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# International Arbitration 2021

A practical cross-border insight into international arbitration work

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## Introduction

### Commercial arbitration climate

Both the United States and Canada have arbitration-friendly legal regimes, as well as experienced arbitration counsel and arbitrators. In addition, both countries host a number of important arbitral institutions. The United States is home to: the American Arbitration Association ("AAA") and its international arm, the International Centre for Dispute Resolution ("ICDR"); Judicial Arbitration and Mediation Services ("JAMS"); the CPR International Institute for Conflict Prevention & Resolution ("CPR"); the New York International Arbitration Center ("NYIAC") (which does not administer arbitrations, but does provide arbitration hearing facilities); and the International Chamber of Commerce ("ICC"). In Canada, arbitral institutions include: the ADR Institute of Canada ("ADRIC") and its international arm, the ADR Chambers International ("ADRCI"); the British Columbia International Commercial Arbitration Centre ("BCICAC"); the Canadian Commercial Arbitration Centre ("CCAC"); the International Court of Arbitration of the ICC; and Arbitration Place.

### Investment arbitration climate

Both the United States and Canada are signatories to a number of free trade agreements and bilateral investment treaties ("BITs").[1] BITs – known as Foreign Investment Promotion and Protection Agreements ("FIPAs") in Canada – also typically provide for arbitration of disputes.[2] In July 2020, Chapter 11 of the North American Free Trade Agreement ("NAFTA"), which previously governed the arbitration of investor-state dispute settlements ("ISDS") between the United States, Canada, and Mexico, was superseded by Chapter 14 of the United States-Mexico-Canada Agreement ("USMCA").[3]

The USMCA imposes new limitations on claims involving sectors other than: (i) oil & gas; (ii) power generation; (iii) telecommunications; (iv) transportation; and (v) infrastructure (together "covered sectors").[4] Under the USMCA, foreign investors outside of those "covered sectors" are only able to bring claims for: (i) direct expropriation; (ii) national treatment and most-favoured-nation treatment; or (iii) the establishment or acquisition of an investment.[5] Claims involving "covered sectors" must be sponsored by the investor's home state using the USMCA's state-to-state dispute settlement mechanism, or brought directly by the investor before the host state's courts.[6] These claimants must also initiate domestic litigation in the host state before submitting their claim to arbitration, and can only commence arbitration if there is a final decision of a "court of last resort of the respondent or 30 months have elapsed" since domestic proceedings were initiated. The USMCA has a four-year statute of limitations for arbitration claims, which, along with the requirement of domestic litigation prior to arbitration, encourages parties to act quickly to bring claims.[7]

Finally, the ISDS provisions under the USMCA are limited to the United States and Mexico, as Canada is not party to the USMCA's ISDS provisions. Therefore, Canadian investors in the United States or United States investors in Canada may not be able to pursue direct arbitration proceedings against the state in which they have invested.[8] However, legacy foreign investors may still bring claims under Chapter 11 of NAFTA so long as arbitration proceedings against a host state are initiated within three years of NAFTA's termination; the deadline to bring such claims is July 1, 2023. On May 13, 2021, Canada announced a new, modernised FIPA Model.[9] If enacted, the FIPA Model would permit investors to bring an ISDS claim after completing alternative dispute resolution.[10]

## Arbitration in the United States and Canada

### U.S. arbitration framework

**Basic framework**

The Federal Arbitration Act ("FAA") is the starting point for U.S. arbitration law.[11] The FAA "declare[s] a national policy favoring arbitration".[12] The FAA applies to arbitrations related to interstate and foreign commerce and maritime transactions.[13] State arbitral law is preempted by the FAA, but continues to apply to areas on which the FAA is silent.

