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International Arbitration

A review of 2020 – Canada and beyond

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Table of Contents

Dentons is pleased to bring you our review of international arbitration for 2020 in Canada. The following compiles the legal trends and developments that we have seen in the last year that are likely to impact international arbitration going forward. Please feel free to contact us if you would like any further information on how these developments might impact your interests with respect to dispute resolution clause drafting, investment structuring, international commercial or investor-state arbitration, and enforcement.

Institution and Rules Updates

Updates to the ICC Rules and LCIA Rules

2020 introduced notable changes in two leading international arbitral institutions' procedural rules: the Rules of Arbitration of the International Chamber of Commerce (the "**ICC Rules**"); and the London Court of International Arbitration Rules (the "**LCIA Rules**"). Effective on 1 October 2020, the LCIA Rules were updated from their previous 2014 iteration, and the ICC introduced updates to its 2017 Rules to take effect on 1 January 2021. These updates seek to further procedural fairness and efficiency while also reflecting the realities of international arbitration proceedings.

Virtual Proceedings & Electronic Submissions

Reflecting the realities of 2020, the updates to the ICC Rules include expressly providing for the tribunal's authority to order that a hearing, even a merits hearing, proceed virtually. This brings these rules into alignment with the LCIA Rules which, in both the 2014 and 2020 iterations, expressly permit a merits hearing to proceed by way of video-conference. The 2020 LCIA Rules, however, are now more overt in stating at Article 19.2 that "a hearing may take place in person, or virtually, by conference call, videoconference or using other communications technology" when compared to the earlier version which noted that "a hearing may take place by video or telephone conference or in person (or a combination of all three)."

In addition to expressly providing for virtual proceedings, the 2021 ICC Rules no longer presume that all pleadings, other written communications, and documents will be delivered in hard-copy. The new LCIA Rules go one step further, providing that the request, answer to request, written communications, and documents may be submitted in electronic form as e-mail attachments.

These updates to the conduct of proceedings and document submission simplify arbitral procedure and accommodate continuity in proceedings where the global environment does not easily permit physical hearings. This trend towards proceeding virtually is likely to continue in some respects even once travel restrictions are no longer in place. This shift, which is arguably long overdue, is likely to show an increase in arbitral efficiency in 2021 and beyond by reducing the time and expense associated with international travel for arbitral hearings.

Transparency

In an effort to promote transparency and prevent conflicts of interests, the 2021 ICC Rules now require parties to promptly notify the tribunal, the other parties, and the ICC Secretariat of the identity of any third-party funders relied on in advancing any claims or defences. This update aligns with the ICC's efforts to increase safeguards to procedural fairness and with the general trend towards transparency in international arbitration. Requiring parties to make prompt disclosure of third-party funders eliminates concerns over conflicts of interest at an early stage, and in turn, assists in ensuring the award's enforceability.

Joinder and Consolidation

In another step toward efficiency, where the former LCIA Rules required parties to file separate requests for claims arising out of multiple agreements, and it was only after these separate requests that a party could request consolidation, the 2020 LCIA Rules provide that:

> A Claimant wishing to commence more than one arbitration under the LCIA Rules (whether against one or more Respondents and under one or more Arbitration Agreements) may serve a composite Request in respect of all such arbitrations.

Additionally, Article 22A of the LCIA Rules permits tribunals to order consolidation in certain circumstances, including when the same parties commence multiple arbitrations, or where multiple proceedings arise out of the same agreement.

In similar fashion, the 2021 ICC Rules amend Article 10 to permit the ICC Court to consolidate arbitrations at a party's request where:

- the parties so agree;
- the relevant arbitration agreements are the same; or
- the arbitration agreements are compatible, the arbitrations are between the same parties, and the disputes arise in connection with the same legal relationship.

The updated ICC Rules also give tribunals authority to join third-parties to the arbitration after the tribunal's confirmation or appointment, as long as the joining party accepts the tribunal's constitution once constituted, and accepts the terms of reference. This update to the ICC Rules simplifies the process for joining additional parties to proceedings, thereby promoting efficiency in international arbitration.

Related to this update, the 2021 ICC Rules include an additional provision empowering the Court to override the parties' chosen appointment procedure *in exceptional circumstances*. Article 12(9) of the 2021 ICC Rules provides:

> Notwithstanding any agreement by the parties on the method of constitution of the arbitral tribunal, in exceptional circumstances the Court may appoint each member of the arbitral tribunal to avoid a significant risk of unequal treatment and unfairness that may affect the validity of the award.

