CIArb Canada's Newsletter
Winter 2022

The CIArb Canada Arbitrator

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Message from the Chair

Julie G. Hopkin, FCIArb

Dear Canada Branch Members:

Despite the challenges of another COVID-19 Fall and Winter, the Canada Branch has been working hard to maintain its activities in and for the arbitral community.

In the previous newsletter, I mentioned that the Canada Branch was again co-hosting, with the North America and New York Branches, an ARF in December in Miami. Given circumstances related to COVID-19, a quick pivot was required, and the decision was taken to offer a hybrid program – both virtually and in person - the first ARF of its kind offered in North America. I want to thank Canada Branch members Annie Lespérance and Anthony Daimsis who served as tutors.

Our "Last Thursday of the Month" free education webinars have been very well received and are continuing apace. I want to thank our Education Chair, Anthony Daimsis, and Dr. Ayodele Akenroye for organizing these popular events.

In November, the webinar topic was "Drafting Better Dispute Avoidance and Resolution Agreements: What to Include and What Not to Include" and the Panel consisted of the Honourable Barry Leon, Ms. Shan M. Greer, and Mr. Artem Barsukov who each provided practical advice concerning some of the most problematic points of drafting dispute clauses.

In January, the webinar was co-hosted with the Canadian Journal of Commercial Arbitration. The Panel was moderated by Lisa Munro and consisted of Ludmila Herbst, Q.C., the Honourable Barry Leon and Myriam Seers and they spoke about the trend in Canada of court challenges to the sufficiency of arbitral awards.

I have no advance information about the February webinar topic to share with you but watch for a notice in your inbox. And, of course, if you have a topic you would like to see tackled, get in touch with Ayodele or Anthony.

In January, the Toronto Chapter in

The CIArb Canada Arbitrator Co-Editors:
Bim Olawumi E. bim.olawumi@gmail.com
Robin Dodokin E. robin@dodokinlaw.com

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partnership with the Toronto Commercial Arbitration Society hosted a presentation by Alexander Moreno on the important arbitration cases of the last year. The presentation was very well attended. Thank you to co-chairs of the Toronto Chapter Lisa Munro and Robin Dodokin.

Finally, also in January, the Canada Branch intervened before the Supreme Court of Canada in the case of *Peace River Hydro Partners, et al. v. Petrowest Corporation, et al.* The case was heard on January 19, 2022, and the Court reserved its judgment. I want to thank our counsel, Christina Doria, and her team at Baker & McKenzie LLP, for their skilled representation of the Canada Branch in this important matter.

The date for this year's Annual General Meeting, which will again be held virtually, has now been set for April 25, 2022. Please mark your calendars and I look forward to seeing you there. A formal notice will be circulated in due course.

The Canada Branch is an entirely volunteer organization. All CIArb Members who reside in Canada are encouraged to participate actively and to promote our growing organization. Please contact one of the following Directors to discuss how you can become involved:

Vancouver –
Joe McArthur: joe.mcarthur@blakes.com

Calgary –
Sabri Shawa: shawas@jssbarristers.ca

Toronto –
Lisa Munro and Robin Dodokin:
lmunro@lerners.ca & robin@dodokinlaw.com

Ottawa –
Anthony Daimsis: adaimsis@uottawa.ca

Montréal –
Jacques Darche: jdarche@blg.com

Rest of Canada –
Julie Hopkins: Julie.hopkins@jghopkins.com

Wishing you all the best for a busy and productive Winter.

Julie G. Hopkin, FCIArb, Chair Canada Branch

Arbitration – A Year in Review (2021)

Alexander Moreno Gay
General Counsel, Department of Justice

A. Introduction

The year 2021 saw a number of interesting cases, some which brought clarity to the law of arbitration and others which sowed confusion on well-established law. What follows is an account of the more notable cases decided under the *Arbitration Act* and the *International Commercial Arbitration Act* in 2021. This document deals with cases from across the country. There are similarities between a number of provincial Acts, including their reliance on the UNICTRAL Model Law, and thus the cases have broad application, beyond the borders of the province in which they were decided.

Maintaining a balance between the courts and arbitral tribunals and allowing the latter to perform their role independently of the former is an important consideration in any review. Although it is often difficult for the courts to recognize, arbitration must be allowed to exist as a parallel adjudicative process, independent of the courts. The courts have a limited role, and their involvement must be measured and limited to assisting arbitration. However, arbitration finds itself in a difficult predicament. The courts ultimately have the power to define their relationship to arbitral tribunals, and much too often succumb to the temptation of wanting to hold arbitral tribunals to a judicial standard. This is a common mistake which suffocates arbitration.

Before the advent of *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 ("*Vavilov*"), the Supreme Court of Canada had established the law regarding appellate review of arbitration awards. The standard of review on appealable questions of law was almost always reasonableness. This allowed the arbitral tribunal to act with some independence and autonomy. There was a narrow exception to this general rule, namely where the appeal gave rise to questions of a constitutional nature or questions of central importance to the legal system and outside of the arbitral tribunal's expertise, in which case the correctness standard

applies: *Sattva Capital Corporation v Creston Moly Corporation*, 2014 SCC 52, ("*Sattva*") and *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32. ("*Teal Cedar*"). *Vavilov* has cast doubt on the applicable standard of review on an appeal of an arbitral award, as evidenced by a host of conflicting cases from all courts: *Buffalo Point First Nation et al. v Cottage Owners Association*, 2020 MBQB 20; *Cove Contracting Ltd. v Condominium Corporation No 012 5598*. 2020 ABQB 106; *First Nations (2008) Limited Partnership v Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516; and *Allstate Insurance Company v Her Majesty the Queen* 2020 ONSC 830. What remains missing from this account is a decision from the Supreme Court of Canada on the applicable standard of review from an appeal of an award of an arbitral tribunal. Having said that, given the disarray in the case law, any discussion on *Vavilov* would provide little guidance at this juncture. *Vavilov* gives rise to nothing more than a waiting game. One can only hope that the pendulum will swing back, and that *Sattva* will be rise from the ashes again.

B. Arbitration Act

Role of the Courts

It is trite law that a court does not have the authority to order arbitration. Absent an arbitration agreement for which consent of the parties is required, an arbitration may not be compelled by the courts. However, the courts in Alberta and Ontario have recently held that, where appropriate, they may propose and even encourage parties to pursue arbitration: ***Canadian Consulting Engineers Inc v Brazeau (County)*, 2021 ABQB 464 (CanLII); *CUSO International v. Pan American Development Foundation*, 2021 ONSC 3101**. While this is non-controversial, they are welcome statements to the extent that the courts have a role to play in directing parties to ADR alternatives, especially in jurisdictions where the Rules of Court allow for it and even support it. For instance, in Ontario, the reference rules of the Ontario Rules of Court is a court supervised arbitration. These provisions are seldom used or even understood by the legal market.

Arbitration Agreements

Contracts often contain a variety of clauses that offer a multi-step dispute resolution process (i.e., mediation and arbitration). A contact may, for example, include an arbitration clause alongside a clause purporting to grant "sole" or "exclusive" jurisdiction to the courts, both of which may, conflict. In these cases, it is important to give effect to the arbitration clause wherever possible, without imposing a result that was never intended by the parties. Recently, the Superior Court of Quebec held that a contract containing an arbitration agreement as well as a clause stating that the courts have "exclusive jurisdiction" should be read such that the latter simply indicates the judicial territory in which arbitration-related court proceedings should be brought: ***9369-1426 Québec inc. (Restaurant Bâton Rouge) c. Allianz Global Risks US Insurance Company,* 2021 QCCS 47**. The Court was able to reconcile what appeared to be conflicting clauses in favour of arbitration.

Arbitration agreements will often include language stating that the award shall be "final and binding" on the parties. This has given rise to some legal debate. The words are often remnants from the past that continue to find their way into legal documents in a context where they were never intended to preclude a right of appeal. These words are to be read carefully and in context. However, there is a recent case from Ontario that considered these words and held that their inclusion is sufficient to exclude an appeal: ***Kingston Automation Technology Inc. v. Montebello Packaging*, 2021 ONSC 5924, at para 32.** There is no hard and fast rule on how to interpret the words 'final and binding", but the context has to be considered in deciding the legal effect and whether they preclude a right of appeal.

