CIArb Canada's Newsletter
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The CIArb Canada Arbitrator

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Message from the Chair

Julie G. Hopkin, FCIArb

Dear Canada Branch Members:

As successful as we have been offering virtual programming over the last few years, I must admit I am excited to report that the Branch is slowly returning, in part, to in-person events.

The Toronto Chapter made our first foray outside of the virtual with an in-person event in June. We hosted the event, with the Toronto Commercial Arbitration Society, at the National Club. Reports are that the weather co-operated and that it was an enjoyable and well-attended event with new, old, and prospective members.

Looking ahead, we are holding our 10th Annual Symposium on International and Domestic Arbitration on October 19, 2022, in Montreal as part of CanArbWeek. Among the many highlights planned is the keynote speech by Dr. Joshua Karton, Associate Professor at Queen's University, entitled "Everyone Agrees that Arbitration Agreements are Contracts, But No One Does Anything About It". The Symposium will conclude, as has become customary, with the annual presentation of the CIArb Canada Distinguished Service Award. I am excited to announce that this year's recipient is our founding Chair, Dr. Paul A. Tichauer. Previous recipients include J. Brian Casey, Janet Walker, and David Haigh. I want to acknowledge the Symposium organizers, Christina Doria, and Lisa Munro, who have been working hard to put together a jam packed and thought-provoking program. I hope to see you there.

But all of this does not mean that the Canada Branch is abandoning virtual programming. The benefit from removing geographic barriers in a country the size of Canada is just simply too great. So, for example, we will be continuing the successful "Last Thursday of the Month" free webinars, organized by Anthony Daimsis and Ayodele Akenroye. As with last year, each webinar will be focused on a topic of interest to arbitration practitioners. We are also planning an Associates Course which is a virtual two-day program ,

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consisting of interactive workshops to introduce the practice of international arbitration from inception to enforcement. Stay tuned for more details!

Finally, I want to welcome our new and returning Board members and also acknowledge and thank those hard-working Board members who have retired. First, I want to welcome Joanne Luu, our newest Director, who has assumed the position of Secretary. We are delighted to have her on the team. Also, we are pleased to have Sabri Shawa, the Alberta Chapter Chair, and Matt Mortazavi, the Honorary Treasurer returning to the Board for another three-year term. They join the rest of our hardworking Board: Anthony Daimais, Paul Tichauer, Jacques Darche, Janet Walker, Joe McArthur, Joel Richler, Lisa Munro, Ayodele Akenroye, Robin Dodokin and me. Our departing directors are Laura Cundari, Arif Ghaffur and Gus Richardson all of whom served more than one term. The work and leadership they provided in getting the Canada Branch up and running was invaluable. Thank you!

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

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

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

Julie G. Hopkin, FCIArb, Chair Canada Branch

Jurisdiction and Admissibility – When Dispute Resolution Clauses Give Rise to Disputes

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Clauses requiring parties to undertake dispute resolution steps prior to arbitration – often referred to as stepped or tiered dispute resolution clauses – can result in disputes about jurisdiction and admissibility. Specifically, does an arbitral tribunal lack jurisdiction if prescribed pre-arbitral steps have not been completed, or does non-compliance with such steps engage issues of admissibility that should be left to the arbitral tribunal? Canadian courts have applied a deferential approach to these disputes that trends in favour of the latter theory.

Few arbitration practitioners are strangers to stepped dispute resolution clauses. Sometimes referred to as tiered dispute resolution clauses, these clauses provide for parties to take specific steps, such as mediation and negotiation, before commencing arbitration.

For parties hoping to avoid costly dispute resolution, the prospect of treating arbitration as a last resort can be appealing. Ironically, however, stepped clauses can give rise to disputes of their own when one party alleges that the other has failed to adequately perform the pre-arbitration steps. In these cases, arbitral tribunals and courts must grapple with the question of jurisdiction vs. admissibility: does an arbitral tribunal lack jurisdiction if contractual pre-arbitration steps have not been completed, or is the question of whether the claim should be heard a matter of admissibility to be left to the arbitral tribunal?

