

The Impact of International Commercial Arbitration on Canadian Law and Courts

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This paper considers the impact of globalization's favoured form of dispute resolution—international commercial arbitration—on Canada's domestic legal system. The most important principle of international commercial arbitration is party autonomy. Party autonomy is used to justify deference to the independence of the arbitration process by national legal systems, both legislatures and courts. That principle relies on the assumption that parties to international commercial arbitrations are of relatively equal bargaining strength and want to be free of national procedural and substantive laws.

When the principle of party autonomy and the practices of international commercial arbitration are transferred to the domestic arbitration arena and applied outside the context of commercial transactions, the justification for judicial deference and non-intervention in the arbitration process is considerably weaker. The principle of party autonomy, and hence deference to the arbitration process, is not as accepted by Canadian courts in the domestic context as it is in the international commercial context. While some decisions extend the same deference to the domestic arbitration process, others apply a higher level of judicial scrutiny. Some of this lack of deference to arbitral autonomy appears to be a remnant of judicial attitudes prevalent before the mid-1980s. Other judges, however, appear willing to scrutinize domestic arbitration agreements on the principled basis of respect for party autonomy.

My focus in this paper is on consensual, domestic arbitrations. Consensual arbitration is a process in which a tribunal other than a court decides a dispute between two or more parties based on a prior agreement by which the parties agreed to honour the decision of the tribunal.¹ The only interactions between the courts and consensual arbitration that I am concerned with in this paper are those facilitated by modern domestic

¹ Institute of Law Research and Reform, *Towards a New Arbitration Act for Alberta*, Issues Paper No. 1 (Edmonton: Institute of Law Research and Reform, 1987) at 1. Arbitrations mandated by statute are not considered in this paper.

arbitration legislation, that is, cases brought since 1986 in British Columbia² and Québec,³ since 1991 in Alberta⁴ and Ontario,⁵ since 1992 in Saskatchewan⁶ and New Brunswick,⁷ since 1997 in Manitoba,⁸ and since 1999 in Nova Scotia.⁹ Interactions between the courts and arbitration under provincial statutes still modeled on the English *Arbitration Act, 1889*¹⁰ are not considered.¹¹

Part II of this paper discusses globalization and its relationship to international commercial arbitration, the principle of party autonomy, the competing principle of judicial scrutiny, and the theories underlying both of these principles. In Part III, I briefly summarize the reform of Canadian arbitration legislation to accommodate the principle of party autonomy, both in international commercial and domestic arbitrations. Part IV looks at Canadian courts' responses to this change in the legislation in the context of applications to courts to stay litigation in favour of arbitration. There are other contentious areas of interaction, most notably applications for leave to appeal arbitration awards, appeals of awards and applications to set aside awards.¹² Stay applications are, however, the most common and they often raise access to justice issues.

² *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 [hereinafter *BCCAA*].

³ *An Act to amend the Civil Code and the Code of Civil Procedure in respect of arbitration*, S.Q. 1986, c. 73, arts. 1-2. Provisions on arbitration have been inserted in the *Civil Code of Québec*, S.Q. 1991, c. 64, arts. 1926.1-1926.6 [hereinafter *C.C.Q.*] and the *Code of Civil Procedure*, R.S.Q., c. C-25, as am. by S.Q. 1986, c. 73, and S.Q. 1992, c. 57, arts. 940-951.2 [hereinafter *C.C.P.*].

⁴ *Arbitration Act*, S.A. 1991, c. A-43.1 [hereinafter *AAA*].

⁵ *Arbitration Act, 1991*, S.O. 1991, c. 17 [hereinafter *OAA*].

⁶ *Arbitration Act*, S.S. 1992, c. A-24.1 [hereinafter *SAA*].

⁷ *Arbitration Act*, S.N.B. 1992, c. A-10.1 [hereinafter *NBAA*].

⁸ *Arbitration Act*, S.M. 1997, c. 4, C.C.S.M. c. A120 [hereinafter *MAA*].

⁹ *Commercial Arbitration Act*, S.N.S. 1999, c. 5 [hereinafter *NSCAA*].

¹⁰ *Arbitration Act, 1889* (U.K.), 52 & 53 Vict., c. 49.

¹¹ *Arbitration Act*, R.S.N. 1990, c. A-14; *Arbitration Act*, R.S.P.E.I. 1988, c. A-16; *Arbitration Act*, R.S.Y. 1986, c. 7; *Arbitration Act*, R.S.N.W.T. 1988, c. A-5 (in force in Nunavut under the *Nunavut Act*, S.C. 1993, c. 28).

¹² See the chart, "Domestic Arbitrations by Issue" in Appendix B, below.

I. GLOBALIZATION, INTERNATIONAL COMMERCIAL ARBITRATION AND PARTY AUTONOMY

The meaning and “badges” of globalization are discussed elsewhere in these Conference proceedings in papers by William A.W. Neilson and Patricia Hughes. For the purposes of this paper, I would highlight that globalization is generally associated with economic development, the internationalization of capital and financial markets, and the movement towards regional economic and political bodies.¹³ Banks and telecommunication, transportation, oil and gas, and manufacturing operations now routinely conduct business across national boundaries.¹⁴ National borders and territory-based legal systems are less and less of a barrier to the business of transnational corporations, capital flow and commerce.

Most relevant to this paper is the recognition that one of the central phenomena of globalization is the “proliferation of actors” on the law-making scene.¹⁵ What is described by the concept “globalization” includes competition in law, in approaches to law, and in approaches to the state and governance in general.¹⁶ As other participants in this Conference have noted, the growth of extra-judicial forms of dispute resolution threatens to displace domestic judicial systems by privatizing the settlement of disputes and taking them outside the courts and, sometimes, outside the law.¹⁷

Financial and commercial entities active in transnational trade and commerce want to avoid being “trapped in domestic, ethnocentric judicial

¹³ J. Stopford & S. Strange, *Rival States, Rival Firms: Competition for World Market Shares* (Cambridge: Cambridge University Press, 1991) at 5.

¹⁴ P.F. Drucker, “The Global Economy and the Nation-State” (1997) 76 *Foreign Affairs* 159 at 168.

¹⁵ A.-M. Slaughter, “Breaking Out: The Proliferation of Actors in the International System” in Y. Dezalay & B.G. Garth, eds., *Global Prescriptions: The Production, Exportation, and Importation of a New Legal Orthodoxy* (Ann Arbor: University of Michigan Press, 2002) 12 at 13.

¹⁶ Y. Dezalay & B.G. Garth, “Legitimizing the New Legal Orthodoxy” in Dezalay & Garth, *ibid.* 306 at 308. See also K. Jayasuriya, “Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?” (2001) 8 *Constellations* 442.

¹⁷ M.O. Chibundu, “Globalizing the Rule of Law: Some Thoughts at and on the Periphery” (1999) 7 *Ind. J. Global Leg. Stud.* 79 at 81.

systems”¹⁸ should disputes arise. They want to avoid both the substantive and procedural laws of foreign states which may be totally alien and unacceptable to one or both of the parties.¹⁹ As one commentator notes:

“The most typical international case is an arbitration agreement with ensuing arbitral proceedings between two parties who have their places of business in different countries. Each of the parties will probably have confidence only in its own law and misgivings about the law of the other party. The reason is not necessarily that the other law is in fact less favourable than one’s own law but that as a foreign law it is simply not so familiar and thus often perceived as strange. As in the similar situation of the choice of substantive law of the contract, the result is often to choose the law of a third country with which neither party is really familiar. In the context of arbitration, this means to choose a so-called ‘neutral’ venue which is equally foreign to both parties.”²⁰

The avoidance of local and national courts and legal systems is the main reason for the popularity of international commercial arbitration as globalization’s dispute resolution process of choice.²¹ It is argued that international trade and other transnational transactions, including Internet transactions, require a body of rules that is free from the idiosyncratic

¹⁸ E. Mendes, “Canada: A New Forum to Develop the Cultural Psychology of International Commercial Arbitration” (1986) 3 J. Int’l Arb. 71 at 81.

¹⁹ *Ibid.* This desire to avoid national legal systems is also illustrated by the growing use of international commercial arbitration in foreign direct investment (FDI) disputes between states and private persons such as those overseen by the International Centre for Settlement of Investment Disputes (ICSID) and the work of the Iran-United States Claims tribunal. Core provisions of bilateral investment treaties (BITs) include dispute settlement using arbitration. The particular dispute settlement provisions in NAFTA’s controversial Chapter 11 are based on those in the standard United States BIT. Under these procedures in the NAFTA, private investors may seek arbitration of a dispute against a signing party to NAFTA. The basic model for Chapter 11’s dispute resolution process is private international commercial arbitration.

²⁰ G. Herrmann, “The UNCITRAL Model Law on International Commercial Arbitration: Introduction and General Provisions” in Petar Šarcevic, *Essays on International Commercial Arbitration* (London: Graham & Trotman, 1989) 3 at 5.

²¹ L. Wilberforce, “Resolving International Commercial Arbitration Disputes: The Alternatives,” in R.K. Paterson & B.J. Thompson, *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation* (Toronto: Carswell, 1987) 7 at 7.

differences that arise between national legal systems.²² It has been said that creating a “viable international adjudicative system which is truly supranational and multi-cultural in character, to meet the needs of the international business community” is one of the most challenging tasks facing the global community.²³ And, it is argued, specialized systems of law devised and employed by groups of traders are the models of law-making towards which, in a deregulated, market-driven world, we should all aspire.²⁴

A basic tenet of international commercial arbitration law, therefore, is the idea that disputants should have the greatest freedom to select the rules applicable to the resolution of their dispute: “The principle of party autonomy seeks to free parties to international business disputes from the limitations and idiosyncrasies of particular legal systems and to fulfil their more cosmopolitan needs and expectations.”²⁵

In all of the late 20th century reforms of arbitration law, including those in Canada, a primary tension exists between two principles:

- party autonomy—that is, that arbitration is founded on the agreement of the parties, and that agreement should be respected even though a court may have reservations about its terms, the process followed or the result achieved; and
- judicial scrutiny—that is, that courts have a public right and responsibility as organs of the state to ensure that the process of arbitration operates in all cases according to a uniform, if minimum, standard imposed by law.²⁶

²² R.D. Cooter, “Decentralized Law for a Complex Economy” (1994) 23 Sw. U. L. Rev. 443.

²³ Mendes, *supra* note 18 at 92.

²⁴ Cooter, *supra* note 22. Such an assertion, of course, assumes that law exists to serve the economy rather than other ends: J. Goldring, “Consumer Protection, Globalization and Democracy” (1998) 6 Cardozo J. Int’l & Comp. L. 1 at 56.

²⁵ R.K. Paterson, “International Commercial Arbitration: An Overview” in Paterson & Thompson, *supra* note 21, 113 at 114.

²⁶ Law Commission, *Report No. 20: Arbitration* (Welland: Law Commission, 1991) at 65 [hereinafter *New Zealand Law Commission*]. The tension is also reflected in the division between the majority report and the dissent on the extent of judicial supervision in the Law Reform Commission of British Columbia, *Report on Arbitration* (Vancouver: Law Reform Commission of British Columbia, 1982). The majority stated that “[j]ustice, in

This tension is related to the conceptual basis for arbitration. As the New Zealand Law Commission noted in its 1991 report on arbitration law reform, “[t]here are various theories which have been put forward to explain arbitration—each with consequences for where the balance between party autonomy and judicial scrutiny should be.”²⁷

In the “Contractual Theory” of international commercial arbitration, the arbitration agreement is seen as an independent source of arbitrators’ authority. One definition of arbitration from this perspective is as follows:

“Arbitration is a device whereby the settlement of the question, which is of interest for two or more persons, is entrusted to one or more other persons—the arbitrator or arbitrators—who derive their powers from a private agreement, not from the authority of a state, and who are to proceed and decide the case on the basis of such an agreement.”²⁸

The argument here is that the parties voluntarily agree to submit their disputes to arbitration, to appoint the arbitrator and, most importantly, to accept his award as having binding force.²⁹ Once authorized by the parties to

our view, should not be subordinated to considerations of speed and convenience” *ibid.* at 74. The dissent insisted that “the most important feature of an arbitration system is that it was intended to be quick and final” and “we must be sensitive to the needs of the people whom the system will serve and recognize their needs and expectations rather than the existing system they have sought to avoid” *ibid.* at 87-88.

²⁷ *New Zealand Law Commission, ibid.* at 66.

²⁸ R. David, *Arbitration in International Trade* (Deventer: Kluwer, 1985) at 5. See also H.C. Alvarez, “Introduction to International Commercial Arbitration”, Chapter 1 in *Commercial Arbitration* (Vancouver: Continuing Legal Education Society of British Columbia, 1986) at 1.1.02.