Remedies

As a general rule, an arbitral tribunal does not have the authority to make orders that bind persons who are not party to the arbitration agreement. This may limit the available remedies for an arbitral tribunal. There is recent authority from Ontario which provides that an arbitral tribunal can appoint a receiver: ***Randhawa v. Randhawa,* 2021 ONSC 3643**. These remedial measures may be ordered, but only to the extent that it does not have a consequence on the rights of third parties. An arbitral tribunal must

only concern itself with the immediate effects of a remedy and not with the possible theoretical effects of a remedy on a third party. A possible effect on a third party should not be a bar to a remedy.

The preponderance of jurisprudence in Canada,

including from the Court of Appeal for Ontario, has found that oppression claims are arbitrable subject-matter in Ontario: ***Leon v. Dealnet Capital Corp.*, 2021 ONSC 3636; *Randhawa v. Randhawa*, 2021 ONSC 3643 (CanLII); *1059217 Ontario inc. et autres c. General Motors Ventures LLC*, 2021 CanLII 37810 (NB BR)**. These cases confirm what is already law.

An arbitral tribunal has the authority to appoint an inspector under the OBCA to investigate the signatories to the arbitration agreement, but only the signatories. However, to the extent that an inspector is asked to exercise its powers vis-à-vis persons who are not party to the arbitration agreement, an arbitrator has no jurisdiction to empower an inspector under the OBCA or its equivalent: ***Randhawa v. Randhawa*, 2021 ONSC 3643 (CanLII).** Again, this case makes the point that an arbitral tribunal must only concern itself with the immediate effects of a remedy, even if the legislation allows for remedies that affect the rights of third parties.

CJA/Arbitration Act

The relation between the *Courts of Justice Act* of Ontario and the *Arbitration Act*- and its equivalent in other jurisdictions - remains a constant source of concern. The concern stems from the fact that the general provisions found in the *Court of Justice Act* can be used to thwart the more specific provisions found in the *Arbitration Act*. This allows the delicate balance that exists between the courts and the arbitral tribunals to be easily disrupted. For example, there are situations where a dispute may involve several parties, some of which are subject to an arbitration agreement and some of which are not. The case law provides that the court must, where possible, avoid a multiplicity of proceedings, as provided for under section 138 of the *Courts of Justice Act* or its equivalent in other jurisdictions. However, the legislative objective of the *Courts of Justice Act* may not come at the expense of a valid agreement to arbitrate: ***Star Woodworking Ltd. v. Improve Inc.*, 2021 ONSC 4940 (CanLII)**. While a multiplicity of proceedings is to be avoided, any such order must not undermine a valid arbitration agreement. The powers of a court under section 138 of the *Courts of Justice Act* must be exercised in a very measured way. There are ample examples where the *Courts of Justice* can undermine arbitration.

Stays

As far as stays are concerned, the issue of whether a claim is a matter covered by an arbitration agreement is a straightforward exercise. Where the dispute is subject to arbitration, the courts must issue a stay of proceedings. However, this year saw an interesting twist to this issue, namely where a plaintiff amended a statement of claim to include an arbitrable matter. The Alberta courts held that where an amendment is made and where it contains an arbitrable matter, a defendant is entitled to apply for a stay under subsection 7(1) of the *Arbitration Act* if the amendment is allowed and to the extent that it is covered by an arbitration agreement: ***Canexus Corporation v. MEG Energy*, 2017 ABQB 739, 2017 CarswellAlta 2567 (Alta. Q.B.)**. However, there are limits. For instance, there is also case law from Quebec that holds that it is an abuse of process to add a claim to an existing statement of claim in a context where that claim is subject to a pending arbitration: ***Raymond Chabot Administrateur provisoire Inc. du plan le garantie La Garantie Abritat Inc. v. 7053428 Canada Inc.*, 2021 QCCS 1039**.

A number of provincial Arbitrations Acts provide, for example, that a stay may be refused if a motion for summary judgment is brought with undue delay. What constitutes "undue delay" is fact specific and determined by the circumstances of each case: ***Leon v. Dealnet Capital Corp.*, 2021 ONSC 3636 (CanLII)**. The *Arbitration Act* of Ontario, for example, does not expressly require a party to bring an application at a specific point in time, such as prior to filing motions or a statement of defence. However, the conduct of the defendant and the steps taken in the litigation will be assessed in deciding whether the motion was brought with undue delay. The issue of "undue

delay" should be considered in the context of the litigation as a whole and how it compares with the efficiency objectives of arbitration: ***Leon v. Dealnet Capital Corp.,* 2021 ONSC 3636 (CanLII)**. There is nothing surprising about this case, except that it calls for a broad reading of the surrounding circumstances in assessing whether there has been undue delay. In any event, it is anticipated that most provinces will likely remove this provision from their respective Arbitrations Acts.

The actions of a defendant will often determine whether they have waived arbitration in favour of the courts. Courts have stayed proceedings in favour of arbitration where: a defendant has filed a statement of defence; a defendant has filed a counterclaim; a plaintiff has filed a defence to counterclaim; the parties have made documentary production; and the parties have scheduled examinations for discovery. The rule of thumb is that the fewer procedural steps, the greater the likelihood that the court will issue a stay: ***Leon v. Dealnet Capital Corp.*, 2021 ONSC 3636 (CanLII)**. Allowing for a stay, even in the face of a procedural step that is inconsistent with an arbitration, makes an abundance of sense. The courts must continue to push parties into arbitration and limit waiver arguments.

The issue to be decided by the courts is whether the case of *Hryniak v. Mauldin,* 2014 SCC 7, [2014] 1 S.C.R. 87 ("*Hryniak")* has an impact on the application of paragraph 7(2) 5 of the Ontario *Arbitration Act* or its equivalent in other jurisdictions. The Supreme Court of Canada in *Hryniak* explained the effect of replacing the "for trial" language with "requiring a trial" language in Rule 20 of the Ontario Rules of Civil Procedure. The old "no genuine issue for trial" standard had been interpreted to mean that summary judgment was available merely to weed out "claims or defences that have no chance of success" at an early stage. The new "no genuine issue requiring a trial" standard expanded the range of cases in which summary judgment could be available. Coupled with an expansion of judges' fact-finding powers (including hearing viva voce evidence) on summary judgment motions, replacing "no genuine issue for trial" with "no genuine issue requiring a trial" in the Ontario Rules of Civil Procedure had a dramatic effect in how summary judgment was applied. These new fact-finding powers are discretionary and are presumptively available to a court. They may be exercised unless it is in the interest of justice for them to be exercised only at a trial. Thus, the amendments to the Rules of Civil Procedure were designed to transform summary judgment from a means to weed out unmeritorious claims to a significant alternative model of adjudication. However, the summary judgment exception in paragraph 7(2) 5 of the *Arbitration Act* was enacted well before *Hryniak* and the 2008 changes to the Ontario Rules of Civil Procedure, which have both made summary judgment more accessible and appropriate in a wider number of cases litigated before the courts. The question then arises as to whether this broadened conception of summary judgment ought to influence the analysis under paragraph 7(2) 5. Under the rule in *Sharp v. Wakefield, (1899)*, 22 Q.B.D. 239 at p. 242, the words in a statute must be construed as they would have been the day after the statute was passed, unless some subsequent statute has declared that some other construction is to be adopted or has altered the previous statute. Given the wording of paragraph 7(2) 5, it is appropriate to interpret the statutory language statically, as it existed when the legislation was passed. "Summary judgement" is a legal term of art that had a specific meaning when the Legislature in Ontario passed the Act in 1991. At least in Ontario, there are no subsequent statutes that specifically alter the construction of the term prevailing when the Act was created. Given the specific wording in paragraph 7(2) 5, it is likely that the Legislature intended the words to be caught in time and that the dynamic approach should not be applied. For the most part, the courts across Canada have been reticent to rely on *Hryniak* when interpreting the scope of paragraph 7(2) 5 and its sister provisions in the other ULCC-based jurisdictions (Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia). A static approach to the interpretation of this provision has also been adopted in a number of cases: see ***Melcor Reit Limited Partnership (Melcor Reit GP Inc) v TDL Group Corp (Tim Hortons),* 2021 ABQB 379 (CanLII)** where the application of *Hryniak* was expressly rejected. This more restrained approach to the