While potentially controversial, it is unlikely that the Court would exercise the discretion provided therein lightly. Indeed, the ICC did not include Article 12(9) in the 2021 ICC Rules as a means to undermine party autonomy—the foundation of international arbitration—but rather, to ensure the ICC Court can intervene where the parties' selection of arbitrators could reasonably challenge the award's validity and enforcement. Practically speaking, this is most likely to occur in a situation where there is a joinder of a party or a consolidation of arbitrations that results in a disconnect with the arbitral appointment process set out in the relevant agreement(s) to arbitrate.

Early Determination of Claims

In a significant step forward, Article 22.1(viii) of the 2020 LCIA Rules provides that the tribunal may resolve claims and defences that are "manifestly without merit" at any time in the proceeding. This is a substantial departure from the previous rules and follows developments seen in other international arbitral rules to permit early or summary dismissal. It remains to be seen what circumstances would constitute a claim or defence that is "manifestly without merit" and presumably this would not be a common remedy.

The ICC Rules do not contain an express provision for early determination of claims. However, Appendix IV, which outlines case management techniques, urges tribunals to identify issues that can be resolved by agreement between the parties or their experts. This accommodates procedural efficiency, but certainly not to the same degree as that now provided by Article 22.1(viii) of the LCIA Rules.

Expedited Procedure

Under the 2017 Rules, the expedited procedure automatically applied to any arbitration where the amount in dispute did not exceed USD 2 Million. This upper limit is now USD 3 Million for any arbitration commenced pursuant to an arbitration agreement concluded on or after January 1, 2021.

Like the 2017 ICC Rules, the 2021 Rules also allow for parties to opt-in or out of the ICC's expedited procedure. Where the expedited procedure applies, the ICC Court streamlines the arbitral process—the Court may appoint a sole arbitrator notwithstanding any contrary appointment process in the parties' arbitration agreement; no terms of reference are required; the tribunal may decide to limit document production and witness evidence; and the tribunal may proceed without a hearing. This procedure is not new, however, the increased threshold for the expedited procedure's default application will result in more arbitrations proceeding in this expedited fashion.

Institution Updates

On the west coast, on 1 September 2020 the British Columbia International Commercial Arbitration Centre became the Vancouver International Arbitration Centre ("VanIAC").

To adapt to the realities of international arbitration hearings, Arbitration Place (with offices in Toronto and Ottawa), joined with London's International Dispute Resolution Centre and Singapore's Maxwell Chambers to form the International Arbitration Centre Alliance. Whether or not one of the parties is located in Canada, developments such as these can be used to ease the difficulty posed by distance and operating virtually.

British Columbia's Updated Domestic Arbitration Regime – Taking Cues from International Arbitration

On September 1, 2020, the B.C. Arbitration Act, SBC 2020, c 2 (the "New Act") repealed and replaced the B.C. Arbitration Act, RSBC 1996, c 55 (the "Previous Act"). On this same date, the VanIAC enacted new Domestic Arbitration Rules to supplement the New Act (the "Domestic Rules"). The New Act is aimed at modernizing and harmonizing B.C.'s domestic arbitration regime with those adopted across Canada and internationally; it is based, in part, on the UNCITRAL Model Law.

The New Act, in brief, expressly stipulates that:

- Both the parties and the arbitral tribunal must strive for a just, speedy and economical determination of the proceeding on its merits (sections 21-22).
- The law respecting limitation periods for commencing court proceedings applies to commencing arbitral proceedings, as determined by the discretion of the arbitrator (section 11).
- The parties and the tribunal must not disclose proceedings, evidence, documents and information in connection with the arbitration that are not otherwise in the public domain, including an arbitral award (unless the parties otherwise agree, or disclosure is required or authorized, as specified) (section 63(2)-(3)).
- An arbitral tribunal must decide the dispute in accordance with the applicable law, *including* any available equitable rights or defences (section 25).

Procedural Changes

- The Previous Act was silent on how witnesses were to give direct evidence. The New Act expressly provides that direct evidence must be presented in written form (unless otherwise agreed upon or directed by the arbitral tribunal) (section 28(3)).
- The New Act also allows for the arbitral tribunal to appoint experts, and to order a party to deliver relevant information to that expert, or provide them with access to relevant records, goods, or other property for inspection (section 34).
- With respect to interim measures (any temporary measure that the arbitral tribunal orders at any time before the issuance of the arbitral award) the New Act specifies the procedures to be followed for obtaining and enforcing interim measures to the Supreme Court of British Columbia (Part 6).
- The New Act authorizes VanIAC to resolve certain procedural issues in its role as the "designated appointing authority". For example, VanIAC now has the power to appoint arbitrators and make a summary determination of fees and expenses. These decisions are generally not appealable (see sections 14(8) and 55(5)).