The FAA consists of three chapters. Chapter 1 contains general provisions.[14] Importantly, it recognises the validity of written arbitration agreements[15] and provides judicial procedures for confirming and challenging arbitration awards.[16] Chapter 2 implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which provides the basic framework for domestic enforcement of most international arbitral awards, subject to two reservations. The New York Convention applies only to: (i) awards made in other signatory nations (a reciprocity requirement); and (ii) disputes that are deemed "commercial" under U.S. law.[17] Importantly, the Supreme Court recently held in *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC* that, although the New York Convention applies only to other signatory nations, it does not prevent federal courts from applying state-law equitable estoppel to enforce arbitration agreements by non-signatories.[18] The Court reasoned that nothing in the Convention prohibits non-signatory enforcement or the

application of equitable estoppel – indeed, many contracting states allow both – and remanded for the Court of Appeals to determine whether the non-signatory could actually enforce the clause through equitable estoppel.[19]

Finally, Chapter 3 of the FAA implements the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").[20] The Panama Convention supersedes the New York Convention where a majority of the parties are citizens of eligible Panama Convention signatory countries.[21]

**Requirements and procedures**

As stated, the FAA applies only to written arbitration agreements involving interstate, foreign and maritime commerce. Such agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".[22] Accordingly, courts must look to state contract law to determine the validity of an arbitration agreement. However, arbitration provisions are considered to be "severable" from the remainder of a contract such that, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance".[23] The FAA does not provide many default rules, leaving the procedures for conducting arbitrations largely to the parties. The FAA does, however, set out a procedure for appointing an arbitrator in the absence of agreement by the parties.[24] It also gives arbitrators the power to summon witnesses and to enlist the aid of U.S. courts in compelling their attendance.[25] Relatedly, courts are split as to whether 28 U.S.C. § 1782(a), which authorises federal district courts to grant discovery "for use in a proceeding in a foreign or international tribunal", allows courts to authorise discovery in aid of foreign *private arbitral panels*, or only foreign *courts*.[26] The Supreme Court recently granted cert of the Seventh Circuit's decision involving this issue in *Servotronics v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020).

In the wake of the COVID-19 pandemic, all of the major arbitral institutions have amended their rules to accommodate virtual procedures where convening in person is not possible due to public health concerns and restrictions. For example, the ICC issued a Guidance Note that includes factors to consider in determining whether to postpone an in-person hearing, hold an in-person hearing with sanitary precautions, or proceed with a virtual hearing.[27] The Note further requires that parties who proceed with a virtual hearing establish "cyber-protocol" that satisfies applicable data privacy regulations, and consider a list of proposed tools for ensuring "that parties are treated with equality [and] given a full opportunity to present [their] case during a virtual hearing".[28]

***Kompetenz-kompetenz***

*Kompetenz-kompetenz* refers to a tribunal's authority to rule on questions related to the scope of its own jurisdiction (*i.e.*, questions of "arbitrability"). Under U.S. law, questions about whether an arbitration agreement is valid and covers the dispute at issue are presumptively for the court to decide.[29] The exception is where the parties have agreed to grant the arbitrator the authority to decide such questions of arbitrability. This decision must, however, be established by "clea[r] and unmistakabl[e]" evidence; "silence or ambiguity" is not sufficient.[30] So-called "procedural" questions, on the other hand – *i.e.*, whether "prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate" have been met – are presumptively for the arbitrator to decide.[31]

### Enforcement and *vacatur*

The grounds for vacating an arbitral award in the U.S. are very narrow. The FAA provides that arbitral awards may only be vacated upon a showing that: (i) "the award was procured by corruption, fraud, or undue means"; (ii) "there was evident partiality or corruption in the arbitrators"; (iii) "the arbitrators were guilty of misconduct in refusing to postpone the hearing... or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or (iv) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made".[32] The FAA also allows courts to modify or correct arbitral awards where there was a material miscalculation or mistake, the arbitrators have ruled on a matter not submitted to them, or there is a problem of form with the award not affecting the merits.[33] Before 2008, courts held that arbitration awards could also be set aside if the arbitral tribunal acted in "manifest disregard of the law".[34] In *Hall Street Associates, L.L.C. v. Mattel, Inc.*, the Supreme Court held that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited vacatur and modification".[35] Federal circuit courts split on whether the "manifest disregard" standard survived after *Hall Street*. In *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, the Supreme Court declined to "decide whether 'manifest disregard' survives our decision in *Hall Street*... as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. § 10".[36] The Fifth, Eighth and Eleventh Circuits have held that "manifest disregard" is no longer available as a ground for *vacatur*,[37] but the Second, Fourth, Sixth, Seventh and Ninth Circuits continue to apply it.[38] The First, Third and Tenth Circuits have acknowledged uncertainty as to whether "manifest disregard" survives and avoided its application by holding that the stringent standard, if available, has not been met on the facts.[39] The circuits that continue to apply "manifest disregard" require proof of a clearly established legal principle that the arbitrator wilfully ignored.[40]