application of paragraph 7(2) 5 is seen in a number of other cases where the courts have, for example, held that it is not enough for the party resisting arbitration to establish that the dispute could be decided by summary judgment: ***Wardrop v. Ericsson Canada Inc.*, 2021 MBQB 183 (CanLII)**. Like the pre-Hryniak cases, the recent case law holds that the jurisdiction conferred under paragraph 7(2) 5 should only be exercised if the court can get a full appreciation of the issue and the evidence before it and if justice would be better served by requiring the parties to litigate the issue before an arbitrator: ***Maisonneuve v. Clark,* 2021 ONSC 1960 (CanLII).** Thus, where a court is able to get a full appreciation of uncontroverted evidence and rule on whether a case in its entirety is time-barred, the court may exercise its discretion and refuse to issue a stay: ***Maisonneuve v. Clark*, 2021 ONSC 1960 (CanLII)**. However, there are some exceptions to this trend. In one recent case, the Court found that, even where a matter raised a genuine issue for trial, a judge may, rather than refer the matter to arbitration, invoke the enhanced fact-finding powers under rule 20.04 (2.1) of the Rules of Civil Procedure and direct a mini trial: ***Jencel 407 Yonge Street Inc. v. Bright Immigration Inc. and Ramroop,* 2021 ONSC 6030**. This case was wrongly decided. The Uniform Law Conference of Canada recently recommended that the paragraph be removed on the grounds that it is inconsistent with the Uniform Model Law and that it opens the door to unnecessary judicial intervention. The case law under this paragraph suggests that there is merit to this view and that it remains a legislative remnant that must be revisited by a number of provinces. Indeed, this provision appears to proceed on a false premise, namely that a summary judgment motion before the court is quicker, cheaper and a more effective means of resolving a dispute than arbitration: ***Maisonneuve v. Clark*, 2021 ONSC 1960 (CanLII)**.

Subsection 7(5) of the Ontario *Arbitration Act* does not give the court jurisdiction to allow an entire court action to proceed even where it is not reasonable to separate the matters in dispute. The entire action should be stayed in these circumstances and the arbitration must be allowed to proceed. Even in cases where an applicant satisfies the court that the arbitration agreement deals with only some of the matters raised in the claim, the court has the discretion to stay the court proceedings, especially where the adjudication of the claim would have legal consequence on the arbitral claim. This can occur, for example, in a context where the valuation of an asset is subject to an arbitration and where the eventual award will have some consequence in, for example, a proceeding where the family law issues are to be decided by a court: ***Pezo v. Pezo et al*, 2021 ONSC 5406 (CanLII)**.

Procedural Considerations

When John Locke wrote the first *Arbitration Act* in 1698, he sought to create an adjudicative process that was free of the legal shenanigans that often play out in a court. The adage nemo *auditur propriam turpitudinem allegans* is alive and well in the law of arbitration and is indeed consistent with the philosophy that underlies the law of arbitration. For instance, where an arbitration agreement provides that a notice to arbitrate must be delivered within a specified time of a reply to a claim being served, the party who refuses to provide the reply cannot argue that the arbitration agreement is inoperable because the notice to arbitrate was delivered late. A party cannot use its own breach or default in satisfying a condition precedent as a basis for being relieved of its contractual obligations to arbitrate: ***Mazzei Electric Ltd. v Western Canadian Construction Company Ltd.*, 2021 BCSC 1873.** Invoking one's own turpitude to gain an advantage in an arbitration is a non-starter and this case clearly makes that point. Arbitration is about removing procedural impediments and creating a process that is free of the lawyering that often encumbers the courts.

An arbitrator must be impartial. An arbitrator is impartial when he or she neither favours nor is predisposed as to the question in dispute towards one of the parties. There is both a subjective and an objective requirement to the assessment. The arbitrator must be subjectively free from personal prejudice or bias. The arbitrator must also be impartial from an objective viewpoint. In a recent case from Quebec, the court concluded that the fact that an arbitrator resides in the same region of the province as the parties and the municipalities

involved in the dispute is not a basis to disqualify the arbitrator: ***Madysta Constructions Ltée v. Maskicom Inc.*, 2021 QCCS 2101.** This is a stunning case, to the extent that there was little merit to the challenge.

When the arbitrator's mandate terminates, the court may, on a party's application, give directions about the conduct of the arbitration. The directions should, however, be limited to conduct of the arbitration and must not touch on the substantive issues to be adjudicated by an arbitral tribunal. The intervening period before the appointment of a new arbitrator may be used by the court as an opportunity to correct matters that were interfering with the conduct of the arbitration. However, a court must resist giving directions or even adjudicating on matters that are best left to the new arbitral tribunal. The courts seem to have difficulty in understanding their limited role, as shown in ***Hodder v. Eouanzoui*, 2021 ONSC 2391 (CanLII)** where the court gave directions that went well beyond what it was required to do to ensure transition.

The powers of an arbitral tribunal to compel attendance are well understood. In ***Bergmanis v. Diamond*, 2021 ONSC 2375 (CanLII)**, the court concluded that an arbitral tribunal has the authority to issue a summons under subsection 29(1) of the Ontario *Arbitration Act* and the contestation of the summons by a non-party to the arbitration agreement must not be taken as an attornment to the arbitration. In other words, an arbitral tribunal can compel evidence but participation in the provision of the evidence is not an attornment to the arbitral process by the person that has been asked to provide evidence.

Jurisdictional Challenges

A party's failure to raise a jurisdictional objection at the outset precludes them from doing so later on. This is established law in the arbitration. In ***Kingston Automation Technology Inc. v. Montebello Packaging*, 2021 ONSC 5924, t**he Court dismissed a party's appeal of an arbitrator's award on jurisdictional grounds when the jurisdictional argument was raised for the first time in final argument. This case is a reminder that subsection 17(3) of the *Arbitration Act* clearly provides that a party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration must make the objection no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal.

Confidentiality

A number of mistaken assumptions are made about confidentiality in arbitration. Even in the face of a confidentiality clause, the moment an arbitration matter is put to the courts, the confidentiality of that arbitration is put at risk. Absent a confidentiality order, the open court principle demands that the proceeding be made public. However, the courts may, upon request and to the extent that *Sierra Club of Canada v. Canada (Minister of Finance)* can be satisfied, fashion a confidentiality or a sealing order to protect confidential information provided during the course of an arbitration: ***Stewart v. Stewart*, 2021 BCSC 1212**. The courts must give effect to the confidentiality requirements of the parties.

Motions

The extent to which dispositive motions are available in arbitrations has been recently clarified. The general notion in arbitration is that a proceeding must continue to the end before an award is made by an arbitral tribunal, with or without the participation of the defendant. However, there is case law that allows for motion for summary judgment at any stage of the proceeding. Thus, unless there is language to the contrary in an arbitration agreement or the arbitration rules relied upon for the conduct of the arbitration forbids it, an arbitral tribunal has the authority under section 20 of the Ontario Arbitration Act to hear and rule on motions for summary judgment: ***Optiva Inc. v, Tbaytel,* 2021 ONSC 2929 (CanLII)**. Most arbitration rules give arbitrators expansive powers and wide latitude in the procedures used to give effect to the arbitration agreement. Thus, the arbitral tribunal may, if permitted by the arbitration rules and the arbitration agreement, allow for the filing of and make rulings upon a motion for summary judgment, but only if it determines that the moving party has shown that the motion is likely to succeed and

dispose of or narrow the issues in the case. There is case law that provides that where an arbitral tribunal dismisses a motion for summary judgment, it remains open to the arbitrator to find in a respondent's favour, even in the absence of a cross-motion by the respondent: ***Canada Bread v. Mallot Creek*, 2019 ONSC 2578 (CanLII).** Generally speaking, motions for summary judgment and other like dispositive motions are to be discouraged in arbitration given that the parties have bargained for a process that allows them to fully canvass disputes before a neutral third party. However, some institutional rules, such as JAMS, specifically allow for it – the JAMS rules specifically allow for the filing of dispositive motions even under objection from the other side.

