR Canada (1 January 2015) have recently introduced arbitration rules in line with international best practices, with the ICDR Canada opening its doors at the same time.

## 2. The Arbitration Agreement

### 2.1 Governing law

Arbitral tribunals apply the law chosen by the parties. If the parties have not expressly selected an applicable law, then the proper law of the contract must be determined in light of their agreement, considered as a whole, and any surrounding circumstances. In general, the law with which the agreement appears to have the closest and most substantial connection ought to prevail.

In Canada, courts will generally respect parties' express choice of law as to what law should govern the enforceability of an arbitration agreement where there is a question of whether the scope of matters in dispute are arbitrable.

In *Schreter v Gasmac Inc*, the parties' arbitration agreement seated the arbitration in Atlanta in the state of Georgia in the United States. An award was issued and confirmed at the seat. However, Gasmac, the losing party, failed to make the required payments to Schreter, which led to Schreter applying to enforce the award in an Ontario court. The Ontario court looked at the question of arbitrability and respected the parties' agreement – by seating their arbitration in Atlanta the law of the state of Georgia applied:

*Because it is Georgia law which governs, the respondent must provide to this court evidence of Georgia law if it wishes to demonstrate that the award dealt with matters not properly within the submission.<sup>7</sup>*

### 2.2 Formal requirements for an enforceable agreement

In Canada, arbitration agreements are often included in main contracts, although they can also be set out in a separate document. Per Article 16 of the Model Law, an arbitration agreement contained within a contract is subject to the doctrine of separability – it is separable and therefore must be treated as an independent agreement even though part of a main contract.

Formal requirements for arbitration agreements are found in provincial legislation, which differ slightly from province to province. In most provinces, the agreement must be in writing but in Ontario this is not required.<sup>8</sup> Like in the Model Law, it is possible for an arbitration agreement to be found in multiple written documents or through electronic communications. In Quebec and British Columbia, a written arbitration agreement may also be found if one party alleges such an agreement in writing and the alleged counterparty does not object.

Canadian courts take a broad approach to the enforceability of arbitration agreements and are deferential to parties' agreements to arbitrate. Unless it is clear that the arbitration agreement is void, inoperative or incapable of being performed, Canadian courts are likely to defer to the arbitrator the initial task of determining the existence and scope of the arbitration agreement, in accordance with the *competence-competence* principle.<sup>9</sup> For example, Canadian courts will uphold the identification of the "seat" if the term "place" is used (as with many arbitration rules, and if a "venue" is identified, *i.e.*, if only one possible "seat" is mentioned it likely will be upheld regardless of the language used to identify it unless that language specifically excludes the location as being the legal seat).

<sup>7</sup> *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608 at 623 (Ont Ct J (Gen Div)) [*Schreter*].

<sup>8</sup> *Arbitration Act, 1991*, SO 1991, c 17, s 5(3).

<sup>9</sup> *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801 [Dell].



### 2.3 Ability to bind third parties

Generally, neither an arbitral tribunal nor a court can compel a third party who is not subject to the arbitration agreement to join in the arbitral proceedings. That said, Canadian courts have recognised a number of international principles with regard to the binding of non-signatories, including:

- where the contractual agreement between a party and the non-party incorporates the arbitration clause by reference;
- where there is an agency relationship between a party and a non-party;
- where the corporate veil is pierced as a result of a sufficiently close relationship between a parent and subsidiary to hold one corporation legally accountable for the other; or
- by estoppel.

The overriding principle of consent to arbitrate is often considered by courts, including findings of implied consent of a non-signatory to be bound to an arbitration agreement.

### 2.4 Restrictions to arbitrability

In Canada, arbitrability is generally considered a requirement for jurisdiction as opposed to a condition of validity of the arbitration agreement (with the possible exception of arbitration agreements in the consumer protection context where a lack of arbitrability of such disputes may lead to invalidity).

In considering arbitrability, Canadian courts tend to respect the *competence-competence* principle, leaving the initial determination to the arbitrator.<sup>10</sup> For example, in *Dell Computer Corp v Union des Consommateurs*,<sup>11</sup> the Supreme Court of Canada (“SCC”) held, consistently with Articles 8 and 16 of the Model Law, that a challenge to an arbitrator’s jurisdiction or the arbitrability of a dispute should first be addressed by the arbitrator before a court could consider the issue. In Canada, if a challenge to the arbitrator’s jurisdiction or the scope of the arbitration agreement is brought to court, the court “*is required to limit itself to a prima facie analysis and to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable*”.<sup>12</sup>

In *Gulf Canada Resources v Arochem International*, a leading international arbitration-related case in Canada, the Court of Appeal for British Columbia addressed the *competence-competence* principle:

Considering s. 8(1) in relation to the provisions of s. 16 [of the Model Law] and the jurisdiction conferred on the arbitral tribunal, in my opinion, *it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement* because those are matters within the jurisdiction of the arbitral tribunal. *Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement* or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.<sup>13</sup> [Emphasis added.]

<sup>10</sup> John AE Pottow, Jacob Brege & Tara J Hawley, “A Presumptively Better Approach to Arbitrability” (2013) 53:3 Can Bus LJ 323 at 341.