## Canadian Arbitration Framework

### Basic framework

Legislative authority in Canada is divided between the federal Parliament and provincial legislatures. Unlike in the U.S., however, provincial, rather than federal, legislation governs most commercial arbitrations. As such, parties wishing to arbitrate international disputes in Canada typically must look to provincial, rather than federal, law.

Fortunately, in the context of international commercial arbitration, there are few differences across provinces because the federal government[41] and all Canadian provinces and territories[42] have adopted the United Nations Commission on International Trade Law ("UNCITRAL") Model Law on International Commercial Arbitration with minor modifications. They have done so either by appending the Model Law as a schedule to provincial legislation,[43] reproducing it as a stand-alone statute (in some cases with minor variations),[44] or, in the case of Quebec (Canada's only civil law jurisdiction), by incorporating it in the Code of Civil Procedure.[45]

Canada is also a signatory to the New York Convention,[46] which has been implemented through both federal[47] and provincial legislation.[48] Unlike the U.S., Canada did not adopt the reciprocity reservation in the New York Convention, meaning that arbitral awards issued in jurisdictions that are not otherwise Contracting States may be enforced in Canada under the New York Convention. The federal government[49] and common law provinces[50] have, however, limited the application of the New York Convention to "differences arising out of legal relationships,

whether contractual or not, which are considered as commercial" in accordance with Article I(3) of the New York Convention. The Quebec Code of Civil procedure contains no such limitation and provides that "[c]onsideration may be given" to the New York Convention in interpreting the rules for recognition and enforcement of arbitration awards made outside Quebec.[51]

## Requirements and procedures

Procedural requirements for international commercial arbitration in Canada generally conform to the default rules in the Model Law. There are, however, certain important differences across provinces.

Most provincial statutes in Canada were enacted before the 2006 amendments to the Model Law and are based on the original 1985 text.[52] While both versions of the Model Law require arbitration agreements to be in writing, the 2006 amendments provide that "[a]n arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means".[53] The 2006 amendments to the Model Law also updated the definition of "in writing" to expressly include electronic communications, including "data messages" and "electronic mail".[54] The 2006 amendments also contain provisions addressing applications for interim measures and preliminary orders.[55]

In 2014, the Uniform Law Conference of Canada recommended reform to provincial arbitration legislation, including the adoption of the 2006 Model Law amendments in each province.[56] In 2017, Ontario repealed and replaced its international commercial arbitration legislation with a new act that appends the Model Law, as amended in 2006.[57] The Ontario legislation also abrogated the effect of a 2010 Supreme Court of Canada decision, which held that foreign arbitral awards are subject to Canadian statutes of limitation, which vary by province, when brought to Canadian courts for recognition and enforcement.[58] The Ontario act provides that an application under the New York Convention or Model Law for recognition or enforcement shall be made within 10 years of the date of the award or the date on which the proceedings concluded.[59] As a result, different limitation periods may apply depending on the province where recognition and enforcement is sought.[60] On May 17, 2018, British Columbia followed suit, becoming the second Canadian province to modernise its international arbitration law by adopting the 2006 amendments to the Model Law.[61]

The Model Law on which provincial legislation is based contains default rules for the composition of the arbitral tribunal – one chosen by each party, and the third chosen by the first two appointed arbitrators – unless the parties have agreed otherwise.[62] Upon request of a party, courts may intervene to appoint arbitrators if parties do not follow their chosen procedures or if a vacancy is not filled.[63] The parties may challenge the appointment of an arbitrator only if there exist justifiable doubts as to his or her impartiality or qualifications, and may seek the court's intervention in doing so.[64] Parties may modify these and other rules by agreement.

