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Spring 2021

# Canadian Arbitration and Mediation Journal

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# Message from the Editor

Welcome to the spring 2021 issue of the *Canadian Arbitration and Mediation Journal*. Since the last issue, our contributors have been actively researching and writing on a variety of topics of relevance to practitioners. Before I describe the contents of this issue, however, celebration is in order.

First, editorial board member [William \(Bill\) G. Horton](#) received the Award of Excellence in Alternative Dispute Resolution from the Ontario Bar Association on December 3, 2020. Congratulations, Bill.

Second, it is my pleasure to introduce [Nasser Chahbar](#) who worked to develop this issue and who now joins our volunteer editorial board as Assistant Editor. Welcome, Nasser, and thank you. I invited him to introduce himself to readers, and this is what he offered:

*My name is Nasser Chahbar, and I am a Qualified Mediator (principal) at Chahbar Mediation Group. I hold degrees in Sociology (BA) and Law (JD), which led me to develop a deep passion and love for ADR.*

*Throughout my education, I saw the dire need for mechanisms that bring about effective and practical change for all of us. For me, ADR's versatility does just that. With its inherent flexibility and adaptability, we are able to push the human element to the forefront of conflicts. With ADR, we are given an opportunity to tackle real issues head on, without the need to complicate the process. Hence my love for ADR—a simple, real method of solving society's everyday problems.*

*I am excited and honoured to serve as an Assistant Editor of the Canadian Arbitration and Mediation Journal, an important place for dialogue in the ever growing and changing field of ADR. Throughout this journey, I hope to continue meeting some of the brightest and uplifting individuals I've yet to work with. I want to thank ADRIC, and the Editor of the CAMJ, Genevieve Chornenki, for this wonderful opportunity.*

This issue's articles allow readers to learn about and reflect on a range of ADR topics. In a round table that Nasser convened, three aspiring mediators from different backgrounds—[Laurence Laporte](#), [Areta Marshall](#) and [Ryan Goodman](#), — reveal what drew them to ADR and describe the pressures they face in the field given their age and experience levels. [Marc Bhalla](#) gently pushes the conventional mediation model off its pedestal in favour of asynchronous mediation. [Lauren Tomasich](#) and [Stephen Armstrong](#) help readers understand the implications of a U.K. Supreme Court decision about the choice of law for arbitration agreements. [Ali Soleymaniha](#) describes a holistic approach to dispute resolution process design that is premised on a sound understanding of complex systems. [Jennifer Webster](#) shares her insights on a new book intended to help practitioners analyse conflict in organizational contexts. In the first of two articles, [Joel Richler](#) explores the apparent dichotomy between a passive and an interventionist arbitrator. In his second article, he



GENEVIEVE A. CHORNENKI,  
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Genevieve is the author of *Don't Lose Sight* (2021) and co-author of *Bypass Court* (2015). She holds a Certificate in Creative Writing from the University of Toronto and a Publishing Certificate from Ryerson University. She was inaugural chair of the Ontario Bar Association's ADR section and serves on ADRIO's C.Med accreditation committee. [www.genevievechornenki.com](http://www.genevievechornenki.com)

walks readers through a recent UK Supreme Court case about disclosure and confidentiality in arbitration. [Sahaj Mathur](#) also surveys and studies confidentiality in international commercial arbitration, and [The Honourable Clément Gascon](#) shares his experience and analysis as a jurist in relation to arbitration appeals in Canada.

We hope readers will enjoy and benefit from these submissions, and we urge everyone to share this issue with colleagues, clients, and friends. Past issues of the journal can also be found on CanLII at [www.canlii.org/en/commentary/journals/43/](http://www.canlii.org/en/commentary/journals/43/).

Thank you to all who made this issue possible: our contributors, the helpful staff at the ADRIC office, our volunteer editorial board, and to you, our readers. Please be in touch. Your feedback, submissions, and pitches are always welcome. 🏠

Genevieve A. Chornenki  
Editor-in-Chief



# President's Message

I am pleased to address you for the first time as president since my election in October 2020. I have been on the ADRIIC Board as a director representing ADRBC (as the Affiliate President) since 2014 and look forward to serving our members, affiliates, and ADR users in the advancement of our work as a Federation.

As we all know, experience, and feel, these are challenging and unprecedented times which present dispute resolution leaders with both opportunities and responsibilities. ADR practitioners, and particularly those who form the ADR system, can be one of the building blocks of a brighter future framed by ADRIIC's core values of accountability, collaboration, excellence, integrity, and leadership.

In our relentless pursuit to stay on the leading edge of ADR best practices in Canada and the world, ADRIIC will continue to be focused on understanding and addressing the needs of our members and users by both collaboratively working with our Regional Affiliates and engaging our membership in meaningful initiatives.

ADRIIC will work shoulder to shoulder with our Affiliates in the support of our members both in the practice of ADR through training and information, as well as in the promotion of ADR to potential users, which, in turn, will generate new and expanded professional opportunities for our members.

Developing broader and better benefits and services for our members and clients is one of our key goals. To this end, amongst other initiatives, ADRIIC is both building an improved technology platform to best serve our members and promote ADR users' access to the services provided by members, and, at the same time, increasing its efforts in promoting our members, our designations and our services to Business and Government.

Faithful to our core values, supporting young and recently trained practitioners, as well as promoting access to our profession by minorities, is not only a necessary step in ADRIIC's commitment to diversity and inclusion, but also, an investment in our profession's



**ELTON SIMOES, MBA, MDR, IDP-C, C.MED, Q.ARB**

Elton Simoes is an accomplished Arbitrator, Mediator, Negotiator, Consultant, Board Director, and Business Executive. He practices arbitration, mediation, and Med-Arb in complex, confidential, time sensitive, commercial disputes. He has lived, worked, and studied in Canada, U.S., Latin America, and Europe. He possesses a strong academic background in Business, Law, Corporate Governance and Dispute Resolution.

health, vigour, and future.

In the pursuit of these goals, diversity and inclusion will continue to be ADRIIC's North Star. A key element here is the development, in partnership with our Affiliates, of professional support systems that foster new and potential ADR practitioners' access not only to training, but also to professional opportunities, setting them up for success in the ADR field.

As the leading dispute resolution organization in Canada, ADRIIC will continue to increase and protect the value of your investment in your membership and designations. We are delighted to have your support and engagement.

I am honoured with the opportunity to serve you. Feel free to reach out to me with your feedback and challenges ([eltonsimoes@adric.ca](mailto:eltonsimoes@adric.ca) <https://www.linkedin.com/in/eltonsimoes/>). I am always eager to connect.

Here's to 2021; health and prosperity. 🍀

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# Listen In:

## A conversation with Assistant Editor Nasser Chahbar and new and aspiring mediators

ADR is an unregulated field open to practitioners from all walks of life. Does that make it an easy field to enter?

At law school where I had the privilege of studying under some of Canada's top ADR practitioners, it became clear to me that being a mediator was an even more natural fit than being a lawyer. My journey to mediation, however, entailed many obstacles such as my age and "inexperience." Other aspiring ADR practitioners have told me that they have confronted similar limiting sentiments, and they wanted to talk openly about them. So, I convened a virtual roundtable to investigate and give voice to the experiences of three new and aspiring ADR practitioners from varied backgrounds. My hope is that by identifying some of the challenges that they face, the ADR field can begin to revise what it means to be an effective practitioner. At the same time, I hope to encourage and support all aspiring practitioners who may be embarking upon one of the most rewarding and stimulating undertakings in today's professional world.



**NASSER CHAHBAR, JD, Q.MED**

Nasser Chahbar is the owner and principal of Chahbar Mediation Group, an ADR practice that primarily offers online mediation services. He is Co-Chair of the Online Mediation Section for the ADR Institute of Ontario. Nasser graduated from Western University with a BA in Sociology. He went on to complete his law degree (JD) at the University of Ottawa, Faculty of Law.

### Tell us about yourself and what attracted you to ADR

#### **Laurence Laporte - My interest in ADR came from a**

larger interest in understanding human relations. Conflict is central in our lives, either on an interpersonal level or on a wider social and political level.

I found in ADR new perspectives that help better understand how conflict, in all its dimensions, can be used as an opportunity for constructive change.

Seven years ago, I had the opportunity to be introduced to ADR through a training in civil and commercial mediation. This confirmed my interest in working with conflict, dialogue and human relations. After completing a degree in intercultural mediation at the University of Sherbrooke, I worked as a social mediator<sup>1</sup> at Institut Pacifique, a community organization in Montreal. In this role, I facilitated mediations and accompanied individuals who were experiencing conflicts, either with their neighbours, within their family contexts or in relation to shared community spaces. I later continued working within this organization as a trainer and consultant in conflict resolution in a diversity of work environments. I am currently completing a Master's degree in social work at University of Montreal.

As a future social worker, I do not intend, for now, to work specifically in the ADR field. However, I know I will be working with human conflict. The tools and insights I have learned from my ADR background will definitely help me to

establish relations of trust with individuals and families, and to accompany them in dealing with diverse conflicts in their lives.

**Areta Marshall - I was attracted to ADR because of its** ability to help people help themselves. They get a voice in the outcome of their dispute.

I didn't plan on becoming a mediator full time. I was thinking about becoming a life coach first, and I decided to go back to school and take some courses to help me achieve that goal. As I went through the process, I realized that mediation also made sense for me as well in terms of obtaining an additional transferable skill.

Both coaching and mediation encourage people to develop the skills to help resolve their own conflict. I am definitely going to be pursuing a career in ADR and hopefully run my own firm one day.

I come from a legal administrative and an insurance background. I would consider myself an everyday/average type of individual with many years of life and work experience behind me.

In my daily life friends and family would ask me for my advice as they thought I would always be neutral in my response. I found that if I really listened to what they were saying and asked the right questions, they were able to shift perspective and see all sides. This enabled them to make better informed decisions for themselves. This is something I

feel passionate about, and I get excited about being part of something like that—that's what mediation does for me.

**Ryan Goodman** - If you had asked me back in law school while I was applying for jobs at corporate law firms if this was where I envisioned my career in 12 years, I'd be lying if I said it was. My path to this point has not been a straight line, but each little turn brought me here by reinforcing my belief in the value of ADR to the legal profession.

It's been almost two years since I started my mediation practice, I am at a point where I am growing my practice by adding other young lawyers with specialized legal backgrounds different from my own. I certainly intend to make a career out of this.

I started my legal career at a large national law firm where I practiced corporate tax and tax litigation. I then briefly practiced family law before transitioning to insurance defence and becoming a partner at a boutique litigation firm in Toronto.

In 2017, I obtained my Certificate in Dispute Resolution from York University. In 2018, I started my own company where I dedicate 100% of my practice to mediation primarily in the areas of insurance and personal injury. I subsequently obtained my Qualified Mediator (Q.Med) accreditation with the ADR Institute of Canada.

Were there any pressures that you faced or continue to face given your age and/or experience level?

**Laurence Laporte** - Absolutely. As much as training gives you some good bases to integrate into your role as a mediator, you learn a lot by doing...and I think you never stop learning.

What helped me a lot to gain confidence was to have a team of great colleagues around me that I could learn from. I have worked many times in co-mediation, which is great to receive constructive feedback and to discover your particular strengths and difficulties. I also think engaging in a self-reflective practice helps to build on your experience.

**Areta Marshall** - Pressure? Some days I wondered what I was doing! I was working full-time, working part-time, and taking a very intensive ADR program at York University part-time.

I was thinking of making a career change halfway through my life and unsure of what I was doing. When I realized this was the path meant for me, I kept focused on my goal. I exercised often, or, I should say, when I could. Having a supportive network around me of people who believed I would make a great mediator really helped.

**Ryan Goodman** - Lawyers can be slow to change.

We like precedent! Starting a mediation practice as a young lawyer is difficult because some counsel can be apprehensive about trying new people or people that they believe don't have enough experience. I've found that the best way to counter that narrative is preparation. My goal for each mediation is to be more prepared than counsel. I will often do case law research and additional reading, outside of anything mentioned in the briefs, before a specific mediation so that I am well versed on the nuances of a specific fact pattern.

How have you grown since you started out?

**Laurence Laporte** - I think working as a social mediator helped me become a better listener because it is all about

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listening before anything else. What impacted me the most is the power that being heard and recognized can have on individuals, how they can open themselves to you when they feel safe, respected, and valued. This, I find, is the best part, to feel like you already helped someone by listening to them, to their stories, their emotions, their fears. Afterwards, as a social mediator, your role is to help parties listen to each other, share with each other, see each other. But you know that your role as a listener has already played a part in helping parties make sense of their conflict and feel recognized.

**Areta Marshall** - In my opinion, there is always room to grow, and real growth comes from continuously learning. I find that I am more self-assured than I was before in how I approach things. I find myself using the skills I've learned to ask the questions that help a person better understand what their issues may be, and I now approach things in my life, more often than not, as an observer. I am surprised at how natural it feels—it wasn't like this a few months ago.

**Ryan Goodman** - I was personally surprised at how hard it is as a lawyer to shed "lawyer" as the defining feature of my identity as a professional and a person. I even started this roundtable by saying "I am a lawyer." Over the past two years, I've grown to a place where being a lawyer is a part of who I am as a professional, but that designation no longer solely defines me.

What do you think the field of ADR or mediation, specifically, has to offer the world?

**Laurence Laporte** - ADR has the potential to be applied and integrated in the contexts of many other fields. I think a diversity of professionals would benefit from training in

conflict resolution, not with the objective of working as accredited mediators but to diversify and enrich their skills and perspectives. I am referring to professionals from the fields of health and social services, public policy, education, law enforcement and many more. Youth would also benefit from being introduced to conflict resolution skills from a young age. In sum, we should aim collectively for individuals to be empowered to deal with conflict in a constructive way, in a diversity of settings. In this regard, the field of ADR has a lot to offer, and more bridges could be built between this field and other professions.