<sup>11</sup> *Dell*, *supra* note 9.

<sup>12</sup> *Seidel v TELUS Communications Inc.*, [2011] 1 SCR 531 at para 29 [Seidel].

<sup>13</sup> *Gulf Canada Resources v Arochem International*, [1992] BCJ No 500, para 43 (CA) [Gulf Canada].

Courts in Canada will also be wary of entertaining any challenge to an arbitrator's jurisdiction where it appears merely to be a delaying tactic on the basis of it being a potential abuse of process that would "*unduly impair the conduct of the arbitration proceeding*."<sup>14</sup>

In *Dell*, the SCC was clear that the *competence-competence* principle should not be undermined stating that "the fact that art. II(3) of the New York Convention provides that the court can rule on whether an agreement is null and void, inoperative or incapable of being performed does not mean that it is required to do so before the arbitrator does."<sup>15</sup> The SCC noted that the "arbitrator first" approach is often referred to as the *prima facie* analysis test,<sup>16</sup> which as noted above was set out in *Gulf Canada*.

Generally, in Canada, the analysis of whether a particular issue or dispute is arbitrable – in the sense that it is within the scope of the applicable arbitration agreement – involves a broad approach.<sup>17</sup> For example, in *Quintette Coal Ltd v Nippon Steel Corp*, the Supreme Court for British Columbia considered whether an arbitral award, which included calculations that were not explicitly contemplated in the arbitration agreement, was enforceable in light of the Respondent's objection that the issue was not arbitrable.<sup>18</sup> The court took a broad approach, supporting the arbitrator's interpretation of the scope of the arbitration agreement. This broad approach was consistent with that taken by other judicial authorities, which, together, has been referred to as indicative of a "powerful presumption" in favour of a broad approach in light of international comity and a global marketplace.<sup>19</sup>

Thus, there are very few matters that cannot be arbitrated under the laws applicable in the Provinces of Canada. Applicable provincial legislation provides guidance on whether particular matters are arbitrable. For example, criminal matters cannot be resolved by arbitration. In certain areas, such as patent rights, copyrights, trademarks, bankruptcy, employment and consumer contracts, and competition law matters, some jurisdictions have statutory restrictions with respect to arbitration. In Quebec, for instance, any stipulation that obliges the consumer to refer a dispute to arbitration that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.<sup>20</sup> The status and capacity of persons, family matters, and other matters of public order are also non-arbitrable.

In the context of a consumer protection related case, the SCC, however, has suggested that recourse to the court may be had in the first instance where the jurisdiction issue is solely a question of law.<sup>21</sup>

However, this exception should not be applied if the issue involves questions of fact, or mixed fact and law.<sup>22</sup>

### 3. Intervention of Domestic Courts

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. As outlined above, Canadian courts have consistently expressed their approval of these principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, one Canadian court stated that:

<sup>14</sup> *Dell*, *supra* note 9, para 86.

<sup>15</sup> *Dell*, *ibid*, para 73.

<sup>16</sup> *Dell*, *ibid*, para 75.

<sup>17</sup> Henri C Alvarez, QC, "The Implementation of the New York Convention in Canada" (2008) 25:6 J Intl Arb 669 at 674.

<sup>18</sup> *Quintette Coal Ltd v Nippon Steel Corp*, [1990] BCJ No 2241 (CA).

<sup>19</sup> *Mexico v Cargill, Incorporated*, 2011 ONCA 622, para 19.

<sup>20</sup> *Consumer Protection Act*, RSQ, c P-40.1, art 11.1.

<sup>21</sup> *Dell*, *supra* note 9, para 84.

<sup>22</sup> *Dell*, *ibid*, para 85.

[T]he purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.<sup>23</sup>

Courts across Canada have echoed these views; Canadian legislation provides for, and courts respect, the *competence-competence* principle, which leaves initial determinations of jurisdiction and arbitrability to the arbitrator. Indeed, the fact that the New York Convention provides that the court may rule on whether an agreement is null and void, inoperative or incapable of being performed does not mean that it is required to do so before the arbitrator does.

In May 2020, the SCC issued its decision in *Uber Technologies Inc. v Heller*,<sup>24</sup> in which it determined – in the narrow facts of that case – that a court may rule on the validity of the arbitration agreement before the arbitral tribunal. In *Uber v Heller*, an UberEats delivery driver sought to challenge the enforceability of a standard ICC arbitration provision seated in Amsterdam and under the substantive law of the Netherlands, complaining, among other things, that the ICC commencement fee was equal to over half of the driver's salary. Although the issue was couched as an employment law issue before the Supreme Court, the reality was that the issue arose in the context of the Plaintiff's counsel trying to certify a class action. The Supreme Court held that while *competence-competence* is an important and respected principle, the court could determine the issue based on the allegation that the arbitration agreement was "unconscionable" and its view that the plaintiff was substantially prevented from accessing recourse under the arbitration agreement. The agreement was found invalid, with two of the nine presiding justices dissenting, one of them referring to international jurisprudence that would have supported reading down the "unconscionable" aspects of the arbitration agreement and enforcing the bare commitment to arbitrate.