Jurisdiction & Appeals

- The New Act expressly states that an arbitral tribunal may rule on its own jurisdiction, including ruling on any objections respecting the existence or validity of an arbitration agreement (section 23).
- Under the New Act, the Supreme Court of British Columbia retains its jurisdiction to set aside arbitral awards on specific enumerated grounds related to procedural fairness (section 58).
- The New Act elevates jurisdiction for the hearing of appeals on questions of law to the BC Court of Appeal (section 59). Notably, the parties can opt out of this appeal process by explicitly stating such intention in their arbitration agreement (section 59(3)).

While the New Act allows for greater clarity, efficiency, and predictability in managing arbitral proceedings, it remains the responsibility of the parties to turn their minds to their own overarching goals and leverage the benefits of British Columbia's new and improved domestic arbitration regime. In particular given the interaction within this system, as parties have the option of opting in to the internal appeals process under the Domestic Rules, by expressly providing for such a right in the arbitration agreement, or with all of the parties consent, any time after the arbitration commences.

The influence of international arbitration on domestic arbitration procedures, and changes within British Columbia, underscore the importance of obtaining jurisdiction specific procedural advice when considering options for dispute resolution clauses and advancing claims or defences in arbitrations within Canada.

Virtual Hearings

COVID-19 has resulted in drastic changes around the world. Arbitration is no exception. Accordingly, as previously discussed (in this review and by our team here) certain arbitral institutions have revised their respective rules in order to encourage the use of remote or virtual hearings to mitigate the effect of COVID-19. While virtual hearings were conducted prior to COVID-19, they were not held with the same frequency as they appear to be held now where, for much of the last year, they were the only option for a hearing. Fortunately, modern technology facilitates virtual hearings and allows international and regional arbitration centres to continue to operate seamlessly and expeditiously.

There are several inherent benefits to our new collective ability to proceed with virtual and - upon a return to in-person hearings - hybrid arbitral hearings. These include the ability for more junior members of a counsel team (whether external or in-house), who otherwise would not be able to travel to a hearing, to observe and participate in the proceedings and an ability for the parties involved in the dispute to fully participate when needed without losing time to travel.

Before COVID-19

Prior to the pandemic, arbitral hearings would ordinarily take place in-person at a venue agreed by the parties and the tribunal. Parties would make submissions in person and lay and expert witnesses would give oral evidence before a tribunal at the venue. As part of that process, parties, their legal representatives, witnesses and tribunals would occasionally need to travel to the location and the venue in which the hearing was scheduled. In some cases, certain witnesses would give evidence remotely if extenuating circumstances (e.g. poor health, work commitments) rendered them unable to travel.

After COVID-19

The rapid spread of the pandemic led to travel restrictions, closed borders and airports that in turn, caused parties, tribunals and arbitral institutions to consider alternative options for the efficient conduct of proceedings in circumstances where an in-person hearing was impossible or a public health risk. Chief among those options were virtual hearings, which have become a central feature of arbitral hearings since the effect of COVID-19 became apparent last year.

As arbitration practitioners are all too aware, virtual hearings require extensive preparation and thorough testing beforehand to avoid any disruption or delay during a hearing. As a starting point, parties generally need consider the following in preparation for a virtual hearing:

1. the preparation and management of electronic documents for the hearing;
2. arranging for the electronic presentation of evidence during the hearing;
3. securing a video-conferencing platform to conduct the actual hearing, including but not limited to: ZOOM, MS Teams, Bluejeans and WebEx;
4. real time transcription services;
5. ensuring everyone appearing at the hearing has the requisite technology and internet connection to fully participate;
6. how counsel teams and counsel/client teams in different locations will communicate during the hearing (and security and availability of breakout rooms on the videoconference platform);
7. considering how to handle any technological trouble shooting or issues that might arise if such services are not covered by an institution, Tribunal Secretary, or video-conference platform provider;
8. if or when there is a technological failure, is there a back-up plan for reconnecting and how to address whether the hearing can proceed; and
9. the need for practice sessions – with witnesses, counsel teams, and/or the Tribunal – to ensure audio and video difficulties are addressed before the start of the hearing.