**Areta Marshall** - ADR offers choices and helps create balance. Having a choice gives you a voice in the outcome that is in your best interest. Having balance allows you to take a holistic approach in addressing power imbalances through mediation. I believe the future of ADR is quite bright considering what's happening in our world today. Courts were backlogged before and with COVID-19, that backlog will take many, many more years to clear. ADR was implemented to help in exactly these types of conditions. I believe its importance will be seen in many legal systems around the world, and for those who cannot afford a lengthy court battle, mediation is the alternative.

I think aspiring practitioners from diverse backgrounds who want to bring about change in an alternative way will be at the forefront to help people develop the skills to find options and solutions for themselves through mediation. We live a world that is relationally different to the one our mind prefers and people who can find the balance between the two are better able, I believe, to be more creative in their approach to resolving issues.

**Ryan Goodman** - In the legal sphere, ADR can offer expeditious and affordable resolutions to the most litigious

## Award of Excellence for Alternative Dispute Resolution

Congratulations to William G. Horton who is a member of the Journal's editorial board and its former editor-in-chief. He received the Award of Excellence in Alternative Dispute Resolution from the Ontario Bar Association on December 3, 2020. The award recognizes ADR contributions and achievements in leadership, integrity, and professionalism. Current editor-in-chief Genevieve Chornenki was the first recipient of this award in 1999.





disputes. My inner nerd is about to come out, but a few months ago my wife and I were re-watching all seven seasons of one of my favorite shows, *Star Trek: The Next Generation* when I realized that Captain Picard is, at his core, a mediator. What ensued was some introspection about whether or not I ended up where I am because of my love for a fictional character, but also the realization that mediators can have inherent value at both the micro and macro level.

Nerdiness aside, at the macro level, mediators have a crucial role to play in our justice system especially in light of the pandemic. With the on-again and off-again suspension of civil jury trials in Ontario, litigants will have to wait years for access to justice. Mediation is a process that brings the parties together in a timely manner and online

mediation makes it even more accessible. They aren't perfect, I predict the continued growth of online mediations as they are a cost-effective alternative that helps alleviate the strain on the justice system in this time of crisis. 🏠

- 1 **Editor's note:** Not all ADR practitioners will be familiar with the term "social mediation," so we asked Ms. Laporte to explain. She wrote, "In French, I refer to 'médiation sociale,' which is why I said 'social mediation' in English, but 'community mediation' could also be used, since it is mediation in community/ social contexts. Another term used in French for this type of work is 'médiation citoyenne.' However, where I have worked we distinguished 'social mediators' from 'médiation citoyenne' since the latter involves an implication of a volunteer mediator as a member of a community, whereas as social mediators we were paid. We were a type of community worker that specializes in mediation (between family members, neighbours, tenants and landlords, residents and institutions/organizations etc.). Also, 'social mediation' (as we intend it) is a free service for the participants. Where I worked, this service was specifically funded by one city borough to make it available to all its residents. Other city boroughs in Montreal could also pay for our services in cases of specific conflicts, so in all cases the city pays, never the residents."



Photo credit: Audrey Mc Mahon

**LAURENCE BOURCHEIX  
LAPORTE, (SHE/HER), MA IN  
INTERCULTURAL MEDIATION**

Laurence is currently completing a Masters degree in social work and has worked in the past years with a diversity of community organizations. Her training in mediation led her to work as a social mediator and conflict resolution consultant at Institut Pacifique, a non-profit organization in Montreal.



**ARETA MARSHALL, Q.MED**

Areta Marshall is a recent graduate of the ADR program at York University and a current member of ADRIQ/ADRIC. Areta received her Q.Med designation after interning with Bruce Ally, Principle at A Place for Mediation, in the area of personal injury and employment law.



**RYAN GOODMAN, BA,  
LL.B, Q.MED**

Ryan was called to the Ontario bar in 2010. He began his career practicing corporate tax and tax litigation. From there, he briefly practiced family law before transitioning into insurance defence and personal injury. In 2018, he founded the Goodman Mediation Group where he mediates insurance and personal injury disputes. [www.goodmanmediationgroup.com](http://www.goodmanmediationgroup.com)



# Asynchronous ADR: Tipping In-Person Processes Off Their Pedestal

When the COVID-19 pandemic made in-person gatherings inappropriate, many of Canada's dispute resolution practitioners adopted online dispute resolution ("ODR"), such as through Zoom, Teams, or other forms of video conferencing. While initial reactions were to try to replicate in-person processes and video conferencing appeared to allow for that, such a mindset misses opportunities to overcome the shortcomings of traditional in-person processes. To state it another way, ODR gives us the chance to not just replicate in-person processes but to improve upon them.

ODR grandparent, Colin Rule, has been pointing out the opportunities for improvement for years. Decades, even. As the Director of ODR for eBay and PayPal from 2003 to 2011, Rule found that people involved in disputes were not interested in a video exchange with the others they had issues with. Nor were they interested in the hassle of coordinating live exchanges. In fact, Rule has stated that parties involved in eBay disputes did not even really care to know one another's real names.<sup>1</sup> This impersonal attitude is unthinkable to many who look at the process of addressing conflict through a traditionalist lens.

I prefer asynchronous, text-based ODR to real-time video conferencing because it promotes access-to-justice. In the context of my mediation practice, the hardest part of mediation is scheduling. Most of my mediations involve more people than I can count on one hand, and finding a common time that everyone is available to gather and a common place

that is appropriate and convenient to meet is a hurdle. While video conferencing has offered a degree of convenience by avoiding the need for travel,<sup>2</sup> it still requires a real-time exchange that can be difficult for busy people. It also comes with steep equipment and Internet stability requirements. Telephone-based processes overcome some of these equipment concerns yet maintain the same issues around time.

In her 2019 book, *Truth Be Told: My Journey Through Life and the Law*, Beverley McLachlin shared how her son addressed a problem with his landlord by means of a telephone hearing. "All he had to do was be on the phone at a certain hour on a certain day," she wrote.<sup>3</sup> As with video conferences, telephone hearings indeed save the hassle of having to convene at a particular location, but I would like to push a step further. Why does everyone involved in a conflict have to make themselves available to address it at the same time?

Asynchronous, text-based ODR does not require that everyone participate at the same time. Parties contribute to the process over a series of stages and meet contribution deadlines. Think of it like students writing a paper to complete a course. Each researches and writes their assignment when it is individually convenient to do so, and they collectively meet their submission deadline. When it comes to dispute resolution, this kind of flexibility has been around since the 1990s—to overcome geographic distance and differing time zones—and in the 2020s it offers



MARC BHALLA, LL.M. (DR),  
C.MED, Q.ARB, MCIARB (HE/HIM)  
[BIRACIAL]

is a mediator, arbitrator and trainer who practices online. Marc earned a Master of Laws in Dispute Resolution at Osgoode Hall Law School. He is a Chartered Mediator who holds domestic and international arbitrator designations. For more about Marc, visit [www.456dr.ca](http://www.456dr.ca).

much needed convenience at a local level as we live busy lives and people's schedules vary. With asynchronous dispute resolution, participants do not need to take time off work or otherwise incur opportunity costs to accommodate the availability of others. By removing this form of scheduling, we make dispute resolution more accessible.

As much as I embrace this increased accessibility and the possibilities that appear with the 24/7 nature of text-based ODR, my friend and deep process design thinker, Nicole Aylwin, points to the other edge of the access-to-justice sword. Does text-based ODR risk being overly accessible? The concept is not about enhancing the ability of people to do something to address their disputes but instead how and when they participate. If parties can participate in dispute resolution from the comfort of their smartphones and are glued to their smartphones 24/7, what is the impact? When we spread a three to four hour mediation into a series of

smaller chunks over three to four weeks, what is the consequence to the mental health of parties? What about the stress and anxiety that comes from what is unknown about anticipated interactions, including when they may arrive? Are there not times where it is better to just address everything at once and move on? I think these are legitimate considerations that highlight the importance of embracing the flexibility that dispute resolution offers to “fit the forum to the fuss.”<sup>4</sup> A clear process that is understood by participants and has clear boundaries about how and when to participate, as well as what to expect from others, can address some of these concerns to allow the benefits of text-based ODR to be realized.

In my experience supporting text-based ODR, I have observed two common and contradictory responses from skeptics around what processes are best suited to it. Some feel that adversarial processes are better suited

to text-based ODR because there is no need for the human connection elements<sup>5</sup> that sometimes come into play with conciliatory processes like mediation. These elements include the chance to understand the interests and intentions of others involved in the dispute and to preserve relationships. While critics of ODR cite a lack of personalization, have concerns about confidentiality, and mourn the lost chance to “build momentum” during a real-time mediation<sup>6</sup>, text-based, online mediation offers benefits that traditional, live processes cannot. This includes the opportunity to use breaks between process events to obtain information or advice. Let’s also consider the procedural experience of participants.

I know many people who are uncomfortable with the traditional method of ordering a pizza. Speaking on the phone to place the order and interacting in person with a stranger to collect a pizza is not everyone’s idea

of a good time. Enter contact-less meal delivery. The text-based option does not require a live audible or physical exchange, yet offers deeper communication by providing a point-in-time status of the delivery beyond any time guarantee that would be offered when an order is placed. Technology is utilized not just to provide more specific information to add comfort to the process but to make engaging in the process more comfortable as well. In this light, consider that several younger generations of Canadians do not subscribe to the “just pick up the phone” mentality as offering a faster and more comfortable means of communicating. Professor Noam Ebner’s research on ODR has confirmed that text-based communication is the primary means of communicating for multiple younger generations and is often their most comfortable communication method as a result.<sup>7</sup>

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and look at it, the traditional setting of mediation taking place at a law office or formal physical meeting space is intimidating and foreign to the average person. I believe in procedural justice and feel that the experience of participants in a dispute resolution process is just as important as their outcome. Removing what makes people uncomfortable can only enhance their experience. To that end, while we joke that video conferencing has done away with the need for formal attire from the waist down, text-based ODR does us one better. We can participate from wherever, whenever, and looking however we like.

While formal tops with pajama bottoms will come to define fashion during the pandemic, there is more to the asynchronous ODR than enjoying a comfortable outfit. When we put traditional, in-person processes on a pedestal and look to replicate them, we neglect their deficiencies. This includes inherent bias in both the structure of the process and of those who take part in it. Consider systemic racism and sexism. Consider the unconscious biases that we all have which take cues from the way that people present themselves. While traditionalists mistakenly believe that non-verbal cues are removed in text-based ODR<sup>8</sup>, there are advantages to not requiring parties to physically or audibly present themselves as they participate in dispute resolution. This surrounds not only the related judg-

ments of others imposed upon us, but the judgment we place on ourselves as we identify with various labels that society uses to categorize us. This includes expectations surrounding the way that we are “supposed” to behave attributable to our gender, age, and race labels. Freeing participants in a dispute resolution process to be able to participate as their true selves and not as they feel others expect can enhance procedural experiences and overcome the artificiality embedded into the formalities of our traditional processes.<sup>9</sup>

This leads to the second common criticism of text-based ODR, a criticism that favours it being used for conciliatory processes and not for adversarial ones. The reasoning behind this surrounds comfort with traditional methods, such as assessing credibility and weighing evidence—the mentality that a decision maker needs to look into the eyes of a witness to determine if they are credible.<sup>10</sup> Neglected in this criticism are all of the biases that come into play with traditional methods. That some cultures may not consider it respectful to look their decision maker in the eye. That someone with anxiety may not physically be able to do so.<sup>11</sup> While I believe that technology offers options for us to provide at least an equally appropriate process as is offered traditionally, I would like to push hesitations a step further and again consider the procedural experience.

Consider the intimidating environment in which a witness traditionally offers testimony and self-represented parties experience the process.

The sentiment here acknowledges that those affected by the determination of a decision maker need to feel that they were heard and had an opportunity to make full submissions in order to accept the decision.<sup>12</sup> One concern is that text-based ODR may prevent parties from feeling that they had “their day in court.” I believe this comes down to the concept that decision makers need to empathize with those who come before them rather than a focus on the platform used for the proceeding. There are different ways to show empathy. We all know of judges who participate in live proceedings without empathy for those who come before them; the same dynamics can apply to arbitrators who do their work away from the public eye. It is not that text-based ODR prevents decision makers from being empathetic, it is that the opportunities to show empathy differ in an asynchronous text-based environment. This needs to be appreciated.

At the end of the day, ODR is disruptive. You cannot simply take a traditional process and add technology to it to realize the full potential of ODR. Different approaches and skills are needed. Deeper thought should be given to process design beyond trying to replicate traditional, in-person processes. 🏠

1 Colin Rule, ODR – Essential Skills for Resolving Disputes Remotely, Osgoode Hall Law School, 18 June 2020 [unpublished]. Colin Rule delivered the keynote of this program.

2 In fairness, video conferencing has not truly removed the need for meeting space as each participant must still find an appropriate physical location to participate from. What is removed is the costs involved in finding one common space for everyone to participate. This includes the cost of renting space (if applicable), travel and parking.

3 McLachlin, Beverley. *Truth Be Told: My Journey Through Life and the Law*. (Toronto: Simon & Schuster, 2019) at 316.

4 Frank E. A. Sander, “The Varieties of Dispute Processing,” *The Pound Conference*, St. Paul, Minnesota, April 1976.

5 This includes what some refer to as the “touchy feely” aspects of mediation that help those involved in a conflict better understand one another and offers the chance to improve relationships.

6 I believe that there is opportunity for synchronous exchanges in asynchronous processes, the flexibility of such simply does not require every part to be available at the same time.

7 Ebner, Noam, “Negotiation via Email,” “Negotiation via Text Messaging,” & Negotiation via Videoconferencing,” in Honeyman, Christopher and Andrea Schneider, eds, *The Negotiator's Desk Reference*, Vol. 1 (St. Paul: DRI Press, 2017), pp. 115-170.

8 In fact, non-verbal cues presented in other ways in a text-based process. Cultural awareness is needed to take in these cues.

9 Bhalla, M.A., “Gender Identity & Text-Based, Online Mediation” (2019-2020) Vol 6 No 3, McGill J Dis R. 57-75 online <<https://mjdrrdm.ca/articles/volume-6/gender-identity-text-based-online-mediation/>> [perma.cc/KN64-UH3K].