The *Uber v Heller* decision has been widely criticized for potentially having eroded the *competence-competence* principle, among other things. The class-action bar on the other hand has praised the decision for holding parties like Uber accountable for crafting arbitration agreements that appear to be directed at preventing access to a meaningful dispute resolution process. The *Uber v Heller* decision is fact-specific exception to the historically well-respected principle of *competence-competence* that should not affect the vast majority of arbitral parties in Canada. Other than in *Uber v Heller*, the Supreme Court (and most Canadian courts) have consistently respected Articles 8 and 16 of the Model Law holding that any challenge to an arbitrator's jurisdiction or the arbitrability of a dispute should first be addressed by the arbitrator before a court can consider the issue.<sup>25</sup>

A court may also make a final determination in respect of a dispute where it is clear that the dispute is outside the terms of the arbitration agreement, a party is not a party to the arbitration agreement, or the application is out of time.

### 3.1 Anti-suit injunctions

Canadian courts can, and do, issue anti-suit injunctions to restrain parties from proceeding with litigation in court. To enjoin a court proceeding, the parties seeking the injunction must demonstrate that:

- A valid arbitration agreement exists;

<sup>23</sup> *Automatic Systems Inc v Bracknell Corp* (1994), 18 OR (3d) 257 at 264 (CA), cited with approval in Seidel, supra note 12 and *Desputeaux v Editions Chouette (1987) Inc*, 2003 SCC 17.

<sup>24</sup> *Uber Technologies Inc. v Heller*, 2020 SCC 16.

<sup>25</sup> See, e.g., *Dell*, supra note 9.

- The arbitral forum acquired by the agreement is more appropriate than the judicial forum that is the subject of the injunction based on the principles of *forum non conveniens*; and
- Granting the injunction would not unjustly cause a party to lose a legal right or advantage in the judicial forum.

Canadian courts have also issued anti-suit injunctions against foreign arbitrations. In *Li v Rao*, the applicant sought an injunction to prevent the respondent from continuing its arbitral proceedings in China pending the resolution of a dispute in the British Columbia courts. The British Columbia Court of Appeal held that an international anti-suit injunction may be suitable in exceptional circumstances. In this case, the parties had agreed to await the resolution of the court proceedings before continuing the arbitration. The Court of Appeal's decision to grant the injunction was therefore not predicated upon principles of justice, but upon principles of contract law.<sup>26</sup> There is little, if any, case law on whether a Canadian court would enforce an injunction to stay Canadian court proceedings in favour of a foreign arbitration. The existence of such an injunction would likely be a material fact in support of granting the stay in Canada, but the applicant would likely still need to satisfy the requirements of the applicable Provincial International Arbitration legislation.

#### **4. The Conduct of the Proceedings**

##### **4.1 View on outside counsel or self-representation**

Although all provinces in Canada have rules restricting the appearance of lawyers from other jurisdictions in legal matters, these restrictions do not apply to arbitration proceedings seated in Canada.

##### **4.2 Arbitrators' independence and impartiality**

The usual requirements of independence and impartiality apply. Otherwise, arbitrators are not required to be certified in any way and parties are free to agree to the appointment of non-lawyers as arbitrators if they so wish. Parties sometimes specify required qualifications in their arbitration agreements.

In accordance with the Model Law, an arbitrator may be replaced where:

- his or her qualifications are not satisfactory to the parties;
- there are justifiable doubts as to his or her impartiality or independence;
- he or she becomes unable to perform his or her functions; or
- he or she fails to act without undue delay.

Different and additional default rules apply to domestic arbitration under the relevant provincial legislation. By way of illustration, under the domestic legislation of Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan, the court may remove an arbitrator on a party's application where the arbitrator becomes unable to perform his or her functions, or delays unduly in conducting the arbitration, but also if they commit a corrupt or fraudulent act, or do not conduct the arbitration in accordance with the legislation. Under British Columbia's Arbitration Act, the court may remove an arbitrator who commits an "arbitral error" (which includes bias) or unduly delays in proceeding with the arbitration or in making an award. In Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, the Yukon and Nunavut, the court may remove an arbitrator where he or she has misconducted himself or herself, which is rare.

##### **4.3 Court intervention to assist in the constitution of the arbitral tribunal**

Under the Model Law (so in the international legislation in the provinces and territories of Canada), if a party fails to appoint an arbitrator or co-arbitrators fail to appoint a chair within the required time periods, a party

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<sup>26</sup> *Li v Rao*, 2019 BCCA 264.

may request that the court make the appointment. In the case of a single arbitrator, if the parties cannot agree, a party may request that the court make the appointment.

Under domestic arbitration legislation, the court may appoint the arbitral tribunal on a party's application, if the arbitration agreement is silent on the appointment procedure or if the person with the power to appoint the arbitral tribunal has not done so within the time provided for in the agreement or after a party has given the person seven days' notice to do so.

#### **4.4 Ability of courts to issue interim measures in connection with arbitrations**

In Canada, as with other Model Law jurisdictions, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure. Typically, this is done for the preservation of property and evidence, to bind others who are not party to the arbitration, or to enforce an order made by the arbitral tribunal.