In accordance with the Model Law, arbitrators in Canada have the discretion to request the production of documents. The International Bar Association ("IBA") Rules on the Taking of Evidence in International Commercial Arbitration often serve as a guide.[65] Article 27 of the Model Law also provides for court assistance in collecting evidence.[66]

After an increase of virtual hearings due to the COVID-19 pandemic, in February 2021 the IBA released updated "IBA Rules on the Taking of Evidence in International Arbitration" (the "2020 Rules"), which provided greater clarity on virtual or remote evidentiary hearings.[67] Article 8.2 of the 20202 Rules allows the arbitral tribunal to order, or a party to request, that the evidentiary hearing be conducted as a remote hearing.[68]

### *Kompetenz-kompetenz*

The Model Law provides that the arbitral tribunal may rule on its own jurisdiction,[69] and enumerates specific grounds on which a stay of court proceedings in favour of arbitration may be refused.[70] The Supreme Court of Canada has embraced the *kompetenz-kompetenz* principle, holding that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator".[71] The only exceptions are where: (1) the jurisdictional challenge "is based solely on a question of law"; (2) the jurisdictional challenge requires resolution of "a question of mixed law and fact... [which] require[s] only superficial consideration of the documentary evidence in the record";[72] and (3) referral of a jurisdiction challenge presents a "real prospect that… the challenge [will] never be[ ] resolved".[73] Even if one of the exceptions applies, the court must "be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding" and may "allow the arbitrator to rule first on his or her competence" where it is "best for the arbitration process".[74]

In recognition of the *kompetenz-kompetenz* principle, Canadian courts have held that a stay of court proceedings must be granted in favour of arbitration as long as it is "arguable" that the conditions under Article 8(1) of the Model Law have been met.[75] Thus, "[w]here it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then... the stay should be granted and those matters left to be determined by the arbitral tribunal".[76]

### Enforcement and *vacatur*

The Model Law sets out the grounds for setting aside international arbitration awards, which include a party's legal incapacity, defective notice, a tribunal acting outside its authority and improper composition of the tribunal.[77] Both the Model Law and New York Convention set out grounds on which courts may refuse recognition and enforcement of a foreign award. These grounds are identical to the Model Law grounds for setting awards aside, with the addition that recognition and enforcement may be refused if the party against whom the award is invoked furnishes proof that "the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made".[78] Furthermore, an award may be set aside, or recognition or enforcement refused, where: (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the state; or (ii) the award is in conflict with the public policy of the state.[79]

Canadian courts have strictly adhered to the enumerated grounds in the Model Law and New York Convention and held that there is no authority to review international arbitration awards for mere errors of law, for instance.[80] Further, Canadian courts have held that there is discretion to refuse to recognise and enforce an award even if one or more of the enumerated grounds for recognition and enforcement have been met, based on the permissive language in Article 34(2) of the Model Law.[81]

Canadian courts have construed the public policy provisions of the Model Law and New York Convention very narrowly. For instance, Ontario courts have held that the public policy ground "should be narrowly construed and should apply only where enforcement would violate our 'most basic notions of morality and justice'",[82] such as where "the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts".[83]

## Recent Developments

### United States

**Amidst the COVID-19 pandemic, arbitral institutions transition to virtual practice and arbitral cases soar**

Arbitral institutions around the world have successfully adapted to virtual proceedings in light of the COVID-19 pandemic by leveraging technologies and adopting new procedures that enabled them to handle a record high number of registered cases in 2020. Like many other arbitral institutions, the ICC transitioned to remote operation in March 2020, postponing or cancelling all hearings and meetings scheduled at its Paris Hearing Centre and conducting many hearings virtually.[84]