Cyber-security risks and the threat of hacking is also a matter that parties need to consider as they prepare for a virtual hearing, along with potential data protection issues. You will want to discuss an appropriate "cyber-protocol" – including who has access to the hearing and when, ability to record proceedings and other points unique to any particular matter.

Virtual Hearing Protocols

In preparing for virtual hearings, parties may wish to considering adopting the provisions set out in one or more protocols. One of these is the Seoul Protocol on Video Conferencing in International Arbitration. It is not a direct response to COVID-19, rather, it has been discussed since 2018 and contains nine articles that address:

- Witness examination
- Video-conferencing
- Observers
- Document Management
- Technical Requirements
- Test conferencing
- Translators
- Recordings
- Preparatory arrangements.

The Protocol aims to provide non-exhaustive guidance in the use of 'best practices' for the efficient conduct of virtual hearings and is a valuable tool for arbitration practitioners. Other available protocols can be found on the list maintained by Delos Dispute Resolution (located here) that include:

- The ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic;
- The AAA / ICDR Order and Procedures for a Virtual Hearing via Videoconference; and
- The CPR's Annotated Model Procedural Order for Remote Video Arbitration Proceedings.

Further Considerations

There is little doubt that the process for virtual hearings will continue to be refined over time. Our lawyers have now been involved in several remote hearings, from procedural to jurisdictional matters to full merits hearings – we have experience on the benefits (and risks) of proceeding virtually. While this method has many benefits it is not necessarily a panacea for every international arbitration. Reach out to our team to discuss our insights further.

Cybersecurity and Data Protection in International Arbitration

This is a dynamic and evolving area and the guidance to date is subject to interpretation, bespoke adaptation for any specific matter, and the ever-present question of what to do if there is a security failure or breach. Our team is at the forefront of these issues – reach out to us to discuss how we can assist.

International arbitration has leveraged the countless features of technology by normalizing virtual hearings and the electronic submissions and disclosure of documents. The pandemic has further emphasized the need for technological means to communicate and to connect along with the necessity for data protection and cybersecurity in all aspects of life. International arbitrations have moved to online platforms during these trying times and are equally at risk of cyber incidents.

In last year's edition of *International Arbitration: A review of 2019 – Canada and beyond*, we briefly discussed the ongoing efforts of the *ICCA-IBA Joint Task Force on Data Protection in International Arbitration* to release a guide to data protection issues in international arbitration as well as the much anticipated update of the *Personal Information Protection and Electronic Documents Act,* Canada's federal private sector privacy law. In this edition, we will provide an update on the Joint Task Force's draft consultation as well as a quick overview of the recently introduced Bill C-11, Canada's proposed federal privacy legislation.

Cyber Security Risks in International Arbitration

A recurring theme in the various guidelines and protocols published on cybersecurity is that no one-size-fits-all solution is appropriate when considering implementing information security measures, which poses a challenge for parties seeking to comply with requirements. There are many factors for which international arbitrations are increasingly more the target for hackers, including: the large number of parties involved in the process creating multiple points of vulnerability; the increasingly complex nature of disputes and potential for valuable information being shared or disclosed between the parties; the number of jurisdictions involved and various legal regimes at play; as well as the flow of data across national borders.

Another important factor stems from the very reason why parties turn to arbitration: the sensitive nature of the personal and confidential information exchanged and presented at all stages of the arbitral process (including on high-profile public (and private) entities and their assets). This information can consist of personal information, often sensitive personal information such as financial or passport information, but also company trade secrets or confidential business information disclosed among the parties under tight contractual obligations to maintain confidentiality.

Recognizing the lack of preparation by the parties and the need to create awareness, prominent arbitral institutions have released publications aiming to provide guidelines and protocols that arbitral participants can follow or adopt in their proceedings. Key publications include: the International Council for Commercial Arbitration (ICCA)/ Association of the City Bar of New York/International Institute for Conflict Prevention and Resolution (CPR) Cybersecurity Protocol for International Arbitration (2020), which was discussed in our last year's edition, the Cybersecurity Guidelines established by the International Bar Association's (IBA) Presidential Task Force on Cybersecurity (2018) and the International Chamber of Commerce (ICC)'s Commission Report on Information Technology in International Arbitration (2017). These publications all recognize the need to implement "reasonable" information security measures and provide for considerations and factors for parties and tribunals to determine what is "reasonable" in the circumstances. The ICCA/NY Bar/CPR Protocol also noted the role of the Arbitral Tribunal in determining whether additional security measures are required for the standard of "reasonabless" to be met.