²⁹ My use of the male pronoun in referring to the arbitrator is gender-specific. A September 2003 scroll through the list of arbitrators on the web sites of various arbitration organizations revealed that more than 90 per cent are male. See the ADR Institute of Canada web site at <http://www.amic.org/>, the British Columbia International Commercial Arbitration Centre web site at <http://www.bcicac.com/> and the Québec National and International Commercial Arbitration Centre web site at <http://www.cacniq.org/en/>. There has not yet been much concern in Canada about who is deciding the cases referred to arbitration. The issue of gender in arbitration was addressed by an American Arbitration Association Task Force: see “Women and Diversity in ADR: A Roundtable”, (April/Sept. 1996) *Dispute Resolution Journal* 65 at 66. For a detailed analysis of the elite group of transnational lawyers that make up the field of international commercial arbitrators, see Y. Dezalay & B.G. Garth, *Dealing in Virtue: International Commercial*

make the award, the tribunal acts as an agent of the parties, and the award is binding on them as an agreement made on their behalf by their agent.³⁰ This explanation of the legal nature of arbitration reduces the role of national law to a minimum.³¹

The ascendancy of the Contractual Theory as the predominant explanation for arbitration was assured in the international commercial arena quite some time ago.³² For example, a mid-1980s ICSID award stated: “Under the doctrine of party autonomy, parties to a contract are free to choose for themselves the law which is to govern their relationship. This doctrine has gained almost universal acceptance, particularly in international commercial arbitrations.”³³

The United States Federal Court of Appeal in 1987 proclaimed: “The right and duty to arbitrate disputes is purely a matter of contractual agreement between the parties.”³⁴ The privatization of law under this perspective has led to charges of lawlessness³⁵ and incompatibility with the rule of law.³⁶

Arbitration and the Construction of a Transnational Legal Order (Chicago: University of Chicago Press, 1996).

³⁰ *New Zealand Law Commission, supra* note 26 at 66-67. See also S.J. Toope, *Mixed International Arbitrations: Studies in Arbitration between States and Private Persons* (Cambridge: Grotius Publications, 1990) at 9.

³¹ J.D.M. Lew, *Applicable Law in International Commercial Arbitration* (Dobbs Ferry: Oceana, 1978) at 56-57.

³² *Ibid.* at 51-66. See also Alvarez, *supra* note 28, “Introduction to International Commercial Arbitration”, Chapter I in *Commercial Arbitration* (Vancouver: Continuing Legal Education Society of British Columbia, 1986); P. Fouchard, *L'Arbitrage commercial international* (Paris: Dalloz, 1965) at 7-12; T.E. Carbonneau, “Arbitral Adjudication: A Comparative Assessment of its Remedial and Substantive Status in Transnational Commerce” (1984) 19 *Texas Int'l L. Rev.* 34. Each theory is contested: see e.g. F.A. Mann, “Lex Facit Arbitrum”, reprinted in (1986) *Arbitration Int'l* 241; A. Kassis, *Théorie générale des usages du commerce* (Paris: L.G.D.J., 1984).

³³ *LETCO v. Republic of Liberia*, ICSID Award, October 24, 1984 and March 31, 1986, reprinted in (1988) 13 *Yearbook of Commercial Arbitration* 35 at 42-43.

³⁴ *National Oil Co. of Iran v. Ashland Oil, Inc.* 817, F.2d 326 (5th Cir. 1987).

³⁵ P.J. McConaughay, “The Risks And Virtues of Lawlessness: A ‘Second Look’ at International Commercial Arbitration” (1999) 93 *Nw. U.L. Rev.* 453. McConaughay states, at 453:

It is entirely possible today for parties to conduct an international arbitration in a nation that imposes no requirements or review whatsoever on the procedure or

The main alternative to the Contractual Theory is the “Jurisdictional Theory” which holds that the real authority of arbitration derives not from the contract between the parties, but from the recognition accorded by the state.³⁷ The validity of the arbitration agreement, the powers of the arbitrator, the act of adjudication by the arbitrator and the enforcement of the arbitrator’s award are all seen as depending on the law of the enforcing state.³⁸ The arbitrator, in this theory, is more than an agent of the parties because he exercises a power that is beyond the authority of the parties to endow him. Therefore, the court, representing the state and applying its law, is entitled to insist on certain conditions. The courts need not recognize only the immediate needs and expectations of the parties before them; they are entitled to recognize, for instance, state interests in maintaining a fair and uniform system of law and order.³⁹ The uniformity policy was the primary rationale for court intervention in England for a long time. Today court intervention is mainly justified by the felt need to protect weaker contractual parties from the consequences of their contracts or framed in terms of “procedural fairness.”⁴⁰ The result of adopting this theory is to subject arbitration to domestic law and assimilate arbitrators to judges.⁴¹

The most important convention on international commercial arbitration and the most important impetus to the growth of international commercial arbitration in the latter half of the twentieth century is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁴² The New York

outcome of the arbitration. It is possible for the parties to elect, or for the arbitrators to decide, that the “law” governing the merits of the arbitration is basically no law at all. Further, it is possible for the parties to escape meaningful review of their resulting arbitral award and to secure the award's judicial enforcement in virtually all developed nations of the world. All but the last of these events, moreover, may occur in complete secrecy.

³⁶ W.E. Scheuerman, “Economic Globalization and the Rule of Law” (1999) 6 Constellations 3. Scheuerman notes, at 3, that dispute resolution processes associated with globalization exhibit few of the virtues normally ascribed to the rule of law, relying instead on *ad hoc*, discretionary, closed and non-transparent legal forms.

³⁷ *New Zealand Law Commission*, *supra* note 26 at 66-67.

³⁸ Lew, *supra* note 31 at 52.

³⁹ *New Zealand Law Commission*, *supra* note 26 at 66-67.

⁴⁰ *Ibid.*

⁴¹ Lew, *supra* note 31 at 53-54.

⁴² UN Doc. E/Conf. 26/9/Rev. 1, reprinted in 330 U.N.T.S. 38 (in force June 7, 1959) [hereinafter the *New York Convention*]. According to C.O.D. Branson, “The Enforcement

Convention is an example of what William A.W. Neilson, in his paper for these Conference proceedings, calls “unification”. When the New York Convention entered into force in 1959, it put in place a treaty system which ensured the recognition and enforcement of foreign arbitral awards within contracting states. Nations adopted it unchanged as domestic law with full force and effect in their legal systems. The New York Convention limits the grounds for judicial review of awards and excludes any judicial review on the merits of an award by the court where enforcement is sought. It does not, however, contain any rules to guide the arbitration process and says nothing about control or supervision of the arbitral process by the courts at the place of arbitration. Those rules were supplied, in 1985, by the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration.⁴³ This blueprint for the unification of national laws embodies mid-1980s trends in international commercial arbitration and, particularly, American trends to allow the arbitration of previously non-arbitrable issues and to compel unwilling parties to arbitrate.⁴⁴

The central philosophy of the Model Law is one of party autonomy. The Model Law’s guiding principles can be summarized as follows:

- parties should be free to design the arbitral process as they see fit, but the arbitral process should be “fair” to both parties;
- parties who enter into valid arbitration agreements should be held to those agreements;
- the arbitration tribunal should be neutral and as unbiased as possible, and should be empowered to determine its own jurisdiction;

of International Commercial Arbitration Agreements in Canada” (2000) 16 *Arbitration International* 19 at 19, the New York Convention “the greatest contributing factor to the acceptance and use of international commercial arbitration today.”

⁴³ UN Doc A/40/17 (1985), reprinted in (1985) 24 *I.L.M.* 1302 [hereinafter the *Model Law*]. See also E. Chiasson, “Canada: No Man’s Land No More” (1986) *J. Int’l Arb.* 67.

⁴⁴ *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* 473 U.S. 614 (1985) (U.S.S.C.) [hereinafter *Mitsubishi*].

- the arbitration should proceed in confidence without substantial intervention by the courts; and
- the resulting award should be readily enforceable, subject to review only on the basis of a limited and specified list of fatal flaws in form or procedure.⁴⁵

It is important to note that recognition of party autonomy as the basic norm of international commercial arbitration is not merely a consequence of theorizing that arbitration rests on the agreement of the parties. It is also the result of policy considerations geared to economic globalization.⁴⁶ As Henry J. noted in *Rio Algon Ltd. v. Sammi Steel Co.*, the purpose and spirit of the adoption of the Model Law by Ontario was to make commercial arbitration law in that province consistent with the law of other trading countries “so as to enhance and encourage international commerce in Ontario and the resolution of disputes by rules of international commercial arbitration ...”⁴⁷

II. REFORMING CANADA’S ARBITRATION LEGISLATION

The adoption of the New York Convention and the Model Law in Canada in 1986 has been discussed extensively.⁴⁸ The Manitoba Law Reform Commission’s 1994 report on arbitration provides a concise summary:

“Federal and provincial government apathy about arbitration reform started to change in the 1980s due to the desire to attract international arbitration business. Canada was one of the last major international trading countries to accede to the 1958 United Nations Convention of the Recognition and Enforcement of Foreign Arbitral Awards, but it

⁴⁵ R.A. Pepper, “Why Arbitrate?: Ontario’s Recent Experience with Commercial Arbitration”(1998) 36 Osgoode Hall L.J. 807 at para. 8. These central features and the primary motivations for their adoption are canvassed in greater detail in Uniform Law Conference of Canada, *Proceedings of the Seventy-Second Annual Meeting of the Uniform Law Conference of Canada* (Toronto: Uniform Law Conference of Canada, 1990) at 88 [hereinafter *ULCC 1990*] and in Mendes, *supra* note 18.

⁴⁶ Herrmann, *supra* note 20 at 9.

⁴⁷ (1991), 47 C.P.C. (2d) 251 at 257 (Ont. Gen. Div.).

⁴⁸ See *e.g.* Chiasson, *supra* note 43; Mendes, *supra* note 18; Paterson & Thompson, *supra* note 21; H. Alvarez, “The Role of Arbitration in Canada—New Perspectives” (1987) 21 U.B.C.L. Rev. 247; and J.E.C. Brierley, “Québec’s New (1986) Arbitration Law” (1987-88) 13 C.B.L.J. 58.

did so finally in 1986. This federal action was supported and implemented by uniform provincial statutes passed in 1986, the *International Commercial Arbitration Act(s)*.

Those statutes are patterned on the 1985 legislative model developed by the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL model was developed by a group of experts in the field of international arbitration and was reflective of the most progressive, developing views. The implementation of this model was ‘like going from the 19th century to the 21st century’ in international arbitration law.

This momentum for change has been continued in the area of domestic arbitration by some provinces. In 1986, British Columbia enacted a new *Commercial Arbitration Act*, based on earlier recommendations of the British Columbia Law Reform Commission which pre-dated the UNCITRAL model but anticipated many of its general reforms. In the civil law arena, Québec also adopted a more progressive domestic arbitration law in 1986.

The Alberta Law Reform Institute did major work in adapting the UNCITRAL model for provincial domestic arbitration use; this work was furthered by the Uniform Law Conference of Canada which in 1990 produced a model *Uniform Arbitration Act*. This model uniform statute forms the basis for the new arbitration legislation enacted in Alberta, Ontario and Saskatchewan. New Brunswick has also passed an Act based on this uniform model...”⁴⁹

⁴⁹ Manitoba Law Reform Commission, *Arbitration*, Report #85 (1994) at 3 [footnotes omitted]. See the *United Nations Foreign Arbitral Awards Convention Act*, S.C. 1986, c. 21; *Commercial Arbitration Act*, R.S.C. 1985 (2nd Supp.), c. 17; *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6; *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233; *International Commercial Arbitration Act*, S.M. 1986-87, c. 32, C.C.S.M., c. C151; *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2; *International Commercial Arbitration Act*, R.S.N. 1990, c. I-15; *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6; *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234; *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9; *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5; *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2; *International Commercial Arbitration Act*, R.S.Y. 1986 (Supp.), c. 14 [hereinafter collectively *International Commercial Arbitration Acts*]. The history is reported in greater detail in the Preface to Paterson & Thompson, *supra* note 21 at vi-x. Paterson and Thompson attribute the most serious obstacle to creating a legal climate suitable for the business of resolving international commercial disputes as being “an attitudinal problem” that changed only when Canadian business began to take international trade more seriously.

Subsequently, Manitoba enacted its own new domestic arbitration law, modeled on the Alberta legislation.⁵⁰ Nova Scotia also passed a new *Commercial Arbitration Act* in 1999,⁵¹ bringing to eight the number of provinces with domestic arbitration statutes strongly influenced by the UNCITRAL Model Law designed for international commercial arbitrations.