Functus Officio

The general rule is that the issuance of a final award in respect of a given matter renders the arbitral tribunal *functus officio*. The award, once made, may not be revoked by the arbitral tribunal. However, there are exceptions where it would be permissible to allow an arbitral tribunal to reopen or reconsider an award. This is one of the particularities of arbitration. For example, when the statute authorizes it. The Ontario *Arbitration Act*, for example, has several provisions that meet this requirement, which include, for example, section 40, subsections 44(1) and subsection 44(2). There may also be institutional rules that allow for similar interventions and that allow an arbitral tribunal to revisit an award. Another example is where the arbitral tribunal still has jurisdiction or has retained jurisdiction to dispose of an issue it has not yet disposed of. A partial award that has disposed of some but not all of the issues is a scenario under which the arbitral tribunal would retain jurisdiction over the remaining issues. Thus, as shown by a recent Manitoba case, the doctrine of functus officio is not offended where the arbitration is staged and conducted in two phases, with each phase addressing different issues in sequence: ***Broadband Communications North Inc. v. 6901001 Manitoba Ltd.*, 2021 MBQB 25 (CanLII)**. This case is a reminder that we cannot be too hasty to conclude that an arbitral tribunal is *functus officio* every time it renders an award. Rather, the concept of functus officio is malleable in the law of arbitration.

Appeals – S. 45

What is to be included with an appeal book under section 45 of the Ontario *Arbitration Act* remains open to debate. Generally speaking, a leave application must be limited to the award and the reasons that accompany it. Transcripts and the relevant exhibits are often appended. There are recent decisions from Ontario and Alberta where the courts have allowed exhibits, even though the official transcript of the proceeding was not available: ***Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited,* 2021 MBQB 77 (CanLII); Wang v. Takhar, 2019 ONSC 5535.** These cases are problematic in that they may leave out the transcript of a cross-examination where the evidence has been tested and which is critical in assessing that evidence. Thus, where the nature of the evidence is such that the transcript of a cross-examination would serve to explain that evidence, the courts should avoid this approach as it would breed unfairness. The threshold for excluding this evidence from the leave application should be low given the potential harm to a party. Of course, there is a body of case law that provides that regardless of the evidence there should always be an absolute prohibition against the introduction of evidence on an application for leave. This is anchored on the belief that the courts should not be allowed to rehear a case and substitute its decision, which undermines arbitration.

Where an arbitrator considers an approach to an issue that has not been raised by either party, natural justice requires the arbitrator to give the parties an opportunity to comment on the approach. The fact that a party does not make sufficient use, if any, of the opportunity given by the arbitrator is not a breach of natural justice and, accordingly, not a basis for setting aside an arbitral award: ***Hotel Georgia Development Ltd. V The Owners, Strata Plan* EPS849, 2021 BCSC 1236 (CanLII**). As long as the offering is made, there is no breach if a party refuses to avail itself of the opportunity.

The courts in British Columbia have held that there are no special rules of procedure for a self-

represented party in an arbitration proceeding beyond the basic procedural requirements for any arbitration: an impartial arbitrator, procedural fairness of notice, and a fair or reasonable opportunity to make submissions and to respond to the other side's case: ***Marchetti v Lane,* 2021 BCSC 1259 (CanLII); 0927613 B.C. Ltd. v. 0941187 B.C. Ltd., 2015 BCCA 457**. Although, this case stands in contradiction to more recent case law from Ontario which provides that in fulfilling the duty to treat parties fairly and equally, arbitrators have special responsibilities towards self-represented litigants: ***A.P. v. L.K.*, 2021 ONSC 150**. The accommodation of a self-represented party should be guided by the terms of the arbitration agreement and limited only to meeting the objectives of the statute. The case law from Ontario is offside.

Reviews – S. 46

The standard of review to be applied under section 46 has been subject to serious misapprehension by the courts in the last three years. In large part, the case of *Freedman v. Freedman Holdings Inc.*, 2020 ONSC 2692 (CanLII) ("*Freedman*") is responsible for this serious aberration. For example, in ***Chadeesingh v. Flores*, 2020 ONSC 5534**, the applicants brought an application to set aside an arbitrator's award pursuant to s. 46 of the *Arbitration Act*, claiming at para. 17 that "the applicant was not treated equally and fairly, was not given an opportunity to present a case or respond to another party's case". The Court determined that the standard of review in such cases is a deferential standard of reasonableness and not the standard of correctness. This case simply follows *Freedman* which is patently wrong. The standard of review is expressed in the provision itself, no more and no less. *Freedman* continues to be applied: ***Parc-IX Limited v. The Manufacturer's Life Insurance Company,* 2021 ONSC 1252 (CanLII); *Broadband Communications North Inc. v. 6901001 Manitoba Ltd.*, 2021 MBQB 25 (CanLII).**

Subsection 46(1) 3 of the Ontario *Arbitration Act* provides that the award may be set aside if the award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement. In so doing, the court cannot apply paragraph 46(1)3 without having regard to an arbitrator's award. Paragraph 46(1)3 requires that arbitrators act within the bounds of the authority granted by the arbitration agreement pursuant to which they are appointed – no less, but no more. Section 46(1) 3 is not an alternate appeal route and must not be treated as such: ***Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2021 ONSC 2575 (CanLII).**

The phrase "not given an opportunity to present a case or to respond to another party's case", which is found in section 46 of the Ontario Act entails a number of possible procedural breaches. For instances, while an arbitral tribunal has considerable scope in determining what evidence is relevant for its purposes, it is not entitled to deprive an opposite party of the means to effectively challenge such evidence. If an arbitration tribunal were to disregard a party's evidence completely, this would amount to a denial of the right to be heard: ***Kingston Automation Technology Inc. v. Montebello Packaging,* 2021 ONSC 5924, at para 55**. There is nothing particularly novel about this case, other than it confirms established law.

The substantive complaints advanced by a plaintiff in an arbitration must not be confused with a breach of procedural fairness and natural justice as contemplated by paragraph 46(1) 6 of the Ontario Act. Paragraph 46(1) 6 aims to deal with procedural lacunae that are inherent to the arbitral proceeding itself and not with whether the preconditions to asserting a claim have been fully satisfied. For example, a failure by an arbitrator to properly consider the common law principles prohibiting a partnership from suing a partner or requiring a dissolution of the partnership and an accounting as a precondition to recovery of debt owing by a partner is a substantive complaint giving rise to an appeal and not a procedural breach giving rise to an application under paragraph 46(1) 6. However, where a point of law is made by a party and the arbitral tribunal fails to address it in the award, the failure to address may be caught by paragraph 46(1) 6. The legal distinction is subtle, but important. There are a number of recent decisions from the Ontario courts where the courts have sought to

explain this distinction: ***Dua v. BGD LLP et al.*, 2021 ONSC 4435 (CanLII)**.

Appeals/Set Asides/Stays

An appeal of an award or an application to set aside an award must be commenced within thirty days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based. However, the time limit provided for in subsection 47(1) of the Ontario *Arbitration Act* does not apply where the applicant or appellant alleges corruption or fraud. Allegations of fraud or corruption are extremely serious. An arbitral award will not be set aside on the grounds of fraud or corruption without clear evidence: ***Toronto Standard Condominium Corporation No. 1466 v. Weinstein*, 2021 ONSC 1306.** The case maintains a high threshold.

To obtain a stay of a judgment pending a motion for leave to appeal, a moving party must meet the three-part test for an interlocutory injunction: (a) a serious question to be determined on the motion for leave to appeal; (b) the moving party will suffer irreparable harm if the stay is denied; and (c) the balance of convenience favours granting the stay: *RJR MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 S.C.R. 311, at p. 334. In applying this test, the court is generally mindful that these three criteria are not watertight compartments. The strength of one may compensate for the weakness of another. Generally, the court must decide whether the interests of justice call for a stay: ***Spadacini Kelava v. Kelava*, 2021 ONCA 345 (CanLII).**

Enforcement of an Award

Subsections 50(3) and 50(5) of the Ontario *Arbitration Act* deals with the enforcement of an award by a Court. In the case of ***Zenith Aluminum Systems Ltd. v. 2335945 Ontario Inc.*, 2021 ONSC 1128** , the Ontario Court held that where the requirements of ss. 50(3) and 50(5) are not met, the court has the power to stay the enforcement of a final arbitral award under s. 106 of the *Courts of Justice Act* on such terms as are considered just. These subsections must also be read together with subsection 50(8) of the Act which treats final awards in the same manner as a final judgment. The courts in Ontario and in other jurisdictions have yet to pronounce themselves on the relationship between the stay provisions found in the Arbitration Act and the *Courts of Justice Act* and whether the exercise of discretion under the latter is circumscribed. While the Courts of Justice Act offers wonderful remedies, they are sometimes at odds with the law of arbitration.