If a party makes an *ex parte* application in Canada, it has a duty to disclose all the relevant facts and circumstances to the court. In hearing an *ex parte* motion, the court's first question is whether the circumstances justify granting the order without hearing the other party. To that end, the moving party needs to satisfy the court that there is some urgent need, and failing to act immediately will result in irreparable harm. The relief sought must be proportional to the prejudice suffered if the relief is not granted. Also, a party must be prepared to compensate the other parties in case the *ex parte* order is obtained improperly or results in unjustified prejudice or loss to the other parties.

#### **4.5 Legal regulation of the conduct of the arbitration**

Arbitration legislation in Canada is not overly prescriptive as to procedure, other than general provisions relating to the availability of particular procedures and the court's ability to assist arbitration proceedings. Generally, the legislation provides the parties and the tribunal with the power and flexibility to shape their own procedure; tribunals are required to conduct the arbitration in the manner they consider appropriate, subject to the parties' rights of procedural fairness and goals of efficiency and reduced costs. Institutional rules are often more prescriptive and will be respected by the courts.

Where parties have not agreed on the number of arbitrators, the Model Law, as adopted in the relevant province's international legislation, defaults to a panel of three arbitrators. Beyond the arbitrators' independence and impartiality, the default provisions do not require any default qualifications or characteristics.

Domestic legislation across all provinces and territories – with the exception of Quebec – indicates that where an arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of a single arbitrator. Under the Quebec Code of Civil Procedure, three arbitrators is the default.

Per the Model Law at article 19, absent an agreement by the parties, the tribunal may conduct the arbitration in any manner it finds appropriate. Accordingly, an arbitration may proceed virtually despite objections by one party. The tribunal must be cognizant of the parties' legal rights and interests, however. The integrity of the arbitration may be compromised by a virtual hearing where the technical arrangements have a prejudicial impact. For example, the fairness of a hearing may be called into question where a key witness does not have a webcam.

#### **4.6 Confidentiality of arbitration proceedings**

Confidentiality is generally not addressed in the legislation other than in Quebec and British Columbia. The British Columbia ICAA's confidentiality provisions came into force as of 17 May 2018. In the other Canadian jurisdictions, arbitral confidentiality is presumed through the "implied undertaking" rule from court practice. Moreover, confidentiality obligations flow from the arbitration rules adopted by the parties or express confidentiality agreements entered into by the parties. That said, the open-court principle applied in Canada

means that the ability to maintain confidentiality if a party resorts to court to challenge an award or otherwise seek assistance is limited; the principle requires that court proceedings presumptively be open and accessible to the public and to the media. Parties may apply to maintain confidentiality but the jurisprudence limits the circumstances in which a court will grant such protection.

A recent Quebec court decision favoured confidentiality of arbitration over the open-court principle by ordering that the arbitral award be filed under seal and that the documents supporting the award be withdrawn from the court record. The court noted that (i) doing so encourages the use of arbitration as a dispute resolution mechanism; and (ii) the public interest favours confidentiality orders to promote arbitrations and protect the expectations of the parties to the arbitration.<sup>27</sup> While it remains to be seen whether other Canadian courts will do the same, this case demonstrates the mindfulness of courts that they must strive to accommodate arbitration's confidentiality with the court's public hearings because doing so supports a public policy of encouraging alternative dispute resolution.

As a practical matter, information regarding the existence of the arbitration may also be inadvertently disclosed by persons involved in the proceedings but who would not normally be bound by any confidentiality agreement, including couriers and third-party witnesses.

#### **4.7 Length of arbitration proceedings**

International arbitration legislation of the provinces and territories is silent on time limits for delivery of an award, although limits are set on corrections, interpretations, and additions to the award. This legislation does contemplate (by providing for extensions of time) that parties may stipulate a time limit in their arbitration agreement.

Domestic arbitration legislation limits the time allowed to render an award in one of two ways. First, a time limit may be provided for the duration of the arbitration process, where an award must be rendered within X months from the commencement of the arbitration. Alternatively, an award may be required within X months of the conclusion of the arbitration hearing.

The time given for delivery of an award varies between provinces. In Nova Scotia, domestic legislation provides that the arbitrator must render a decision within 10 days of the completion of the arbitration. In British Columbia, the short rules provide for a decision to be rendered within 30 days of the closing of the hearings, whereas the standard rules allow for 60 days after the close of the hearings. Domestic legislation in Newfoundland and Labrador, the Northwest Territories, Prince Edward Island and the Yukon allow three months after entering on the reference to have the award rendered.

#### **4.8 Place where hearings and/or meetings held**

Consistent with the freedom accorded to the parties and, in the absence of agreement between them, to the arbitral tribunal to determine the procedure in the arbitration, there are no rules that govern the conduct of an international arbitration hearing aside from those set out in the Model Law. Accordingly, unless otherwise agreed by the parties, it is in the tribunal's discretion to decide whether oral hearings are to be held, although, consistently with many international arbitration rules globally, if one party requests a hearing, a tribunal would very likely grant the request to try to avoid grounds for set aside or refusal of enforcement on natural justice grounds. The issue of a right to an oral hearing, in light of COVID-19 and the inability to hold oral hearings, has yet to be decided by a Canadian court, and is an open debate internationally.