10 Marc Bhalla, “Catch Up or Get Left Behind... Arbitrating Online in 2019” (delivered at “Expanding the Pie”, the 34th Annual General Meeting and Conference of the ADR Institute of Ontario, Toronto, 6 June 2019) [unpublished].

11 Marc Bhalla, “Let's Talk – Helping is What ADR Practitioners Do” (January 29, 2020) ADR Athletics, online <<https://adrathletics.ca/home/letstalk>>.

12 Robin Jacob, “Knowledge of the World and the Act of Judging” (2014) *Osgoode Review of Law and Policy* 2.1 22-28 at 25.

# Choice of Law for Arbitration Agreements: A Case Comment on *Enka Insaat Ve Sanayi AS v. OOO Insurance Company Chubb*, [2020] UKSC 38A



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A recent decision of the U.K. Supreme Court may help clarify which law governs an arbitration clause in a commercial contract when the parties have not made that preference explicit.

An international commercial contract containing an arbitration clause potentially engages three separate systems of law. The first is the law of the main contract containing the arbitration clause. The second is the procedural law of the arbitration, which is the arbitration law of the “seat” or the place chosen for the arbitration in the arbitration clause. The third system that may be relevant is the law of the arbitration clause, which governs, among other things, the validity and scope of the parties’ agreement to submit disputes to arbitration.

Parties to international commercial contracts often include an express choice of law for both the main contract and the seat of the arbitration, but do not typically do so for the law that governs the arbitration clause itself. For example, the parties may stipulate that their agreement is governed by Russian law, with any disputes to be resolved through arbitration in London, England. In this instance, the law of the main contract is the law of Russia and the procedural law of the arbitration is that of England. But what law governs questions about the arbitration clause itself?

The law applicable to the arbitration clause is a significant issue to consider when drafting international contracts that provide for arbitration. In particular, where the parties choose the law of one jurisdiction to govern the main contract and provide for the seat of arbitration in a different jurisdiction, important issues such as whether a dispute falls within the scope of the arbitration clause or whether the clause is invalid, may be decided differently under these different legal systems. This scenario gives rise to the difficult question of whether the parties intended the arbitration clause to be governed by the law of the main contract or by the law of the seat.

The U.K. Supreme Court has recently provided helpful guidance on this question in *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*, [2020] UKSC 38. It established a general rule that a choice of law for the main contract should be construed as the parties’ implied choice of law for their agreement to arbitrate, even where the main contract law differs from the seat of the arbitration. In the absence of *any* choice of law, however, the Court found that the law of the seat of the arbitration will generally be the most closely connected legal system to the agreement to arbitrate and, thus, the applicable law for the arbitration clause.

## Background Facts and Procedural History

In February 2016, a power plant in Berezovskaya, Russia, was severely damaged by fire. Enka was a subcontractor involved in the construction of the plant. Chubb was the insurer for the owner of the plant. The owner had taken



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an assignment of the rights that the general contractor held under its subcontract with Enka. In May 2019, exercising its right of subrogation, Chubb commenced proceedings in a Moscow court against Enka for damages in relation to the fire at the plant.

Enka's subcontract, however, included a term providing for arbitration pursuant to the International Chamber of Commerce's arbitration rules, with London, England as the place of the arbitration. Enka commenced proceedings in the Commercial Court in England, seeking an order restraining Chubb from litigating in violation of the arbitration clause (anti-suit injunction). It also applied to the Moscow court for a stay of the litigation.

The parties took opposing positions on the law applicable to the arbitration clause. Chubb argued that the arbitration clause was governed by Russian law because the parties impliedly chose Russian law for the main contract. It also argued that the English Commercial Court should decline to rule on the issue as a matter of judicial comity<sup>1</sup> or discretion given the stay proceedings pending in the Moscow court. Enka, on the other hand, argued that the arbitration clause was governed by English law as the law of the seat. It also took the position that an English court could grant an anti-suit injunction regardless of the applicable law because the arbitration was seated in England.

The Commercial Court dismissed Enka's claim for an anti-suit injunction on the grounds that England was not the most appropriate forum to seek such relief.<sup>2</sup> The English Court of Appeal reversed the Commercial Court's decision and granted the anti-suit injunction. The Court of Appeal found that the seat of the arbitration is always an appropriate forum in which to seek an anti-suit injunction.<sup>3</sup> The Court of Appeal also established a general rule that in the absence of an express choice of law for the arbitration agreement, the law of the seat should be considered the parties' presumptive implied choice of law for the arbitration clause.<sup>4</sup>

### The Supreme Court's Decision

A 3–2 majority of the U.K. Supreme Court dismissed Chubb's appeal, thereby affirming the English Court of Appeal's decision to grant an anti-suit injunction. All five members of the panel, however, disagreed with the Court of Appeal's ruling that the law of the seat should be the presumptive choice of law for the arbitration clause. Instead, they found that when the parties' had chosen a law to govern the main contract, that choice should be their presumptive choice for the arbitration clause.

Lord Hamblen and Lord Leggatt wrote for the majority (the "Majority"). They began with the familiar two step choice of law analysis from the common law which

provides that a contract is governed by: (1) the law expressly or impliedly chosen by the parties or (2), in the absence of such a choice, the law with which the contract has its closest and most real connection.<sup>5</sup> Applying this framework, the Majority found that a choice of law for the main contract, whether express or implied, should generally be construed as an implied choice of law for the arbitration clause.<sup>6</sup> The dissenting justices, Lord Burrows and Lord Sales (the "Dissent"), agreed with the Majority on this point.<sup>7</sup> The Majority relied on the simple logic that "the arbitration clause is part of the contract which the parties have agreed is to be governed by the specified system of law."<sup>8</sup> They reasoned that this approach would provide certainty, consistency, and coherence, while avoiding needless complexity and artificiality.<sup>9</sup> It is, noteworthy, however, that this is only a presumption of implied choice which may be rebutted where the circumstances warrant a different inference.

The Majority also provided guidance on when the presumption may be rebutted. In particular, the Majority reaffirmed what they styled the "validation principle," a general principle of contractual interpretation that provides that an interpretation that upholds the validity of the contract is to be preferred to one that would render it invalid or commercially ineffective.<sup>10</sup> In the Majority's view, if there is a serious risk that the arbitration clause would be invalid or ineffective under the law chosen for the main contract, this grounds an inference that the parties likely did not intend for their arbitration clause to be governed by that law. In addition, the Majority acknowledged that a choice of seat may entail an implied choice of law for the arbitration agreement where the law of the seat requires that an arbitration subject to its procedural law must also be subject to its substantive law concerning arbitration clauses.<sup>11</sup>

In the absence of an express or implied choice of law for the main contract or for the arbitration clause, the Majority found that the law of the seat generally has the closest and most real connection to the arbitration clause.<sup>12</sup> This is so because the common law places great weight on the place of performance as a connecting factor, and the seat is the place of performance of the arbitration agreement.<sup>13</sup> The law of the main contract, by contrast, is less likely to have as significant a connection to the arbitration clause, because the substantive obligations in the main contract address a different subject matter and purpose than the arbitration agreement, and parties often purposefully choose a neutral seat with no connection to the place of performance of the substantive obligations in the main contract.<sup>14</sup> The Majority also pointed out that their approach was consistent with article 36(1)(a)(i) of the *UNCITRAL Model Law* and article

V(1)(a) of the *New York Convention*, which have been interpreted to suggest that the law of the seat should be considered a strong connecting factor in the choice of law analysis.<sup>15</sup> The Dissent parted ways with the Majority on this point, because, in their view, the law of the main contract generally has the closer and more real connection to the arbitration clause.<sup>16</sup>

The Majority also commented on the Commercial Court's comment that England might not be the most appropriate forum to grant an anti-suit injunction. In the Majority's view, this was an error, as the effect of choosing London, England, as the seat is a submission to the jurisdiction of the English courts to grant injunctive relief to restrain parties that are found to be in breach of their agreement to arbitrate.<sup>17</sup> In response to Chubb's argument that an English court should nonetheless defer to the foreign court as a matter of comity, the Majority stated that comity had "little if any role to play where anti-suit injunctive relief is sought on the grounds of breach of contract."<sup>18</sup> The Dissent agreed with the Majority that the English courts were not required to defer their decision pending the outcome of proceedings in a foreign court.<sup>19</sup>

Turning to the merits of the appeal, the Majority found that the subcontract did not contain either an express or implied choice of law.<sup>20</sup> They therefore concluded that the law of the arbitration agreement was English law, because the seat of the arbitration was London, England.<sup>21</sup> Chubb did not dispute that if the arbitration clause were to be governed by English law, then there would be no basis to interfere with the Court of Appeal's order. On this basis, the Majority dismissed the appeal. The Dissent, however, would have found that the parties impliedly chose Russian law to govern the subcontract and this choice extended to the arbitration clause.<sup>22</sup> As a result, the Dissent would have remitted the claim back to the Commercial Court to decide the issues under Russian law.

### Comment

The U.K. Supreme Court's decision provides welcome guidance on a common law issue that is underdeveloped in the Canadian jurisprudence. It is worth noting that the foundational pillars of the Majority's reasoning are generally applicable throughout Canada's common law jurisdictions. Canadian common law jurisprudence employs the same two step choice of law framework for contracts.<sup>23</sup> The common law provinces have enacted legislation implementing the *UNCITRAL Model Law* and the *New York Convention*, which, as mentioned above, include provisions suggesting that the law of the seat should be a strong connecting factor in the absence of a choice of law.

Thus, the U.K. Supreme Court's decision appears poised to serve as strong persuasive authority for a court or arbitral tribunal applying Canadian common law choice of law rules to international contracts which contain an agreement to arbitrate.

The situation in respect of interprovincial contracts is, however, not as clear. Common law choice of law rules also apply to interprovincial contracts.<sup>24</sup> But, there is no equivalent to article 36(1)(a)(i) of the *UNCITRAL Model Law* and article V(1)(a) of the *New York Convention* in domestic arbitration legislation to suggest a default rule in favour of the law of the seat in the absence of a choice of law. Therefore, the Dissent's approach of favouring the main contract law over the law of the seat as having a closer and more real connection to the arbitration clause could carry some weight in the case of domestic arbitrations providing for a place of arbitration that differs from the main contract law. Nonetheless, Canadian jurisprudence reflects cohesive choice of law rules, as opposed to differentiating between international contracts and interprovincial contracts.

Overall, the U.K. Supreme Court's decision to establish a general rule favouring the parties' choice of law for the main contract as an implied choice of law for the arbitration clause appears to accord with commercial

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practice and commercial expectations. It is not uncommon to see governing law clauses and arbitration clauses drafted alongside one another in international contracts. Nonetheless, parties that prioritize certainty in terms of the applicable law governing their arbitration agreement may consider expressing a specific choice of law for the arbitration clause in their contract. Parties should remain cognizant, however, that an express choice of law for the

arbitration agreement leaves little, if any, room for the operation of the principle of validation if the choice of law would result in an unenforceable arbitration clause. As always, great care should be taken in choosing the seat, the main contract law, and law of the arbitration clause, given their significance to ensuring the effectiveness of the parties' commitment to submit disputes to arbitration. 🏠

- 1 The phrase "judicial comity" refers to the deference and respect which domestic courts accord to the decisions of foreign courts.
- 2 *Enka Insaat Ve Sanayi AS v OOO "Insurance Company Chubb" & Ors*, [2019] EWHC 3568 (Comm), at para 113.
- 3 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors*, [2020] EWCA Civ 574, at para 42.
- 4 *Ibid*, at paras 91, 109.
- 5 *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb*, [2020] UKSC 38, at para 27. Some courts break the test into three components: (1) express choice of law; (2) implied choice of law; and (3) most real and substantial connection. There does not, however, appear to be any substantive difference between these different formulations. See *BNA v. BNB*, [2019] SGCA 84, at paras 44-48.
- 6 *Ibid*, at para 170(iv).
- 7 *Ibid*, at para 266.
- 8 *Ibid*, at paras 43-58.
- 9 *Ibid*, at para 53.

- 10 *Ibid*, at paras 95-109.
- 11 *Ibid*, at para 94.
- 12 *Ibid*, at para 121.
- 13 *Ibid*, at para 121.
- 14 *Ibid*, at paras 122-123.
- 15 *Ibid*, at paras 127-128, 132-136.
- 16 *Ibid*, at para 257.
- 17 *Ibid*, at paras 174, 179.
- 18 *Ibid*, at para 180.
- 19 *Ibid*, at paras 261, 293.
- 20 *Ibid*, at para 155.
- 21 *Ibid*, at paras 156-169, 171.
- 22 *Ibid*, at paras 207-230.
- 23 *Imperial Life Assurance Co. of Canada v. Segundo Casteleiro Y Colmenares*, [1967] SCR 44, 62 DLR (2d) 138; *Vita Food Products Inc. v. Unus Shipping Company*, [1939] AC 277, [1939] 1 All ER 513 (JCPC).
- 24 *Lilydale Cooperative Limited v. Meyn Canada Inc.*, 2015 ONCA 281.

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# Transformational Process Design for Dispute Resolution

## Introduction

Before any dispute resolution process is designed or implemented, there should be a planning process to avoid surprises and pitfalls and minimize the risk of failure. Without advanced planning, there is no direction to go towards, no priorities to focus limited resources on, and no sense of progress and achievement. On the other hand, one cannot predict or prepare for every single possibility; as soon as implementation begins, one will need to adjust, adapt, course correct, and change in response to new findings or unforeseen situations, especially in dealing with such dynamic systems as human beings—who can perceive, think, and react in numerous ways, creating new possibilities at every turn, rendering previously designed plans ineffective.

This article explores the characteristics of complex systems and suggests a new framework for designing dispute resolution processes. It takes into account the dynamic and complex nature of human systems and the ever-changing quality of dispute systems.

## Our Tendency Toward Stepwise Models

Regardless of the framework or model utilized, designing dispute resolution processes starts with the designer making sense of the conflict, grasping the dynamics of the behaviour among all participants, comprehending the context and situation in which the conflict has occurred, gaining an understanding of the desired objectives, and forming a foundation upon which the system is to be built.