The organization and principles of the *Uniform Arbitration Act* adopted by the Uniform Law Conference of Canada (ULCC) in 1990 are recognizably those of the Model Law:

“Generally speaking, the *only interests* involved in an arbitration are those of the parties. While it may be argued that a whole mandatory scheme should be imposed upon them for their own good, we see no justification for doing so. *Party control is one fundamental principle* upon which arbitration law should be based.”⁵²

However, the ULCC did conclude there was a greater role for judicial scrutiny of domestic arbitral procedure and awards.⁵³ While the *International Commercial Arbitration Acts* apply only to “international” and “commercial” arbitration agreements,⁵⁴ usually entered into by reasonably sophisticated

⁵⁰ *MAA*, *supra* note 8.

⁵¹ *NSCAA*, *supra* note 9.

⁵² “*Proceedings of the Seventy-first Annual Meeting*” (Uniform Law Conference of Canada, Yellowknife, Northwest Territories, August 1989) [hereinafter *ULCC 1989*] [emphasis added].

⁵³ *ULCC 1990*, *supra* note 45 at 88-89.

⁵⁴ The adoption of the Model Law created this distinction between international commercial and domestic arbitrations in Canada. With regard to being “international”, the most important provision, governing 90 to 98% of the cases regarded as international, is art. 1(3)(a) which provides that if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states, then the arbitration is international. See Herrmann, *supra* note 20 at 22. Thus, for the most part, “international” means across state boundaries. There is no definition of “commercial” in the Model Law. Most Canadian common law jurisdictions have enacted a provision that slightly expands the application of the Model Law by stating it applies “in respect of differences arising out of commercial legal relationships, whether contractual or not.” See *e.g.* the *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, s. 2(2). However, the *International Commercial Arbitration Act*, R.S.O. 1990, which does not define “commercial” and restricts “international” by not adopting art. 1(3)(c) which states that an arbitration is international if “the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.”

commercial parties assumed to have relatively equal bargaining power, the domestic arbitration legislation applies to all forms of arbitration, whether commercial or not. The Uniform Arbitration Act, and the provincial statutes that shaped it or are modeled after it, are therefore based upon the following principles:

- fairness, or equality of treatment
- control by the parties (except as required by equality of treatment), and
- efficiency, or satisfaction of the interests of the parties (except as required by equality of treatment, and except as agreed by the parties).⁵⁵

Fairness, or equality of treatment, represents the partial adoption of the Jurisdictional Theory. However, the Contractual Theory and party autonomy are well represented by the second and third principles. In the third—efficiency—we also see economic globalization’s influence.

III. RESHAPING CANADIAN JUDICIAL DECISION-MAKING

Canada was one of the last industrial nations to sign the New York Convention, albeit the first to adopt the Model Law.⁵⁶ Our courts lag anywhere from five to fifteen years behind their United States counterparts in adopting a deferential attitude to arbitration. It was in the mid-1970s that American courts began to shed their hostility toward arbitral proceedings, characterizing the change as “an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.”⁵⁷ The key to the evolution of judge-made

⁵⁵ *ULCC 1989*, *supra* note 52.

⁵⁶ See text accompanying note 52.

⁵⁷ *Scherk v. Alberto Culver*, 417 U.S. 506 at 516 (1974). A further step was taken in 1985 in *Mitsubishi*, *supra* note 44, when the United States Supreme Court overturned a series of lower court decisions that held the public interest in the enforcement of antitrust laws and the nature of antitrust claims made them inappropriate for arbitration. A brief history of the change in the American courts, attitude to arbitration and its acceptance of the New York Convention and the principle of party autonomy can be found in M.F. Hoellering, “International Commercial Arbitration: The United States Perspective” in Paterson & Thompson, *supra* note 21 at 17.

arbitration law in the United States is party autonomy and the courts have maintained a non-intervention policy in both domestic and international arbitrations since the early 1980s.⁵⁸

Despite the late start here, broad deference to arbitration under the Model Law has been shown in almost all Canadian international commercial arbitration cases.⁵⁹ For example, the Ontario Court of Appeal in 1994 acknowledged:

“The purpose of the United Nations Conventions and legislation adopting them is to ensure that the method of resolving disputes, in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.”⁶⁰

The norm of party autonomy and its underlying Contractual Theory has been explicitly recognized in cases such as *Cangene Corp. v. Octapharma AG*,⁶¹ where Morse J. noted that “[c]ourts in Canada and the United States have, on the basis of freedom of contract, generally accepted and approved of the arbitration contemplated in the Act and there is little room for judicial intervention in the process.”⁶²

The question is whether the Contractual Theory predominates in domestic arbitration as it does in international commercial arbitration. To what extent have Canadian judges adopted the norm of party autonomy in domestic and, particularly, consumer cases? To what extent is the principle of judicial scrutiny, which was recognized as having a greater role to play in the

⁵⁸ Hoellering, *ibid.* at 18.

⁵⁹ R.O. Chibueze, “The Adoption and Application of the Model Law in Canada” (2001) 18 J. Int’l Arbitration 191 at 197.

⁶⁰ *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.) at 264.

⁶¹ (2000) 147 Man.R. (2d) 228 (QB) relying on *BWV Investments Ltd. v. Saskferco Products Inc.* (1995), 137 Sask. L.R. 238 (C.A.).

⁶² The relationship between globalization and the principle of party autonomy has also been acknowledged. See text accompanying note 47.

domestic context by those drafting the domestic legislation,⁶³ incorporated into judicial decisions?

For at least 500 years, judges have shown discomfort with their relationship to the arbitral process.⁶⁴ However, in the past ten to twenty years, numerous law reform commission reports and legislative changes in Canada's arbitration laws have opened the door to a change in judicial attitudes towards arbitration.⁶⁵ The latest word from the Supreme Court of Canada on the relationship between the Canadian courts and arbitration—*Éditions Chouette (1987) Inc. c. Desputeaux*⁶⁶—is a particularly strong endorsement of the norm of party autonomy in arbitration and the expectation of deference by the judiciary to the arbitration process. In the context of limits on judicial review of the validity of arbitral decisions, the Supreme Court reversed a Québec Court of Appeal decision that an arbitrator must apply the rules of public order correctly, an approach that LeBel J. held that runs “counter to the fundamental principle of the autonomy of arbitration.”⁶⁷ And while acknowledging “limitations placed on the autonomy of the arbitration system”,⁶⁸ just as there are limitations on the scope of individual legal action and contractual freedom,⁶⁹ LeBel J. continued by noting the

⁶³ See text accompanying note 55.

⁶⁴ See D. Roebuck, “The Myth of Judicial Jealousy” (1994) *Arb. Int'l* 395 and R.B. von Mehren, “From *Vynior's Case* to *Mitsubishi* and Public Law” (1986) 12 *Brooklyn J. Int'l L.* 583.

⁶⁵ L. Biukovic, “Impact of the Adoption of the Model Law in Canada: Creating a New Environment for International Arbitration” (1998) 30 *C.B.L.J.* 376 at 379.

⁶⁶ 2003 SCC 17 [hereinafter *Éditions Chouette*]. The Quebec National and International Commercial Arbitration Centre (CACNIQ) was one of the interveners in the action, broadly supporting the appellants in their arguments for the need to protect the role of arbitration. In a March 21, 2003 press release on its web site at <http://www.cacniq.org/en/>, the arbitration centre noted: “In a decision which is very favourable to arbitration and which adopted, in substance, arguments the CACNIQ presented as intervener, the Supreme Court of Canada has set aside a decision of the Quebec Court of Appeal that had annulled an arbitral award on various grounds.” The relevant Québec statutory framework, unlike that of the common law provinces, makes almost no statutory distinction between international and domestic arbitrations and thus some caution must be exercised in applying *Éditions Chouette* to cases under the domestic legislation of other provinces.

⁶⁷ *Ibid.* at para. 66.

⁶⁸ *Ibid.* at para. 51.

⁶⁹ *Ibid.* at para. 52.

concept of public order, in the context of arbitration, had to be interpreted and applied with regard to:

“legislative policy that accepts this form of dispute resolution and even seeks to promote its expansion. For that reason, *in order to preserve decision-making autonomy within the arbitration system*, it is important that we avoid extensive application of the concept by the courts. Such wide reliance on public order in the realm of arbitration would jeopardize that autonomy, contrary to the clear legislative approach and the judicial policy based on it.”⁷⁰

Although a thorough analysis of the approach of Canadian courts to the modern domestic arbitration legislation is beyond the scope of this paper, I want to highlight some of the issues in the interpretation and application of that legislation which reveal the tension between the principles of party autonomy and judicial supervision. The question of the influence of international commercial arbitration’s norm of party autonomy will be examined in the context of applications to stay court proceedings in favour of arbitration, applications that speak directly to the judiciary’s relationship to arbitration. Although over two hundred cases have been decided under the modern domestic arbitration legislation,⁷¹ I consider only five of the many issues raised in stay applications. Only a few of the cases considering those five issues will be discussed: cases that illustrate the tension between the two supposedly contradictory principles of party autonomy and judicial scrutiny. In the last section of this part, I look at two recent cases suggesting the process of the “consumerization” of domestic arbitration has begun in Canada.

A. Applications to Stay Court Proceedings in Favour of Arbitration

All of the modern domestic arbitration legislation contains a provision stating the courts cannot intervene in the arbitration process except as

⁷⁰ *Ibid.* [emphasis added].

⁷¹ See Appendix B, below for a breakdown of these cases by type of application before the court, by year, and by province. The cases were accumulated using the digests in the Canadian Abridgement Online, through queries for “arbitration” restricted by date in each of the relevant provinces’ “Judgments” databases in Quicklaw, and through references to other cases in those located through the first two sources.

expressly allowed by that legislation.⁷² Courts are expressly allowed to intervene in order to prevent the preemption of arbitration by court actions.⁷³ If a party to an arbitration agreement brings an action in court about a matter which it agreed to submit to arbitration, the court in which the action is brought must, when asked, stay the action except in the specific, limited circumstances listed in the legislation. I will focus on courts' responses to the apparent removal of their discretion to refuse to stay court proceedings and courts' approaches to interpreting these stay provisions.

1. From "May" to "Must" and "Shall"

The old arbitration acts, modeled on the English *Arbitration Act, 1889*,⁷⁴ made the granting of a stay a discretionary matter for the courts.⁷⁵ It was the exercise of that discretion which is said to have led legislatures to regard refusals of stays as judicial intervention.⁷⁶

Almost all courts have taken note of the change in the domestic arbitration legislation which appears to make the granting of stays mandatory if the enumerated preconditions are met. For example, in *International Resource Management (Canada) Ltd. v. Kappa Energy (Yemen) Inc.*, the Alberta Court of Appeal heard an appeal from an order staying legal proceedings conditionally and noted: "[T]he Arbitration Act section 7 has rewritten the rules for a stay. The court *must* stay a suit in favour of

⁷² *BCCAA*, *supra* note 2, s. 32; *AAA*, *supra* note 4, s. 6; *SAA*, *supra* note 6, s. 7; *MAA*, *supra* note 8, s. 6; *NSCAA*, *supra* note 9, s. 8; *NBAA*, *supra* note 7, s. 6; *OAA*, *supra* note 5, s. 6; art. 940.3 C.C.P.

⁷³ *BCCAA*, *ibid.*, s. 15; *AAA*, *ibid.*, s. 7; *SAA*, *ibid.*, s. 8; *MAA*, *ibid.*, s. 7; *NSAA*, *ibid.*, s. 9; *NBAA*, *ibid.*, s. 7; *OAA*, *ibid.*, s.7; art. 940.3 CCP. See Appendix A, below for the wording of these sections.

⁷⁴ *Supra* note 10.

⁷⁵ See *e.g.* *OAA*, *supra* note 5, which provided that if a party to an arbitration agreement applied to court to stay court proceedings "a judge of that court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission ... *may* make an order staying the proceeding" [emphasis added].

