



The CI Arb Canada Arbitrator

CI Arb Canada's Newsletter – Fall 2019 edition

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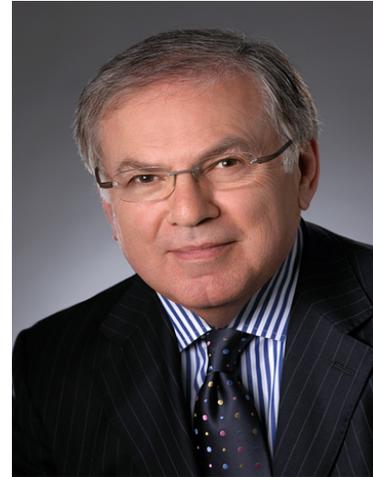
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A Message from Dr. Paul Tichauer, FCI Arb, Chair

Dear Fellow Canada Branch Members,

The Canada Branch has enjoyed an active and vigorous autumn with two key events in September: the **7th Annual Arbitration Symposium** on September 19 (see below for full details) and another successful **Accelerated Route to Fellowship** (ARF) program at the Toronto offices of Bennett Jones LLP, September 20 – 22. Under the able direction of BLG's **Julie Hopkins**, FCI Arb, with **Bill Horton**, FCI Arb, **David Huebner**, C. Arb, **Kathleen Paisley**, FCI Arb **Jim Reiman**, F. CI Arb, **Sabri Shawa**, FCI Arb and **Dan Urbas**, FCI Arb, as tutors, the ARF drew 18 candidates from across North America and was very well received.

In addition to the aforementioned events, the Canada Branch was active on the legal front with Applications to Intervene in appeals before the Supreme Court of Canada being made on behalf of the Canada Branch in *Heller v. Uber Technologies Inc.*, 2019 ONCA 1 (by Blakes LLP on a pro bono basis) and in *Instrubel, n.v. v Republic of Iraq*, 2019 QCCA 78 (by McCarthy Tetrault LLP also on a pro bono basis). Both interventions were initiated to support a clearer understanding of the role and rules which govern arbitration.



The Canada Branch now has 272 members of whom 147 or 54% are Fellows. Congratulations also to **Joe McArthur** from Blakes LLP, Vancouver who recently completed a successful application for appointment as a Chartered Arbitrator.

I look forward to seeing you at the various Canada Branch events and programs across the country and encourage you to reach out to the Canada Branch executives in your area and offer to become more involved in CI Arb activities.

With best wishes for the upcoming holiday season,

Best Regards,

Dr. Paul A. Tichauer, FCI Arb
Chair, CI Arb Canada Branch

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7TH ANNUAL CANADA SYMPOSIUM SEPTEMBER 19, 2019, THE ALBANY CLUB, TORONTO

“JUDICIAL TREATMENT OF ARBITRAL PROCEEDINGS- DEFERENCE OR DEFIANCE”

This year's Annual Canada Symposium, “*Judicial Treatment of Arbitral Proceedings-Deference or Defiance*” consisted of two panels which considered the topic from different perspectives. Thank you to co-chairs **Marvin J. Huberman, FCI Arb** and **Lisa C. Munro** for organizing this event as well as to our generous sponsors: **ADR Institute of Ontario, Arbitration Place, Bay Street Chambers, Bentham IMF, Borden Ladner Gervais LLP and Lerner LLP.**

The first panel focused on domestic arbitration and was structured in the form of a debate which definitely made for lively discussions on the various aspects of the topic. The panel consisted of **J. Brian Casey, FCI Arb** arguing on behalf of “deference” while Chloe Snider and **Prof. Anthony Daimsis** argued on behalf of “defiance”. **The Honourable Todd Archibald, FCI Arb** gave the rebuttal. A vigorous debate ensued around whether either of these terms captures what is really going on surrounding arbitration in the courts and as to whether arbitration may at times still be seen as an inferior dispute resolution mechanism. The panelists stressed the importance of the level of familiarity of the reviewing court with arbitration as well as the key role of arbitration counsel. Doubts were expressed as to whether deference or defiance are the correct terms to use to describe this dynamic: resisting or not application of the law may be a better description. One of the themes that emerged from the panel's discussion was whether it is implicit in how we think of this dynamic that deference is good and defiance is not. There are times when litigation may be more appropriate and in such cases there is neither defiance nor deference. In rebuttal, Mr. Justice Archibald reminded us that overall courts strive to do what is right, achieve finality and give effect to the will of the parties and that they will accordingly defer to arbitrators whenever possible except in extreme cases.



Thomas Giles Heintzman

1941-2019

An exceptional construction lawyer and arbitrator, Tom died peacefully at home surrounded by family on October 24, 2019. The Canada Branch wishes to extend our condolences to his family, friends and colleagues.

Tom was elected chair of the Toronto Chapter of CI Arb in 2012 to pursue the formation of the Canadian Branch an aspiration that was made possible by his indefatigable leadership. He was past president of the CI Arb Toronto Chapter and the first recipient of the Canada Branch's Award for Distinguished Service in Arbitration in Canada. In his remarks at the time of the Award, The Hon. Warren Winkler, OC, QC, described Tom as the last true generalist lawyer – a lawyer who practiced in every type of matter all across the country, working cases in every possible field or area of law. Mr. Winkler concluded by giving Tom one of the highest forms of compliment: “I think I'm a better person for having known him.”