The Sedona Conference also published a commentary proposing a cybersecurity "reasonableness" test as part of its ongoing project for *Data Security and Privacy Liability*. It suggests that a "reasonableness" test should be applied where a party has, or is alleged to have, a legal obligation to provide "reasonable security" for personal information. The commentary supports the popular statement that cybersecurity programs cannot follow a one-size fits all approach as different sectors face different data security risks and have different levels of resources available to consider for their programs.

Despite the well-established NIST Framework that is commonly used as an industry tool for best-practice, the Sedona Conference commentary suggests that it remains unclear as to what is "reasonable" under specific sets of circumstances and organizations often cannot understand the necessary steps they must take to fulfil their obligations. Across several statutory regimes reviewed by Sedona, common factors to

determine the level of data protection required included the sensitivity of the information, the availability of resources, the cost versus benefit analysis and the presence of industry standards.

Principles of Data Protection are applicable in International Arbitration

In February 2020, the ICCA-IBA Joint Task Force released the consultation draft of its Roadmap to Data Protection in International Arbitration ("Roadmap") for public comment. The document focuses on privacy obligations as these apply in the context of international arbitration proceedings, with an aim to assist practitioners involved in arbitration proceedings to proactively consider data protection.

Given the potential for high fines for non-compliance with the EU's General Data Protection Regulation ("GDPR") (such fines may rise to 4% of global gross revenue or EUR 20 million, whichever is higher), and the regulation's comprehensive provisions for data protection, the ICCA-IBA Joint Task Force chose the GDPR as a reference for the Roadmap. Nevertheless, the intent is that the Roadmap will be applicable around the globe to ensure protection of personal data in arbitral proceedings.

The ICCA-IBA Joint Task Force recognizes at the outset that data protection laws apply to arbitrations but these laws fail to address how they should be applied in arbitration. Still, personal data protection is grounded in law and arbitral participants must comply with obligations under applicable data protection laws. To fill this gap, the ICCA-IBA Joint Task Force identifies the key principles of data protection, which can also be applicable in arbitration:

In addition to the principles above, the draft Roadmap provides a helpful step-by-step roadmap of data protection and cybersecurity considerations that arbitral participants can implement throughout every step of the arbitral process. It might make sense to incorporate aspects directly in agreements to arbitrate, or to raise at a first meeting with the Tribunal for an early procedural order or specific cybersecurity and data protection order.

Accountability Applying this principle to international arbitration would require that arbitral participants processing personal data as part of the proceeding document all measures and decisions taken regarding data protection compliance, so they can demonstrate compliance with applicable laws, if necessary. To that end, implementation of a data protection protocol is highly recommended.

Transparency Individuals' whose personal data may be processed during arbitral proceedings should be provided with notices in plain language about the processing activities related to their personal information. This may often pose challenges where parties to the arbitration cannot agree to send a consolidated notice to individuals affected, or where the very proceeding is confidential and sending notices may compromise the confidentiality of the arbitration. Parties must always be mindful of the applicable legislation and the availability of exceptions that allow processing in arbitral proceedings without notice or consent.

Fair and lawful processing Personal data must be processed fairly and lawfully to ensure that data subjects anticipate the processing activities and that legal requirements are followed. Under most data protection and privacy laws, parties must have a lawful basis to process personal data, and often processing in the context of making or defending legal claims is lawful. When legislation allows for and parties may rely on legitimate purposes for processing, it is recommended to undertake an assessment to ensure such processing is allowed under applicable laws, which will dictate the what arbitral participants may be able to rely on. For example, currently in Canada participants in arbitral proceedings may rely on one of the exceptions to express consent, while in Brazil and Europe parties can rely on legitimate interests. Note however that there are other jurisdictions, like India, where parties must have consent from individuals whose data is processed during the proceedings.

Proportionality The proportional approach to data protection compliance can be found in most laws, and the participants in arbitration must consider the rights and interests of data subjects weighed against the need for a fair and efficient administration of justice. This can be achieved by considering the risks posed to individuals by the processing of their personal data for the arbitration.

Data Minimization and Accuracy The amount and type of personal data processed during arbitral proceedings should be limited to what is necessary for each stage of the process. Parties must also ensure the accuracy of the information, by maintaining personal information that is valid, complete and up to date.