Ordinarily, the hearing will be held in the seat of the arbitration, although the parties can agree otherwise. Where an arbitration agreement provides that the arbitration be seated in Toronto, Ontario (for example), the parties could nevertheless agree for hearings to be held in Vancouver, British Columbia and be deemed

<sup>27</sup> 79411 USA Inc c Mondofix Inc., 2020 QCCS 1104.

to be taking place in Toronto. In this case, the Ontario statute would still govern the procedure of the arbitration and, if the parties require court assistance, they would apply to the Ontario courts.

#### **4.9 Ability of arbitrators to issue interim measures**

Arbitrators in Canada are granted broad powers. Once appointed, arbitrators may award interim relief without prior authorisation from a court. Under international arbitration legislation, arbitral tribunals are granted broad powers to issue interim measures. Unless otherwise agreed, the arbitral tribunal may, at the request of a party, order any party to take such interim protection measures that the tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may also require any party to provide appropriate security in connection with such interim measures.

Domestic legislation in Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan also provides broad powers to arbitral tribunals to make an order on a party's request for the detention, preservation or inspection of property and documents which are the subject of the arbitration and may order a party to provide security in that connection. In British Columbia, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection that the arbitral tribunal deems necessary with respect to the subject matter of the dispute and may order a party to provide security in connection with such a measure.

#### **4.10 Arbitrators' right to admit/exclude evidence**

Arbitration legislation across the provinces and territories generally affords arbitrators more flexible rules of evidence than those afforded to the courts; they are not required to apply strictly the rules of evidence. Arbitral tribunals have broad discretion to conduct the arbitration in a manner that they consider appropriate to avoid unnecessary delay or expense and to provide a fair and efficient means for the final resolution of the parties' dispute. Flowing from that discretion is the power to:

- determine the admissibility, relevance, materiality and weight of any evidence;
- exclude cumulative or irrelevant evidence; and
- direct the parties to focus their evidence or argument on specific issues which may assist in the disposal of all or part of the dispute.

Generally, in lieu of direct examination, witness evidence is provided in the form of written statements and cross-examined under oath before the tribunal. In Canada, parties and their representatives (*e.g.*, officers and employees) may present evidence as witnesses of fact, and in fact, there are generally no limitations on who may present evidence in support of a party's case.

Expert evidence may be adduced by the parties or in certain circumstances tribunals may retain experts. In common practice, the evidence is provided in a written report followed by oral examinations in a hearing.

#### **4.11 Prescription of principles governing the awarding of interest**

International arbitration legislation in Canada does not provide explicitly for the award of interest, except in British Columbia. As a result, the tribunal's power to award interest is determined by the arbitration agreement or by the procedural rules adopted for the arbitration, which may contain specific provisions as to costs. Domestic legislation in some provinces provides that the arbitral tribunal has the same power with respect to interest as the court has under provincial court order interest legislation.

Parties may expressly provide for the power to award interest in their agreement or the necessity to do so may arise as part of an arbitrator's obligation to apply the general law. Where an arbitration agreement is broad enough to encompass all claims and disputes between parties, it has been recognised that arbitrators have the power to award interest.



Generally, if there is no contractually agreed rate, the rate of the governing substantive law of the parties' agreement is most likely to prevail, although in some circumstances, it may be argued that the law of the seat or the place of enforcement should apply.

#### 4.12 Principles governing the allocation of arbitration costs

The general principle applied in Canada is that costs follow the event and can be full indemnity for reasonable legal fees, disbursements, and arbitration costs. Tribunals generally have discretion to allocate costs, which is explicitly provided for in Canadian domestic arbitration legislation. The British Columbia international arbitration legislation also provides such discretion, although the international legislation of other provinces is less explicit.

With respect to costs claims, parties are generally invited by the tribunal to provide statements of costs (and sometimes to make submissions on costs).

#### 4.13 Liability

Arbitrators are generally immune from civil liability, except in instances of fraud or bad faith. Except in the recent amendments to British Columbia's ICAA, legislation in Canada provides no express immunity, but most arbitral institutions' rules do. For example, the CCAC's International Arbitration Rules provide that none of the CCAC, its staff or the members of the arbitral tribunal is liable to any party for any act or omission in relation to arbitration under these rules. In the case of *ad hoc* arbitrations, jurisprudence establishes that arbitrators who are acting in a "judicial or quasi-judicial capacity" are generally immune from civil liability in Canada, except in instances of fraud or bad faith.<sup>28</sup>

### 5. The Award

As previously noted, courts across Canada have consistently given substantial deference to arbitrators' decisions, and have narrowly interpreted the grounds for setting aside arbitral awards. In addition, some provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.<sup>29</sup>

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law and Article V of the New York Convention. Based on these limited grounds on which enforcement may be refused, courts apply a high burden on arbitral award debtors to prove any allegation of injustice or impropriety that could render an award unenforceable.

#### 5.1 Provision of reasons

The arbitral award must state the reasons on which it is based, unless the parties have agreed that no reasons are required.

#### 5.2 Appealing an award

There are no appeals for international awards, and only the limited grounds for set aside or refusal of enforcement under the Model Law and New York Convention apply.