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The second panel considered the same topic but from the perspective of international arbitration. This panel was made up of **Prof. Crina Baltag, MCI Arb** presenting the UK perspective, BLG's **Craig Chiasson** and **The Hon. Thomas Cromwell** speaking from the Canadian perspective, with retired U.S. Ambassador and arbitrator **David Huebner, C. Arb** offering comments from the U.S. perspective. The panel began its discussion by focusing on dissents as a factor in the judicial treatment of an award. Dr. Baltag discussed *Vantage Deepwater v Petrobras America*, a \$701 million USD arbitration award involving allegations of corruption in the procurement of the arbitration agreement and off-the-record discussions with the arbitrator. Despite the dissenting panel member being of the opinion that the respondent had been denied due process, the court upheld the award, ignoring the corruption allegation. It was noted that the panel majority had been provided with the dissenting opinion prior to the release of the award. The view from the Canadian perspective was put forward as to whether such dissents, which go to the heart of the arbitration panel's deliberations, are appropriate in commercial cases (as opposed to treaty cases) where what the parties are looking for is certainty. Was it of significance that the dissent had been by the appointee of the losing party? The discussion then moved to the question of arbitrator bias as a factor in the judicial treatment of awards, commenting on the difficulty courts have had articulating and applying a consistent standard in this area as evidenced by two important seats of international arbitration, London and Paris, coming down on opposite sides of the objective versus subjective character of the arbitrator bias test. The Canadian judicial view was then brought to bear on the topic by The Hon. Thomas Cromwell emphasizing the importance for courts of upholding the contract that the parties made while balancing in private party cases international obligations and in the end coming down on

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A Celebration of Life will be held for Tom Heintzman on November 24 at 3:00 p.m. at *Upper Canada College*, in Laidlaw Hall.

Tom's obituary can be read in *The Globe & Mail* edition of October 31st.



Paul Tichauer and David R. Haigh, QC.



Rt. Hon. Beverlev McLachlin



L to R: The Hon. Justice Todd Archibald, J. Brian Casey, Chloe Snider, Prof. Anthony Daimsis and Marv Huberman



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the side of order and predictability rather than of fairness. David Huebner spoke on public policy as the ground for refusing recognition and enforcement under Article 5 of the New York Convention asking such key questions as to the content or scope of this public policy, whose public policy it should be (domestic, international or transnational) and whether it should be procedural or substantive public policy that should be looked at, all matters on which the Convention is silent. Additional discussion ensued around the difficulties posed by the different conceptions of public policy found in common law jurisdictions versus civil law ones and even the different emphasis given to public policy within each of those legal traditions.

The panels were interspersed with a brief address from **Thomas Halket, C. Arb.**, 2019 Global President of the Chartered Institute followed by a networking reception during which **David Haigh, C. Arb** was presented with the *Canadian Branch Award for Distinguished Service in Arbitration*.

The evening wrapped up with dinner and a closing address from CI Arb Canada Branch Patron and former Chief Justice of Canada, **the Rt. Hon. Beverley McLachlin**. The Canada Branch is honoured to have Chief Justice McLachlin as its Patron and thanks her for joining us and sharing her thoughts on the role of arbitration in dispute resolution.



L to R: Hon. Thomas Cromwell, Craig Chiasson, Lisa Munro, Dr. Crina Baltag, Amb. (Ret.) David Huebner



Thomas D. Halket, Paul Tichauer



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BOOK REVIEW

"THE GUIDE TO CHALLENGING AND ENFORCING ARBITRATION AWARDS"

**J. WILLIAM ROWLEY QC., General Editor,
EMMANUEL GAILLARD and GORDON E. KAISER,
Editors.**

The point is made in the opening words of the first chapter of this new text published by Global Arbitration Review, that without effective enforcement of an arbitral award there really is no effective resolution of the dispute.

To assist the international practitioner or in-house counsel the editors have looked to the leading practitioners in the field to contribute significant practical information, tactics and strategies in respect of challenging and enforcing arbitration awards. This is an excellent desktop reference book that should be near at hand to all who practice international arbitration.

What makes this guide particularly useful is its division into two distinct parts. Part one contains 13 chapters setting out the issues relating to challenging and enforcing arbitration awards generally. It starts with a chapter on initial strategic considerations when drafting the arbitration agreement then moves through how to best achieve an enforceable award, including the form and content of the award itself, the types of challenges, the enforcement of interim measures and the grounds for resisting enforcement.

Of particular note are chapters on the prevention of asset stripping and worldwide freezing orders and challenges based on the misuse of tribunal secretaries.

Part one concludes with a chapter on the specifics of challenging and enforcing an ICSID award.

Part two of the Guide is structured to provide answers to specific questions for specific countries. What the editors have done is to formulate thirty-five questions that a practitioner might well ask of local counsel when considering whether to use or avoid a particular jurisdiction such as the seat of arbitration, whether to use it as a venue for the hearing or as a place of enforcement or place to challenge the award.

While not covering all the questions counsel may have with respect to the challenge or enforcement in a particular country, the questions posed form an excellent first step in determining the judicial landscape for challenge or enforcement of an award.

In total, practitioners from twenty-nine jurisdictions, each in a separate country chapter, provide answers to these questions for their particular judicial system. While additional countries may be added in subsequent editions this first edition covers most of the countries an international practitioner will usually encounter.

At over 600 pages, this book is a practical reference guide for in-house counsel and those outside counsel retained to assist in the enforcement or challenge of international arbitration awards.

The book is published by Law Business Research Ltd., London.

- J. Brian Casey