By April 2020, the ICC issued a Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic.[85] The Note suggests factors to consider in determining whether to (1) postpone a hearing, (2) hold a hearing with proper precautions if "convening in a single physical location is indispensable", or else (3) proceed with a virtual hearing.[86] The Note requires that the tribunal and parties develop "cyber-protocol" that satisfies applicable data privacy regulations.[87] The Note proposes potential issues to consider, such as holding hearings for parties situated in different time zones, and tools like offering real-time transcripts for ensuring "that parties are treated with equality [and] given a full opportunity to present [their] case during a virtual hearing".[88] In addition, the Note reaffirms the ICC's commitment to expeditiously resolving disputes and proposes techniques for maximising efficiency. Techniques include: resolving issues based on documents without a hearing, without discovery or with limited discovery, or without witnesses and/or expert evidence; holding conferences to identify the most relevant issues and focus resources on solving them; and requesting that parties agree to facts and issues to narrow the dispute.[89] With these new measures in place, the ICC handled a total of 946 new cases – the highest total since 2016.[90]

Similarly, the International Centre for Settlement of Investment Disputes ("ICSID") has increasingly relied on virtual hearings to navigate the restrictions and travel disruptions associated with COVID-19. In March 2020, ICSID released a Brief Guide to Online Hearings, in which it committed to devote the same care and attention to online hearings as it does to in-person hearings and outlined online hearing features, such as ease of access with no requirement for special hardware or software, capability of hosting groups of any size, as well as sharing audio, video, and presentations and a real-time transcript.[91] Like the ICC, ICSID boasted a record 58 new cases in 2020 and hosted 156 virtual hearings in total, which was commensurate with the previous year.[92] Amidst the pandemic, the demand for arbitration is higher than ever and arbitral institutions have demonstrated that they are up to the challenge.

***Forum non conveniens* and the new restatement of the U.S. Law of International Commercial and Investor-State Arbitration**

Since 2007, the American Law Institute ("ALI") has been working on a restatement of the law on the subject of U.S. Law of International Commercial and Investor-State Arbitration. The proposed final draft was approved by the ALI membership at the 2019 Annual Meeting.[93] The scope of this comprehensive project includes "arbitration agreements, the judicial role in the U.S. and abroad, enforcement and preclusive effect of international arbitral awards rendered in the U.S. and abroad, and ICSID Convention arbitration".[94] Like other ALI publications, the Restatement does not only "restate" the law in the U.S., but rather it provides guidance when courts take different approaches on a particular legal question. One such example is the Restatement's discussion on whether *forum non conveniens* is a defence to enforcement under the New York or Panama Conventions.[95] Citing cases such as *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002), the Restatement recognises that U.S. "courts have traditionally been willing to entertain motions to dismiss enforcement proceedings based on *forum non conveniens*", even if such motions are rarely granted.[96] Despite this, the Restatement takes the position that: "An action for confirmation or enforcement under the New York and Panama Conventions as implemented by FAA Chapters 2 and 3 is not subject to stay or dismissal on *forum non conveniens* grounds, whether brought in state or federal court. Stay or dismissal of an action to confirm or enforce a Convention award based on *forum non conveniens* would run afoul of the Conventions' requirement that, absent a specific Convention defense to enforcement, Contracting States confirm and enforce such awards."[97] It is too soon to tell whether the Restatement's position will impact how U.S. courts deal with *forum non conveniens* motions moving forward.