⁷⁶ *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2nd) 113 (C.A.).

arbitration when the plaintiff is a party to the contract for arbitration. It has *no choice*.”⁷⁷

The court later emphasized that “the general scheme of the Act, and the evil to remedy for which it was passed, suggest an inflexible duty to stay, with few and clear exceptions.”⁷⁸ This same point was acknowledged in *Deluce Holdings*, an Ontario case:

“Whereas prior to the enactment of this legislation the courts in Ontario had a broad discretion whether or not to stay a court action, the focus has now been reversed: the court *must* stay the court proceeding and allow the arbitration to go ahead unless the matter either falls within one of the limited exceptions or is not a matter which the parties have agreed to submit to arbitration.”⁷⁹

However, in some cases decided under the modern domestic arbitration statutes, courts have continued to act as though they had a discretion to refuse a stay. For example, in *North Sea Products Ltd. v. Carmar Fish Corp.*,⁸⁰ the British Columbia Court of Appeal heard an application for leave to appeal from a dismissal of North Sea’s stay application. That stay application had been dismissed on the basis that the dispute was outside the scope of the arbitration clause. Southin J., in a brief oral judgment refusing leave, indicated her “tentative view” that the arbitration clause did not include licensing disputes.⁸¹ However, the main reason for her dismissal appeared to be the perceived futility of a stay of the court proceedings:

“One of the considerations on granting leave is whether there is practical utility in the appeal. It seems to me there is no practical utility for these parties in this proposed appeal over the issue of whether the licensing questions are within the arbitration clause. They can litigate that in this court. They may end up litigating it again

⁷⁷ (2001), 16 B.L.R. (3d) 163, 92 Alta. L.R. (3d) 25, 281 A.R. 373, 2001 ABCA 146 (C.A.) at para. 12 [emphasis added].

⁷⁸ *Ibid.* at para. 20.

⁷⁹ *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131 at 148 (Gen. Div.) [hereinafter *Deluce Holdings*] [emphasis added].

⁸⁰ [1998] B.C.J. No. 3097 (S.C.), online: QL (BCJ); [1998] B.C.J. No. 2758 (C.A.), online: QL (BCJ). The dispute concerned monies owing under a herring roe processing contract between North Sea and Carmar Fish.

⁸¹ *Ibid.* at para. 8.

in the Court below. If the matter were to go to arbitration, and the arbitrator were to say, ‘Yes, the thing is included,’ there would then, no doubt, be an attack on the arbitration award on the question of jurisdiction, and this case would go on forever unresolved.”⁸²

There is no discussion of whether a court can hear an appeal of a refusal of a stay application, no discussion of the statutory provision governing stays, and no discussion of who decides questions of the arbitrator’s jurisdiction. Instead, Southin J. essentially refused leave to appeal the stay refusal because she perceived the court to be a better forum in which to decide the issues. However, the appropriateness or convenience of the forum are not relevant considerations under the new domestic arbitration legislation, as other courts have noted.⁸³

At the opposite extreme of the approach taken in *North Sea Products* is that seen in *AMEC E & C Services Ltd. v. Nova Chemicals (Canada) Ltd.*⁸⁴ AMEC applied to the court for a declaration that any liability they might have had under a contract with Nova Chemicals had expired with the passage of time.⁸⁵ During the hearing of the application, Sachs J. raised the question of whether the issues in the application were within the scope of the arbitration clause in the parties’ contract. While acknowledging the “relevant statutory provisions”⁸⁶ contemplated a stay order would be made on application by a party to an arbitration agreement, Sachs J. held that court

⁸² *Ibid.* at para. 10.

⁸³ See e.g. *Scotia Realty Ltd. v. Olympia & York SP Corp.* (1992), 9 O.R. (3d) 414 (Gen. Div.) and *Pembina Resources Ltd. v. Saskenergy Inc.*, (1993) Alta. L.R. (3d) 153 (C.A.).

⁸⁴ (2003) 35 B.L.R. (3d) 100 (Sup. Ct.) [hereinafter *AMEC*].

⁸⁵ AMEC had provided engineering consulting services to Nova for the expansion and upgrading of a chemical plant at Sarnia and the work had been completed in 1998, four-and-one-half years earlier. The parties’ contract provided that any liability which AMEC may have had under the contract would expire two years after the date the work was completed. The same contract provided: “Any dispute between the Parties that cannot be resolved by negotiation within 60 days shall be finally settled by arbitration pursuant to the International Chamber of Commerce Rules and procedures for Arbitration.”

⁸⁶ Sachs J. referred to both the domestic arbitration legislation and the international commercial arbitration legislation despite the fact that, by their provisions, they are mutually exclusive.

could, on its own motion, stay the proceedings and refer the dispute to arbitration.⁸⁷ Sachs J. stated:

“[T]he fact that neither party has clearly asked for a stay does not detract from the fact that this is a case where the parties have agreed to have their disputes dealt with through arbitration and, having reached that agreement, they should be encouraged by the courts ‘to hold their course’ in that regard, absent legitimate considerations to the contrary.

...

Proceeding to arbitration will necessitate some more delay but, taken as a whole, this delay is not a sufficient reason to depart from what I see to be an important principle—that parties who contractually agree to submit their dispute to arbitration should be held to that agreement, rather than being encouraged to separate out certain aspects of their dispute for determination by the courts in separate proceedings.”⁸⁸

AMEC’s application for a declaration was stayed and the parties were referred to arbitration, something neither of them asked for. Having once agreed their disputes “shall be finally settled by arbitration,” the parties were held to their contract, enhancing arbitral, if not party, autonomy.⁸⁹

2. The Use of *Heyman v. Darwins Ltd.*⁹⁰

The leading case under the old arbitration statutes in which the granting of a stay was discretionary was *Heyman*, a 1942 decision of the House of Lords. The four-step approach to deciding how to exercise the court’s discretion was described in that case as follows:

⁸⁷ She found such authority in s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 which provided: “A court, on its own initiative or on motion by any person, whether or not a party, may stay any proceeding in the court on such terms as are considered just.”

⁸⁸ *AMEC*, *supra* note 84, at paras. 28, 30.

⁸⁹ The parties could have agreed to terminate the arbitrator’s mandate under s. 14(1)(b) of the *OAA*.

⁹⁰ [1942] A.C. 356, [1942] 1 All E.R. 337 (H.L.) [hereinafter *Heyman* cited to A.C.].

“Where proceedings at law are instituted by one of the parties to a contract containing an arbitration clause and the other party, founding on the clause, applies for a stay, the first thing to be ascertained is the precise nature of the dispute which has arisen. The next question is whether the dispute is one which falls within the terms of the arbitration clause. Then [consider] whether the clause is still effective or whether something has happened to render it no longer operative. Finally... [determine] whether there is any sufficient reason why the matter in dispute should not be referred to arbitration.”⁹¹

Oddly enough, *Heyman* is the most often cited precedent in cases considering the mandatory stay provisions in the modern domestic arbitration legislation.⁹² Use of *Heyman*, however, implies the old discretion remains.⁹³

⁹¹ *Ibid.* at 370.

⁹² *Heyman* is cited, for example, in *AMEC*, *supra* note 84; *Axia Supernet Ltd. v. Bell West Inc.*, [2003] A.J. No. 283, online: QL (AJ) 2003 ABQB 195 [hereinafter *Axia*]; *Continental Commercial Systems Corp. v. Davies Telecheck International, Inc.*, [1995] B.C.J. No. 2440 (S.C.) [hereinafter *Continental*]; *Daigneault Holdings Ltd. (c.o.b. NorSask Aboriginal Consulting Group) v. Metis Nation of Sask Secretariate Inc.*, [2000] S.J. No. 390 (Q.B.); *Ontario v. Abilities Frontier Co-operative Homes Inc.*, (1996), 5 C.P.C. (4th) 81 (Ont. Gen. Div.), leave to appeal refused, [1997] O.J. No. 238 (C.A.), online: QL (OJ) [hereinafter *Abilities Frontier*]; *Thompson General Hospital v. CSL Hospital Services Ltd.*, [1996] M.J. No. 495 (Q.B.) [hereinafter *Thompson General Hospital*]. Many other cases merely cite *Abilities Frontier* for the proper approach but in that case, at page 86, Sharpe J. adopted the *Heyman* approach, relying on prior approval for it in *TIT2 Ltd. Partnership v. Canada*, [1994] O.R. (3d) 66, (1994), 19 B.L.R. (2d) 72 (Ont. Gen. Div.) [hereinafter *TIT2*]. See *e.g. Durham (Regional Municipality) v. Oshawa (City)*, [2003] O.J. No. 776 (Sup. Ct.) and *Mantini v. Smith Lyons LLP*, [2003] O.J. No. 1831 (C.A.), online: QL (OJ) at para.17 [hereinafter *Mantini*]. A reference to the approach taken in *TIT2*, as well to that in *Abilities Frontier*, is therefore a reference to the *Heyman* approach to stay applications.

⁹³ See *e.g. McCulloch v. Peat Marwick Thorne* (1991), 124 A.R. 267 (Q.B.). Perras J. found that the approach set out in *Heyman* was reflected in s. 7 of the new Alberta legislation. He refused to grant a stay, despite what he referred to as a “relatively encompassing” arbitration clause in a partnership agreement, because the plaintiff had alleged tortious conspiracy to remove him from an accounting partnership and loss of reputation and these matters were not capable of being the subject of arbitration under the Alberta Act. The decision was criticized by a member of the Alberta Law Reform Institute at a ULCC annual meeting for implying the old discretion remained through the use of stay rules from a decision made long before the new legislation significantly revamped the stay rules. See P.J.M. Lown, “Judicial Interpretation of the Uniform Arbitration Act” in Uniform Law Conference of Canada, *Proceedings of the Seventy-seventh Annual Meeting*, *supra* note 52 at app. K.

There are several challenges to the principle of party autonomy when courts use the *Heyman* approach. Its first step requires the “precise nature of the dispute” be determined. In *B & N Holdings Ltd. v. Acrylon Plastics MB (1983) Inc.*,⁹⁴ a tenant applied for a stay in order to submit a dispute to arbitration under the terms of a lease and Manitoba’s new legislation. Schulman J. referred to a 1990 Manitoba Court of Appeal decision, *Injector Wrap Corp. v. Agrico Canada Ltd.*,⁹⁵ which was, as Schulman J. noted, a case decided under the old legislation. In *Injector Wrap*, the Court of Appeal had held, relying on *Heyman*, that a litigant who wishes to obtain an order staying an action and referring the issue to arbitration must first file an affidavit showing the precise nature of the dispute between the parties.⁹⁶ In *B & N Holdings*, the tenant argued the different requirements of the modern legislation to no avail. Schulman J. concluded:

“[I]n order for these defendants to succeed on an application for a stay on the ground that the matter should be submitted to arbitration, the defendants must set out in affidavit form the nature of the dispute. The defendants must satisfy this requirement for two reasons. Firstly, as under the former statute, the statute requires that there be a ‘matter in dispute,’ and the court, on an application of this kind, must go through the steps of ascertaining the nature of the dispute and ascertaining whether the dispute is one which falls within the terms of the arbitration clause. Secondly, under subsection 2(e), the court is required to consider whether ‘the matter in dispute is a proper one for default or summary judgment.’”⁹⁷

In contrast to the high level of scrutiny given the nature of the dispute in *B & N Holdings*, other courts appear to simply review claims alleged in the pleadings.⁹⁸

⁹⁴ (1999), 135 Man. R. (2d) 95 (Q.B.) [hereinafter *B & N Holdings*].

⁹⁵ (1990), 67 Man. R. (2d) 158 (C.A.).

⁹⁶ *Ibid.* at 158-159.

⁹⁷ *B & N Holdings*, *supra* note 94 at para. 15. Schulman J. went on to find that, based on the very limited information the tenants provided, and despite not having a motion for summary judgment before him, s. 7(2)(e) applied.

⁹⁸ See *e.g.* the approach of the Ontario Court of Appeal in *Armstrong v. Northern Eyes Inc.*, [2001] O.J. No. 1085, online: QL (OJ), 2001 CarswellOnt 1100 (Ont. C.A.) online: eCarswell <http://www.ecarswell.com>, aff’d (2000), 8 B.L.R. (3d) 46, 133 O.A.C. 366, 48 O.R. (3d) 442, [2000] O.J. No. 1594 (Div. Ct.), online: QL (OJ) [hereinafter *Armstrong*].

The second step in the *Heyman* approach is for the court to determine whether the dispute or disputes fall within the terms of the arbitration clause. One of the most common issues raised in stay applications is whether the parties agreed to arbitrate the disputes before the courts, *i.e.*, whether the dispute is covered by the wording of their arbitration agreement.⁹⁹ That agreement can be interpreted either narrowly or liberally.