<sup>28</sup> See, for instance, *Flock v Beattie*, 2010 ABQB 193 (although this case was an Alberta case regarding the Alberta domestic Act, it also canvasses the applicable Canadian and international law).

<sup>29</sup> For example, the definition of "local judgment" in British Columbia's *Limitations Act*, SBC 2012, c 13, s 1 [BC *Limitations Act*] specifically includes arbitral awards to which the *Foreign Arbitral Awards Act* or the *International Commercial Arbitration Act* apply, providing arbitral creditors with a 10-year limitation period for enforcement proceedings. Similarly, the British Columbia *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [*Proceedings Transfer Act*] presumes a "real and substantial connection" (the standard for Canadian courts to assume jurisdiction over a dispute) in any proceeding to enforce a foreign arbitral award.



Provincial legislation dealing with domestic arbitration provides limited rights to appeal an award. Generally, an appeal can be brought only on a question of law, not a question of fact. In some provinces, there is no right of appeal unless all parties have agreed to such a right or consented to an appeal. In other provinces, a right of appeal may be subject to obtaining leave to appeal from a judge or superior court of the province, and / or parties may contract out of the limited statutory rights of appeal.

### 5.3 Enforcement procedures and limitation periods

The international legislation provides for Model Law and New York Convention recognition and enforcement rights. Creditors of international arbitral awards generally have access to the same enforcement remedies available to domestic litigants. Awards can be enforced in local courts; the applicable legislation identifies which level of court – usually the superior court in the province – has jurisdiction. Thus, an application for recognition and enforcement of awards will be made to the Federal Court if the subject matter of the arbitration is governed by federal law. If the subject matter of the arbitration is governed by provincial or territorial law, the application must be made to the court of inherent jurisdiction (the superior court). Typically, the party seeking to enforce the award must file it, together with evidence of the arbitration agreement on which it is founded, as part of a summary procedure.

Enforcement of a domestic arbitral award may be sought by application to the court, through a procedure that is intended to be summary in nature. Once an award is recognized by the court, all usual remedies available to the holder of a court judgment are available. The particulars of the application procedure (including filing fees, limitation periods, and leave requirements) are detailed in the province's domestic arbitration legislation and rules of court.

A party with a foreign arbitral award should expect its award to be enforced, unless the extremely limited grounds to refuse enforcement apply. Canadian courts are highly deferential to arbitration and uphold the principles set out in the New York Convention. The grounds on which enforcement can be denied are limited to those set out in the New York Convention and the Model Law. Canadian courts construe these grounds very narrowly, and generally enforce international awards.

This was evident in the BC Court of Appeal decision in *Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited*,<sup>30</sup> which held that a party's claim to enforce a foreign arbitration award was "very strong, approaching certainty given the limited grounds upon which the claim could be defended", and reinforcing that an award creditor is entitled to the full panoply of enforcement remedies available to any creditor of a court judgment.<sup>31</sup>

The limitation period for recognition and enforcement of foreign awards in the Federal Court is six years.<sup>32</sup> The limitation periods applicable in each province varies, as discussed below.

In Alberta, legislation does not expressly provide for a limitation period applicable to recognition and enforcement of foreign awards, but recent jurisprudence addresses the issue directly. The Alberta Court of Appeal held that the applicable limitation period for foreign judgments is two years, and that the same principles apply with respect to a foreign arbitral award. The SCC has upheld this decision. It is also worth noting, that in making its determination, the SCC found that an arbitral award is not "*a judgment or a court order for the payment of money*", and is instead subject to the general two year limitation period applicable to most causes of action, per section 3 of the Alberta Limitations Act.<sup>33</sup>

<sup>30</sup> *Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited*, 2014 BCCA 205 [Sociedade-de-fomento].

<sup>31</sup> *Ibid* at para 47.

<sup>32</sup> *Federal Courts Act*, RSC 1985, c F-7, s 39(2) [Federal Courts Act]; *Compania Maritima Villa Nova SA v Northern Sales Co*, [1992] 1 FC 550 (CA); *Limitations Act*, RSA 2000, c L-12.

<sup>33</sup> *Yugraneft Corp v Rexx Management Corp*, 2007 ABQB 450; 2008 ABCA 274; 2010 SCC 19.

In British Columbia, an action for recognition and enforcement of an arbitral award for the payment of money or the return of personal property and to which either the FAAA or the ICAA applies, is subject to a 10-year limitation period. An action consequent upon an arbitral award for the possession of land to which either the FAAA or the ICAA applies is not governed by a limitation period and may be brought at any time. Judicial interpretations of the BC Limitations Act hold that limitation periods established under that Act (which would apply to arbitral awards under the FAAA or the ICAA) only begin to run on the date on which the right to bring an action on the award or judgment in British Columbia arises. In the absence of judicial interpretation of the new BC legislation on court jurisdiction, it would be prudent to assume that the limitation period for the enforcement of arbitral awards to which the FAAA or the ICAA apply begins to run when the arbitral award is rendered.<sup>34</sup>

Ontario's recent enactment of the new uniform International Commercial Arbitration Act means that it has now adopted the 10-year limitation period applicable to the recognition and enforcement of a foreign arbitral award under the Model Law.<sup>35</sup>