**U.S. Supreme Court will rule on whether U.S. discovery can be obtained in international arbitration proceedings**

On March 22, 2021 the U.S. Supreme Court granted Servotronics's petition for writ of *certiorari* to review the U.S. Court of Appeals for the Seventh Circuit's decision in *Servotronics v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020). The Supreme Court's decision will determine whether 28 U.S.C. § 1782(a), which authorises federal district courts to grant discovery "for use in a foreign or international tribunal", can be used to obtain discovery in aid of a foreign private commercial arbitration.[98] In 2004, the Supreme Court held in *Intel Corp. v. Advanced Micro Devices, Inc.* that the Directorate-Generate for Competition of the European Communities qualified as a "tribunal" under Section 1782.[99] The Court noted that, by enacting Section 1782, Congress had sought to provide "assistance to foreign courts *and quasi-judicial agencies*".[100] Since *Intel*, however, the Supreme Court has not provided lower courts with further guidance about the scope of the phrase "foreign or international tribunal". The Circuit Courts of Appeals are split as to whether Section 1782 authorises discovery for a foreign commercial arbitration. The Second, Fifth, and Seventh Circuits have held that Section 1782 cannot be used to obtain discovery for foreign commercial arbitrations, while the Fourth and Sixth Circuits have held that it can.[101]

Amidst the circuit split, Servotronics filed applications for discovery in aid of a private commercial arbitration in London in both the Northern District of Illinois, which is in the Seventh Circuit, and the District of South Carolina, which is in the Fourth Circuit. The U.S. Court of Appeals for the Fourth and Seventh Circuits came to conflicting decisions as to whether Servotronics could obtain discovery in aid of the foreign arbitration.[102] The Seventh Circuit reasoned that the dictionary definition of the word "'tribunal' means 'a court'", and not an arbitral panel.[103] In contrast, the Fourth Circuit held that foreign private commercial arbitration qualifies as a "foreign or international tribunal" because arbitration is a "product of 'government-conferred authority'".[104]

In December 2020, Servotronics filed a petition for *certiorari* to appeal the Seventh Circuit's denial of discovery. The question presented is "[w]hether the discretion granted to district courts in 28 U.S.C. § 1782(a) to render assistance in gathering evidence for use in a 'foreign or international tribunal' encompasses private commercial arbitral tribunals...". The International Court of Arbitration of the ICC has also submitted an *amicus* brief in the case. The brief takes no position, but argues that if the Supreme Court concludes that U.S. judges have power to order such discovery, the

justices should also caution U.S. judges to defer to the views of the international arbitration tribunal before authorising depositions and document production. "One of the foundational elements of the international arbitral process is that the arbitral tribunal has primary authority over the conduct of the proceedings, including discovery", wrote the ICC's lawyers at Freshfields Bruckhaus Deringer.[105] "A U.S. court should give great weight to the arbitral tribunal's position on the discovery requested."[106]

The Supreme Court's decision in this case will have broad ramifications for any company that routinely engages in international arbitration, as well as companies that may have documents responsive to matters involved in an international arbitration, even if they are only third parties. However, Servotronics's petition may still be mooted, denying the court the opportunity to weigh in on this issue, if Servotronics's underlying arbitration is resolved prior to the case before the Court.

**U.S. Supreme Court rules that independent contractor agreements qualify as "contracts of employment" under the FAA**

On January 15, 2019, the U.S. Supreme Court unanimously held in *New Prime Inc. v. Oliveira* that, due to a statutory exception contained in the FAA, independent contractors in the interstate transportation industry may not be subject to forced arbitration.[107] The case involved a class action lawsuit in federal court against New Prime, an interstate trucking company, brought by Dominic Oliveira, who worked as one of its drivers.[108] Pursuant to the parties' contracts, Mr. Oliveira, similar to all of New Prime's drivers, was classified as an independent contractor.[109] Mr. Oliveira alleged that New Prime failed to pay its drivers the statutorily required minimum wage. In response, New Prime asked the court to compel arbitration according to the terms found in the parties' agreements.[110] The Supreme Court held that the lower court lacked authority under the FAA to order arbitration because Mr. Oliveira's agreement with New Prime fell within an exception found in § 1 of the FAA.[111] The Supreme Court explained that while a court's authority under the FAA to compel arbitration according to the terms of the parties' agreement "may be considerable, it isn't unconditional".[112] Rather, § 1 of the FAA states that "nothing" in the FAA "shall apply to... contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce".[113] Noting this exception, the Supreme Court held that the term "contracts of employment", as understood by Congress when the FAA was enacted in 1925, meant not only contracts that reflected an employer-employee relationship, but any "agreement to perform work".[114] As a result, independent contractors qualify as performing work within the meaning of the FAA.[115] Consequently, the Supreme Court affirmed the decision of the First Circuit, finding that the court lacked authority under the FAA to order arbitration.[116] Important to acknowledge, however, is that this holding does not extend to all "agreements to perform work" involving independent contractors, but only those employment contracts involving workers engaging in foreign or interstate commerce.[117]