Limiting Purposes The individuals must or should have been informed about the purposes for processing their personal data at the time of collection. This principle is connected to the "Transparency" principle above, and it could create limitations for participants who failed to identify legal proceedings as a purpose for collection and processing of personal information.

Rights of Individuals Depending on their residence, individuals may have the right to request access to, correction or deletion of their personal data. These requests may come from parties involved in the arbitration, witnesses, experts, or even persons not directly involved in the proceedings. Early in the process, the parties should consider the impacts such requests may have on the arbitration as often answers must be provided within short periods of time.

Data Security There is no doubt that security measures must be implemented at every stage, and followed by all involved. The security measures must be appropriate to the sensitivity of the personal data proceedings and must protect against the risk of destruction, loss, alteration or unauthorized access or disclosure. Arbitral participants' existing information security measures must be evaluated against the risks posed by virtual arbitration and digital exchange of data.

Under the same principle, breach reporting is a very important consideration, as well as the role of the arbitrators in the breach notification process to protect the integrity of proceedings and their ethical obligations. Considering the time-sensitive nature of breach notification requirements under certain laws, these consideration must be discussed at early stages of the arbitration process, and should be included in writing in the arbitration agreement to avoid confusion.

Canada's Privacy Legislation is due to change

Bill C-11, Canada's newly proposed federal private sector privacy law, introduced some key concepts that also provide cybersecurity guidance. One of the major changes proposed by Bill C-11, which will ensure accountability, is that organizations will need to establish and implement a privacy management program proportionate to the sensitivity and the volume of the information that the organization processes, and consisting of its policies and practices. This is important to consider given the high volume of sensitive and confidential information involved in arbitration, during the discovery process but also during the virtual hearings that take place during the pandemic. Procedures regarding retention of this information will also be vital to an organization, as the retention of unnecessary and supplemental information can be not only costly during discovery, but also presents an increased risk of breach and is a violation of various data protection laws, and may come at a hefty price.

The next year should be an interesting one for cybersecurity; if Bill C-11 becomes law as currently drafted and more guidance is provided to respond to the ongoing digitization of legal processes, organizations ought to have a clearer picture of the steps to take and the safeguards to implement in order to protect their assets from various threats such as inadvertent discovery or accidental disclosures. As of the time of this writing, an official data protection and cybersecurity framework for arbitration with clear requirements remains to be published.

We are only as protected as the weakest link

Overall, the stakes are especially high in international arbitration and the risk of cybersecurity incidents in such proceedings has increased exponentially with arbitrations taking place entirely online. As a result, all parties and arbitrators must understand the threats present in the context of arbitration, must undergo a rigorous risk analysis prior to commencing the proceedings and take the necessary steps to avoid the identified risks and prepare for potential breaches of security. The Tribunal must also understand its role is the protection of information and cybersecurity during the arbitration process. Every party involved in the process must be diligent in fulfilling its obligations, as each party relies on the others to maintain privacy and cybersecurity and a minor vulnerability can be fatal and put the entire arbitration at risk.

Cybersecurity issues will continue to arise at the risk of becoming more complex, which supports the fact that parties must have data protection and cybersecurity practices in place before, during and after arbitration. In addition, including provisions for the protection of personal and confidential information during the arbitral process in arbitration agreements ensures that all parties are bound to the obligations. Finally, considering that privacy and cybersecurity are shared responsibilities of all participants involved in the arbitration process, ensuring that the institution conducting the arbitration has an established program to ensure that proper safeguards are in place, is a way to support efforts to fulfil its obligations.

Enforcement in a Globalized Economy

Canadian case law on enforceability of arbitration clauses continues to develop. See our team's review of the current state of when litigation will be stayed for international arbitration here

Key international arbitration decisions from other jurisdictions in 2020 are covered by Dentons' global team here (on risks from multiple appointments in related proceedings) and here (on governing law for arbitration clauses).

A primary goal of commercial arbitration is efficiency and finality; it is all well and good to obtain an arbitral award in the context of an international dispute, but an award is only useful if it can be enforced. The Supreme Court of Canada's decision in *International Air Transport Association v Instrubel NV*, examined whether a Québec court could order a seizure before judgment by order of garnishment where the garnishee was located in Québec but where the funds at issue were allegedly located outside of Québec. A situation that is potentially quite common in an increasingly globalized economy.