(Jurisdiction and Admissibility – When Dispute Resolution Clauses Give Rise to Disputes cont'd)

The distinction between jurisdiction and admissibility can be critical. Unlike a tribunal's determinations on admissibility, it is generally open to courts to adjudicate issues of arbitral jurisdiction. The international consensus is that Article 16 of the Model Law – which permits courts to "decide the matter" of jurisdiction if an arbitral tribunal rules that it has jurisdiction as a preliminary question – prescribes a hearing *de novo* on the issue of arbitral jurisdiction (see e.g. *The Russian Federation v. Luxtona Limited*, 2021 ONSC 4604 at para. 38)

Approaches to the question of jurisdiction vs. admissibility in disputes about stepped clauses vary across jurisdictions and the unique facts of each case. However, the bulk of international authority favour the theory that such disputes engage issues of admissibility that should be left to the arbitral tribunal. For example, the English Commercial Court recently held that non-compliance with a stepped clause is an issue of admissibility rather than jurisdiction, noting that "[t]he international authorities are plainly overwhelmingly in support of a case that a challenge such as the present does not go to jurisdiction" (*Republic of Sierra Leone v. SL Mining Ltd* [2021] EWHC 286 at para. 16 (Comm)).

Common law jurisdictions in particular tend towards public policy (codified in domestic arbitration legislation) favouring arbitration. In keeping with these values, Canadian courts have applied a deferential approach when dealing with disputes about pre-arbitration steps. For example:

- Considering a claim that a party had failed to comply with a clause providing for consultation between various levels of management prior to arbitration, the Ontario Superior Court of Justice distinguished between "contingent" conditions and "promissory" conditions, noting that a promissory condition "refers to an event which one party is obliged…to bring about", but which failure to perform does not "nullify the basis of the contract" (*Boeing Satellite Systems International Inc. v. Telesat Canada*, 2007 CanLII 78726 at para. 18 (ONSC)). The Court interpreted the clause in question as a "promissory condition" that could be waived by the parties and was not a true condition precedent to the arbitration agreement (*ibid* at paras. 19-20). In the Court's view, the procedural issues raised by the parties were clearly "contemplated by the arbitration clause, and therefore… should be up to the arbitrator or the arbitration tribunal to decide" (*ibid* at para. 37).

- Dealing with a contract that vaguely required the parties to "make all reasonable efforts to resolve all disputes and claims by negotiation", the Saskatchewan Court of Queen's Bench held that negotiation or mediation was not a condition precedent to arbitration and that "[s]tronger language would be required to draw such an interpretation" (*Alberici Western Constructors Ltd. v. Saskatchewan Power Corp.*, 2015 SKQB 74 at para. 67 (aff'd 2016 SKCA 46)). The Court relied on Saskatchewan's *Arbitration Act*, accepting that it "entrenches the primacy of arbitration proceedings over court proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene, and by establishing a 'presumptive' stay of proceedings in favour of arbitration" (*ibid* at para. 35).

- More recently, the Ontario Superior Court of Justice considered a claim in which a party sought to challenge an arbitral award on the basis that the tribunal lacked jurisdiction to determine counterclaims that had not proceeded through the staged pre-arbitration process contemplated in the contract (*Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2016 ONSC 7171 (aff'd 2017 ONCA 939)). The Court concluded that the satisfaction of pre-arbitration steps was not a matter of true jurisdiction (*ibid* at para. 35). Instead, it dictated "when the contractual right to arbitrate arises, not whether there is a right to arbitrate at all" (*ibid* at para. 35). On appeal, the Ontario Court of Appeal reaffirmed that the proper role of a reviewing court is to "identify and narrowly define any true question of jurisdiction", and that the tribunal's determination of whether it could rule on the counterclaims was not a true question of jurisdiction.

(Jurisdiction and Admissibility – When Dispute Resolution Clauses Give Rise to Disputes cont'd)

(*Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.*, 2017 ONCA 939 at para. 31 and para. 54).