As we try to understand the dynamics of dispute resolution process design, our stepwise perception and categorizing brain naturally nudges us towards visualizations such as the one depicted in Figure 1. This reductionist approach—which, in essence, is based on Aristotle's principle of non-contradiction<sup>1</sup>—is distinctly prevalent today and prompts us to habitually group similar activities into stages or steps, followed by other stages or steps. The same stepwise approach, more often than not, has been utilized to model human behaviour or interactions.

Models help a beginner's mind make sense of a complex system by focusing on essential aspects (i.e. steps,

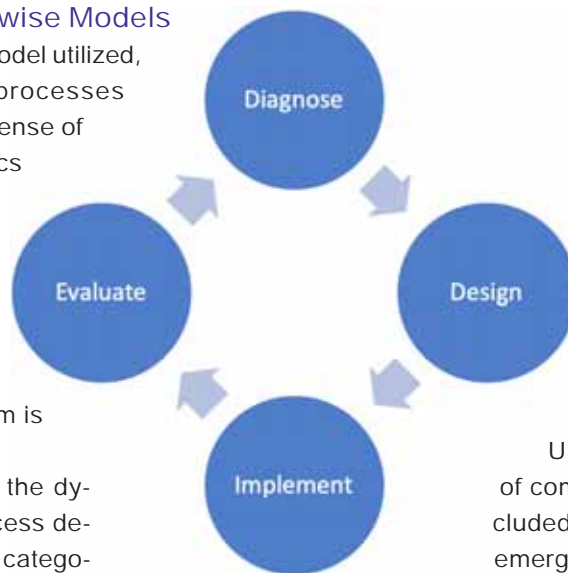


Fig. 1 – Four Basic Stages of Dispute System Design, adapted from Sander & Bordone (2005)

categories). The reality of life, however, is much more complicated. The steps, stages, or phases of these models are so inseparably interconnected and intrinsically intertwined that, in the real world, they seldom materialize in isolation from one another.

## Complex Systems Design

Understanding the dynamics and nature of complex systems—dispute systems included—enables a more holistic approach to emerge, as depicted in Figure 2.

The more complex a system, the more interrelated its components and inner workings will be. As a result, even initiating a diagnosis will create change within the system, causing “implementation” to occur at the same time as “diagnosis.”

Picture two colleagues choosing a third party to mediate their dispute or coach them through their conflicts. The first questions and the initial dialogues between participants will affect all involved: curious minds start to absorb visual, auditory, and tactile (e.g. handshake) signals, gaining more knowledge and forming an understanding of others around



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them. Any question asked by the dispute resolution practitioner may trigger emotions and will build comprehension for either party.

In dealing with complex systems, it is almost impossible to make a diagnosis without causing change. As soon as the designer starts interacting with participants, the change process has already been initiated. It can prove incalculably challenging to pinpoint a specific time in which the “Diagnose” step started or ended.

This challenge is also present on the “Evaluate” end of the traditional process. The more adept the dispute resolution practitioner, the more tuned in they will be towards

pen, no matter what, so to effectively lead the process, the practitioner must manage the transformation from the start and continue until the end is achieved, with the *end* itself being fluid, forming, and changing through dialogue amongst the participants.

Transformational Process Design for dispute resolution is dynamic and alive: the dispute system lives through all participants. It moves and evolves constantly, the conflict changing and transforming frequently, the participants experiencing and learning repeatedly, with the end result gaining form, structure, and substance along the way.

Figure 3 illustrates a model for Transformational Process Design for dispute resolution. **This model does not translate into any steps or stages.** Instead, it consists of nested spheres and concentric components, all interrelated, all occurring simultaneously.

### Key Components of Transformational Process Design

#### Defining the Desired Future

Unless participants define, well in advance, what success looks like and clearly define what they want to achieve out of the dispute resolution or conflict management process, the process will not lead to a satisfactory end.

This clarity of vision—of what is desirable—might not occur right at the beginning for all participants; people might change their vision (i.e. what they want, their desired future) as they learn more about each other and know more about the possibilities. Moreover, some participants might not even believe they have the option or authority to form a desired future, even as a fantasy.

Those who believe all is lost will seem as if they have stopped reaching out, and when asked to picture their desired future, they may freeze with indecision. However, the sheer presence of participants and their continued efforts to find a way to resolve their dispute are clear signs for the practitioner that they are still reaching out, and the participants themselves need to see and understand this. Regardless of the burning thirst and raging heat, they need to look down and see they are still walking, hoping to find an oasis.



*Power imbalances and past oppressions play a significant role for those who, voluntarily or by force, have adopted a more helpless and incapacitated state of mind. The practitioner's role is to facilitate the en-*

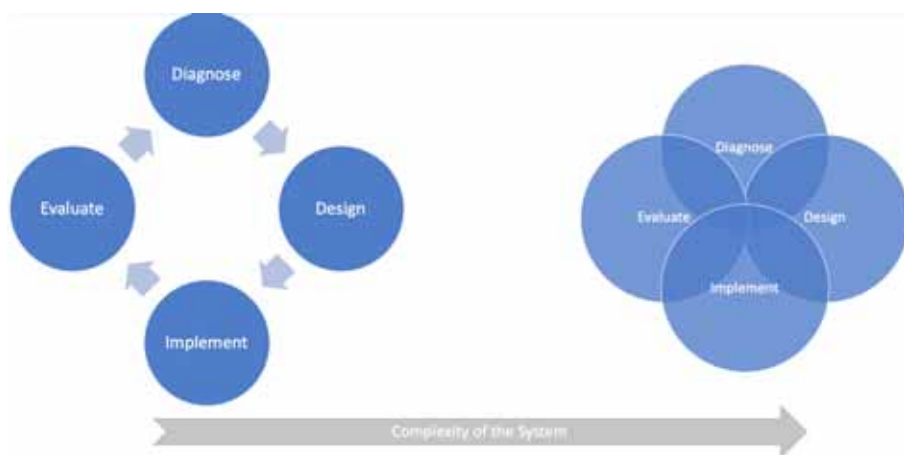


Fig. 2 – From a Reductionist to a Holistic Approach

observing and receiving feedback, especially that which emerges unconsciously (e.g. body language), continuously evaluating their performance and its effects, and ever so slightly adjusting their tactics and questions accordingly as they continue with the dialogue.

Human behaviour is immeasurably complex: many things happen simultaneously, everything is interrelated, and all affects all. Using traditional reductionist models to deal with such a manifold and complicated system is more like attempting to manage a child’s behaviour and attitude using the carrot-and-stick model, a model that might work on some animals, and even then, only to some degree.

### Transformational Process Design for Dispute Resolution

In order not to reduce complex dispute resolution processes to mechanical categories and steps, one must embrace their interrelated and transformational nature and accept the nebulous and fuzzy knowledge that *everything affects everything*.

I use the term “Transformational Process Design” to highlight the mindset needed to initiate any dispute resolution process design. Change and transformation will hap-

*visioning process, allowing the light to be seen and highlighting and encouraging hope for all participants.*

### Collective Learning

In this model, the practitioner is not the only one exploring, understanding, and learning about the conflict and the other participants. In an effective process, everyone involved will be learning more about everyone else. However, life's reality introduces yet another impediment: people being defensive about their ideas and often closed to learning.

Beliefs are not logical concoctions; they link directly to emotions and shape behaviours, and are fundamental building blocks of our ever-evolving identity. People's beliefs, values, and opinions comprise their identity and tend to be passionately defended against anything perceived as offensive or aggressive.

Protecting one's identity—the self-preservation instinct—prompts people in conflict situations to defend their *positions* and try to prove theirs are the right ones, leading to a win-lose mindset. This behaviour will be inflated in cases of perceived aggression, whereas any *acceptance* will be regarded as a *retreat*.



*The practitioner's role, for this part, is to provide awareness and guidance by asking effective questions, leading participants to dig deeper and probe for understanding, rather than proving themselves right. Practitioners need to create a safe space in which participants won't perceive dialogue as verbal attacks, an environment in which they can exercise mutual respect.*

### Solutions Building

Conflict is a discomforting difference. It has a tendency to provoke emotions and manipulate feelings (Saunders, Lin, Milyavskaya, & Inzlicht, 2017, pp. 31-40). Conflict also begets conflict; it branches out and propagates (Sharvit, 2014, pp. 252-261).

It is natural for people in conflict situations to experience distressing feelings and sweltering negative emotions. If unchecked, these sentiments will find their way out, permeating into conversations between participants, fanning the flames, and aggravating the conflict between them.

A practitioner with a problem-solving orientation will focus on exploring and probing for problems, pain points, challenges, and issues between participants, trying to pinpoint the root causes, devising a plan of action to address problems and overcome challenges.

On the other hand, a practitioner with a transformation orientation will focus on facilitating a process for the participants to discover their own resources and strengths, identifying times when they experienced a more satisfying relationship or times when they were able to overcome a challenge, thereby highlighting their resources and success stories. A solution will emerge out of those success stories since those are the ones that have already worked. The stories make sense to participants and are not prescribed external advice.

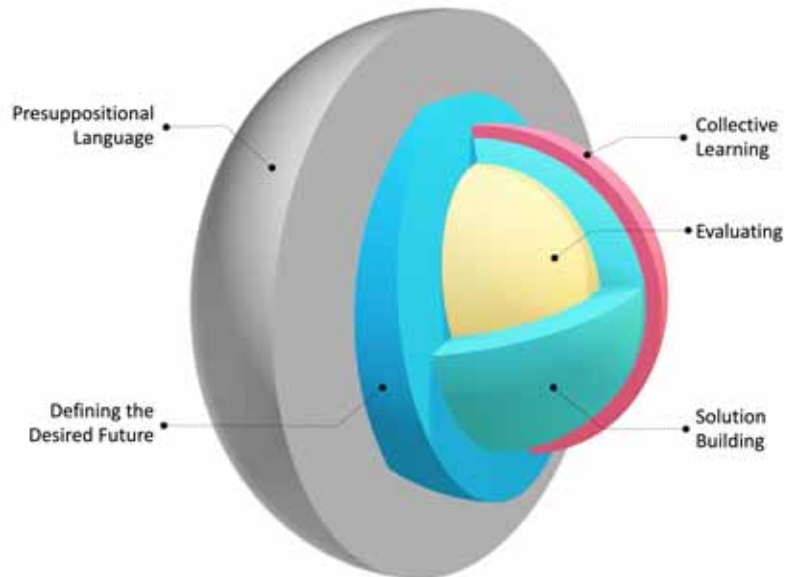


Fig. 3 – A model for Transformational Process Design for dispute resolution



*The practitioner's role is to facilitate and help all participants to reflect, remember, and recognize their own success stories, resources, strengths, and support systems. They will then need to leverage these resources to co-construct pathways that bridge their current situation to their desired future, making their vision a reality. The focus is on building solutions rather than finding problems.*

### Presuppositional Language

Focusing on finding solutions and success stories has a transformational effect on the language the practitioner uses. Questions will have positive connotations, and conversations will incorporate constructive suppositions. Hence the term "presuppositional language."

In Transformational Process Design, the practitioner truly *believes* that participants will be able to achieve success on their own, making the practitioner's

presuppositional language genuine and honest.


## Evaluating

One key element of this model is to ensure progress and maintain the forward momentum of all participants. The problem for which the participants seek help might seem, in the beginning, immense and insurmountable. They therefore receive a message of hope and progress when the practitioner recognizes every step forward and all achievements.

Evaluation is an effective tool to anchor participants to reality and avoid extreme bargaining. Evaluating the current status versus the desired future will bring a pathway

into view. It might not be *the* pathway, but it exposes the fact that the target cannot be achieved all at once, thereby focusing the dialogue on the next step instead of sticking to a desired, far-away objective.



*The practitioner's role is to evaluate the progress of all participants in the conflict against their desired future, searching for signs of progress and success, reinforcing the message of hope, demonstrating the progress made so far, and refocusing attention towards going through the next step, instead of on far-away objectives.* 

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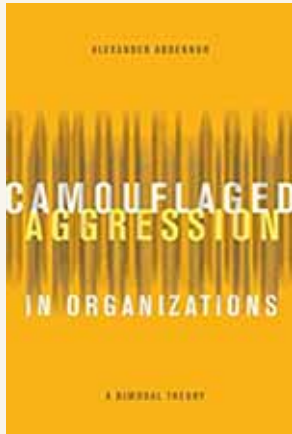


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## Camouflaged Aggression in Organizations: A Bimodal Theory

Alexander Abdennur,  
University of Alberta Press, 2020

ASIN: B07W2V9D2Y

Reviewed by: Jennifer Webster



JENNIFER WEBSTER, B.A., LL.B.

Jennifer Webster, B.A., LL.B., is a mediator and arbitrator in private practice with a focus on labour, employment and human rights law. She worked as a mediator for Federal Mediation and Conciliation Service prior to starting her practice.

Understanding and analysing conflict are central to our practice as mediators and arbitrators. To excel as conflict management practitioners, we must continually learn and reflect about the causes and expressions of conflict. In *Camouflaged Aggression in Organizations* Alexander Abdennur helps us to do that through a social science lens.

Authors who preceded Abdennur have explored the causes of conflict in a variety of ways. In *The Mediation Process* (Jossey Bass 1986), Christopher Moore proposed a circle of conflict in which the causes of conflict are categorized as values, relationships, data, interest, and structure. Our understanding of the causes of conflict can also draw from the distinction between rights-based and interest-based conflict. Additionally, in mediation and arbitration practice, the model of different conflict styles, with particular reference to the work of Ron Kraybill, can be applied to better understand the different responses and approaches to conflict.

In *Camouflaged Aggression in Organizations*, Alexander Abdennur contributes to our understanding of conflict through a detailed theory of the way in which conflict is expressed through

aggression. He defines aggression as “any action or inaction directed by an individual toward the conscious or unconscious goals of causing harm or suffering” and argues that there are two modes of aggression, being confrontational and non-confrontational.