A more liberal approach to interpretation of arbitration clauses is often adopted when the court says nothing about the approach that should be taken to interpreting the legislative stay provisions.¹⁰⁰ In Québec, a liberal approach appears to be tied to the policy change evidenced by the legislature's approval and encouragement of arbitration.¹⁰¹ Most often, especially in Ontario, a court taking a liberal approach cites *Onex Corp. v. Ball Corp.*,¹⁰² a case decided under Ontario's international commercial arbitration legislation. In *Onex*, Blair J. had indicated that courts should not try to put too fine a distinction on nuances between words such as "under," "in relation to," or "in connection with" when interpreting the scope of arbitration clauses. He went on to say:

"At the very least, where the language of an arbitration clause is capable of bearing two interpretations, and on one of those interpretations fairly provides for arbitration, the courts should lean

⁹⁹ The requirement that the party commencing the court action be a "party to an arbitration agreement" has resulted in arguments resisting stays on the basis the plaintiff or petitioner was not a party to the arbitration agreement, but such arguments are less common than those about the scope of the agreement.

¹⁰⁰ See *e.g. Kwan & Kwan Ltd. v. Daimler Chrysler Canada Inc.* (2002), 2002 CarswellOnt 792 (Ont. Sup. Ct.) online : eCarswell <http://www.ecarswell.com>.

¹⁰¹ See *e.g. Condominiums Mont Saint-Sauveur Inc. c. Constructions Serge Sauvé Ltée*, [1990] A.Q. No. 2052 (C.A.), online: QL (AQ) [hereinafter *Condominiums*]; *Clavel c. Productions Musicales Donald K. Donald Inc.*, [1994] A.Q. No. 411 (C.A.), online: QL (AQ) [hereinafter *Clavel*]; *Bridgepoint International (Canada) Inc. v. Ericsson Canada Inc.*, [2001] Q.J. No. 2470 (Sup. Ct.), online: QL (QJ).

¹⁰² (1994), 12 B.L.R. (2d) 151 (Ont. Gen. Div.) [hereinafter *Onex*]. *Agrifoods International Cooperative Ltd. v. Agropur, Coopérative Agro-Alimentaire* (2001), 2001 CarswellOnt 911 (Ont. Sup. Ct.) online: eCarswell <http://www.ecarswell.com> at para. 26 and *Thompson General Hospital*, *supra* note 92 at para. 20, are two cases which cite *Onex* for this purpose.

towards honouring that option, given the recent developments in the law in this regard to which I have earlier referred.”¹⁰³

Many cases, however, are still quite concerned with the nuanced distinctions between phrases such as “under”, “arising out of” or “arising in connection with.”¹⁰⁴ *Heyman* figures in these cases too, cited for the finding that the words “arising out of” have a wider meaning than “under.”¹⁰⁵ As well, the distinction made in *Heyman* between “limited” or “executory” arbitration clauses and clauses of a “universal” character which are a “general resort to arbitration” remains in use in Ontario.¹⁰⁶

Deference to arbitration and respect for party autonomy would appear to require a more pragmatic and policy-oriented approach to determining whether a dispute before the court is within the scope of the parties’ arbitration agreement. Close attention to the exact words used and how they have been interpreted over the past sixty or seventy years and the categorization of types of clauses as “universal” or “limited” has been disparaged as the “old strict constructionist approach,”¹⁰⁷ more in keeping with judicial scrutiny of the boundaries of arbitration.

3. Who Decides Whether the Disputes are Within the Scope of the Arbitration Agreement?

It is true that an arbitration agreement can be drafted as narrowly or broadly as the parties wish, referring all or only certain disputes to arbitration. The real issue, however, is *who* determines whether the dispute

¹⁰³ *Onex, ibid.* at 160. One commentator said of this passage from *Onex*, “This statement provides both a refreshing approach to the conflicting authorities on defining the scope of an arbitration clause, and a strong endorsement of party autonomy.” See Pepper, *supra* note 45 at para. 37 [footnote omitted].

¹⁰⁴ See e.g. *Campney & Murphy v. Bernard & Partners*, [2002] F.C.J. No. 1520, online: QL (FCJ), 2002 FCT 1136 (T.D.) (decided under the *BCCAA*); *D.G. Jewelry Inc. v. Cyberdiam Canada Ltd.*, [2002] O.J. No. 1465 (S.C.J.), online: QL (OJ); and *Mantini*, *supra* note 92.

¹⁰⁵ *Heyman*, *supra* note 90 at 356, Porter L.J.

¹⁰⁶ See e.g. *Deluce Holdings*, *supra* note 79 at 150 and *Cityscape Richmond Corp. v. Vanbots Construction Corp.* (2001), [2001] O.J. No. 638, online: QL (OJ), 8 C.L.R. (3d) 196, 2001 CarswellOnt 517 (Ont. Sup. Ct.) online: eCarswell <http://www.ecarswell.com> at para. 21.

¹⁰⁷ Branson, *supra* note 42 at 52.

before the court is within the scope of the arbitration agreement. All of the modern domestic arbitration legislation provides that an arbitrator may rule on his own jurisdiction to conduct the arbitration—the *Competence de la Competence* principle.¹⁰⁸ They all state that in doing so, the arbitrator may rule on objections to the existence or validity of the arbitration agreement. They also all provide that, if the arbitration agreement is a clause in another agreement, an arbitration clause is to be treated as an independent agreement for the purposes of ruling on jurisdiction and may survive even if the main agreement is found to be invalid.¹⁰⁹ Despite the existence of the last mentioned provision in the Ontario, Alberta and Manitoba domestic legislation, some courts in those provinces rely on *Heyman* for the independence of the arbitration clause principle¹¹⁰ and not the statutory provision.

The difference in approaches to the question of who decides whether the disputes before the courts are within the scope of the arbitration clause can be illustrated by contrasting two cases from British Columbia. Deference to the arbitrator's authority to decide his own jurisdiction is evident in *Swanson v. Mitchell Bay Properties Ltd.*,¹¹¹ a case in which the sole issue was whether all of the plaintiff's claims were within the scope of the arbitration clause. That case is one of the very few British Columbia cases to take note of section 22(1) of the *BCCAA*. Shabbits J. noted that section 22(1) states that unless the parties otherwise agreed the rules of the *BCCAA* for the conduct of domestic commercial arbitrations applied. Rule 20(1) of that arbitral organization stated the arbitral tribunal may rule on its own jurisdiction,

¹⁰⁸ See *AAA*, *supra* note 4, s. 17(1); *OAA*, *supra* note 5, s. 17(1); *SAA*, *supra* note 6, s. 18; *MAA*, *supra* note 8, s. 17; *NSCAA*, *supra* note 9, s. 19; *NCAA*, *supra* note 7, s. 17. The *BCCAA* provision is different. S. 22(1) merely states that the rules for domestic commercial arbitrations of the British Columbia International Commercial Arbitration Centre (the *BCICAC*) apply unless the parties otherwise agree. Those incorporated rules include the *Competence de la Competence* principle.

¹⁰⁹ See *AAA*, *ibid.*, s. 17(3); *SAA*, *ibid.*, s. 18(3); *OAA*, *ibid.*, s. 17(2); *MAA*, *ibid.*, s. 17(3); *NSCAA*, *ibid.*, s. 19(3); *NCAA*, *ibid.*, s. 17(3). Again the *BCCAA* merely provides in s. 22(1) that the domestic commercial arbitration rules of the *BCICAC* are applicable unless the parties otherwise agree and those rules include the independence of the arbitration clause provision.

¹¹⁰ For reliance on *Heyman*, *supra* note 90, see *e.g.* *Axia*, *supra* note 92; *B & N Holdings*, *supra* note 94; *Thompson General Hospital*, *supra* note 92.

¹¹¹ 2002 BCSC 1434, 2002 CarswellBC 2485 (B.C.S.C.) online: eCarswell <http://www.ecarswell.com>.

including on any objection with respect to the existence or validity of the arbitration agreement. The court deferred to the arbitrator's authority in the first instance.¹¹²

That deferential approach can be contrasted with the judicial scrutiny brought to bear on the same issue in *Maier v. Morelli Chertkow*.¹¹³ A former partner commenced an action against the law firm he was forced to leave and the firm applied for a stay based on the partnership agreement's arbitration clause. Maier opposed the application on the basis there was an issue as to whether the partnership agreement was valid and binding and argued that where there is that type of issue, it cannot go to the arbitrator because it effectively requires the arbitrator to decide an issue outside his jurisdiction. Maier relied on *Heyman* which, among other things, held that where there is a dispute as to whether there has ever been a binding contract between the parties, such a dispute cannot be within the scope of an arbitration clause in the challenged contract. Williams J. held:

“In my view, that issue (whether a party is bound by the arbitration clause) *will be resolved by the court*, in the context of an application such as the present one, assuming sufficient evidence exists to enable a finding to be made. I take this from a plain reading of section 15 of the Commercial Arbitration Act ...

For one party to simply contend that it does not consider itself bound by the arbitration clause cannot, standing alone, entitle that party to avoid the application of the clause. As I read subsection (2), *the Court is mandated to determine* whether the arbitration agreement (here, incorporated into the Partnership Agreement) is ‘void, inoperative or incapable of being performed’, or, alternatively, whether it is valid and in force.”¹¹⁴

¹¹² *Clavel*, *supra* note 101, is another example of deference to the arbitrator's authority to decide his own jurisdiction. The court acknowledged the dispute before the court was not an ordinary kind of dispute under the parties' contract because it involved the deliberate and gratuitous sabotage of a rock concert. Nevertheless, the court held that because arbitrators had the power to decide their own competence under art. 943 C.C.P., subject to possible review by the court, it was up to the arbitrators to decide, in the first instance, whether the arbitration clause covered this dispute.

¹¹³ (2003), 2003 CarswellBC 35 (B.C.S.C.) online: eCarswell <http://www.ecarswell.com>. There is no mention in this case that the parties had chosen any particular arbitration rules.

¹¹⁴ *Maier*, *ibid.* at para. 16 [emphasis added].

There is also said to be a “somewhat disturbing trend”,¹¹⁵ adverse to party autonomy, in cases relying upon statements of Blair J. in *Deluce Holdings Inc. v. Air Canada*.¹¹⁶ That case considered the interplay of the parties’ shareholder agreement, which included an arbitration clause, with the oppression remedy provisions of the *Canada Business Corporations Act*. Blair J. held that the real subject matter of the dispute was not the fair market value of the shares but one which “strikes at the very underpinning of the contractual mechanism itself.”¹¹⁷ In staying the arbitration proceedings, he stated that “[t]he question is whether that oppression is such that it destroys the very underpinning of the arbitration structure, thus taking the subject of the dispute out of the ‘matters to be submitted to arbitration under the agreement.’”¹¹⁸ The case is critiqued, however, for the court’s usurpation of the arbitration panel’s authority to rule on its own jurisdiction.¹¹⁹ In addition, the reasoning in *Deluce Holdings* is seen as an invitation to narrowly construe the ambit of arbitration clauses and to find rather too easily that the conduct under consideration “destroys the very underpinning of the arbitration structure.”¹²⁰

4. Reasons to Refuse a Stay of Court Proceedings

The modern domestic arbitration legislation in all but British Columbia lists five reasons the court may refuse a stay even if the arbitration agreement covers the disputes before the court.¹²¹ Only one of those five is frequently an issue, the ground that the arbitration agreement is invalid. In British

¹¹⁵ Pepper, *supra* note 45 at para. 48.

¹¹⁶ *Supra* note 79.

¹¹⁷ *Ibid.* at 150.

¹¹⁸ *Ibid.* at 149.

¹¹⁹ Pepper, *supra* note 45 at para. 50.

¹²⁰ *Ibid.* at para. 51. Cases that rely on *Deluce Holdings*, *supra* note 79, for this point include *Jaffasweet Juices Ltd. v. Michael J. Firestone & Associates* (1996), 45 C.P.C. (3d) 350 (Ont. Gen. Div.) and *Kightley v. Beneteau*, [1999] O.J. No. 1892 (Sup. Ct.), online: QL (OJ) [hereinafter *Kightley*].

¹²¹ The five grounds are: (1) a party entered into the arbitration agreement while under a legal incapacity; (2) the arbitration agreement is invalid; (3) the subject-matter of the dispute is not capable of being the subject of arbitration under the relevant province’s law; (4) the motion was brought with undue delay; and (5) the matter is a proper one for default or summary judgment.

Columbia, where the legislation is less specific and more Model Law-like on this point, similar issues are raised because the court is required to refer the parties to arbitration unless it finds the arbitration agreement is null and void, inoperative, or incapable of being performed.¹²²

In dealing with arguments alleging the arbitration agreement is invalid and a stay should therefore be refused, some courts ignore the provision stating that the arbitration clause in a main agreement shall be considered a separate contract for the purposes of determining the arbitrator's jurisdiction and may survive even if the main agreement is found to be invalid.¹²³ Other courts ignore the fact that it is invalidity of the arbitration agreement, not the main agreement, that is listed as a reason to refuse a stay. For example, in the context of a wrongful dismissal suit in which the employer attempted to invoke an arbitration clause, Caswell J. in *Novak v. Rodak*,¹²⁴ while acknowledging that the arbitration clause was very broad, declined to exercise what she called her "discretion" to stay on the ground that the validity of the main agreement was in issue. Why the validity of the main agreement was relevant to the validity of the arbitration clause in that main agreement was not discussed. Neither was the source of the court's discretion.