These cases illustrate a deferential approach by Canadian courts faced with disputes about pre-arbitration steps in cases with valid arbitration agreements. However, the existence of such disputes – and the associated costs and delays – should give pause to arbitration practitioners and contracting parties alike. It is also worth remembering that stepped clauses can result in a range of disputes, including disputes about whether agreements requiring pre-arbitration steps operate to suspend limitation periods.

Parties considering stepped clauses in their agreements may benefit from a reminder that parties can, and often do, resolve disputes without them. This is not to say that stepped clauses are ill-advised; while some parties may find themselves bogged down by formal pre-arbitration procedures, others can benefit from structured procedures for dispute resolution. For example, a stepped clause requiring negotiation between parties' upper management may bring fresh perspectives and shift focus to the parties' long-term goals.

Ultimately, stepped clauses should be considered on a case-by-case basis and tailored to the parties' specific needs. When parties elect to incorporate such causes, disputes can be minimized by avoiding vague language (such as language requiring parties to make "reasonable efforts" to resolve disputes) in favour of finite time periods and objective metrics for each pre-arbitration step. Finally, as Mary E. Comeau has noted, parties should consider specifying that either party may commence an arbitration pending completion of tiered steps, provided that the arbitral tribunal's role during this period is limited to supervising the parties' completion of those steps (Mary E. Comeau, "In Defense of Tiered Dispute Resolution Clauses" (2019), 6:3, ADR Perspectives).

Case Summary: Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership

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In *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, Justice Perell of the Ontario Superior Court of Justice set aside a decision of an arbitral tribunal that had determined that it had jurisdiction to hear a dispute (2022 ONSC 894). Justice Perell determined that the tribunal did not have jurisdiction because there was no meeting of the minds and, therefore, no binding arbitration agreement between the parties (*Electek* at para 210).

The court's decision addressed the following questions:

- **In an application under section 17(8) of the *Arbitration Act, 1991*, seeking to set aside an arbitral tribunal's decision on its jurisdiction, should the court conduct a hearing *de novo*, or a judicial review?**
    - Justice Perell concluded that the court must conduct a hearing *de novo* because it is required to "decide the matter" under section 17(8) (*Electek* at para 25). In doing so, Justice Perell re-affirmed the decision, in 2021, of Justice Corbett of the Ontario Superior Court of Justice in *Russian Federation v. Luxtona Limited* (2021 ONSC 4604 (Div. Ct.)).

(Case Summary: Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership cont'd)

- **How should a court determine whether the parties had entered into a binding arbitration agreement?**

    - There must be a legally enforceable arbitration agreement for the tribunal to have jurisdiction. The court noted that its task was to determine objectively whether the parties had reached a *consensus ad idem*. The subjective beliefs of witnesses would not be determinative (*Electek* at para 36). Instead, the court analyzed the conduct of the parties and the content of documents, including competing terms and conditions, which the parties had exchanged over a period of nine years. Ultimately, the court determined that the dispute was governed by Electek's terms and conditions, which did not include an arbitration agreement (*Electek* at para 207).

- **Is there a right of appeal from a court's decision on an application under section 17(8)?**

    - Interestingly, Justice Perell stated, *obiter dicta*, that there would be a right of appeal, if the court were to determine that the arbitral tribunal did not have jurisdiction, but there would be no right of appeal if the court were to determine that the tribunal did have jurisdiction (*Electek* at para 25). Justice Perell reasoned that, where there is no arbitration agreement, the *Arbitration Act, 1991*, has no application, and "it follows that if the court has decided that the *Act* is not applicable, then the prohibition against an appeal is equally not applicable" (*Electek* at para 24).

Background

The *Electek* case case involved a claim by Greenfield, which was the owner of an electrical power plant in Sarnia, Ontario. Greenfield had alleged that its contractor Electek had caused $10 million of damage while performing emergency services in 2018 (*Electek* at para 74).