Within the context of subsection 50(5) of the Ontario *Arbitration Act*, which deals with the enforcement of awards, there are a line of cases from Ontario that modify the application of the governing principles enunciated in *American Cyanamid Co. v. Ethicon* Ltd., [1975] UKHL 1, [1975] A.C. 396, [1975] 1 All.E.R. 504 [1975] F.S.R. 101 (U.K. H.L.) and *RJR-MacDonald Inc. v. Canada (Attorney General),* 1994 CarswellQue 120F, 1994 CarswellQue 120, [1994] 1 S.C.R. 311, 54 C.P.R. (3d) 114 (S.C.C.) [R.J.R MacDonald]. These cases provide that when deciding to issue a stay of the award under paragraph 50(5)(b), the courts must assess: (a) the bona fides of the application to set aside and/or appeal of the award; and (b) the relative hardship to the parties in the event the court grants the stay: see *887574 Ontario Inc. v. Pizza Carswell Ltd.*, 1995 CarswellOnt 1205, 23 B.L.R. (2d) 250, [1995] O.J. No. 146 (Ont. Gen. Div. [Commercial List]) at para. 7; *Mungo v. Saverino*, 1995 CarswellOnt 3420, [1995] O.J. No. 1659 (Ont. Gen. Div.) at para. 16; *Jaffasweet Juices Ltd. v. Michael J. Firestone & Associates*, 1997 CarswellOnt 4384, 17 C.P.C. (4th) 113, 52 O.T.C. 283, [1997] O.J. No. 4585 (Ont. Gen. Div.) at para. 41. The courts in Manitoba have recently articulated a slightly different legal test and have held that the exercise of court's discretion should be governed by the same principles and criteria which are to be applied when a party seeks a stay pending an appeal of a judgment: ***Shelter Canadian Properties Limited v. Christie Building Holding Company, Limited,* 2021 MBQB 59 (CanLII)**. The principles are: (a) there is a presumption of correctness to the decision. Accordingly, a stay ought not to be granted easily; (b) the following three factors must be considered in determining whether to grant the stay: (i) Is there an arguable case? (ii) Does the person seeking the stay suffer irreparable harm if the stay is not granted? and, (iii) Does the balance of convenience support

granting or refusing the stay; that is, is the harm of refusing the stay greater than granting it? Although articulated differently, there may indeed be little distinction in approaches between Ontario and Manitoba. A more recent case from Ontario appears to be more closely aligned with the approach adopted by Manitoba: ***Kingston Automation Technology Inc. v. Montebello Packaging,* 2021 ONSC 2684 (CanLII)**.

Other

In ***Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7**, the Supreme Court heard its first appeal of an arbitral award post Vavilov. While the minority would have applied *Vavilov* and reviewed the arbitral decision on a standard of correctness, the majority refrained from identifying the standard of review, leaving it for another day the consideration of whether *Vavilov* had any effect on the standard of review principles articulated in *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53, [2014] 2 S.C.R. 633 ("*Sattva*"). The majority noted that *Vavilov* did not advert to either *Sattva* or *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, decisions which emphasized that deference serves the particular objectives of commercial arbitration. The Court of Appeal for Ontario followed the same approach in ***Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2021 ONCA 592**, holding that a court should generally refrain from deciding issues of law that are unnecessary to the resolution of an appeal. The standard of review and the impact of *Vavilov* remains an issue for the SCC to decide. Vavilov has left the law of arbitration in a state of limbo and there are cases that accept *Vavilov* and others that do not.

C. International Commercial Arbitration Act

Meaning of "Commercial"

The issue of what is "commercial" remains the subject of debate. The UNCITRAL Model Law was unable to resolve it entirely, which explains the presence of a footnote to the text which provides a series of examples rather than a definition. The Ontario Superior Court of Justice recently held that a dispute over the rights as between two people to the use and ownership of an antique double bass was not "commercial" and therefore fell under the domestic arbitration statute: ***Armour v. De Groot*, 2021 ONSC 3505.** The term "commercial" is to be given a broad reading.

Arbitration Agreements

The presence of an arbitration agreement is an important consideration for the *International Commercial Arbitration Act*. An exchange of letters confirming the existence of an arbitration agreement satisfies the requirements of the Act. However, as confirmed by the Manitoba courts, where there is an exchange, both sides must clearly consent to an arbitration agreement: ***Razar Contracting Services Ltd v. Evoqua Water*, 2021 MBQB 69 (CanLII)**. The evidence, viewed objectively, must establish, on a balance of probabilities, the three elements required for a binding contract: (a) intention to contract; (b) settlement of essential terms; and, (c) sufficiently certain terms.

Jurisdictional Challenges

Article 16(3) of the *International Commercial Arbitration Act* provides that the arbitral tribunal may rule on a plea regarding its jurisdiction either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may appeal the decision within thirty days of receiving notice of that ruling to the Superior court. The Court's decision on such an appeal is final. While the appeal is pending, the arbitral tribunal may continue the arbitral proceedings and make an award. The decision by an arbitral tribunal to make a jurisdictional ruling on a preliminary basis or, alternatively, to wait and make a ruling in the final award on the merits has an impact on the rights of review that may be exercised by the affected party. A preliminary jurisdictional ruling under article 16 may be reviewed by the Superior Court under article 16(3). However, if the jurisdictional decision is made as a final award on the merits, it is the review provisions found in articles 34 and 36 that apply. Under the latter two provisions, the Superior Court's decision is subject to appeal, whereas article 16(3) bars an appeal. In *United*

Mexican States v. Burr, the Court of Appeal for Ontario quashed an appeal of an application judge's decision finding that applicant had not established that the arbitral tribunal incorrectly assessed its jurisdiction: ***United Mexican States v. Burr*, 2021 ONCA 64.** The Court found that since the tribunal ruled on jurisdiction as a preliminary matter, the bar on appeals from the Superior Court's decision on the matter was engaged. The Court declined to answer the question of whether a party may rely on both section 34 and 16 at the same time to get around the bar to appeal. The arbitral tribunal's procedural choice whether to review the challenge on a preliminary basis is not open to scrutiny by the courts as it is a proper exercise of jurisdiction to allow an arbitral tribunal to decide at what moment in time it wishes to pronounce itself on the jurisdictional challenge.

The courts in Ontario have had to consider whether a review of a jurisdictional award by an arbitral tribunal under article 16(3) of the *International Commercial Arbitration Act* is a simple review of the arbitral tribunal's award (without deference) or whether it allows for fresh evidence such that the review is a de novo proceeding before a court. Until recently, the Ontario Superior Court of Justice reached opposite conclusions in two decisions arising from the same litigation: *The Russian Federation v. Luxtona Limited,* 2018 ONSC 2419 (Ont. S.C.J. [Commercial List]); *The Russia Federation v. Luxtona Limited*, 2019 ONSC 7558, 2019 CarswellOnt 21212 (Ont. S.C.J.). More recently, the Divisional Court in *The Russian Federation v. Luxtona Limited* concluded that the review is a de novo proceeding such that the parties may present fresh evidence. The Court considered several international authorities and found that the balance favoured a review de novo: ***The Russian Federation v. Luxtona Limited*, 2021 ONSC 4604 (Divisional Court).** This decision brings some clarity to the issue.