Confrontational aggression is direct, active and conscious. Where aggression is confrontational, Abdennur deduces that there is clarity as to the intention, perpetrator, act and target. By contrast, in the non-confrontational mode of aggression, he proposes that the intention, perpetrator, act and target are masked such that the aggression is “camouflaged.”

Camouflaged aggression has become dominant in our organizations, Abdennur argues, for both structural and sociocultural reasons. He maintains that the structure of organizations provides myriad avenues for the practice of camouflaged aggression through, for example, information control, time manipulation, rigid processes, and inaccessibility. In addition, our society has favoured anti-confrontation values and norms such that the practices of camouflaged aggression have increased.

Abdennur describes in-depth the practices and impact of camouflaged aggression. His writing is mostly through an academic lens with citations to his previous works as well as published studies from other social scientists. His descriptions can prove challenging to follow, particularly when the vocabulary is drawn from scientific and social scientific research. For instance, Abdennur writes that there is a “phylogenetic regression towards camouflage” and this concept could be more effectively communicated by avoiding the statistical reference, “phylogenetic regression,” identifying instead that humans have a genetic predisposition towards camouflage.

There is a six-page glossary of terms at the end of the book which is useful to enhance the understanding of the concepts introduced, but the need for the glossary highlights that there is a significant number of concepts and theories that are new and unfamiliar to most readers.

Abdennur’s writing is most accessible when he provides a chart to

compare the confrontational and non-confrontational modes and when he identifies a specific series of techniques of camouflaged aggression. He includes labels and definitions for some forms of camouflaged aggression in the book's glossary, such as:

**Affectional Yo-Yoing:** The intermittent display of emotion which involves shifting unpredictably between affectivity and coolness.

**Carpet Pulling:** Engaging in anxiety-provoking practices.

**Decision Laundering:** The rationalization of a personally-motivated decision in terms of the organization's needs and restrictions.

**Dusting:** The dissemination of harmful information.

**Organizational Foliage:** A metaphor taken from the natural world; refers to the intricate organizational structures where aggressors take cover.

**Withdrawal of Love:** Deliberate withdrawal of attention and affection from someone.


Given Abdennur's theoretical writing, it initially seems that his intended audience was academics and behavioural scientists. However, as the book moves from a description to prescription, it becomes clear that the writing is directed at managers and leaders in organizations. Ultimately, Abdennur developed a guidebook for organizations through which they can create an environment where camouflaged aggression is discouraged in favour of confrontation.

Abdennur concludes that there is an imbalance between the two modes of aggression and outlines a three-dimensional strategy for managers to use to combat camouflaged aggression. He proposes that managers: 1) understand and recognize aggressive behaviour in its camouflaged expressions; 2) use intervention strategies to manage and reduce camouflaged aggression; and 3)

affirm the value of confrontation as an expression of aggression. This strategy necessarily involves educating the manager as well as employees about camouflaged aggression and then addressing the organizational structures which encourage it. Through a balancing of the two modes of aggression, the organization can, in Abdennur's view, reduce conflict, mental health problems, and episodes of explosive violence.

Although Abdennur has provided a detailed analysis of aggression in organizations, he does not explicitly address the dynamics of race and gender. He does note that confrontational values were traditionally considered core values of masculinity, but does not further elaborate on the impact of gender and race on the expression of aggression. In my view, his analysis would have been richer had he applied more specificity and examined the experience of women, racialized persons, and members of the LBGTQ community as targets and perpetrators of camouflaged aggressions, as well as the role and practice of micro-aggressions against people who are marginalized in the traditional power structure of an organization. He describes in detail the way that the structures and processes of organizations have favoured camouflaged aggression without considering how these structures also favour particular people within the organization.

*Camouflaged Aggression in Organizations* is deeply rooted in social science concepts and theories and requires a close read in order to fully understand Abdennur's call for a modal shift from camouflage to confrontation as a precondition for systemic improvement. Nonetheless, I found that, as I reflect on his theories and prescriptions for change, I am able to apply these ideas in my own analysis of conflict. The approaches that Abdennur outlines for managers can be adapted to workplace and organizational interventions to help mediators, arbitrators, and investigators identify the extent to which organizational structures favour and support camouflaged aggression.

As conflict management practitioners we can draw on Abdennur's guidance to help people and organizations address camouflaged aggression by removing the mask and identifying the behaviour, the perpetrator, the direct and indirect victims, and the injury. Since the confrontation mode involves directing the right issue to the right party while respecting civility, mediation can readily support the shift from camouflage to confrontation. As Abdennur stresses on page 44, "the cultivation of confrontation as an intellectual approach, as an ethic, as a method, and, ultimately, as an integral part of one's character is the most viable approach to addressing conflict within the organization." 

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# Passive or Interventionist: Maintaining an Even Playing Field in Commercial Arbitration

There are three fundamental tenets of commercial arbitration that affect how arbitrators treat parties, including during the course of a hearing. First, unless the parties otherwise agree, arbitrators are to be neutral and impartial.<sup>1</sup> Second, parties are entitled to fair and equal opportunities to present their cases and defences.<sup>2</sup> Third, arbitrators must, unless the parties agree otherwise, decide disputes in accordance with applicable law.<sup>3</sup>

What then, are arbitrators to do when they believe that cases are not being properly presented, either because material facts, relevant authorities or legal issues are missed? What are the respective roles of arbitrators and counsel during the course of arbitral proceeding and, in particular, at the hearing stage? This article examines these questions in the context of arbitrations where the parties are represented by counsel. The obligations of arbitrators dealing with self-represented parties or parties represented by non-lawyers will be dealt with in another article.

For international cases, there is a divide between the common and civil law worlds. In the former, arbitration procedures are heavily influenced by procedures typified in the litigation process (for want of a better expression, the adversary system model). In the latter, procedures more closely resemble an inquisitorial court system.

The stark differences between the two are easily identified by a comparison between the *International Bar Association Rules on the Taking of Evidence in International Arbitration* (IBA Rules) and the *Rules on the*

*Efficient Conduct of Proceedings in International Arbitration (Prague Rules)*. Under the IBA Rules, procedures for the taking of evidence are clearly based upon the common law model, whereas the Prague Rules are expressly intended to empower tribunals to achieve efficiency by use of inquisitorial techniques. As a specific example, under the Prague Rules tribunals may, under the principle of *Jura Novit Curia* ("the court knows the law"), apply legal provisions not pleaded by the parties if it finds it necessary (subject to consultation with the parties).

Arbitrations that are seated in Canada (whether international or domestic) almost invariably adhere to the common law model of adversarial proceedings. An important, but incorrect, assumption that underlies the Canadian arbitration practice is that arbitrations are conducted by passive arbitrators who leave the presentation of cases to evenly matched and experienced counsel. The rationale is that, through the cut and thrust of the adversarial process, arbitrators will be well-placed to make accurate findings of fact and then properly apply legal principles to produce "correct" awards that fairly bind the parties.

When applications to set aside awards are made on the ground that the arbitrators failed to treat parties equally and fairly or that parties were not given opportunities to present or respond to their cases, reviewing courts examine the proceedings through the prism of this model. As a result, most arbitrators take their



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guidance from judges in deciding how to conduct themselves throughout arbitral proceedings.

It is important to note, however, that the adversary system model that is ubiquitously used in Canadian arbitrations derives not from arbitration norms, but from an importation of litigation practice into our arbitral world. In effect, at least at the hearing stage, and notwithstanding that use of written examinations-in-chief are becoming more common, most arbitrations are conducted much like private trials. Hearings start with written or oral opening statements; claimants' fact and opinion witnesses are called in the order determined by counsel; those witnesses are cross-examined; respondents' witnesses are then called and cross-examined, and hearings end with closing submissions. While arbitrators do question witnesses, those questions typically follow cross examination, and they tend to be limited to points of clarification.

tion. Many arbitrators base their conduct largely upon the ways in which trial judges conduct themselves in their courtrooms.

This need and should not be the case. It is often stated that parties opt for arbitration in order to avoid the relatively inflexible litigation model, so there is no limitation on parties and arbitrators infusing that objective in their design of hearing procedures. Focusing on arbitrator conduct as a specific example, there is no principled reason that would prevent an arbitrator, even within the context of the adversary system, from engaging witnesses and counsel at all stages of the hearing, including during the examination of witnesses, in order to permit greater efficiency in the presentation of evidence and argument and a fuller understanding by arbitrators of cases that are being presented to them. In order to guard against possible post-award challenge, arbitrators (working together with counsel) can provide in their terms of appointment and in procedural orders specific mechanisms that would empower arbitrators to carry out this role. Failures to do so is easily attributable to conservatism and/or a lack of imagination on the part of both arbitrators and counsel.

Even with these enhanced powers, however, arbitrators are and should always be concerned that interventionist behaviour could be viewed by a court in post-award proceedings as contravening the principles of neutrality, and fair and equal treatment. This concern presents itself in many contexts, including requests for adjournment, requests for changes to case timetables, requests to allow new witnesses, evidentiary rulings, and the like. In these situations, the arbitrators will always be torn between adherence to agreed-upon procedures and the risk that any decision that they may make will provide an opportunity for applications (whether meritorious or not) to set aside an award. Ultimately, arbitrators must be guided by their own determinations as to what is "right" in any given situation. They should consider how their rulings will be perceived by all parties, and they should, on the record (i.e., by procedural rulings or transcribed or recorded statements), explain their decisions so that a reviewing court can fully understand why those decisions have been made.

Turning to the hearing itself, if the goal of arbitration is to provide parties with awards that are consistent with applicable law, then the task that

is imposed on arbitrators is to provide that result. But the arbitrator has to be fair in discharging that responsibility. Where an arbitrator intervenes, for any purpose, one side may easily perceive that its interests are being subordinated to those of the other. Here, the need for arbitrator even-handedness is all the more acute.

In most arbitration procedures, the parties' respective positions are set out in their initial statements of their claims and defences, and at that stage the legal issues that will have to be determined will be known to them and to the arbitrators. But cases evolve. New facts often emerge during the course of pre-hearing disclosures and as witness statements are delivered. With these new facts, it often happens that new legal issues emerge. Typically, counsel will be sensitive to these new issues, and they will be fully canvassed during the course of the hearing and in closing submissions.

But this does not always happen. Very often, one side of the case will have a better appreciation of the legal or factual issues that have to be determined. This may happen as the result of an imbalance of resources between the parties or differences in the quality of legal representation. Or arbitrators themselves may identify

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issues that they believe should be addressed in order that they can feel comfortable in rendering their award. Where these types of situations manifest themselves during the hearing, arbitrators are often in a quandary when trying to decide if, when, and how they should bring issues to the attention of counsel.

Here, one principle is absolute and incontestable. Whenever an arbitrator determines that he or she will address an authority, case or issue that has not been dealt with by counsel, that must as early as possible be presented to counsel in order that they can address the matter. While no authority need be cited for this self-evident proposition, this was the primary basis upon which an award was set aside and a new arbitration ordered in *Tall Ships Landing Development Inc. v. Corporation of the City of Brockville*<sup>4</sup>. Moreover, should they wish, counsel must have the opportunity to object and, where they do not, they may be precluded from doing so in post award proceedings.<sup>5</sup>

There is a second principle that, I suggest, is uncontestable. Where an arbitrator identifies an issue that could go to his or her jurisdiction, that must be brought to the attention of the parties as soon as possible. Jurisdictional issues can arise at any time in an arbitration, even as late as an arbitrator's deliberations. Arbitrators cannot act beyond their jurisdiction, and they should not presume that the silence of parties on an issue can serve as an implied acceptance of jurisdiction.

Probably the most typical problematic situation is where an important case is by oversight not brought to a tribunal's attention. This would include, for example, a case that articulates a legal test that should be applied. While an arbitration hearing is not a trial, and while counsel are not officers of the court as they would be

in a litigation context, it is uncontroversial that as a matter of professional ethics, a lawyer is expected to bring relevant and probative authorities to an arbitrator's attention. In this type of situation, no counsel should be in a position to object where an arbitrator invites an adverse counsel to consider the possible import of a case that is clearly on point.

The slightly more difficult situation is where an arbitrator is aware of a case, perhaps freshly decided or from another jurisdiction, that may or may not have an impact on a legal position being advocated by a party. Here, the problem is more nuanced. Counsel for whom the case might not be helpful may have been aware of the case, but through perfectly legitimate reasoning, may have chosen not to bring that case to the tribunal's attention. On the other hand, counsel for whom the case could be helpful may be unfairly assisted if a tribunal were to bring the case to counsel's attention.

In this situation, arbitrators have to be very careful before intervening. An arbitrator should not simply act as the "smartest person in the

room". Moreover, it would be very dangerous for an arbitrator to intervene based only on an assumption of uneven resources or inadequate representation. I would suggest that where an arbitrator concludes that he or she must have the input of counsel on the possible application of the case, the arbitrator should provide the case to both counsel and invite submissions. This should be done as early in the proceedings as possible. If the arbitrator becomes aware of the case during the deliberative process, he or she should ask counsel to address the case in supplementary oral or written submissions. Even where disclosure is late in the proceedings, it is hard to imagine that a losing party could credibly challenge an award on the basis that he or she was called upon to deal with a case that might have an impact on determination of issues in an arbitration. Even so, where an arbitrator concludes that a case, while of possible importance, is not truly necessary to that arbitrator's analysis and determination, I suggest that the arbitrator should demur and not provide the case to counsel. This removes any possibility of challenge



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based upon unfair treatment. While easy to state and hard to apply, “necessity” should be the arbitrator’s test.

A situation that presents greater difficulty is where an arbitrator concludes that a party has neglected a categorically important aspect of its case. This may occur, for example, where a party neglects to deal with an applicable legal test or, more typically, where a material legal theory has been missed. There are many examples that easily come to mind, but for purposes of this discussion assume that in a case that depends upon performance of a contractual obligation, a respondent neglects to plead that the obligation is unenforceable on some legal theory such as unconscionability. Or, a respondent may neglect to make an argument that the contract is void on some basis. Under what circumstances can or should an arbitrator intervene?