In 2020, Greenfield delivered a notice of arbitration. In response, Electek commenced an application in the Superior Court of Justice, seeking a declaration that there was no binding arbitration agreement between the parties. The court declined to hear the application, stating that, under the competence-competence principle, the arbitral tribunal should rule on its jurisdiction first, without prejudice to Electek's right to ask the court to rule on the same question later (*Electek* at para 10). In 2021, after a hearing, the arbitral tribunal held that it had jurisdiction. Subsequently, Electek commenced an application under section 17(8) to set aside the tribunal's decision.

Decision

As noted above, the court determined that it could "ignore" the arbitral tribunal's decision, and, instead, conduct a *de novo* hearing (*Electek* at para 163). The critical issue was whether the parties had entered into an arbitration agreement at all. Justice Perell stated that, "for an arbitrator to have jurisdiction, two matters have to be established in law" (*Electek* at para 175). First, there must be a binding arbitration agreement. Second, the arbitration agreement must apply to the subject matter of the dispute. The court remarked that, typically, the first matter is not controversial, and the analysis focuses on the second matter. However, this case represented a "rare inversion of the typical problem" in which the analysis focused on whether there was a binding arbitration agreement in the first place (*Electek* at para 176).

Of central importance was a document titled 'Purchase Order General Terms and Conditions' (**POGTC**), which contained an arbitration agreement. Electek had signed the POGTC while making a sales pitch to Greenfield in 2009. Greenfield argued that the POGTC represented a master contract between itself and Electek, governing the work performed by Electek in 2018. Electek, on the other hand, argued that the POGTC was not a master contract and did not apply to the subject matter of the dispute.

(Case Summary: Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership cont'd)

Commencing in 2011, Electek performed work for Greenfield hundreds of times. When Greenfield would retain Electek to perform work, the parties would exchange the following documents:

- Greenfield would issue a purchase order to Electek. Greenfield's purchase orders stated that they were governed by the "Terms and Conditions already agreed upon between the parties of this purchase order." However, none of Greenfield's purchase orders had annexed the POGTC.

- Electek would provide Greenfield with a time sheet, which Greenfield always signed. The time sheets stated: "by approving this project Timesheet, you agree that you have read, understand, and accept [Electek's] terms and conditions." Electek's terms and conditions (which were different from the terms and conditions of the POGTC) did not contain an arbitration agreement.

Justice Perell concluded that the work in 2018 was governed by Electek's terms and conditions, which did not contain an arbitration agreement. Justice Perell found that the POGTC was "in the nature of an agreement to agree and, therefore, it lacks contractual force as a free-standing agreement" (*Electek* at para 202). As there was no arbitration agreement, the court concluded that the tribunal did not have jurisdiction (*Electek* at para 210).

Right of Appeal (*Obiter*)

Interestingly, Justice Perell commented, *obiter dicta*, on the right to appeal his decision. Section 17(9) of the *Arbitration Act, 1991*, states that there would be "no appeal" from the court's decision. Nonetheless, Justice Perell said that his decision could be appealed for the following reasons:

- If a court were to dismiss the application, an appeal of the court's decision would be barred by section 17(9) (*Electek* at para 24).

- However, if a court were to grant the application on the basis that the dispute was not subject to arbitration, the court's decision could be appealed. Justice Perell stated that, where there is no arbitration agreement, the *Arbitration Act, 1991*, has no application, and "it follows that if the court has decided that the *Act* is not applicable, then the prohibition against an appeal is equally not applicable" (*Electek* at para 24).

Case Summary: Dufferin v. Morrison Hershfield

Paul Winfield, FCIArb

Application to remove the Arbitrator on the basis that circumstances existed which give rise to justifiable doubts about the Arbitrator's independence and impartiality, pursuant to §13(6) and §15(1) of the *Arbitration Act, 1991,* S.O. 1991, c. 17 ("the *Act*"). [para. 1]

The Applicants, Dufferin and Aecon are a joint venture ("RapidLINK"), the Respondent Morrison Hershfield Ltd ("MHL") is an engineering firm. The parties agreed a fixed price contract for design-related services on a public transit project on Yonge Street, Toronto. [paras. 2-6]