Part of the problem in cases such as *Novak* appears to stem from *Heyman* again and also older Supreme Court of Canada cases, such as *Stokes-Stephens Oil Co. v. McNaught*,¹²⁵ which adopted the principle that "if one party to the alleged contract is contending that it is void *ab initio* (because, for example, the making of such a contract is illegal), the arbitration clause cannot operate, for on this view the clause itself is also void."¹²⁶

¹²² See s. 15(2) *BCCAA* in Appendix A, below.

¹²³ See *e.g. G. v. G.* (2000), 79 Alta. L.R. (3d) 153, [2000] 7 W.W.R. 363 (Q.B.) at para. 19.

¹²⁴ [1999] O.J. No. 4996 (Ont. Sup. Ct.), online: QL (OJ) [hereinafter *Novak*]. *Wat-Char Holdings Ltd. v. Deltram Corp.*, [1999] O.J. No. 109 (Ont. Gen. Div.), online: QL (OJ) is a very similar case in which the court also declined to exercise its "discretion" to stay legal proceedings.

¹²⁵ (1918), 57 S.C.R. 549, 44 D.L.R. 682, [1918] 2 W.W.R. 22 (S.C.C.) [hereinafter *McNaught* cited to S.C.R.].

¹²⁶ *Ibid.* at 559.

These old authorities were considered in *Armstrong v. Northern Eyes Inc.*,¹²⁷ which concluded that reliance upon them was questionable due to the clear shift in policy in the legislation governing arbitration. Pitt J. refused to follow the older authorities, stating:

“Presumably, parties seeking a stay to pursue arbitration will not acknowledge invalidity. There are, therefore, two possible ways to interpret section 7(2)2 of the Arbitration Act. Either it applies wherever the party resisting arbitration argues for invalidity, or where the court makes a *prima facie determination that invalidity is a serious issue*. In my view, the latter is the more reasonable interpretation, as the former would mean a mere allegation of invalidity would doom any attempt to invoke an arbitration clause in all cases, even where it is quite clear that is what the parties wanted when they made the agreement.”¹²⁸

In the above passage, Pitt J. suggested, as a way to approach section 7(2) in which the invalidity of the arbitration agreement is a reason to refuse a stay, that the court make a “prima facie determination” that the alleged invalidity is a “serious issue”. However, the agreement which was alleged to be invalid in *MG Canada* was the main agreement in which the arbitration clause was contained. What of the independence of the arbitration clause and the possibility it might survive any invalidity of the main agreement?

A more deferential attitude to party autonomy and a more deferential approach to arbitration acknowledges that the validity of the arbitration agreement can be attacked only if the grounds for attack specifically affect that part of the agreement and not just the contract in general.¹²⁹ In a less deferential approach, doctrines such as fraud, unconscionability and duress which are alleged to affect the main agreement have been invoked as grounds for a court to refuse a stay.¹³⁰

¹²⁷ (2000), 8 B.L.R. (3d) 46 (Ont. Div. Ct.). See also *MG Canada Ltd. v. Melitta Canada Inc.* (2001), 11 C.P.C. (5th) 391, 18 B.L.R. (3d) 78 (Ont. S.C.J.) [hereinafter *MG Canada*].

¹²⁸ *MG Canada, ibid.* at para. 18 [emphasis added].

¹²⁹ *New Zealand Law Commission, supra* note 26 at 140.

¹³⁰ Unconscionability is the most common basis for allegations that the arbitration agreement itself is invalid. It has been raised several times in the franchise context but as most franchisors are American corporations the governing statutes are usually the ICA Acts. In such cases, many of the reasons for staying Canadian court actions in favour of

5. Partial Stays

In all of the new domestic arbitration legislation except that of British Columbia, the provision governing stays contains a subsection providing that the court *may* stay those matters in dispute before it which are dealt with in the arbitration agreement and allow the court action to continue with respect to the other matters.¹³¹ In the exercise of this discretion, a court must find that the arbitration agreement deals only with some of the matters in dispute and that “it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.” The mere existence of this subsection causes some problems. One of its preconditions is that the court must find the arbitration agreement deals with only some of the matters in dispute and not others. It seems to demand the kind of close scrutiny called for in the *Heyman* approach and appears hostile to an arbitrator’s being able to determine his own jurisdiction.

One specific issue that has arisen is whether the court has discretion to refuse a stay altogether and allow the entire court proceeding to continue if a partial stay is not reasonable or whether the only alternative is for a court to grant a complete stay of the court proceedings, given the section’s introductory and mandatory “shall stay” requirement. As Stewart J. in *MacKay v. Applied Microelectronics Inc.*¹³² noted, there is case law adopting both interpretations.¹³³ Staying the entire court proceeding when a severing of causes of action is not “reasonable” is more deferential to the autonomy of the arbitral process. Referring none of the issues to arbitration, even though some of them are covered by the parties’ arbitration agreement, is usually

arbitration in the United States rely on the Canadian franchisees not being vulnerable consumers and on American cases considering the same issues and the same franchise agreements. See *e.g. Ellis v. Subway Franchise Systems of Canada Ltd.* (2000), 8 B.L.R. (3d) 55, 2000 CarswellOnt 1659 (Ont. Sup. Ct.) online: eCarswell <http://www.ecarswell.com>; *Continental*, *supra* note 92; *Petrolon Distribution Inc v. Petro-Lon Canada Ltd.* (1995), 19 B.L.R. (2d) 123 at 135 (Ont. Gen. Div.); *D.L.T. Holdings Inc. v. Grow Biz International, Inc.*, [2001] P.E.I.J. No. 29 (S.C. (T.D.)), online: QL (PEIJ).

¹³¹ See *AAA*, *supra* note 4, s. 7(5); *OAA*, *supra* note 5, s. 7(5); *SAA*, *supra* note 6, s. 8(5); *MAA*, *supra* note 8, s. 7(5); *NSCAA*, *supra* note 9, s. 9(5); *NCAA*, *supra* note 7, s. 7(5). See Appendix A, below for the wording of the statutes.

¹³² [2001] N.S.J. No. 342 (S.C.), online: QL (NSJ).

¹³³ See *Rosedale Motors Inc. v. Petro-Canada Inc.*, [2001] O.J. No. 5368 (Div. Ct.), rev’g (1998), 42 O.R. (3d) 776 (Gen. Div.); *Hammer Pizza Ltd. v. Domino’s Pizza of Canada Ltd.*, [1997] A.J. No. 67 (Q.B.), online: QL (AJ); *Kightley*, *supra* note 120.

done in the name of the inefficiency of multiple proceedings and the possibility of inconsistent results from the two different forums.¹³⁴

IV. THE CONSUMERIZATION OF ARBITRATION AND THE NORM OF PARTY AUTONOMY

In 1997, one American commentator noted that the era of “consumerized arbitration” had arrived in the United States:

“A sampling of judicial opinion and published commentary revealed mounting preoccupation with the use of arbitration in contracts involving employees, investors, franchisees, consumers of medical care and a host of other goods and services. On this broad front lie unprecedented challenges and perils for consensual conflict resolution. In contrast to the historical roots of commercial arbitration, members of the public were finding themselves steered into a process about which they knew little by virtue of boilerplate in a mass-produced contract presented by employers or businesses.”¹³⁵

A variety of consumer groups in the United States have made arbitration a major issue. They allege mandatory arbitration clauses are used to deny millions of Americans their right to sue in court; that they undermine consumer protections designed to level the playing field between big business and individuals; that private arbitration is much more expensive than going to court;¹³⁶ that mandatory arbitration clauses are used to defeat class actions; and that a pro-business bias is built into the arbitration

¹³⁴ See e.g. *Angelo Breda Limited v. Guizzetti*, [1995] O.J. No. 3250 (Gen. Div.), online: QL (OJ) and *Self v. Abridgean Inc.*, [2001] N.S.J. No. 493, online: QL (NSJ), 2001 NSSC 191. See also the discussion of these issues in the context of conflicts and choice of law in the paper by C.A. Kent collected in these Conference proceedings.

¹³⁵ T.J. Stipanowich, “The Growing Debate Over ‘Consumerized’ Arbitration: Adding Cole to the Fire” *Dispute Resolution Magazine* 3:4 (Summer 1997) 20.

¹³⁶ One of the main problems in many of the American cases was the adoption of the rules of the American Arbitration Association (AAA) in arbitration clauses. Those rules required the initiating party to pay the filing fee and the costs were prohibitive for many consumers, sometimes \$1,500 or \$2,000. The AAA recently announced it would cap consumer arbitration costs at \$375 for cases involving less than \$75,000 and require the business to pay the remainder. It also announced it would no longer enforce pre-dispute arbitration clauses in health insurance contracts.

system.¹³⁷ Arbitration in the consumer context has even been an election issue in the United States.¹³⁸

Arbitration in the employment arena has attracted special criticism in the United States, where pre-dispute agreements to arbitrate employment disputes of all types, including allegations of discrimination and sexual harassment, became a common condition of non-unionized employment in the 1990s.¹³⁹ Arbitration, and especially mandatory, pre-dispute agreements to arbitrate are said to be unlawfully coercive and a form of second-class justice.¹⁴⁰ Even the National Academy of Arbitrators announced its opposition to such practices.¹⁴¹ Some courts refused to uphold such agreements on the basis that employees' waivers of a judicial forum for claims such as sexual harassment and sex discrimination were not knowing or voluntary,¹⁴² but most lower courts upheld such agreements.

Bearing in mind that changes in judicial attitude in favour of party autonomy in arbitration began ten to fifteen years earlier in the United States than in Canada, is there any indication that these types of concerns will be

¹³⁷ State Action, <http://www.cfpa.org/issues/mandatoryarbitration/index.cfm> (date accessed: August 18, 2003)

¹³⁸ In the last state-wide election in Alabama, visible and plentiful placards promoted or derided arbitration, proclaiming such slogans as "Arbitration is a license to steal" or "Trial lawyers win—enough said." See F.M. Haston, III, "Arbitration in Alabama: Of Road Signs and Reality" *Ala. Law.* 62 (January 2001) 63; M.C. McDonald & K.E. Reid, "Arbitration Opponents Barking up the Wrong Branch" *Ala. Law.* 62 (January 2001) 56; T.J. Methvin, "Alabama—The Arbitration State" *Ala. Law.* 62 (January 2001) 48; M.B. Hutchens, "At What Costs?: When Consumers Cannot Afford the Costs of Arbitration in Alabama" (2002) 53 *Ala. L. Rev.* 599. The issues that had arisen in the consumer context—the reasons why arbitration was an election issue—included unconscionability, mutuality, post-contract notification, fraud as a defence, non-signatory challenges, the effects on class actions, and arbitration's applicability in product warranty cases. Interestingly enough, pre-dispute arbitration clauses in consumer contracts are illegal *per se* in Alabama. In addition, consumers have to waive their Seventh Amendment rights to a jury trial when they sign an arbitration provision.

¹³⁹ See Gorman, "The *Gilmer* Decision and the Private Arbitration of Public Law Disputes" (1995) *U. Ill. L. Rev.* 635 and Hoffman, "Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?" (1996) 17 *Berkeley J. Emp. & Lab. Law* 131.

¹⁴⁰ See *e.g.* R. Alleyne, "Statutory and Discriminatory Claims: Rights 'Waived' and Lost in the Arbitration Forum" (1996) 13 *Hofstra Labor Law Journal* 381.

¹⁴¹ Stipanowich, *supra* note 135.

¹⁴² See *e.g. Prudential Ins. Co. of America v. Lai*, 42 F.3d 1299 (9th Cir. 1994).

coming before Canadian courts in the near future? The issue of the enforcement of arbitration clauses in pre-employment contracts has recently arisen in this country, as has the use of arbitration agreements as risk management tools to avoid class actions. Based on the American experience, these few cases may well be just the beginning.