The history for the dispute is quite lengthy. In brief, in 1996 and again in 2003, two ICC arbitration awards were issued against the Ministry of Industry of the Republic of Iraq ("**Iraq**") and in favour of Instrubel n.v. ("**Instrubel**"), a Dutch company, in relation to non-performance of contracts and lost profits. By 2013, Iraq had still yet to pay the damages ordered. Instrubel suspected that Iraq, through its Iraqi Civil Aviation Authority (the "ICAA"), likely had assets in Québec, in the form of aerodrome and air navigation fees held by the International Air Transportation Association ("IATA"), either at the IATA's headquarters in Montreal or at any of the IATA branches worldwide. Consequently, Instrubel sought and obtained a Writ of Seizure before Judgment by Garnishment in the Superior Court of Québec over certain charges billed and collected by the IATA on behalf of the ICAA.

In 2015, Iraq brought a motion in Québec Superior Court challenging the Court's jurisdiction to grant such a writ. While the Supreme Court had previously held that in the context of recognition and enforcement proceedings of arbitral awards a connection, whether real and substantial, or otherwise with the parties or their dispute is not important, the Court granted ICAA's motion to quash the writ. The Superior Court noted that while the Court had a connection to the dispute insofar as it was assisting in the execution of the arbitral award, and the funds were the property of the ICAA under the IATA's agency agreement with the ICAA, the Court did not have jurisdiction to authorize a writ of seizure by garnishment that extended to assets outside Québec, in this case funds held in a Swiss bank account.

Instrubel appealed the decision to the Court of Appeal of Québec. The Court of Appeal found that the relationship between IATA and ICAA was not an agency relationship as indicated by the Superior Court, but rather the IATA was debtor of a personal right owed to ICAA, which could be the subject of a garnishment order issued by the Courts of Québec. The ICAA appealed the Court of Appeal's decision to the Supreme Court of Canada ("SCC"). The SCC dismissed ICAA's appeal in brief oral reasons for substantially the reasons of the Court of Appeal.

Justice Côté was the sole dissenting justice. In her reasons, released May 1, 2020, Justice Côté disagreed with the conclusion that IATA owed ICAA a debt. Instead, she agreed with the decision of the Superior Court of Québec, noting the location of the property, rather than its owner or the garnishee, is the most important consideration and that which was supported by the Civil Code of Quebec. Justice Côté concluded that Québec courts only have jurisdiction, generally, to issue a writ of seizure where the property is located in Québec. Therefore, in a case such as this, where the property "was *owned* by ICAA" and "only held by IATA *on behalf* of ICAA" and the funds were deposited in a Swiss bank account and continued to belong to the ICAA outside the jurisdiction of the Quebec Superior Court, such a writ could not be issued.

The majority decision from the SCC emphasizes the jurisdictional analysis to be undertaken in determining the location of assets, and whether they can be subject to writs and garnishment. While this does not fully settle all of the legal issues around enforcement of international arbitral awards, it does speak to the realities and potential difficulties in garnishment where accounts are also international.

Investor-State Dispute Settlement & Canada

2020 saw various developments relating to investor-state dispute settlement in Canada. The most notable being a substantially redesigned investment chapter replacing the North American Free Trade Agreement (NAFTA) Chapter 11 when the Canada United States Mexico Agreement (CUSMA) entered into force on July 1, 2020. This, along with other continual developments in the area, underscore a need to consider investment structuring at the outset of an international investment and to revisit that structure from time to time as the system is not static. A few of the key developments in this area are recapped below.

Canada United States Mexico Agreement & Investor-State Dispute Resolution

On July 1, 2020, NAFTA was replaced by the CUSMA. The CUSMA's investment chapter is a significant break from investor-state dispute settlement's (ISDS) evolution that began with NAFTA. Even though the investment chapter contains several instances of innovation and evolution from NAFTA's Chapter 11, such provisions are largely overshadowed by the foreign policy approach to investment dispute resolution and the corresponding significant limitations on investor-state dispute settlement.

For Canada, one change is particularly significant: Canada is not a party to the investment chapter's dispute resolution procedures. This means that Canadian investors can no longer bring investment disputes under the CUSMA's investment Chapter. Practically, this means that moving forward there will be no investor-state dispute settlement between Canada and the U.S. (or Canada and Mexico), under CUSMA save for certain NAFTA legacy claims discussed below. Both Canada and Mexico are, however, parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which includes ISDS procedures. Notably, where investors in to or out of Canada were used to the single NAFTA regime within North America, this change in investment protection, and the differences raised between the CUSMA and CPTPP, might now require consideration for both continuing and new investments.