Court Interventions

There is some authority for the proposition that parties should not seek to enlist the court's assistance unless truly necessary. This is an important consideration in the law of arbitration. In one recent B.C. case, the Court declined to issue a subpoena compelling two non-party witnesses where the evidence showed they had not declined to voluntarily appear for cross-examination. The petition was pre-mature and adjourned sine die to be brought back on should the non-party witnesses refuse to participate: ***Octaform Inc. v Leung*, 2021 BCSC 73B.**

With respect to the scale of costs, counsel should be aware that, unless the Rules of Civil Procedure apply to the arbitration (by the parties' agreement or the arbitral tribunal's choice), the ordinary "partial indemnity"/"substantial indemnity" framework does not necessarily apply. This was recently recognized by the B.C. Supreme Court: ***Allard v The University of British Columbia*, 2021 BCSC 60.**

In the case of ***Lululemon athletica Canada inc. v Industrial Color Productions Inc.*, 2021 BCSC 15**; ***Lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428 (CanLII),** the Court held that when determining whether an award falls within the terms of the submission to arbitration, the standard of reasonableness and not correctness will generally best serve to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention. The Court's role is to be satisfied that an arbitrator's finding that it had jurisdiction was a reasonable one.

Set Asides

The case of ***Vento Motorcycles, Inc. v. United Mexican States*, 2021 ONSC 7913 (CanLII)** offers insight on the evidence that is admissible on an application to set aside under article 34(2) of the UNCITRAL Model Law, which is Schedule 2 to the International Commercial Arbitration Act 2017, S.O. 2017, c. 2, Sched. 5. The law is that reviewing courts must accord a high degree of deference to the awards of international arbitral tribunals under the Model Law. They cannot set aside an international arbitral award simply because they believe that the arbitral tribunal wrongly decided a point of fact or law: See *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939 at paras. 23-24; application for leave to appeal dismissed: 2018 CanLII 99661 (S.C.C.) ("Consolidated Contractors"). The standard to be applied by a

reviewing court depends on the specific Model Law grounds on which the application is based: see Consolidated Contractors at para. 25. The parties in this case agreed on the standard to be applied under article 34(2)(a)(ii) of the Model Law. To justify setting aside an award under that provision for reasons of fairness or natural justice, the conduct of the Tribunal must be sufficiently serious to offend our most basic notions of morality and justice. Judicial intervention for alleged violations of the due process requirements of the Model Law will be warranted only when the Tribunal's conduct is so serious that it cannot be condoned under Ontario law: See Consolidated Contractors at para. 65. However, while the parties in this case were in agreement on the applicable test on the Application to set aside the Award, they did not agree on the test applicable to the admission of fresh evidence in the context of this Application. Prior to *Vento*, there were no cases directly on point as it relates to this issue. The test applicable on an application for judicial review is the most appropriate on issues of procedural fairness. Given the very limited grounds on which an international arbitral award can be set aside, an application to set aside such an award is much closer in nature to an application for judicial review than to an appeal. The test is articulated in *Scott v. Toronto (City),* 2021 ONSC 858, where the Divisional Court stated the test as follows: (a) the record on judicial review is, generally, restricted to what was before the decision-maker: *Bernard v. Canada Revenue Agency,* 2015 FCA 263, para. 13. That is because this court's function is to review the decision below, not to hear the case de novo; (b) there are exceptions to the general rule. (c) An exception is for evidence relevant to natural justice, procedural fairness, improper purpose or fraud that is not contained in the tribunal's record, and that could not have been raised before the decision-maker (Bernard, para. 25). However, if a party knew of the issue at the time, this should be on the record. If a party failed to object before the decision-maker, it generally cannot raise an objection for first time on judicial review (Bernard, paras. 26-30). The exception applicable to the admissibility of fresh evidence relevant to procedural fairness on an application for judicial review is structured so as not to interfere with the role of the administrative decision-maker as the merits-decider. This is consistent with the high degree of deference owed to international arbitral tribunals and the very strict limits imposed on judicial intervention. Requiring a certain degree of diligence by the parties before the Tribunal is consistent with the high degree of deference that must be accorded to awards of international arbitral tribunals under the Model Law. Diligence should be assessed in light of all the circumstances and what was known at the relevant time.

Recognition/Enforcement

Article 36(1) of the *International Commercial Arbitration Act* provides that an arbitral award, irrespective of the country in which it was made, must be recognized by a court in Ontario unless one of the grounds for refusal enumerated in article 36 is made out. The seat of arbitration is of little importance within the context of article 36. The language of the legislation is not ambiguous in this regard. A real and substantial connection is presumed to exist between the award and Ontario. The presumed jurisdictional connection applies equally for both interlocutory and final judgment purposes: ***Enrroxs Energy and Mining Group v Saddad*, 2021 BCSC 291 (CanLII)**. For example, if the test can be satisfied, a foreign award may be used to secure a Mareva injunction in Ontario, if the domestic requirements for obtaining such a remedy can be satisfied: ***Enrroxs Energy and Mining Group v Saddad*, 2021 BCSC 291 (CanLII)**.

In ***China Yantai Friction Co. Ltd. v. Novalex Inc.*, 2021 ONSC 3571 (CanLII)**, the Court held that in the absence of an allegation that one of the grounds found in 36(1)(a) applies, the opposition to recognition is without substance. Thus, unless one of the grounds is specifically raised, the opposition is without merit and frivolous. The case is not novel, other than to confirm established principles and the requirement that the basis of opposition to the recognition of the award be made clear.

D. Conclusion

There is an absence of guidance from the Supreme Court of Canada on the applicable standard of review from an appeal of an award of an arbitral tribunal. *Vavilov* continues to plague arbitration. The

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Supreme Court of Canada will need to deal with this omission and, hopefully, re-establish the state of the law as it existed under *Sattva* and *Teal Cedar*.

As it relates to the cases that have been identified, 2021 proved to be a fruitful year. The courts offered guidance on a number of provisions under both the *Arbitration Act* and the *International Commercial Arbitration Act*. While the courts continue to occasionally overreach, the delicate balance between the courts and arbitration remains undisrupted.

The case that contributed the most to the law of arbitration in 2021 are: **a) *Vento Motorcycles, Inc. v. United Mexican States*, 2021 ONSC 7913 (CanLII); *United Mexican States v. Burr*, 2021 ONCA 64 and c) *Russian Federation v. Luxtona Limited*, 2021 ONSC 4604 (Divisional Court)**. All of these cases were decided under the *International Commercial Arbitration Act* which does not generally see much jurisprudential activity.

The case that remains of concern is *Freedman v. Freedman Holdings Inc.*, 2020 ONSC 2692 (CanLII) ("Freedman") which has caused the law of arbitration to stray far. The case continues to find its way into a number of recent cases: ***Chadeesingh v. Flores,* 2020 ONSC 5534; *Parc-IX Limited v. The Manufacturer's Life Insurance Company*, 2021 ONSC 1252 (CanLII); *Broadband Communications North Inc. v. 6901001 Manitoba Ltd.*, 2021 MBQB 25 (CanLII).** The standard of review under s. 46 of the Ontario *Arbitration Act* is guided by the wording of the provision, no more and no less. We should be concerned with this judicial trend.

CIArb Framework Guideline on the Use of Technology in International Arbitration

Rachel Howie, FCIArb
Partner, Dentons

On November 30, 2021, the CIArb released its Framework Guideline on the Use of Technology in International Arbitration (the "**Guideline**"), setting out general principles for counsel and arbitrators on the use of technology along with insight on practical implications flowing from that use. As the Guideline notes, technology can be used in several ways. This includes privately by one or more parties in the course of preparing and bringing their case, or commonly by everyone as a means to facilitate the proceeding. Technology can also vary greatly in sophistication and cost. While technology can aid in efficiency, there are also risks (from that of a failed hard drive to cybersecurity) and increasingly nuanced data protection and privacy regulations around the world. In this context, the Guideline serves as a true "framework" to guide consideration and discussion of these matters in international arbitrations.

Part I of the Guideline contains the following general principles:

- Arbitrators should identify the extent to which they have powers and duties in relation to the use of technology in an arbitration;
- Where arbitrators must decide on the use of technology in an arbitration, they should consider whether the proposed use is proportionate in all the circumstances;
- Any technology used for common purposes in an arbitration must not undermine the fairness of the process and must be transparent; and
- Participants should take appropriate steps to ensure that the technology used in an arbitration remains secure and stable.