In *Huras v. Primerica Financial Services Ltd.*,¹⁴³ potential employees of the defendant were required to undergo training without pay prior to commencing employment, contrary to the British Columbia *Employment Standards Act*. The defendant applied for a stay of the class proceedings on the basis of an arbitration provision in the employment agreements. The defendant's application was dismissed on the ground that the employment contracts were entered into only when the employees began full-time employment, after the "no pay" training. That timing point was the only point on which the judgment of Cumming J. in Chambers was upheld by the Court of Appeal. It is, however, the comments of Cumming J. on the strictly *obiter* matters of exclusion of mandatory law and unconscionability that are of more interest in connection with the norm of party autonomy:

"Very few, if any, of the putative class members would even consider proceeding to an arbitration of a dispute with Primerica given the cost of paying for one's own arbitrator in the first instance and the risk of substantial costs in the event of failure. The arbitration clause mandates a three-person arbitration panel. There are cost sanctions if the plaintiff is unsuccessful at arbitration.

Two of the *normative purposes* of an arbitration provision are to expedite the resolution of a dispute and to save costs that would be seen in a court action. The arbitration provision in the case at hand is to the opposite effect. As I have said, someone in the plaintiff's position is not as a practical reality going to seek an arbitration. At the same time, if the arbitration provision is binding, there is not recourse to a court, including Small Claims Court. Thus, the provision inhibits and effectively frustrates aggrieved individuals from being able to obtain any resolution of disputes through a neutral, independent adjudicator. Primerica submits that the arbitration clause is enforceable even if utilization of the clause might prove

¹⁴³ *Huras v. Primerica Financial Services Ltd.*, [2000] O.J. No. 1474, online: QL (OJ), [2000] O.T.C. 533, (2000) 13 C.P.C. (5th) 114 (Sup. Ct.), aff'd (2000), 137 O.A.C. 79 (C.A.) [hereinafter *Huras*].

inconvenient or more costly to the plaintiff and similarly-situated persons.

I disagree. The existence of the arbitration clause in Primerica's contractual documents gives a superficial appearance of fairness to the unsophisticated. In reality, the arbitration clause serves to prevent any resolution of a dispute *other than upon the terms dictated by Primerica*. The existence of the arbitration clause is *unfair*. It would be perverse and *in conflict with the normative purposes* of an arbitration clause to enforce the one at hand.”¹⁴⁴

Although explicitly neither approved of nor disapproved of by the Court of Appeal, these comments suggest a deeper look at the principle of party autonomy.

However, the more recent case of *Kanitz v. Rogers Cable Inc.*¹⁴⁵ takes a very different approach. *Kanitz*, decided in 2002, is the first Canadian case to deal with the issue of whether the right to pursue a class action can be contracted away in an arbitration agreement. In that case the answer was “yes” and class proceedings were stayed because of the arbitration clause.

The arbitration clause in that case arose in rather unusual circumstances. The plaintiffs in the proposed class action were former subscribers to the defendant’s high-speed Internet access service. The user agreement between the defendant and subscribers provided that the defendant could amend that agreement any time by posting notice of such changes on its web site. Continued use of the service following notice meant that the subscriber agreed to the changes. The defendant amended the user agreement to add an arbitration clause and a waiver of the right to commence or participate in a class action against the defendant and then posted the amendment on its web site. Nordheimer J. held that the terms of the amending provision in the original user’s agreement placed a duty on users to check the web site to determine if any changes had been made. Applying *Rudder v. Microsoft Corp.*,¹⁴⁶ he held that reviewing five screens to get to the user agreement and

¹⁴⁴ *Ibid.* at paras. 42-44 [emphasis added].

¹⁴⁵ [2002] O.J. No. 665, online: QL (OJ), [2002] O.T.C. 143, (2002) 21 B.L.R. (3d) 104, (2002) 16 C.P.C. (5th) 84, (2002) 58 O.R. (3d) 299 (Sup. Ct.) [hereinafter *Kanitz*].

¹⁴⁶ [1999] O.J. No. 3778, online: QL (OJ), (1999) 106 O.T.C. 381, (1999) 47 C.C.L.T. (2d) 168, (1999) 40 C.P.C. (4th) 394, (1999) 2 C.P.R. (4th) 474 [hereinafter *Rudder*]. *Rudder* was a choice of forum and choice of law case, and not an arbitration case, but it also involved an application for a stay of intended class proceedings. Microsoft based its stay

then scrolling down the user agreement to find the separate arbitration clause with its own heading does not mean the amendment is “buried” and does not make the amendment analogous to the fine print on the back of rent-a-car agreements. Nordheimer J. therefore found there was an arbitration agreement. As a result, he held there was a mandatory stay of any action under section 7(1) of the *OAA* unless one of the exceptions in section 7(2) was applicable.

The plaintiffs argued the arbitration agreement was invalid and its subject-matter was not arbitrable. They argued it was invalid because it was unconscionable, relying on the lower court’s decision in *Huras*. Nordheimer J. dealt with this argument by first discussing the standard to be applied in deciding whether any of the exceptions applied. He adopted the conclusions of Hart J. in the Alberta decision of *G. v. G.*,¹⁴⁷ saying the mere suggestion of invalidity was not enough because “it would effectively negate the clear legislative intent to promote arbitral autonomy.”¹⁴⁸ He acknowledged there clearly was an inequality of bargaining power between a single consumer and a corporation the size of Rogers. As he also noted, in reality there was no bargaining at all; it was a “take it or leave it” form of contract.¹⁴⁹ However, he rejected the argument that the mere imposition of a clause mandating arbitration and waiving rights to class actions was evidence that Rogers took advantage of its superior bargaining power. Neither did he find the clause analogous to the one in *Huras*. The plaintiffs had argued the prohibition

application on an alleged agreement that the courts in King County in Washington would have exclusive jurisdiction. In analyzing how to approach forum selection clauses, Winkler J. drew on *Sarabia v. Oceanic Mindoro (The)* (1996), 4 C.P.C. (4th) 11 at 20 (B.C.C.A.), leave to appeal denied [1997] S.C.C.A. No. 69, online: QL (SCCA) where Huddart J. adopted the view that forum selection clauses should be treated with the same deference as arbitration agreements, stating they were “fundamentally similar.” The plaintiffs in *Rudder* had attacked the agreement on the basis of its form, and in particular argued that the necessity to scroll down the Member’s Agreement to find the choice of forum clause made it analogous to “fine print” in hard copy contracts. Winkler J. rejected the analogy to “fine print”, holding that giving effect to this argument “would lead to chaos in the marketplace, render ineffectual electronic commerce and undermine the integrity of any agreement entered into through this medium”, *Rudder, ibid.* at para. 16.

¹⁴⁷ *G. v. G.*, *supra* note 123.

¹⁴⁸ *Ibid.* at para. 25, cited in *Kanitz, supra* note 145 at para. 35.

¹⁴⁹ *Kanitz, supra* note 145 at para. 38.

against class actions defeated the public policy behind the *Class Proceedings Act, 1992*,¹⁵⁰ and was for that reason unconscionable.

Class action legislation is generally seen as having three underlying policy objectives: first, there is a goal of facilitating access to justice for claimants of relatively small amounts of money; second, the legislation seeks to achieve cost efficiencies and economies in the use of resources by providing that common issues be litigated in a single proceeding involving many claimants; and, third, by facilitating access to justice, the legislation is said to act as a mode of regulating business conduct.¹⁵¹ The public policy argument was rejected on the basis the Ontario courts had always held that statute was a procedural statute, not a substantive statute, whereas the arbitration clause in *Huras* was characterized as one denying the plaintiffs' mandatory legal rights.

Like Cumming J. in *Huras*, the court in *Kanitz* addressed the issue of whether the arbitration clause was, in effect, a waiver of remedy because no customer would pursue arbitration for the amount involved. On this point, the court adopted observations made by Chief Justice Rehnquist of the United States Supreme Court in *Green Tree Financial Corp.-Alabama v. Randolph*.¹⁵² Instead of acknowledging that few of the potential class members would even consider proceeding to arbitration due to the cost of paying for their "judges", as Cumming J. did in *Huras*, the deciding factor in *Kanitz* was that there was no evidence on the record that any one customer was put off from arbitrating due to cost and no evidence of the cost of arbitration.

Most Canadian provinces today have legislation facilitating class proceedings.¹⁵³ Even in those provinces without specific statutes, class

¹⁵⁰ *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

¹⁵¹ See *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 [hereinafter *Dutton*]. See also *Huras*, *supra* note 143 at para. 45.

¹⁵² 531 U.S. 79 (2000) at 90-91. The *Green Tree Financial Corp.-Alabama* case figured prominently in making arbitration an election issue in Alabama recently. See *supra* note 128.

¹⁵³ See the *Class Proceedings Act, 1992*, *supra* note 150; *Class Proceedings Act*, R.S.B.C. 1996, c. 50; *Class Proceedings Act*, C.C.S.M. c. C130; *Newfoundland and Labrador Class Actions Act*, S.N.L. 2001, c. 18.1; C.C.P., Book IX and *Act Respecting the Class Action*, R.S.Q., c. R-2.1; *Class Actions Act*, S.S. 2001, c. 12.01; and the *Federal Court Rules*, as am. by Rules Amending the Federal Court Rules, 1998, SOR/2002-417, s. 17.

proceedings are now available under the traditional representative rule as a result of the Supreme Court of Canada decision in *Western Canadian Shopping Centres Inc. v. Dutton*.¹⁵⁴ The reasoning in both *Huras* and *Kanitz* therefore has wide applicability, as evidenced in part by the dismay with which the result in the *Dutton* case has been greeted in some circles. According to one oil and gas lawyer, it means that “plaintiffs are now granted access to the Courts with claims which, if taken on an individual basis, would be uneconomic.”¹⁵⁵ Defendants do not welcome legislative or judicial facilitation of class actions, especially if plaintiffs have small claims that are not viable if pursued individually.¹⁵⁶

Reaction to *Kanitz* in those same circles has, on the other hand, been much more positive. A number of the larger corporate commercial law firms in Canada have begun to tout the benefits of arbitration agreements as “class action risk management tools.”¹⁵⁷ The Co-Chair of Macleod Dixon’s Class Action Practice Group, for example, concluded a brief article summarizing the *Kanitz* decision with the following advice on managing corporate exposure to class proceedings:

“While the decision in [*Kanitz*] may be distinguished on a variety of grounds, business enterprises who contract with numerous customers using standard form agreements would be well advised to take a hard look at using arbitration clauses as part of their risk management strategy.”¹⁵⁸

Alberta introduced a *Class Proceedings Act*, S.A. 2003, c. C-16.5 [Bill 25, 2003], and it received Royal Assent on May 16, 2003 but was not yet proclaimed by June 2003.

¹⁵⁴ *Supra* note 151.

¹⁵⁵ D. McGrath, “Avoiding Class Actions in the Oil & Gas Industry”, available at Blake Cassels & Graydon LLP, http://www.blakes.com/english/publications/bog/bogjulaug02_class_actions.asp.

¹⁵⁶ W.K. Branch, *Class Actions in Canada* (Aurora: Canada Law Book, 2003) at 6-4, 6.200.

¹⁵⁷ See e.g. A.D. Borrell, “Arbitration and Choice of Law Provisions as Class Actions Risk Management Tools” (Vancouver 2002) (published on the web site of Fasken Martineau DuMoulin LLP at <http://www.fasken.com>, Information Resources, Publications, Class Actions); S.K. Leiti, “Ontario Court Forces Proposed Class Action Plaintiffs to Arbitrate Claims” in *Vantage: Class Actions Newsflash*, Macleod Dixon LLP, Fall 2002; McGrath, *supra* note 155.

¹⁵⁸ Leiti, *ibid.*

Dalton McGrath of Blake, Cassels & Graydon was even more explicit when he advised that:

“[a]lthough many factors are considered by the Court in determining whether to certify a class action, the use of an arbitration clause may provide a simple and expedient method of defending expensive and time-consuming class action proceedings which may otherwise arise from the many standard form contracts executed routinely in the oil and gas industry.”¹⁵⁹

Other jurisdictions which have modeled their reformed arbitration legislation on the Model Law have incorporated consumer protection into their new legislation. They did so in the name of party autonomy. For example, the New Zealand Law Commission’s 1991 draft domestic arbitration legislation states that when a consumer enters into a contract which contains an arbitration clause, the arbitration clause is enforceable against the consumer only if the consumer, in a separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it.¹⁶⁰ It also provides that non-compliance means the arbitration agreement shall be treated as “inoperative” in the words of the Model Law. The Law Commission defended this special treatment for consumer arbitration agreements on the basis of the Contractual Theory:

“Our approach to arbitration is premised on a recognition of its contractual nature. The general law of contracts assumes that parties who have voluntarily undertaken obligations as part of a bargain or agreement should be held to those obligations or pay damages should

¹⁵⁹ McGrath, *supra* note 155.