In terms of the CUSMA's investment chapter, and what would apply as between the U.S. and Mexico, there is a substantial departure from what was in NAFTA. The US-Mexico dispute resolution mechanisms are included in Annex 14-D and 14-E. Under these Annexes, dispute resolution is tiered between privileged government contracts in oil and gas, power generation, telecommunications, transportation and infrastructure sectors, with a less favourable dispute resolution process for all other covered investment disputes. While contract claims may proceed directly to international arbitration, general investment claims are subject to a requirement to commence local dispute resolution proceedings for 30 months as a condition precedent to access to international arbitration. Further, general investment claims are limited to claims of national treatment, and most favoured nation treatment save for claims related to establishment and acquisition, which are specifically excluded, and direct expropriation, also explicitly excluded.

While the CUSMA's investment chapter contains certain procedural and substantive evolutions and innovations, the significance of the above-noted limitations far outweighs any innovations contained therein. That said, it remains noteworthy that the CUSMA's investment chapter contains important procedural advances through the inclusion of provisions on transparency of arbitral proceedings, the explicit public access to hearings and pleadings, arbitrator compliance with the IBA Guidelines on Conflicts of Interest in International Arbitration, and a prohibition on arbitrators acting as counsel or party-appointed expert or witness in any pending arbitration under the agreement for the duration of the proceedings.

On a substantive level, certain investment protections under the CUSMA follow the trend of states narrowing and further defining substantive investment protections, with many provisions drafted responsively to previous investment award interpretation. For example, the CUSMA's expropriation provision further qualifies what constitutes indirect expropriation through detailed criteria in Annex 14-B, most favoured nation treatment is limited to substantive obligations, and article 14.6(5) effectively writes out claims based on legitimate expectations from the minimum standard of treatment. Further, the CUSMA does mirror new provisions such as article 14.17 on corporate social responsibility, also found within the CPTPP.

Under CUSMA's investment chapter, legacy NAFTA claims for investments made prior to July 1, 2020, can be brought by CUSMA investors until July 1, 2023.

Investor-State Cases Against Canada in 2020

Throughout 2020 Canadian investors have used Canada's various investment treaties to initiate claims abroad. Similarly, Canada continued to defend several disputes over the course of 2020, while also seeing one final award rendered while settling another investment dispute.

On this final award, it is notable as it involved the first bilateral investment treaty case against Canada. Global Telecom Holding S.A.E. v Canada was brought under the Canada-Egypt bilateral investment treaty and related to changes in Canada's wireless telecommunications regime. Canada successfully defended the case on the basis that the telecommunication regime was largely excluded through reservations to the BIT's coverage, although one arbitrator did write a forceful dissent relating to the BIT's national security exception. The case also provides an initial analysis of Canada's national security regime in relation to investment protection.

Investor-State Cases in Canadian Courts

One key investor-state decision from the Canadian courts was United Mexican States v Burr. This related to set aside proceedings in the Ontario Superior Court for a Partial Award and Partial Dissenting opinion by a NAFTA investor-state tribunal. The NAFTA tribunal was seated in Canada. While the attempt to set aside the award in question was rejected, there are two key points in the decision worth noting. First, Justice Dietrich accepted that legal submissions by the parties to NAFTA (the states) can qualify as "subsequent practice" under article 31(3) of the Vienna Convention on the Law of Treaties. This finding is contrary to those made by several NAFTA tribunals. It is also a questionable application of international law when considering the International Law Commission's 2018 Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties is taken into account. Nevertheless, Dietrich J. found that the alleged subsequent practice fell short of meeting the required applicable standard of a "clear, well-understood, agreed common position" previously set by the Ontario Court of Appeal. Second, Dietrich J. helpfully distinguished jurisdictional objections and objections related to admissibility, finding that the court had jurisdiction to review the former but not the latter.

ICSID Rule Amendments & UNCITRAL Working Group III

On February 28, 2020, ICSID released its latest working paper with proposed amendments to its procedural rules for resolving international investment disputes. This forms part of the ongoing amendment process at ICSID. Further, on May 1, 2020, ICSID and UNCITRAL released a draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. The Code was subject to a public comment period that ran until the end of November.

Throughout 2020 the ongoing discussion about investor-state reform at UNCITRAL Working Group III moved online. While the initial spring session was postponed, the fall session occurred online as scheduled.

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