In the commentary accompanying these principles, the Guideline sets out possible scenarios that may arise and discusses in those scenarios points that arbitrators and counsel may want to consider. For example, one situation that may arise is where parties disagree on the use of certain technology.

(CIArb Framework Guideline on the Use of Technology in International Arbitration cont'd)

This could be because a party alleges the use of a technology (by one party or commonly) creates an unfairness due to cost considerations. Another situation that may arise is a question around the exact operating mechanics of specific technology. For example, technologies that operate in a "black box" such as predictive coding used in selecting responsive documents where there is relatively little knowledge of the exact algorithm and how it operates.

In line with the overall approach of the Guideline, the building blocks for resolving these and other matters are approached by reference to the general principles in the Guideline and first principles of arbitration. The commentary encourages consideration of proportionality when approaching technology use generally (whether the most sophisticated product available is actually suitable for a smaller matter), whether there are barriers to access for certain technologies (including here the impact of time zones on virtual proceedings), and transparency (such as use of analytical software that might impact an arbitrator's duty to decide). For particularly sensitive matters, or those with "high-stakes", the principles stipulate that it may be appropriate to implement special considerations on use of technology and security. Commentary on this point does not wade into defining exactly what qualifies as "sensitive", avoiding a thorny and often disputed topic that can impact other aspects of a proceeding. The Guidelines also advise that if the arbitrator or a party suffers a cybersecurity attack or a data breach, the principles encourage immediate disclosure.

The use of technology in an arbitration, however, remains subject to the relevant laws applicable to that arbitration. These laws might in some way constrain or direct the use of technology. The Guidelines enforce as overarching principles that it is incumbent upon an arbitrator to give each party a full opportunity to present their case, not delegate their duty to others, and not select use of a particular technology if doing so would jeopardise due process. Examples given in the commentary include where one party does not have the resources to use a particular technology (or linguistically are not supported equally by certain software), or where local realities could prohibit efficient use of a technology.

Part II of the Guideline largely elaborates on the final general principle and provides insights on the following:

- Standard security measures;
- Analysis of assets and data that need to be protected;
- Institutional support;
- Management of data; and
- Access to devices and hard copies.

In this section, the commentary helpfully integrates key principles from emerging data protection regulations to assist in determining what might need protection in which contexts. The Guideline also discusses some more ubiquitous aspects for international matters, such as cloud computing and use of third-party servers, along with their benefits and risks.

The considered approach by the Chartered Institute to the principles and insights in the Guideline is evident throughout the document, as is its purpose to serve as a guide that can be help arbitrators and counsel navigate specific situations. It could helpfully assist in preparing for discussions at preliminary case conferences. The Guideline could also assist parties in their submissions, and arbitrators in assessing and rendering decisions, on disputed matters of technology.

Case Summary: Vento Motorcycles, Inc. v United Mexican States

Rebecca Shoom
Partner, Lerners LLP

In *Vento Motorcycles, Inc. v United Mexican States*, 2021 ONSC 7913, Justice Vermette of the Ontario Superior Court considered the test applicable to the admission of fresh evidence on an application to set aside an international arbitral award on grounds other than jurisdiction.

The case arose from an arbitration pursuant to Chapter 11 of the North American Free Trade Agreement ("NAFTA"). The applicant, Vento Motorcycles, Inc. ("Vento"), brought an arbitration claim relating to Mexico's denial of NAFTA preferential *ad valorem* import tariffs to motorcycles assembled by Vento in the United States and exported to Mexico. The dispute was to be heard by a Tribunal of three arbitrators, in accordance with the International Centre for Settlement of Investment Disputes Arbitration (Additional Facility) Rules (the "ICSID Rules") (except as modified by Section B of NAFTA Chapter 11).

In the lead-up to the hearing, an issue arose as to certain evidence filed by Mexico along with its Rejoinder; namely, a witness statement which attached a recording of a conversation that the witness had with one of Vento's witnesses and a transcription of the recording. Vento filed a request to strike the recording and its transcription from the record, or alternatively, that Vento's witness be allowed to testify further. Vento's objections included that the recording was illicitly obtained and lacked authenticity. The Tribunal denied Vento's requests in an October 2019 Procedural Order.

The Tribunal issued its Award on July 6, 2020, dismissing Vento's claims and finding that Mexico did not breach its obligations under NAFTA.

Vento brought an application in the Ontario Superior Court seeking to set aside the Award pursuant to Article 34 of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), in part based on the Tribunal's acceptance of the recorded conversation into evidence and having been prohibited from presenting responsive evidence. Vento also relied on Article 18 of the Model Law, which provides that parties to arbitral proceedings "shall be treated with equality and each party shall be given a full opportunity of presenting his case." Vento's application record contained, among other things, three new affidavits: (1) an expert opinion on whether the recording was manipulated or altered, (2) an affidavit from Vento's witness who wished to respond to the recording, and (3) an affidavit from one of Vento's arbitration counsel. Mexico brought a motion seeking to prohibit the filing of the first two new affidavits, and to strike portions of the third new affidavit.

Justice Vermette considered the appropriate test to apply to the admission of the fresh evidence in the application. No cases directly on point were presented by either party. The parties were not in agreement on the applicable test:

(a) Mexico submitted that Justice Vermette ought to apply the fresh evidence test set out by the Supreme Court of Canada in *Palmer v The Queen*, 1979 CanLII 8, which applies to the admission of fresh evidence on appeal. In support of its submission, Mexico relied on the Ontario Superior Court's decision in *The Russia Federation v Luxtona Limited*, 2019 ONSC 7558, where Russia had applied to set aside an interim arbitral award on jurisdictional grounds. In that case, Justice Penny held that the policy objectives underlying the *Palmer* test are no less applicable in the context of an application to set aside an arbitral tribunal's award on jurisdictional grounds. The Divisional Court reversed Justice Penny's decision on appeal (2021 ONSC 4604), finding that the Model Law prescribes a *de novo* hearing with respect to jurisdictional issues, such that parties are entitled to adduce new evidence relevant to the jurisdictional issue.

(b) Vento submitted that in the context of an application involving procedural fairness, the appropriate test is that which applies in the context of judicial review applications. Vento relied on a number of cases, including the Ontario Divisional Court's decision in *Durham Regional Police Service v The Ontario Civilian*

(Case Summary: Vento Motorcycles, Inc. v United Mexican States cont'd)

> *Police Commission*, 2021 ONSC 2065, which involved a motion to admit fresh evidence on an application for judicial review. In that case Justice Patillo held that the *Palmer* test is not applicable in the judicial review context, where the record generally is restricted to what was before the decision-maker; however, the record may be supplemented in limited circumstances, including to disclose a breach of natural justice that cannot be proven by reference to the record.

Justice Vermette preferred Vento's position, holding that on an application to set aside an international arbitral award on procedural fairness grounds, the test for the admission of fresh evidence is the same as that applied on an application for judicial review. This is because procedural fairness grounds are conceptually distinct from jurisdictional grounds, and an application to set aside an international arbitral award is more similar to a judicial review application than an appeal, particularly when based on procedural fairness grounds.

That test involves a consideration of whether evidence of natural justice, improper purpose, or fraud that a party seeks to introduce was available at the time of the underlying proceeding. If the party had capacity to object before the underlying decision-maker and does not do so, they cannot raise the objection later on a review. Justice Vermette declined to modify this fresh evidence test in circumstances involving allegations of evidence tampering and acknowledged reasonable diligence as an appropriate consideration on the fresh evidence motion before her.

Applying this test to the evidence Vento sought to introduce, Justice Vermette found that two of the new affidavits did not meet the test for admission, as Vento could have introduced the evidence therein before the Tribunal or there was no reason to supplement the record at that stage. Further, some paragraphs of the third new affidavit (sworn by Vento's arbitration counsel) were struck as improper affidavit evidence, as they contained opinion evidence, speculation, and argument.