Again, I suggest that arbitrators should adopt a test of “necessity”. Arbitrators should not presume that important legal issues have been missed. I suggest that, to the contrary, arbitrators should assume that counsel

before them are competent (or better) and that both sides have made strategic decisions based on proper analysis measured against the interests of the parties. Where admittedly important issues have been apparently neglected, arbitrators should carefully consider whether they believe that they can issue awards on the basis of the facts, opinions and legal submissions that have been made. Where they can, there is little point in raising additional issues that would serve little purpose other than to make an award “better” at the risk of inviting post-award challenges.

There will, however, be situations where arbitrators feel that they must, in fairness to the parties, address apparently neglected matters. These should be seen as exceptional cases, and an arbitrator in such a situation must carefully consider the implications of doing so, especially having regard to the fair- and equal-

treatment statutory obligation. Where such matters are to be raised, arbitrators should fully explain their concerns and state the reasons for raising them. These reasons should be stated in a neutral manner (to the extent possible), and both parties should be given any time reasonably required to address the issues, even at the expense of allowing new evidence or otherwise delaying completion of the arbitration.

There can be no easy answer to these types of issues that are commonly identified by arbitrators and there is no magic formula to solve fairness and equality issues. Each case will present unique challenges. So long as arbitrators are sensitive to these issues, and so long as arbitrators consider issues of fairness (even where making decisions that one party might consider unfair), post award challenges should be reduced in number and where brought, awards should be successfully defended. 🏠

- 1 See, for example, *Arbitration Act, 1991*, S.O. 1991 (the “Ontario Domestic Act”), section 11(1) and Article 12 of the Model Law.
- 2 See, for example, section 19(1) of the Ontario Domestic Act and article 18 of the Model Law.
- 3 See, for example, section 31 of the Ontario Domestic Act and article 28(1) of the Model Law.
- 4 2019 ONSC 6597 (CanLII)
- 5 *Xerox Canada Ltd. v. Xerox Corporation*, 2006 CanLII 41006 (ONSC), citing *Minerals Germany GmbH v. Ferco Steel Ltd.*, [1999] All E.R. (Comm) 315 (Eng. Q.B.D. (Comm.))

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# Challenges and Confidentiality in Commercial Arbitration

## *Halliburton v. Chubb*

Arbitrators seated in Canada must be impartial and unbiased.<sup>1</sup> Domestic legislation, the Model Law, and institutional rules all contain provisions that, from the time of potential appointment, require disclosure of circumstances that could give rise to doubts as to independence, bias, or impartiality.<sup>2</sup> Because failure to conform to these requirements can impede or delay arbitrations, or cause awards to be set aside, ethical disclosure standards have evolved to provide guidance to arbitrators and counsel.<sup>3</sup>

While the degree to which Canada-seated arbitrations are private and confidential depends largely upon institutional rules and arbitration agreements,<sup>4</sup> parties often cite confidentiality as an important reason for opting for arbitration, and there is a general expectation that proceedings will be private and confidential. Where arbitrators are faced with disclosure obligations, such disclosure may entail confidential information about other arbitrations. There is an obvious tension between disclosure and confidentiality, and Canadian arbitrators have looked for guidance on these issues in *Halliburton Company v. Chubb Bermuda Insurance Ltd.*,<sup>5</sup> a UK Supreme Court case that dealt with challenges to an arbitrator and concomitant issues of disclosure and confidentiality.

The facts were atypical; a single arbitrator was appointed in a series of arbitrations with overlapping parties and issues that arose out of one incident. The two issues in the courts were whether and to what extent an arbitrator may: (i) accept appointments in multiple arbitrations concerning the same or overlapping subject matter with only one common party, without thereby giving rise to an appearance of bias; and (ii) do so without disclosure.

The arbitrations were "Bermuda Form",<sup>6</sup> conducted *ad hoc*, with no institutional rules, seated in London, with three-member tribunals. The insurance policies were the same. One common issue was whether Chubb was entitled to deny coverage because the insureds made

unreasonable settlements.

In Arbitration 1 (*Halliburton v. Chubb*) the court appointed R as chair. Halliburton opposed that appointment because R disclosed that he was on past and pending tribunals where Chubb was a party, including as a Chubb appointee. In Arbitration No. 2 (*Transocean v. Chubb*) Chubb, using the same counsel, appointed R as one of three arbitrators. R disclosed his past appointments and pending matters to Transocean but not to Halliburton. Arbitration 3 was between Transocean and another insurer; while R was a joint appointment, he made the same disclosures but again made no disclosure to Halliburton. Halliburton objected that R could hear evidence in Arbitrations 2 and 3 to the exclusion of Halliburton. R answered that he had not believed that disclosure was required under the IBA Guidelines, but admitted that he may have disclosed, and offered to consider resigning from Arbitrations 2 and 3 if they proceeded beyond preliminary issues. Halliburton insisted that R resign in Arbitration 1; R replied that he would not unless the parties agreed on a replacement.

The High Court dismissed Halliburton's challenge, finding that R was not required to make disclosure and that the circumstances did not "give rise to justifiable doubts" as to his "impartiality".<sup>7</sup> The Court of Appeal found that R ought to have made disclosure to Halliburton, but agreed that the test for removal had not been met.<sup>8</sup>

The UK Supreme Court unanimously affirmed the



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Court of Appeal's decision, with some differences in reasoning. First, the Court ruled that arbitrators have a statutory duty of impartiality, a principle that applies throughout Canada.<sup>9</sup>

Second, the Court distinguished between disclosure obligations and the test for removal. Removal is to be determined on facts that exist when a court hears a challenge. This ruling was based on the present tense "exist" in the English Act.<sup>10</sup> While this issue has not been dealt with in Canada, similar language is used in several domestic arbitration acts and in the Model Law.<sup>11</sup> This reinforces the proposition that the test for disclosure is broader than that for removal. The logic is that appointing parties ought to be provided with information sufficient to determine whether to make appointments that may ultimately become problematic.

Third, the test for removal is objective: would a fair-minded and informed person, neither complacent nor unduly sensitive or suspicious, having considered the facts in proper context, conclude that there was a real possibility of bias. In this exercise, the same tests apply to tribunal chairs and party-appointees.<sup>12</sup> In considering context, the observer would note the following characteristics of international arbitration: (i) it is private with limited appeals or reviews; (ii) arbitrators are paid and dependent upon parties/counsel for new appointments; (iii) arbitrators may come from different legal cultures and ethical standards; (iv) arbitrators need not

be lawyers; (v) parties may have limited information about potential arbitrators; and, (vi) challenges may be tactical. Canadian statutory tests are similarly expressed.<sup>13</sup> The test for removal of arbitrators is the same as for judges and is objective, with a high onus of proof because removal challenges the integrity of arbitrators and arbitration itself.<sup>14</sup> There is no reason to suggest that the factors pertinent to arbitration suggested in *Halliburton* would not be treated as equally pertinent here.

Fourth, the Court ruled that the role of frank disclosure, which is a badge of impartiality, is to avoid appearances of bias and to enable parties to decide whether to approve appointments or act to mitigate problematic circumstances. Where there are overlapping arbitrations, parties are dependent upon disclosure as a means to consider impacts of evidence and submissions on common issues that may affect arbitrators in common appointments.

Fifth, the Court interpreted the English Act so as to imply a duty to make disclosure as a corollary to the statutory duty of impartiality. This is a moot point in Canada because our statutes and most institutional rules, express a duty to make disclosure of facts that could give rise to justifiable or reasonable doubts as to an arbitrator's impartiality or a reasonable apprehension of bias.<sup>15</sup>

Sixth, the Court ruled that while the statutory test for



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such disclosure is objective, applicable institutional rules or guidelines often provide otherwise. General Standard (3) of the IBA Guidelines requires disclosure of facts or circumstances that may “in the eyes of the parties” give rise to doubts as to impartiality or independence. Article 11(2) of the ICC Rules uses that same phrase. While other rules are unclear (e.g., ADRIC Rule 3.3.3), arbitrators should guide themselves by considering what their parties might consider relevant in any set of circumstances. Arbitrators should err on the side of caution, recognizing that parties have an ongoing interest in problem-free arbitrations and that challenges, even where unsuccessful, have deleterious effects by causing expense, delay and the possibility that awards may be set aside.

Seventh, the Court ruled that where an arbitrator is required to disclose the existence of prior or pending confidential arbitrations, disclosure can only be made if parties to the earlier arbitration(s) consent. Without such consent, an arbitrator can neither make disclosure nor accept the new appointment. Consent, however, may be inferred from an arbitration agreement, by applicable institutional rules or by the context of the arbitration and practice in its relevant field. In *Halliburton*, the Court accepted that R’s multiple appointments had to be disclosed and that the Bermuda Form Arbitration practice permitted R to make disclosure of the prior arbitrations and the common party, but not the other party (i.e., Halliburton itself). The Court accepted that, in England, a presumption of arbitral confidentiality applied. This is not necessarily so in Canada. Nonetheless, given the expectations of parties in *ad hoc* arbitrations, arbitrators should proceed warily in disclosing information that is presumptively confidential. Moreover,

when considering the possibility of disclosure, care must be taken to review existing arbitration agreements, terms of appointment, and procedural orders to determine whether and to what extent parties have expressly agreed that their proceedings are confidential.

Eighth, the Court ruled that while arbitrators need only disclose what they know, in some circumstances they have to make reasonable enquiries, noting that there is a delicate balance, as disclosure of trivial matters could promote unnecessary doubts as to impartiality and encourage vexatious challenges. The Court determined that the disclosure would have to be of a fact that might “reasonably” give rise to doubts. It cannot be doubted that if there is a duty to disclose, there must be some duty to make reasonable enquiries in some situations. As a typical example, arbitrators who practise in large law firms are required to conduct conflict searches (while former firm practitioners are not).<sup>16</sup> Every situation is fact specific. As a practical matter, potential arbitrators may be loath to make disclosure of facts that would not, in their minds, be problematic for fear of being disqualified. There is also, at least in Canadian markets, a mindset that, because the legal community is relatively small, the existence of relationships between counsel and arbitrators will be inevitable. As a result, there may be a tendency to close one’s eyes to matters that should be disclosed.

In *Halliburton*, the Supreme Court concluded that R breached his duty of disclosure and that a neutral observer may well have concluded that he ought to have been removed on the basis of a reasonable apprehension of bias. However, the Court found that the objective test for removal was not met in the context of the actual circumstances that

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prevailed when the challenge was heard, including the uncertain state of the law, R's explanation for his failures to disclose, and the status of Arbitrations 1 and 2.

*Halliburton* should be read by Canadian practitioners as a useful summary of principles. They should not assume, however, that Canadian courts would excuse the same type of non-disclosure. The lessons of *Halliburton* are that: (i) disclosure of multiple and overlapping appointments must be made with any doubt resolved in favour of disclo-

sure; (ii) arbitrators should be alive to their obligations to make reasonable enquiries of facts that might have to be disclosed; (iii) while disclosure might result in the loss of appointments that would withstand court scrutiny, parties are entitled to disclosure of circumstances that could avoid the possibility of unmeritorious challenges; and, (iv) even at the risk of losing new appointments, arbitrators should be cautious in making disclosure that could violate arbitral confidentiality. 🏠

- 1 *Szilard v. Szasz*, [1995] S.C.R. 3
- 2 E.g., *Arbitration Act*, S.B.C. c. 2, section 16; *Arbitration Act*, 1991, S.O. 1991, c. 17, section 11; Model Law, article 12; ADRIE Arbitration Rules, section 3.3; and ICDR International Arbitration Rules, article 13.
- 3 See, for example, the AAA's *Code of Ethics for Arbitrators in Commercial Disputes* (2014) and the IBA *Guidelines on Conflicts of Interest in International Arbitration* (2014) (the "IBA Guidelines").
- 4 See Daniel R. Bennet, Q.C. and Madelaine A Hodgson, "Confidentiality in Arbitration: A Principled Approach", (2016-2017) 3 McGill Journal of Dispute Resolution, 98; see also *Gea Group AG v. Ventra Group Co.*, 2009 CanLII 17992 (Ont. S.C.), *Rheume v. Société d'investissements l'Excellence Inc.*, 2010 QCCA 2209, Quebec Code of Civil Procedure, art. 4, ICDR Canada Arbitration Rules, art. 37, and ADRIE Arbitration Rules, art. 4.18.2
- 5 [2020] UKSC 48 ("*Halliburton*")
- 6 Such arbitrations are provided for by Bermuda Form insurance policies that were created to provide high excess commercial general liability insurance. There are few Bermuda Form arbitrators and it is thought desirable that awards that interpret and apply such policies be consistent with one other.
- 7 *English Arbitration Act*, 1991, s. 33
- 8 It should be noted that the High Court's decision was made while all three

- arbitrations were pending. Ultimately, Arbitrations 2 and 3 were dismissed on preliminary issues, and Chubb succeeded in Arbitration 1 prior to the Supreme Court ruling.
- 9 E.g., section 11 of Ontario's domestic arbitration statute and article 12 of the Model Law.
  - 10 *Arbitration Act*, 1996, section 24(1)(a).
  - 11 E.g., article 12 of the Model Law and section 13(1) of Ontario's domestic act.
  - 12 The Court did note the ongoing debate about the respective roles of chairs and party-appointeds, the proper roles of party-appointeds and the merits of party appointment.
  - 13 E.g., section 13(1) of Ontario's domestic act, section 17(1) of the British Columbia domestic act and article 12 of the Model Law.
  - 14 *Committee for Justice v. National Energy Board*, [1997] 1 S.C.R. 369; *Simcoe Condominium Corporation No. 78 v. Simcoe Condominium Corporation Nos. 50, 52, 53, 56, 59, 63 and 64*, [2006] O.J. No. 605 (S.C.); *MDG Computers Canada Inc. v. MDG Kingston Inc.*, 2013 ONSC 5436; *Farah v. Sauvageau Holdings Inc.*, 2011 ONSC 1819.
  - 15 E.g., article 12 of the Model Law; section 11(1) of Ontario's domestic act.
  - 16 *Jacob Securities Inc. v. Typhoon Capital B.V.*, 2016 ONSC 604

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# Confidentiality in International Commercial Arbitration: A Mechanism to Address Growing Concerns

Confidentiality is widely considered as one of the most important advantages of international commercial arbitration<sup>1</sup> and is regarded as a crucial aspect of effective and efficient arbitral proceedings that must be given legal effect.