Quebec legislation does not expressly provide for a limitation period applicable to recognition and enforcement of foreign awards and there is no jurisprudence addressing the issue directly. However, Quebec courts have held that the applicable period for domestic awards is 10 years from the date the award is rendered and it is likely that the same 10-year period would apply to a foreign award. The question has yet to be put to the Quebec courts.<sup>36</sup>

#### 5.4 Effect of annulment or appeal proceedings

Although procedural rules in each Canadian jurisdiction permit discretionary suspension of the right to enforce an award, the introduction of annulment or appeal proceedings does not automatically suspend the exercise of the right to enforce an award.<sup>37</sup>

When a foreign award has been annulled at its seat, Canadian courts will approach the issue of domestic enforcement on a case-by-case basis. Courts in the past have recognised the permissive nature of this issue under the New York Convention and, in certain circumstances, may enforce an award that has been set aside at the seat. However, Canadian courts will certainly consider the status of an award at the seat, including whether a challenge to it has not yet been determined.

Canadian federal legislation adopts the language of the New York Convention, which gives Canadian courts discretion to refuse to recognise or enforce a foreign award that has been set aside by the competent authority. Neither legislation nor case law interpreting it describes the circumstances under which the court can or should exercise that discretion and refuse to recognise or enforce an award that has been set aside by the competent authority.<sup>38</sup>

In an *obiter dictum*, one Ontario court acknowledged the discretion granted by legislation to recognise or enforce an award that has been set aside, but no court has exercised its discretion to do so.<sup>39</sup>

<sup>34</sup> BC *Limitation Act*, *supra* note 25, ss 2(1)(e), 7(a)&(b), 30; *Proceedings Transfer Act*, *supra* note 25, ss 3 & 10(k).

<sup>35</sup> *Arbitration Act*, 1991, SO 1991, c 17, s 10: "No application under the Convention or the Model Law for recognition or enforcement (or both) of an arbitral award shall be made after the later of December 31, 2018 and the tenth anniversary of, (a) the date on which the award was made; or (b) if proceedings at the place of arbitration to set aside the award were commenced, the date on which the proceedings concluded."

<sup>36</sup> *Civil Code of Quebec*, art 2924; *Transport Michel Vaillancourt Inc v Cormier*, 2006 QCCS 803.

<sup>37</sup> *Federal Courts Act*, *supra* note 29, s 50(1); Alberta Rules of Court, r 1.4(2)(h); Supreme Court Civil Rules, rr 19-3(8) and (9); *Law and Equity Act*, RSBC 1996, c 253, s 8(3); *Courts of Justice Act*, RSO 1990, c C-43, s 106; *Quebec Code of Civil Procedure*, c C-25.01, art 654.

<sup>38</sup> UNFAACA, *supra* note 4, Art. V 1(e); Federal CAA, *supra* note 2, art 36(1)(a)(v).

<sup>39</sup> *Arbitration Act*, 1991, SO 1991, c 17, art 36(1)(a)(v); *Schreter*, *supra* note 7.

## 6. Funding Arrangements

In Canada, many cases are funded. While the common law doctrine of champerty and maintenance remains in effect, there have been several court decisions approving litigation funding agreements in the class actions and commercial context, and one court decision determining that such agreements do not require approval by the court hearing the underlying dispute. In the context of consumer protection class action cases, an Ontario court has suggested that the existence of funding may need to be disclosed and subject to certain conditions. If asked to determine the legality of a third party funding agreement, a Canadian court would look at the terms of the agreement to confirm that it is not champertous in nature.

Notably, the recent amendments to British Columbia's ICAA specifically state that third-party funding is not to be considered contrary to public policy in British Columbia (a common law province) for the purposes of subsection 36(1)(b)(ii); the effect of which is to ensure that the presence of third-party funding will not be a legitimate reason to refuse recognition or enforcement of an arbitral award.

Also recently, in *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) -and- Ernst & Young Inc.*,<sup>40</sup> the Quebec Superior Court reviewed the terms of a third-party funding agreement between Bentham IMF and the debtors. The court highlighted the fact that in Quebec – Canada's only civil law jurisdiction – "litigation funding by a third party has been accepted". Subsequently, in *9354-9186 Québec inc. v Callidus Capital Corp.*,<sup>41</sup> the SCC noted that in common law jurisdictions, third-party funding is not necessarily contrary to the principles of maintenance and champerty. The court does observe that the area of law is evolving, and that the majority of the jurisprudence is focused on the class action context where third-party funding has been leveraged to mitigate financial barriers "which were stymieing litigants' access to justice", but the case does provide comfort to third-party funders and their prospective clients.

## 7. Arbitration and Technology

### 7.1 Blockchain arbitration agreements

Although Canadian courts and legislatures have not addressed blockchain in this context, a blockchain arbitration agreement may be valid in some Canadian jurisdictions. As previously mentioned, in Ontario, an arbitration agreement does not need to be written to be valid. Meanwhile, in Quebec and British Columbia (in the international context), a blockchain arbitration agreement may be valid if one party alleges its existence in writing and the other party does not object. Most Canadian jurisdictions do require an arbitration agreement to be in written form, however, e.g., the recently amended Domestic Arbitration Act in British Columbia expressly states that the agreement "need not be in writing").