RapidLINK claimed $149m from Metrolinx and The Regional Municipality of York (the "Owner") for Owner-related changes, including MHL's additional fees in the amount of $33m, which were initially rejected. [paras. 12-14] RapidLINK and the Owner entered a mediated settlement of all claims for $63m, the settlement included MHL's claim, which was compromised. RapidLINK later advised MHL it

(Case Summary: Dufferin v. Morrison Hershfield cont'd)

had no entitlement to any additional payments. [paras. 15-19]

As a result, MHL filed a Request for Arbitration [para. 20], RapidLINK denied MHL's claim and counterclaimed. [para. 24] The parties agreed to appoint as arbitrator, Stephen R. Morrison, an experienced lawyer, and construction law specialist. [para. 22] The parties also agreed that the ADRIC National Arbitration Rules 2017 (the *"ADRIC Rules"*) would apply. [para. 25]

The Arbitrator heard two pre-hearing applications: (i) an application for Interim Relief, which was dismissed; and (ii) a Redfern Document Request. The production documents were ordered and RapidLINK paid MHL a further $2.43m. [paras. 27-28]

After 14 hearing days, RapidLINK sought to remove the Arbitrator [para 37] arguing that the Arbitrator's interventions crossed from adjudication to advocacy and suggesting the Arbitrator's predisposition to MHL's positions. RapidLINK also argued that the Arbitrator sought admissions adverse to RapidLINK, engaged in cross-examination of its lay witnesses, and failed to demonstrate a balanced/proportionate approach. [paras. 38-41] MHL opposed the application. [paras. 42-45]

Woodley J. chronicled the steps leading up to the Application, including the completion of pleadings, procedural orders, and exchange of evidence and in the First Procedural Order("PO No.1") the parties agreed that the Arbitrator could ask questions of any witness and interject with questions at any time. Prior to the Hearing, the parties exchanged 2,658 pages of written direct evidence [paras. 46-55] and on day 14 of a 15-day hearing, RapidLINK notified the Arbitrator and MHL that it intended to bring an application to remove the Arbitrator for bias. [paras. 56-57] On December 24, 2020, the Arbitrator dismissed RapidLINK's bias application. Following this Application on January 5, 2021, the Arbitrator retained his award until the Court ruled. [paras. 58-61]

Woodley J. considered three threshold issues and two central issues:

(i) Is it open to the Applicants to apply to this Court for removal of the Arbitrator where it has challenged the Arbitrator under the *ADRIC Rules?*

(ii) Did the parties authorize the Arbitrator to take on an inquisitorial role?

(iii) Is a party obligated to object to biased conduct prior to bringing a bias challenge under the *ADRIC Rules*?

(iv) Is the Application out of time under the *ADRIC Rules*; and if not,

(v) Does the Arbitrator's conduct give rise to a reasonable apprehension of bias such as to warrant his removal. [paras. 64-66]

Analysis

(i): *ADRIC Rule* 3.6, allows recourse to the Court following the Arbitrator's decision on a challenge, and §13(6) of the *Act* expressly grants the Court jurisdiction to determine the issue on a *de novo* basis, this was not varied or excluded by agreement or by the *ADRIC Rules*. [paras. 79-80]

(ii): The parties authorized the Arbitrator to take on an inquisitorial role. As this was not an appeal of the decision it was unnecessary to determine whether his reasonings or conclusions were correct. [paras. 81-83]

(iii): The duty to remain wholly impartial remains throughout the duration of the arbitration proceeding (Rule 3.3.2). While one ruling, comment or question may not raise "justifiable doubts", continuous rulings, or a series of comments and questions may raise "justifiable doubts". It would be nonsensical to interpret the Rules to mean that a failure to object to a singular act would permit a partial or biased arbitrator to remain seized where "circumstances" give rise to justifiable doubts. [para. 89]

(iv): It was the cumulative effect of the Arbitrator's conduct which gave rise to justifiable doubts about the Arbitrator's independence or impartiality. [para. 102] Therefore, the Applicants commenced the application within the applicable 7-day period