Toronto Chapter Update

Robin Dodokin and Lisa Munro
Co-Chairs, Toronto Chapter, CIArb Canada

The Toronto Chapter held a successful joint virtual event with TCAS on January 12, 2022. Alexander Gay, General Counsel at Department of Justice, Adjunct Professor at University of Ottawa and Author, reviewed the most important international and domestic arbitration cases of the last year and answered questions. Mr. Gay's review and analysis of the cases and trends was sophisticated, comprehensive, and useful for lawyers and arbitrators. His comments about the Canadian arbitration legislation, its history, and areas where the legislation conflicts with other legislation was insightful. Turnout for the virtual event was high.

Member Profile: Eric Bédard

1. Tell us about yourself.

I am a partner at Woods LLP in Montreal, with which I have been since my articling. If I am not resolving disputes – through litigation or ADR– you might find me biking or skiing, or reading about philosophy and political economy, my life before law. I currently serve as Vice-President – Education and Events of Young Canadian Arbitration Practitioners (YCAP) and as one Regional Representative for ICC Young Arbitration Forum (YAF) in North America, in

(Member Profile: Eric Bédard cont'd)

addition to being a frequent contributor to the Arbitration Matters blog on Canadian arbitration-related jurisprudence.

2. Tell us about your arbitration practice.

Arbitration is part of the range of dispute resolution services I offer to my clients who need ways to return efficiently to their professional, commercial, or personal activities. My arbitration practice is as diversified as my litigation practice, cutting across several industries, such as construction and information technology, and includes arbitration-related litigation regarding the homologation, recognition, and enforcement of awards. Moreover, I provide clients and corporate counsel with strategic advice to prevent disputes by designing arbitration clauses tailored to their needs and intended to avoid avoiding key pitfalls, and I advise and represent corporations in respect of investment treaty obligations. Finally, I have recently started offering my services as an arbitrator and was named to the Arbitration Place NextGen Roster.

3. Tell us about your first arbitration as representative counsel and what was the most important lesson you learned from the experience.

On a secondment to the Trade Law Bureau at Global Affairs Canada, I formed part of the team representing Canada against an investor's recourse under NAFTA Chapter XI in *Lone Pine v. Canada*. I was privileged to learn from a stellar and experienced team of counsel, with whom I gained firsthand experience on what being firm but courteous specifically means in the arbitration context.

4. What influenced your decision to go into arbitration?

I was greatly inspired by the experience and inspiring career path of one of my partners, Stephen L. Drymer. My interest for the intricacies of mining arbitration, which sits at the intersection of a wide range of many areas of law (property, contracts, administrative and securities law, to name but a few) and subject-matters (geology, engineering, finance) also drew me to arbitration as I realized the important role arbitration plays in that field.

5. Will you use virtual proceedings after the health crisis?

Definitely, but mindfully: the health crisis served as a great accelerator in the adoption of new technologies, but also taught us a lot about their limitations and pitfalls as well. Arbitrators and counsel who will thrive in the post-pandemic world will be those who understand when and how to best have recourse to virtual proceedings.

6. What is your message to the young or aspiring arbitrators?

There is a common thread in the professional trajectory of nearly all successful arbitrators and counsel if you listen to their story: one or several unexpected opportunities to dip their toe into the world of arbitration or to get more responsibility that came out of seemingly nowhere, they seized it and the rest is history. So, get involved in ways that will expose you to quality opportunities – whether it be within your own firm, in a young practitioners' group, in academic circles – and do not be afraid to bite the bullet and make the most of your involvement.

Member Profile: Dr. Ayodele Akenroye, FCIArb

1. Tell us about yourself.

I wear multiple hats. I'm an Independent Arbitrator with Arbitration Place, Toronto and equally act as Tribunal Member with the Government of Canada

(Member Profile: Dr. Ayodele Akenroye, FCIArb cont'd)

adjudicating immigration matters. I am also an instructor at the University of Toronto, where I teach international law to advanced undergraduate students. Before my current positions, I was in private law practice with varied experience in different areas of law such as corporate and commercial law, banking, insurance, joint ventures, ethics, and anti-corruption. I had stints with international organizations such as the International Criminal Court, The Hague Netherlands, and The International Anti-Corruption Academy, Vienna, Austria amongst others.

Also, I sit as a director on several boards such as the Canada Branch of the Chartered Institute of Arbitrator, London, U.K., The Canadian Mental Health Association, Simcoe County and Elizabeth Fry Society, Simcoe Muskoka etc. I obtained my LL.B. degree from the Obafemi Awolowo University, Nigeria, earned my LL.M. Degree from the University of Manitoba, Winnipeg, and my doctorate in international law from McGill University Faculty of Law. Further, I am a Fellow of the Chartered Institute of Arbitrators, London, UK. Outside of my professional and educational accomplishments, I am an amateur photographer and an avid cyclist with a particular interest in winter biking with my fat bike.

2. Tell us about your arbitration practice.

My arbitration practice involves all stages of arbitration proceedings. I act as arbitrator in commercial arbitrations under the ICC, ICSID, LCIA, AAA/ICDR, CPR, NAI and other sets of rules, as well as in ad hoc arbitration proceedings. I have expertise in corporate and commercial, joint ventures, licensing, patents, sales of goods and shareholdings, ethics, and anti-corruption.

3. Tell us about your best moment in arbitration.

It's difficult to pick a favorite moment in arbitration, but I always enjoy the hearing stage and seeing how different it is from the litigation process, as witnesses not only have to anticipate questions from opposing counsel during cross-examination, but they also must anticipate questions from the tribunal during the hearing. If you are appearing before a very bright and experienced tribunal, the questions may be much more direct than those of the opposing counsel (depending on the counsel's expertise) and the way the witnesses answer those questions may be decisive for the case. So, it is best if the witnesses answer such questions to the best of their ability rather than avoiding them.

4. What influenced your decision to go into arbitration?

I've been playing a game of hide-and-seek with international arbitration. Arbitration is very popular in my other home country, Nigeria, and I was exposed to it while in law school through various classes and conferences that I attended but did not take it seriously. My interest in International Arbitration was piqued, however, when I worked as a legal consultant for a Canadian multinational corporation involved in an international dispute.

5. Tell us about your first arbitration as an arbitrator or as representative counsel and what was the most important lesson you learned from the experience.

My first arbitration (as a representative counsel) was an interesting one because it involved a shareholder dispute over a violation of pre-emptive rights. Because some of the corporate shareholders and the buyer, in that case, were foreign parties, the arbitration was internationalized even though it was governed by a national arbitration act and domestic rules. The tribunal for the arbitration was made up of local (2) and foreign (1) nationals, as well as lawyers from two of the world's largest international arbitration firms and leading Nigerian law firms. The most important lesson for me was how the parties chose arbitration, even though it was more expensive than choosing the formal courts as a forum to resolve their disputes. However, it provided the parties an efficient and faster way of resolving their disputes. The hearing lasted five days, and both parties and counsel were able to focus their efforts on having all of their witnesses and experts examined and cross-examined at the same time, allowing them to proceed immediately to the closing submissions stage. Such scheduling would have been more difficult to achieve in the local courts because the court would have several other matters

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competing for the same time slot and will not have the judicial capacity to expedite the litigation process. As a result, it was a classic case of using money to purchase something that would have been lost in terms of time.

6. What is your message to the young or aspiring arbitrators?

It is critical for young or aspiring arbitrators to understand that establishing your name and competence as an arbitrator takes time, but you must maintain momentum by deepening your knowledge of international arbitration as a field and actively networking with other practitioners around the world – lawyers, arbitrators, mediators, expert witnesses, and so on. You have no idea where your first mandate will come from. It is also important for young and aspiring arbitrators to find ways to hone their advocacy skills, particularly through litigation experience.

7. Will you use virtual proceedings after the health crisis?

Yes, I intend to continue using virtual proceedings after the health crisis is over. Its benefits far outweigh its drawbacks, and many arbitral hearing centres, such as Arbitration Place in Toronto, have customised videoconferencing platforms, such as ZOOM, to provide the look and feel of an actual hearing room, while also providing technical support to ensure seamless use of electronic documentary evidence throughout a hearing.

Call For Submissions for Spring 2022 Newsletter

Robin Dodokin and Bim Olawumi
Co-Editors, The CIArb Canada Arbitrator

If you have an article, case summary, book review or event related to arbitration practice, please send your submission to the newsletter editors. Deadline for the next issue is March 15, 2022.