### 7.2 Blockchain evidence and awards

No federal or provincial act limits valid forms of evidence, nor does the New York Convention state the medium on which an arbitral award must be recorded in order to be valid. That said, Canadian courts have not yet opined on the validity of blockchain evidence or blockchain arbitral awards. We would expect future jurisprudence and legislation/legislative amendments to more specifically address the identification and testing of blockchain evidence.

### 7.3 Electronic signatures

Each province in Canada has adopted a statute whereby electronic signatures are valid. Under these acts, an electronic signature can be any information that a person adopts or creates as a means of signing a document.<sup>42</sup> Accordingly, a court will consider a document signed if (a) the person inserts an image of their

<sup>40</sup> *Arrangement relatif à 9354-9186 Québec inc. (Bluberi Gaming Technologies Inc.) -and- Ernst & Young Inc.*, 2018 QCCS 1040 (leave to appeal allowed, 2018 QCCA 632).

<sup>41</sup> *9354-9186 Québec inc. v Callidus Capital Corp.*, 2020 SCC 10, paras 94-95.

<sup>42</sup> *Electronic Commerce Act*, 2000, SO 2000, c 17; *Electronic Transactions Act*, SBC 2001, c 10; *The Electronic Information and Documents Act*, 2000, SS 2000, c E-7.22; *Electronic Transactions Act*, SA 2001, c E-5.5; *The Electronic Commerce and Information*

signature or (b) the person authenticates the document with their encrypted key. Notwithstanding these acts, Canadian common law has also developed to consider electronic signatures valid.<sup>43</sup>

## **8. Prospects for Reform**

The limits of third-party funding is an emerging issue in Canada, although the above-mentioned statement approving of it in British Columbia and the SCC's recent comments distinguishing third-party funding from maintenance and champerty is a sign that it is in Canada to stay. In addition, it remains to be seen whether the provinces and territories other than Ontario and British Columbia will adopt the proposed ULCC uniform International Commercial Arbitration Act, and in so doing whether the distinctions between legislation among the provinces and territories will be reduced. Also, the ULCC has almost completed its work on a uniform Domestic Arbitration Act for the provinces to consider.

## **9. Compatibility of the Delos Rules with Local Arbitration Law**

The Delos Rules of Arbitration do not conflict with federal or provincial laws.

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*Act, CCSM c E55; Act to Establish a Legal Framework for Information Technology, c C-1.1; Electronic Transactions Act, RSNB 2011, c 145; Electronic Commerce Act, SNL 2001, c E-5.2; Electronic Commerce Act, SNS 2000, c 26; Electronic Commerce Act, RSPEI 1988, c E-4.1; Electronic Transactions Act, SNWT 2011, c13; Electronic Commerce Act, SNU 2004, c7; Electronic Commerce Act, RSY 2002, c 66.*

<sup>43</sup> *I.D.H. Diamonds NV v Embee Diamond Technologies Inc.*, 2017 SKQB 79, paras 42-43.

## ARBITRATION INFRASTRUCTURE AT THE JURISDICTION

Leading national, regional and international arbitral institutions based out of the jurisdiction, <i>i.e.</i> , with offices and a case team?	<p>Leading arbitral institutions include:</p> <p>Vancouver International Arbitration Centre (VanIAC), formerly the British Columbia International Commercial Arbitration Centre (BCICAC)</p> <p>International Centre for Dispute Resolution of Canada (ICDR Canada)</p> <p>ADR Institute of Canada (ADRIC)</p> <p>Canadian International Internet Dispute Resolution Centre</p> <p>Canadian Commercial Arbitration Centre</p>
Main arbitration hearing facilities for in-person hearings?	<p>Vancouver: Vancouver International Arbitration Centre, Vancouver Arbitration Chambers</p> <p>Toronto: ADR Chambers, Bay Street Chambers, Arbitration Place</p> <p>Ottawa: Arbitration Place</p> <p>Montreal: Canadian Commercial Arbitration Centre</p>
Main reprographics facilities in reasonable proximity to the above main arbitration providers with offices in the jurisdiction?	<p>Vancouver: Print Three</p> <p>Calgary: Print Three</p> <p>Toronto: PrintLegal.ca, Legal Print &amp; Copy Inc.</p> <p>Ottawa: Print Three</p> <p>Montreal: Copie Nova</p>
Leading local providers of court reporting services, and regional or international providers with offices in the jurisdiction?	<p>Vancouver: Charest Legal Solutions, Merit Reporting, Reportex</p> <p>Calgary: Amicus Reporting Group, Dicta Court Reporting</p> <p>Toronto: Arbitration Place, Neesons, Victory Verbatim, Toronto Court Reporters</p> <p>Ottawa: Arbitration Place, ASAP Reporting</p> <p>Montreal: JML Transcription, Lexis Communications</p>
Leading local interpreters for simultaneous interpretation between English and the local language, if it is not English?	<p>Montreal: Keleny Interpretation - Translation</p>
Other leading arbitral bodies with offices in the jurisdiction?	<p>Φ</p>