¹⁶⁰ *New Zealand Law Commission, supra* note 26 at 139-146. The *Consumer Arbitration Agreements Act 1988* (UK) provides that arbitration cannot be enforced against a consumer unless the consumer gives written consent after the dispute has arisen, or submitted to the arbitration, or where a court makes an order that it is not detrimental to the interest of the consumer for the dispute to be referred to arbitration having regard to, in particular, the availability of legal aid and the expense which may be involved in arbitration. See G.G. Howells, “The Consumer Arbitration Agreements Act 1988” *Company Lawyer* 10 (1989) 20, who argues,

“[t]he objection is to small print clauses which make arbitration a compulsory alternative to the courts. The average consumer is unlikely to read these clauses, if he does read then will probably not understand them and even if he does object to the clause he is unlikely to be able to buy the goods or services without accepting the clause.”

they breach them. The assumption accords with reality and expectations in the case of a transaction between two business parties but is often criticized as inappropriate for consumer transactions. The topics of inequality of bargaining power, standard form contracts (also known as contracts of adhesion), and the absence of true consent remain contentious and the subject of divided opinions within the ranks of policy makers and legal commentators and academics.”¹⁶¹

Even if Canadian courts do adopt the principle of party autonomy in the domestic arbitration context, the basis of that principle in the Contractual Theory raises thorny issues about what deference to party autonomy may actually require from the courts. This is especially true in the pre-employment arbitration agreement context where the party with less economic power may be denied the protection of mandatory laws when the arbitration agreement is accompanied by choice of forum and choice of laws provisions. It is also especially true in the class action context where the cost of arbitration may deny access to justice in any forum.¹⁶²

CONCLUSION

Canadian courts are not yet to the point of the American courts’ acceptance of arbitration. Nor has the backlash to the consumerization of

¹⁶¹ *New Zealand Law Commission*, *supra* note 26 at 140.

¹⁶² According to information posted on the relevant organizations web sites in August 2003:

- at the BCICAC (<http://www.bcicac.com/>), the non-refundable fee for commercial arbitration is \$500 plus GST for claims up to \$50,000 and \$1,500 plus GST for claims over that amount. In addition, there is an administrative fee of \$150 per party. The hourly rate of the arbitrator(s) is set by the arbitrator.
- at the CACNIQ (<http://www.cacniq.org/en/>), the online arbitration fee for claims less than \$100,000 is \$500; the arbitrator’s fees are not included in that amount.
- at ADR Chambers, there is an administrative fee of \$500 per party and a deposit of \$3,000 is required for each day of arbitration that is booked. For the ADR Chambers in Ontario and Québec, the arbitrator’s hourly rate is set at \$450; in western Canada at \$400 per hour; and in the Atlantic provinces, \$350 per hour.
- at the ADR Centre (<http://www.amic.org/>), in BC and Alberta, the fee is \$1,200 for a 4 hour, 2 party arbitration, inclusive of the arbitrator and the facilities, and there is also an administration fee of \$250 per file.

arbitration and the privatization of law and judging begun here yet, as it has there. There are, however, indications both are beginning to happen.

Arbitration begins with and depends upon an agreement between the parties to submit their disputes to arbitration. It is based on voluntariness, and voluntariness on the part of both parties. There is little concern that arbitration is voluntary in a genuine sense in the context of commercial arbitrations between business concerns that enter into arbitration agreements knowingly and with legal advice. But the situation may be quite different when the arbitration clause is “boilerplate” in a lease, an installment sales contract, or another document where the parties’ bargaining power may not be even roughly equal. Are arbitration clauses in contracts of insurance, employment, franchisee agreements, and leases really bargained for or are they offered on a take-it-or-leave-it basis to captive insureds, employees, franchisees and tenants?

If the justification for arbitration is indeed party autonomy, then more attention has to be paid to the Contractual Theory underlying it. That explanation for arbitration relies upon the parties voluntarily agreeing to submit their disputes to arbitration, to appoint the arbitrator and, to accept the arbitral tribunal’s award as having binding force. If there is no agreement, if the terms are dictated by the commercial party with more resources, then it is not voluntary. The statutory reforms in New Zealand and the United Kingdom recognize this, even if they do not really address the “take it or leave it” contract offered by corporations such as Rogers, Primerica Financial Services and Microsoft. There is, however, no indication of consumer-oriented changes to the modern domestic arbitration legislation in Canada.

The question I predict will be increasingly confronting Canadian courts is whether or not it is for the state to determine if, and to what extent, some parties should be able to order their private relations. If it is not a matter for Canadian courts and legislatures, then it is a matter of private law-making and an abdication of decision-making authority to those with greater market power.

Appendix A

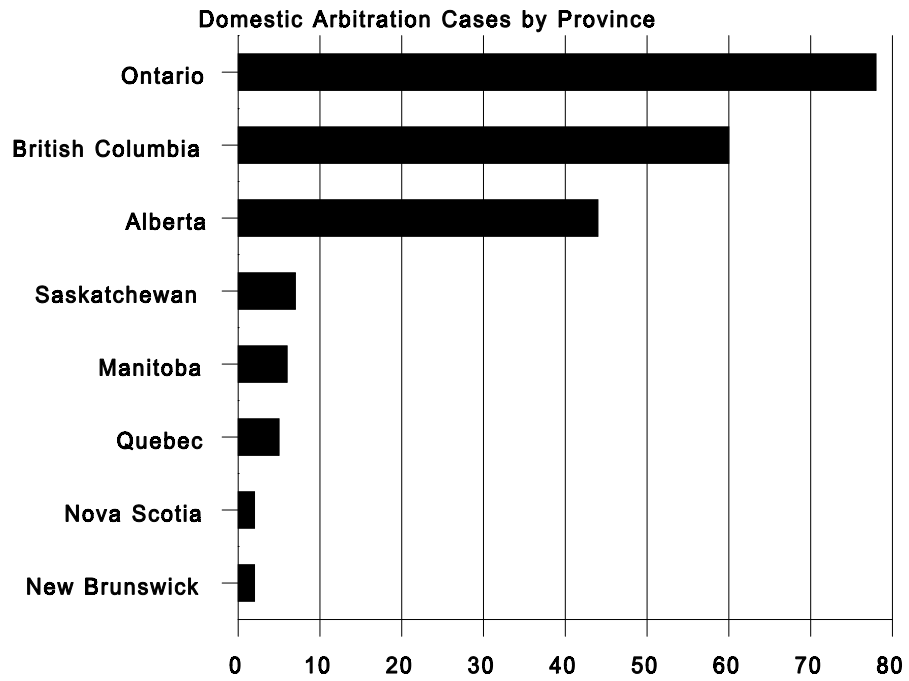
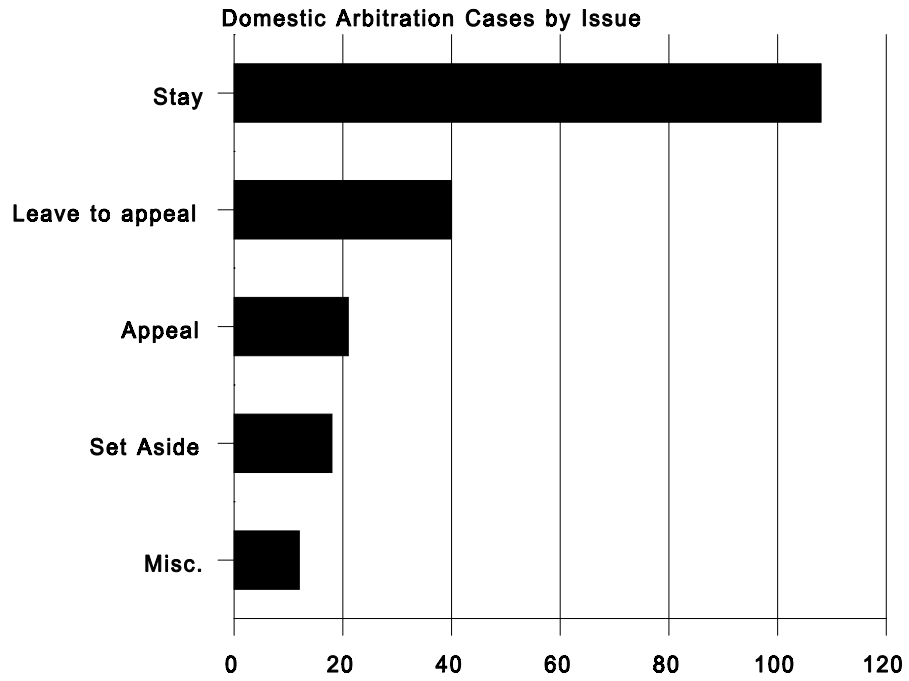
	<p>BC Commercial Arbitration Act</p> <p>32. Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act.</p>	<p>Alberta Arbitration Act (<i>and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted</i>)</p> <p>6. No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:</p> <p>(a) to assist the arbitration process;</p> <p>(b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;</p> <p>(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;</p> <p>(d) to enforce awards.</p> <p>(S. 7 SAA; s. 6 MAA; s. 8 NSCAA)</p> <p>NBAA s. 6: No court shall intervene in matters governed by this Act, except as this Act provides.</p>	<p>Ontario Arbitration Act, 1991</p> <p>6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:</p> <ol style="list-style-type: none"> 1. To assist the conducting of arbitrations. 2. To ensure that arbitrations are conducted in accordance with arbitration agreements. 3. To prevent unequal or unfair treatment of parties to arbitration agreements. 4. To enforce awards. 	<p>Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)</p> <p>940.3 C.C.P. states the occasions for and scope of judicial intervention are limited to those expressly authorized by the procedural code.</p>
<p>No court intervention</p>				

	<p>BC Commercial Arbitration Act</p>	<p>Alberta Arbitration Act (<i>and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted</i>)</p>	<p>Ontario Arbitration Act, 1991</p>	<p>Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)</p>
<p>Stay of court proceedings</p>	<p>15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.</p> <p>(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is</p>	<p>7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.</p> <p>(2) The court may refuse to stay the proceeding in only the following cases:</p> <p>(a) a party entered into the arbitration agreement while under a legal incapacity;</p> <p>(b) the arbitration agreement is invalid;</p> <p>(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;</p> <p>(d) the motion to stay the proceeding was brought with undue delay;</p> <p>(e) the matter in dispute is a proper one for default or summary judgment.</p> <p>...</p>	<p>7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.</p> <p>(2) However, the court may refuse to stay the proceeding in any of the following cases:</p> <p>1. A party entered into the arbitration agreement while under a legal incapacity.</p> <p>2. The arbitration agreement is invalid.</p> <p>3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.</p>	<p>940.3 C.C.P. vests the court with authority to force performance of the arbitration agreement.</p>

	<p>BC Commercial Arbitration Act</p> <p>void, inoperative or incapable of being performed.</p>	<p>Alberta Arbitration Act (<i>and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted</i>)</p> <p>(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that</p> <p>(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and</p> <p>(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.</p> <p>(6) There is no appeal from the court's decision under this section.</p> <p>(S. 8 SAA; s. 7 MAA; s. 9 NSCAA; s. 7 NBAA)</p>	<p>Ontario Arbitration Act, 1991</p> <p>4. The motion was brought with undue delay.</p> <p>5. The matter is a proper one for default or summary judgment...</p> <p>(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,</p> <p>(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and</p> <p>(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.</p> <p>(6) There is no appeal from the court's decision.</p>	<p>Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)</p>
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	<p>BC Commercial Arbitration Act</p>	<p>Alberta Arbitration Act (<i>and Manitoba, Saskatchewan, Nova Scotia and New Brunswick Arbitration Acts unless otherwise noted</i>)</p>	<p>Ontario Arbitration Act, 1991</p>	<p>Civil Code of Québec (C.C.Q.) Code of Civil Procedure (C.C.P.)</p>
<p>Arbitrator may rule on own jurisdiction; arbitration clause is severable</p>	<p>22 (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration. (Those rules state the arbitral tribunal may rule on its own jurisdiction and that an arbitration clause in another agreement shall be treated as an independent agreement.)</p>	<p>17(1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement. (2) The arbitral tribunal may determine any question of law that arises during the arbitration. (3) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the other agreement is found to be invalid. (S. 18 SAA; s. 17 MAA; s. 19 NSCAA; s. 17 NBAA)</p>	<p>17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement. (2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.</p>	<p>943 C.C.P. The arbitrators may decide the matter of their own competence. 2642 C.C.Q. An arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract and the ascertainment by the arbitrators that the contract is null does not entail the nullity of the arbitration agreement.</p>

Appendix B



Domestic Arbitration Cases by Year