(Case Summary: Dufferin v. Morrison Hershfield cont'd)

prescribed by *ADRIC Rule* 3.6.2, [para. 104] and it would be unjust to deny the Applicants the ability to challenge the Arbitrator for bias. Obiter, the Court would have otherwise permitted the application to be heard pursuant to ADRIC Rule 2.4.1, being that a failure to comply would be an *"irregularity* [which would not] *nullify an arbitration or a step, document, award, ruling, or decision in the arbitration"*. [paras. 102-107]

(v): The test for determining reasonable apprehension of bias is well-established and agreed by the parties. [para. 108] Citing *Committee for Justice & Liberty v Canada (National Energy Board),* [1978] 1 SCR 369, the "two-fold objective element" comprising; 1) the informed, right-minded, person considering such bias must be reasonable; and 2) the apprehension of bias must be reasonable in the circumstances. [paras. 109-110]

Woodley J. referred to *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General),* 2015 SCC 25 at paras. 20 & 22, which stands for the proposition that an analysis does not require that the court determine if the Arbitrator is *actually* biased, the *appearance* of bias is sufficient. [para. 111]

The elements necessary to finding a reasonable apprehension of bias and the level of proof required is high. The presumption of impartiality is high, and an inquiry must be objective, realistic and practical in its review of all the circumstances. A challenge will be unsuccessful without evidence beyond a mere suspicion, and when considering actual or the appearance of bias, context matters. [para. 112]

Woodley J. noted that commercial arbitration is critically different from litigation as a stand-alone concept of party autonomy, privacy and confidentiality with different rules and procedures chosen by those parties, including the right of the Arbitrator to question witnesses. [para. 113]

Woodley J. held that the Arbitrator's conduct showed that he was prepared, maintained independence and impartiality, and provided each witness with a full opportunity to explain their (sometimes contradictory) positions using the powers conferred by PO No.1. This, in context, did not support any finding of bias or reasonable apprehension of bias, but was evidence of the Arbitrator's continuous efforts to maintain balance and fairness in the process. [paras. 114-154]

An arbitrator is in a different position than a trial judge, in terms of evidence, experience, and expertise [para. 128], which provided him with the ability to "short cut" the issues to get to the heart of the matter. [para. 133] There were seven further examples of the Arbitrator's continuous efforts to maintain balance and fairness. [para. 155] Woodley J. found that the Arbitrator was not advocating for any party but rather advocating for the truth. (paras. 169-170)

The application was dismissed.

Member Profile: Donny Surtani, LL.B., FCIArb.

1. Tell us about yourself.

I am a lawyer qualified in Ontario, and a barrister qualified in England and Wales. I am a resident neutral at Arbitration Place in Toronto.

Originally from Sri Lanka, I started out as an accountant before gaining my law degree from the London School of Economics. I then joined Herbert Smith (now Herbert Smith Freehills) as a trainee in London. As an associate, I was seconded to the in-house legal team of a major Indian corporate group headquartered in Mumbai. I later returned to London and became a partner in HSF's commercial disputes practice..

In 2019 I relocated to Toronto and moved into independent practice as a barrister, arbitrator and mediator.

I live on the west side of the city, with my wife and two children. We are members of a racquet club where I play badminton and pretend to exercise. My obsession is cricket, and I have been slowly discovering Canada's cricket scene.

2. Tell us about your arbitration practice.

I've been lucky to be involved in a range of interesting cases, seated in London, Singapore, The Hague, New Delhi and elsewhere. They have generally arisen in the fields of banking, energy, natural resources, logistics and construction. For instance, late last year I concluded work on the quantum phase of a US$200 million mining arbitration under the LCIA Rules, and earlier this year I worked on an arbitration relating to the valuation of preference shares in a private equity structure.

Some of my cases have involved multi-party, multi-contract scenarios, which are sometimes challenging to arbitrate efficiently (and make me wish the contract drafters had taken specialist advice before drafting the arbitration clauses).

I have also often had to deal with applications to court in support of arbitral proceedings, or trying to challenge or derail them. These have included freezing and prohibitory injunctions, set-aside applications, appeals on points of law, and others. The question of how tribunals and courts deal with each other's decisions is always interesting, and sometimes difficult.