However, recent developments have challenged the assumption of confidentiality. *The Plowman case*<sup>2</sup> in Australia concluded that confidentiality was not an essential aspect of arbitration, and the principles of this judgment were reaffirmed in the American *Panhandle Eastern Corp case*<sup>3</sup> and Swedish *Bulgarian Bank case*.<sup>4</sup> Thereafter, arbitral confidentiality has been treated differently in different jurisdictions. In civil law jurisdictions like France, Germany, and Switzerland, confidentiality is considered a fundamental feature of arbitration, with proceedings and documents almost entirely bound by confidentiality.<sup>5</sup> The common law jurisdiction of England and Singapore accept the inherently private nature of arbitration<sup>6</sup>, but jurisdictions like Australia, Sweden, and the United States deny a general, implied obligation of confidentiality.

Issues of confidentiality get further complicated by national legislation that does not regulate confidentiality at all or that mentions it in general, non-specific terms. Even institutional rules have significantly different perspectives relating to confidentiality.<sup>7</sup> "This ill-serves the purposes of the international arbitral process, leading to uncertainties and

unnecessary ancillary disputes over the scope of confidentiality obligations."<sup>8</sup>

The current uncertainty regarding confidentiality undermines arbitration and could lead to a host of evils such as trial by press release, publication of sensitive commercial information, loss of efficiency, and aggravation of the dispute.

## 1. Privacy and confidentiality in international arbitration

Significant issues arise out of the relationship between privacy and confidentiality. Privacy concerns the rights of third parties to know about and attend arbitration proceedings, and there is universal acceptance of the private, *in-camera* nature of arbitration proceedings.<sup>9</sup> Confidentiality, on the other hand, refers to the "asserted obligations not to disclose information concerning the arbitration to third parties."<sup>10</sup>

It must be clarified that the secrecy arising from privacy does not equate to an absolutely binding obligation of confidentiality even though privacy and confidentiality are traditionally linked. Private proceedings are not necessarily confidential. Privacy is important to prevent disruption and the involvement of third



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parties, and proceedings can remain private even if certain materials of the arbitration are disclosed to third parties.

However, parties come to arbitration with expectations and beliefs of both privacy and confidentiality. Many institutional rules and national laws have not addressed this distinction which is crucial to understanding the theoretical nature of confidentiality.<sup>11</sup>

## 2. The theoretical basis of confidentiality in international arbitration

Parties' agreements relating to confidentiality are given legal effect by the principle of party autonomy whereby the parties themselves expressly provide for the scope and extent of confidentiality in their proceedings.<sup>12</sup>

In the absence of an explicit agreement relating to confidentiality, the *lex arbitri* (law that governs the proceedings) regulates issues relating

to confidentiality.<sup>13</sup> Institutional and national rules may also provide varying degrees of confidentiality that apply to the arbitral proceedings.<sup>14</sup> In the absence of such rules, I argue that confidentiality can be implied into the arbitration agreement.

I argue that the judgments of the Australian, American, and Swedish courts are based on domestic considerations and are ill-considered from an international perspective. The judgments seem to falsely suggest that privacy does not necessarily require confidentiality, and therefore ignore the underlying reasons why arbitral proceedings are private in the first place. These decisions do not sufficiently criticize the presumptive implied obligation of confidentiality and do not address the widespread expectation of confidentiality in arbitration.

I suggest that confidentiality should be considered an implied obligation that arises from an arbitration agreement, as upheld by English courts. Firstly, this is because confidentiality is one of the most important advantages of arbitration. Secondly, it maintains commercial confidence in arbitration by protecting commercially-

sensitive information. Confidentiality should be considered a matter of law, which should be implied into the agreement.<sup>15</sup> It arises “by virtue of nature and objectives of International arbitration agreement, and through custom and usage.”<sup>16</sup> An implied obligation of confidentiality would eliminate the need for a case-by-case analysis of the parties’ intention. However, it must be noted that such an implication would be merely presumptive; it could be overcome by other agreements and would be subject to exceptions.<sup>17</sup> The arbitral tribunal should be the one to decide whether confidentiality is to be implied into the agreement, with cautious attention to the balance of interests and exceptions.

### 3. The scope of confidentiality in international arbitration

The section aims to clarify the significant issues relating to who is subject to be bound by confidentiality in an arbitration and the extent to which confidentiality must be present in arbitral proceedings.

For arbitrators, their ethical duty to ensure confidentiality regarding

arbitral proceedings is generally recognized and is considered to be extremely high.<sup>18</sup> This is crucial to the integrity of arbitral proceedings and to ensuring neutral and efficient conduct on the part of arbitrators. Duties of confidentiality extend to the drafting of awards and to communications made internally regarding dispositions of cases, as well as to comments on draft awards. Arbitral deliberations also come under the ambit of confidentiality, and, therefore, the parties to the arbitration as well as third parties are precluded from being present or intruding into such deliberations.<sup>19</sup> Confidentiality is not limited to formal meetings but extends to different forms of deliberation that the tribunal may adopt. However, constructive conversations between arbitrators and counsel after the rendering of the award are not considered violations of confidentiality.<sup>20</sup>

With respect to the parties, I suggest that parties to an arbitration are bound by confidentiality due to its implied nature arising from custom and usage. However, this implication is not absolute, and the extent and scope of parties’ confidentiality would be subject to the exceptions identified in Section 5 of this article.

Furthermore, confidentiality provisions in arbitration agreements between parties are binding only on the parties and not on third parties.<sup>21</sup> Therefore, in the absence of specific contractual provisions, third parties are generally not bound by confidentiality duties.<sup>22</sup> Furthermore, compelled disclosures to third parties, such as law enforcement or regulatory authorities, cannot be avoided based on the confidentiality agreement between the parties.<sup>23</sup>

### 4. The extent of confidentiality in international arbitration

An absolute prohibition on publication about the mere existence of an



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arbitration may go against a legitimate need to divulge such information.<sup>24</sup> Therefore, arbitral institutions widely recognize that disclosing the mere existence of an arbitration is permitted when there is a legitimate need to do so.

Many institutional rules provide for express confidentiality for documentary or other evidence during proceedings.<sup>25</sup> While confidentiality relating to materials introduced in proceedings applies with less direct force, the confidentiality of such material remains an important advantage of arbitration.<sup>26</sup> Therefore, I suggest that in ordinary circumstances such materials be disclosed only on the express consent of the parties. In the absence of institutional rules, the powers of the tribunal to make orders relating to confidentiality could be used to provide heightened confidentiality to certain kinds of materials that are of a high commercially-sensitive nature.

I submit that the pursuit of legitimate legal rights by parties, such as the recognition, enforcement, or challenge of an award is not a violation of confidentiality.<sup>27</sup> The question of publication of awards, however, presents a significant issue. I propose that expectations of confidentiality should be significantly lower for awards, as they are given at the end of a dispute, and are therefore not likely to affect the arbitral procedure, eliminating a significant concern of confidentiality. Concerns about confidentiality would be dispelled if awards were to be published in redacted/sanitized form (redacting the names and identifying characteristics of the parties). Published awards would produce substantial benefits in the form of consistency, predictability, guidance to tribunals, precedential value, increased quality of decision making as well as greater speed. To that extent, arbitral institutions should publish awards in a sanitized form, absent joint objection by both parties.

## 5. Limitations on confidentiality in international arbitration

There exists an implied obligation of confidentiality in the law, which is presumptive but not absolute, and is subject to certain situations in which breaches of confidentiality can be excused. The following section aims to identify and address the broad situations in which confidentiality can be breached, but such determinations must be made on a case-by-case basis. It must be noted that such situations are merely exceptions to the general presumption of confidentiality and do not undermine the existence of an implied obligation.<sup>28</sup>

### a) *Consent*

Flowing from party autonomy, confidentiality can be limited where there exists an explicit or implied consent (depending on the conduct) by the parties to do away with confidentiality.<sup>29</sup>

### b) *Business efficacy*

Confidentiality can be limited in cases of business efficacy such as where access to awards is a reasonable necessity.<sup>30</sup>

### c) *Legal compliance obligations*

Parties are permitted to make

disclosures with respect to arbitral proceedings to comply with governmental disclosure obligations in courts or to comply with regulatory authorities such as securities or in matters relating to tax, judicial, and criminal authorities.

### d) *Disclosure in the interest of justice*

Disclosures may be made to fairly determine a case, for preventing contradictory evidence, for protecting legitimate interests of the parties, and for obligations imposed by statutes.<sup>31</sup>

### e) *Safeguarding legal rights*

Parties may disclose confidential information in order to attempt to annul, recognise, or enforce awards, or to ask for injunctions as an exercise of their legal rights.<sup>32</sup> This further exists to safeguard the legal rights of a party vis-a-vis a third party.<sup>33</sup>

### f) *Public interest*

As established by the *Plowman* case, disclosure of information to the public in cases where the public has a legitimate interest in information of arbitral proceedings,

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such as about the affairs of public authorities.<sup>34</sup> This exception relates to public and government actors so as to not provide a level of secrecy that could protect a possible disregard for public interest.<sup>35</sup>

I propose that courts should use an interest-balancing approach, aiming to strike a cautious balance between public/private interests and duties of confidentiality. This becomes evident in the public-interest exception, where unfettered disclosures in all cases involving public actors would undermine the need for arbitration itself.

## 6. Suggestions and

### concluding remarks

Concerns of confidentiality could be substantially dispelled in the international community by the adoption of the following suggestions. Firstly, national legislations and arbitral institutions could introduce clearer rules that provide for express duties of confidentiality and distinguish it from privacy. They must also attempt to create a general rule which is tempered by defined exceptions to confidentiality.

Secondly, owing to party autonomy, the parties themselves can dispel concerns of confidentiality by drafting more detailed confidentiality clauses which explicitly provide for the scope, duration, extent of the proceed-

ings, the exceptions as well as the enforcement of confidentiality.

Thirdly, in the absence of detailed confidentiality provisions in the parties' agreement or institutional rules, tribunals can address confidentiality issues at the outset of the proceedings through procedural orders.

Fourthly, third-party confidentiality concerns can be dispelled if parties would themselves make reasonable efforts to obtain an express agreement from such third parties regarding confidentiality.

Fifth, arbitration research institutions could further develop model clauses that could be adopted by arbitral institutions as well as by the parties themselves, which would avoid

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the uncertainty caused by poorly drafted confidentiality provisions.

Thus, I have argued through

the course of this article that the benefits of confidentiality in international arbitration can be retained by

regarding confidentiality as an implied obligation that is subject to well-defined exceptions. 

- 1 Gary B. Born, *International Commercial Arbitration* 2779-2831 (2nd ed., 2014).
- 2 *Esso Australia Res. Ltd v. Plowman*, [1995] HCA 19 (Aus.).
- 3 *United States v. Panhandle Eastern Corp.*, 681 F. Supp. 229 (D. Del. 1988) (USA).
- 4 *Bulgarian Foreign Trade Bank Ltd v. A.I. Trade Fin. Inc.*, Case No. T 1881-99 (2001) (Sweden) (Unreported).
- 5 *G. Alta v. A. Ojje* (1986) *Revue de l'Arbitrage* 583 (Paris Court of Appeal) (Fr).
- 6 *Dolling-Baker v. Merrett*, [1991] 2 All ER 890 (UK); *Hassneh Insurance Co. of Israel v. Stuart J. Mew*, [1993] 2 Lloyd's Rep. 243 (Queen's Bench) (UK); *Ali Shipping Corporation v. Shipyard Trogir* [1998] 2 All E.R. 136 (UK).
- 7 Gary B. Born, *International Commercial Arbitration* 2779-2831 (2nd ed., 2014).
- 8 *Id.*
- 9 James Hargrove, *Misplaced Confidence? An Analysis of Privacy and Confidentiality in Contemporary International Arbitration*, 3 Disp. Res. Int'l 47 (2009).
- 10 Gary B. Born, *International Commercial Arbitration* 2779-2831 (2nd ed., 2014).
- 11 Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 11 Arbitration International 321 (1995).
- 12 *Id.*
- 13 *Id.*
- 14 Alexis C. Brown, *Presumption Meets Reality: An Exploration of the Confidentiality Obligation in International Commercial Arbitration*, 16 American University International L. Rev. 969 (2001).
- 15 Gary B. Born, *International Commercial Arbitration* 2779-2831 (2nd ed., 2014).
- 16 *Ali Shipping Corporation v. Shipyard Trogir* [1998] 2 All E.R. 136 (UK); John Forster Emmott v. Michael Wilson & Partners Limited [2008] EWCA Civ 184 (UK).
- 17 Gary B. Born, *International Commercial Arbitration* 2779-2831 (2nd ed., 2014).
- 18 *AT&T Corp. & Anr. v. Saudi Cable Co.*, [2000] EWCA Civ 154 (English Court of Appeals) (UK).
- 19 *Himpurna Cal. Energy Ltd v. Republic of Indonesia*, YCA XXV (2000), 13 et seq. (Austria).
- 20 Gary B. Born, *International Commercial Arbitration* 2779-2831 (2nd ed., 2014).
- 21 *Id.*
- 22 Jan Paulsson and Nigel Rawding, *The Trouble with Confidentiality*, 11 Arbitration International 318 (1995).
- 23 *Id.*
- 24 *Id.*
- 25 LCIA Arbitration Rules, Art. 30(1); 2012 Swiss Arbitration Rules, Art. 44(1); WIPO Arbitration Rules, Art. 74.
- 26 Emmott v. Michael Wilson & Partners, [2008] EWCA (Civ) 184 (C.A.).
- 27 *Id.*
- 28 Gary B. Born, *International Commercial Arbitration* 2779-2831 (2nd ed., 2014).
- 29 *Id.*
- 30 *Id.*
- 31 *Id.*
- 32 *Associated Electric & Gas Insurance Services Limited v. The European Reinsurance.*
- 33 *Id.*
- 34 *Id.*
- 35 *Id.*

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# Arbitration Appeals: The Good, the Bad, and the Ugly<sup>1</sup>

If you have followed the confirmation process of Justice Barrett before the US Senate, you are by now familiar with one guiding ethics principle for sitting judges, no matter which court they sit on: try not to express personal views on live legal issues, mostly on those you may be expected to potentially rule upon in the future.