3. Tell us about your best moment in arbitration.

The winning outcomes have all been satisfying, but the settlements have been particularly rewarding. In an asset management dispute a few years ago, we were able to go from arguing over liability and damages to rehabilitating the relationship between our investor client and its asset management firm. That not only took away the dispute risk and saved legal costs, but also preserved jobs within both organisations.

4. What/who influenced your decision to go into arbitration?

I had excellent mentors at HSF (including Paula Hodges QC, now President of the LCIA, and Adam Johnson QC, now a High Court judge in England), and learned from them how arbitration could be flexible as well as suitably robust for dealing with the most serious claims. I learned quickly that arbitration has a unique ability to meet the needs of commercial users, if deployed properly.

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.

One of my first cases as a junior lawyer was an ICC arbitration in The Hague. The lead partner was Dr. Larry Shore (now a prominent arbitrator in Milan). The other side had refused to disclose documents

(Case Summary: Donny Surtani, LL.B, FCIArb. cont'd)

from its parent company on the ground that the parent's documents were not in the subsidiary's control. But at the hearing they produced a witness from the parent company, who had snuck his personal notebook into the witness box with him. Larry spotted this, and put on the best display of controlled fury I've seen. I think that was a decisive moment in winning the tribunal's sympathies.

It showed me early on that if a party wants to take technical arguments (such as that a parent's documents were not in the control of the subsidiary) it needed to be consistent. An inconsistent or cherry-picking approach will often land you in hot water.

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

Don't forget that the people in the most challenging situations are often the parties. Counsel and arbitrators should not be engaged in the arbitral process for vanity or profit. Counsel need to help their clients, and arbitrators need to serve the parties as a whole, in using the process efficiently and properly to get the dispute resolved.

Member Profile: Bim Olawumi, FCIArb.

1. Tell us about yourself.

I am a lawyer and arbitrator. I am currently a lawyer with TD insurance where I am involved all aspects of insurance litigation. I am an amateur French speaker. I am in the executive of the Canadian Bar Association (Alberta South), Civil litigation and ADR Sections. I am also a Fellow of the Chartered Institute of Arbitrators. When I am not working, I enjoy spending time with my family travelling all around the world or doing road trips within Canada. Even though I am not a good swimmer, I love water.

2. Tell us about your arbitration practice.

My arbitration practice started about 15 years ago during my early years of legal practice in Nigeria. I have been involved in a variety of commercial arbitration matters. I have acted as a sole arbitrator, registrar to arbitral panels, and counsel in arbitration matters. Between 2017 and 2021, I served as the Secretary to the Nigerian representative to the Permanent Court of International Arbitration, The Hague.

3. Tell us about your best moment in arbitration.

My best moment in arbitration was when I was part of the team that acted as counsel in an ISCID arbitration involving an oil and gas entity and a state entity. It was a very complex and interesting arbitration which lasted about 3 years.

4. What/who influenced your decision to go into arbitration?

I developed interest in arbitration as my then law firm was one of the leading arbitration law firms in Nigeria. A few months after I joined the firm, I registered for my Associate exams and thereafter became a member and in 2020, I became a Fellow. Since then, I have been passionate about arbitration.

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 an arbitrator was in 2016 when I acted as a sole arbitrator in an employment arbitration. The experience broadened my knowledge and expertise in arbitration, and I learned quickly that arbitrators must be firm on their fees.

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

My message to young arbitrators is to get involved. Join arbitration organizations and get a mentor.

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Editors' Message

We are pleased to present another issue of the CIArb Canada Arbitrator. We wish to thank all of the contributors for their submissions. We hope that you find this edition interesting and useful.

We could not produce this newsletter without the patience and assistance of Carina Leung. Congratulations to Carina who is starting her LLM at Oxford University this September!

If you have an article, case summary, book review or event related to arbitration practice, please send your submissions to the newsletter editors. Deadline for the next issue is November 30, 2022.

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Upcoming Events: CanArbWeek