What is less known, however, are the guiding ethics principles for retired judges regarding past decisions of their court. These principles are no doubt fewer, but there are still some. Amongst those are the necessity to: 1) refrain from sharing the deliberative secrets of a collegial court and 2) refrain from expressing views, good or bad, on reasons you authored, co-authored or participated in.

When it comes to arbitration appeals at the Supreme Court of Canada, given that I authored the majority of reasons in *Teal Cedar*<sup>2</sup> and co-authored with six others the majority of reasons in *Vavilov*<sup>3</sup>, you must be wondering: what is he doing here? This is a fair question and a fair concern.

Let me disappoint and reassure you in this regard. No, I will not violate these ethics guidelines in which I personally firmly believe. But yes, I will still share with you some thoughts on the topic of this Webinar, try to provide a general overview of our subject and frame up some of the tensions at issue, and hopefully kick off our discussions and exchange over the next ninety minutes.



THE HONOURABLE CLÉMENT GASCON

The Honourable Clément Gascon is an experienced appellate and trial judge and commercial litigator, with bilingual/bijuridical expertise. His 17 years judicial career culminated at Canada's highest court. His earlier litigation career covers 20 years. Now Senior Counsel at Woods in Montreal, he assists in advisory work and acts as commercial arbitrator. [View full bio.](#)

## I intend to do so by covering three (3) points:

- I. A broad overview of domestic commercial arbitration appeals legislation in Canada;
- II. A word on recent relevant Supreme Court of Canada decisions on domestic commercial arbitration appeals; and
- III. What in my view is helpful to know and understand for future reflection about the context leading to the *Vavilov* decision.

I have about fifteen minutes. I could easily use one hour.

## I. Domestic Commercial Arbitration Appeals Legislation in Canada

When you think of potential revision of domestic commercial arbitration awards, three concepts come to mind and potentially interplay:

1. Appeals;
2. Set asides or annulments;
3. Judicial reviews.

If only because most legislators and most academics (if not most case law) identify these three concepts by different terms, this indicates that they are different concepts calling for different perspectives and likely different analysis.

Today we focus on one concept: appeals. I offer three remarks or thoughts in terms of overview of the

Canadian legislation in this regard.

First, the laws on domestic commercial arbitration appeals vary in Canada. They are not treated the same everywhere. And they are not treated the same as international commercial arbitration appeals as well.

For instance, in Quebec, the province where I come from and where I now live, there is no such concept of commercial arbitration appeals. Under the current applicable provisions of the *Code of Civil Procedure*<sup>4</sup>, there is no review of the merits of an award and no provision referring to appeals of an award. The only possible intervention of a court is at the stage of a motion for set aside, or annulment under the wording of the *Civil Code of Procedure*, be it at the homologation of the award or by way of a separate proceeding.

The grounds to set aside are specific and provided for in the provisions of the *Code*. They are very similar to the grounds to set aside under the UNCITRAL Model Law and under the relevant regulations dealing with international commercial arbitration. In the Province of Quebec, the appeal concept is simply foreign to the commercial arbitration environment.

I pause here. There are good reasons for that. True, parties go to arbitration because it is more flexible, often less rigid than court proceedings, often less procedural and generally more streamlined. But parties also go to an arbitration process for time efficiency and finality, in a



context where they proceed before an expert decider of their own choosing. There are also confidentiality considerations to the process that are welcomed by many. For some, the fact that there are no appeals of commercial arbitration awards sits well with these considerations.

Second, from my review of the relevant applicable legislation in Canada, the reality in the Province of Quebec is different from that of most of other provinces or territories. There is in fact only one other province, namely Newfoundland & Labrador, where there are no provisions for appeals in the context of domestic commercial arbitration.<sup>5</sup> This is also true for the federal legislation on domestic commercial arbitrations<sup>6</sup>. In all the other provinces or territories though, the legislation applicable to domestic commercial arbitration provide either that the parties can stipulate the possibility for appeals in their arbitration agreement (even, in some situations, on questions of law, mixed questions of law and fact or questions of fact), or that there is a potential leave to appeal a domestic commercial arbitration award, but then, generally only on questions of law<sup>7</sup>.

This brings me to my third and final remark.

Where such an appeal possibility exists, the wording of the applicable legislation is key. True, there are a lot of similarities throughout the various acts of legislation, but each employs a language of its own. Such language varies, and such language matters; and it triggers many queries. For instance, is the possibility of appeal provided for in the arbitration agreement? If leave to appeal is required, on what kind of questions can there be a potential appeal? What are the criteria to be met for leave to be granted on a question of law? What are the criteria to assess whether an application for leave should be granted: importance of the question? impact on the parties? etc. No valid analysis can be made without paying specific attention to the agreement involved and to the statutory regimes that apply.

I add that these appeal provisions are often found in the applicable legislation side by side with set aside (or annulment in the Province of Quebec) provisions. But these are not the same. They are different concepts, with often different criteria to be met. Normally, the statutes do say so, and indicate when one applies as opposed to the other.

I now move to my second point:

## II. The Recent Relevant Jurisprudence of the Supreme Court of Canada on Domestic Commercial Arbitration Appeals

When one turns his or her mind to it, there are really two key decisions in the last decade rendered by the Supreme Court dealing with domestic commercial arbitration appeals: *Sattva* in 2014<sup>8</sup>, a unanimous decision of the Court (7-0), and *Teal Cedar*, 2017, a split decision of the Court (5-4). Both con-

cern the *Commercial Arbitration Act* of British Columbia.

I would suggest that when you read or analyze these decisions, it is important to situate the relevant passages in their proper context. In both these decisions, it is important to be careful to understand the differences between the existence of a right of appeal (for instance, on a question of law) and the standard applicable to the appeal if leave is granted (for instance, if it is a question of law, it then calls for what type of review?).

For example, in *Sattva*, the unanimous decision of the Court of 2014, the first part of the reasons deals with the criteria to grant leave to appeal, namely on a question of law. In *Sattva*, there are key findings of the Court dealing with the issue of contractual interpretation, namely whether contractual interpretation is a question of law or a mixed question of law and fact. In *Sattva*, the Court concluded that contractual interpretations are normally not questions of law but rather mixed questions of law and fact; yet, the Court noted that there can be a question of law on a contractual interpretation where one can identify an extricable question of law in the interpretation process. The Court indicated that there would be narrow situations where contractual interpretation would involve extricable or pure questions of law. In that precise case, the Court found at paragraph 66 that leave should not have been granted because the contractual interpretation at issue did not raise an extricable question of law.

The Court then went on to comment on the appellate review standards in the context of domestic commercial arbitration appeals and discussed the similarities between these appeals and the judicial review process. In that case, the question at issue was not a question of law, but a mixed question of fact and law.

In *Teal Cedar*, the matter before the Supreme Court raised three issues, one of statutory interpretation, one of contractual interpretation and one of statutory application. With respect to the second and third issues, the Court found that since these were not questions of law but rather mixed questions, there was no entitlement to leave to appeal under the applicable legislation. About the first issue dealing with statutory interpretation, the majority found that it was a question of law, and applying *Sattva* and the reasonableness standard, concluded that the interpretation of the arbitrator was reasonable. The dissenting Justices were of the view that no matter what would have been the applicable standard, correctness or reasonableness, the interpretation of the arbitrator was not to be followed.

## III. What is Helpful to Know and Understand for Future Reflection About the Context Leading to the *Vavilov* Decision

I now turn to the last point I wanted to cover with

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you this afternoon, namely, a few words on the *Vavilov* decision. For some, it appears that *Vavilov* represents “the bad and the ugly” of the title of this webinar. This is, of course, not for me to comment or opine upon. My remarks today focus on two points that I guess are important for the understanding of our participants. One deals with the context of *Vavilov*, the other with the remarks of *Vavilov* on the importance of reasons.

The place of *Vavilov* in the larger history of the Supreme Court of Canada jurisprudence in administrative law is useful to appreciate. In granting leave, the Court noted in its reasons, which it rarely does, that the case and the other ones that were joined with it gave an opportunity to the Court to consider the law applicable to judicial review of administrative decisions. At the beginning of their reasons, the majority of the Court indicated that the appeal allowed the Court to re-examine the global approach to judicial review of administrative decisions.

For many, administrative law is a difficult area of the law. It involves the relationship between the administrative state, the “*justiciables*” and the judiciary. It brings into play the interaction between the roles of the legislative power, the executive power and the judicial power.

Clearly, there are no easy answers to many questions in administrative law. No doubt, this area will continue to generate debate in the coming years. This is not surprising and in fact not unprecedented. When one looks at the history of administrative law at the Supreme Court, for instance, over the last half century or so, there have been major reviews of important principles of administrative law almost every decade: in 1979, *CUPE v. New Brunswick Liquor Board* looked at the concept of jurisdictional error and deference<sup>9</sup>. In 1988, *Bibeau*<sup>10</sup> introduced the concept of pragmatic and functional approach. In 1998, *Southam*<sup>11</sup> developed the reasonable *simpliciter* standard. In 2008, *Dunsmuir*<sup>12</sup> discussed the two applicable standards to judicial review, correctness and reasonableness, and the question of categories. And in 2019, *Vavilov* was issued. For the coming years, it is expected that there will be a continu-

ing evolution, additional refinement, and further questioning on the state of administrative law in Canada. Potentially, the debate as to the impact of *Vavilov* on domestic commercial arbitration awards will be part of the discussion one day.

That said, you all know that in *Vavilov*, the framework of the majority reasons deals first with how to select the standard of review in judicial review, and second, with how to apply one standard, namely the reasonableness review. With respect to the selection of the standard of review, the majority emphasized the two types of exceptions that exist to the application of the reasonableness standard, namely those based on legislative intent and those based on the rule of law. With respect to how to conduct the reasonableness review, the majority gave detailed explanation as to how it should be conducted and why.

Amongst other points, the Court stressed in *Vavilov*, and in other previous decisions before such as *Sheppard*<sup>13</sup>, an important message for courts and adjudicators on the writing of reasons. That is, what some have called the culture of justification or the discipline of reasons. Namely, that even though no one is looking for perfection, it is still important to remember that the central and key issues at play should somehow be addressed and that the losing party should understand and know why their position did not prevail.

I would venture to say that the same is likely true for domestic commercial arbitration awards.

I end with this.

Some consider that it would be much easier if there were simply no appeal provisions in any legislation in Canada dealing with domestic commercial arbitration. Final is final, and domestic commercial arbitration awards should be left alone if this is what the parties bargained for. For those, the possibility of appeals brings together the worst of both worlds, namely a long private adjudicative process that the parties pay for, plus a lengthy public judicial process that the parties chose to avoid.

But there is, in my humble view, another unavoidable yet simple truth in the reality of adjudicating, which is perhaps enlightened by the wisdom coming with age and

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with some years of experience adjudicating matters at all levels. Whatever the system, be it with arbitrators, adjudicators, or judges, it remains that all these deciders render human justice, not divine justice. And because it is human, it is imperfect, and it will remain imperfect.

I tend to believe that most deciders do not like to leave the last word to others, through appeals or otherwise, and that most deciders indeed like to have the final say. It is legitimate I guess, and perhaps part of human nature. But it remains that to have the final word is no guarantee that it is necessarily better. As I did at the start of my remarks, I close

with another reference to our friends south of the border. Justice Jackson from the US Supreme Court once said the following about America's own final appellate court: "We are not the last because we are infallible; we are infallible because we are the last".

To have the last word is indeed powerful. But for those who do not have it, they should remember, recognize, and accept that being final does not necessarily mean being right. This, sometimes, helps to better understand and cope with the strengths and weaknesses of any appeal or review process. 🏠

1 Transcript of the remarks made on October 16, 2020 at an ADRIC webinar.  
2 2017 SCC 32 (CanLII), [2017] 1 S.C.R. 688.

3 2019 SCC 65 (CanLII).

4 *Code of Civil Procedure*, c C-25.01, Book VII, Title II, art. 645, 646, 648.

5 *Arbitration Act*, RSNL 1990 c A-14.

6 *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp.), s 34(1).

7 Alberta : *Arbitration Act*, RSA 2000, c A-43, s 44; British Columbia : *Arbitration Act*, SBC 2020 c 2, s 59; Manitoba : *Arbitration Act*, CCSM c A120, s 44; New Brunswick : *Arbitration Act*, RSNB 2014, c 100, s 45; Northwest Territories : *Arbitration Act*, RSNWT 1988, c A-5, s 27; Nova Scotia : *Commercial Arbitration Act*, 1999, c 5, s 48; Nunavut : *Arbitration Act*, RSNWT 1988, c A-5, s 27; Ontario : *Arbitration Act*, SO 1991, c 17, s 45; Prince Edward Island : *Arbitra-*

*tion Act*, c A-16, s 21; Saskatchewan : *Arbitration Act*, 1992, c A-24.1, s 45; Yukon : *Arbitration Act*, RSY 2002, c 8 (amended by SY 2016, c 8), s 26.

8 2014 SCC 53 (CanLII), [2014] 2 S.C.R. 632

9 *CUPE v New Brunswick Liquor Corporation*, 1979 CanLII 23 (SCC), [1979] 2 SCR 227.

10 *U.E.S., Local 298 v Bibeault*, 1988 CanLII 30 (SCC), [1988] 2 SCR 1048.

11 *Canada (Director of Investigation and Research) v. Southerm Inc.*, 1997 CanLII 385 (SCC), [1997] 1 SCR 748.

12 *Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), [2008] 1 SCR 190.

13 *R v Sheppard*, 2002 SCC 26, [2002] 1 SCR 869.

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