**Enhanced right to require arbitration comes with unintended consequences**

Since the FAA passed in 1926, courts have consistently ruled in favour of arbitrating disputes where a valid arbitration agreement exists. In 1983, the Supreme Court ruled that "as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration". That presumption in favour of arbitration has continued in the last several years. In *Epic Systems Corp. v. Lewis*, the Supreme Court held that employment arbitration agreements with class action waivers requiring individual arbitration are enforceable under the FAA, notwithstanding Section 7 of the National Labor Relations Act (the "NLRA"),[118] which protects employees' rights to engage in concerted activities.[119]

However, a backlash against arbitrating disputes has begun to emerge from an unexpected source – major United States corporations that once promoted arbitration. Historically, Amazon has been among the slew of businesses that has included a mandatory arbitration provision as part of its terms of service.[120] In 2020, Amazon received 75,000 arbitration demands from consumers.[121] Under its terms of service, Amazon was obligated to pay an associated filing fee for each case. In order to avoid the significant payments, in 2021, Amazon amended its terms of service to allow individuals to file lawsuits in domestic courts.[122] Several other companies in similar positions are now reevaluating mandatory arbitration clauses in their contracts as well. This trend will continue for many years.

**U.S. Supreme Court holds that the New York Convention does not bar a non-signatory from compelling arbitration with a signatory to an international agreement containing an arbitration clause**

The New York Convention obligates its roughly 160 nation signatories to enforce arbitration agreements between businesses of Member States. On June 1, 2020, in *GE Energy v. Outokumpu*, the U.S. Supreme Court unanimously held that the New York Convention permits federal courts to enforce such arbitration agreements against signatories at the request of *non-signatories* in situations where the signatory has asserted claims against the non-signatory based on the agreement containing the arbitration clause.

Writing for the Court, Justice Thomas noted that the New York Convention "focuses almost entirely on arbitral awards" and "contains only three provisions, each one sentence long", that "addres[s] arbitration agreements".[123] The Court continued, the "text of the New York Convention does not address whether nonsignatories may enforce arbitration agreements"; rather, the "Convention is simply silent on the issue".[124] In reaching its decision, the Court emphasised that "the provisions of Article II [of the FAA] contemplate the use of domestic doctrines to fill gaps in the Convention" and "does not set out a comprehensive regime that displaces domestic law".[125] Therefore, the Court remanded the matter to the Eleventh Circuit to determine whether the doctrine of equitable estoppel would permit GE to enforce the arbitration agreement against Outokumpu.[126] Some commentators have noted that the decision to issue a narrow opinion may have been key to the decision's unanimity, as Chief Justice Roberts and Justice Ginsburg expressed scepticism about GE's equitable estoppel theory, while Justice Sotomayor seemed more receptive to it.[127]

**First Circuit invalidates unilateral arbitrator-selection provision as unconscionable**

In *Trout v. Organizacion de Boxeo, Inc.*, the First Circuit addressed the propriety of a unilateral arbitrator-selection provision.[128] In that case, the parties entered into an arbitration agreement that provided the World Boxing Organization ("WBO") with unbridled, exclusive discretion to appoint the arbitrator of its choosing – including WBO employees.[129] The Plaintiff boxer, Trout, contended that the provision deprived him of a "fair opportunity" to pursue his claim because it would allow WBO to act as "party and judge", and any arbitrator would be biased in favour of WBO.[130] Accordingly, Trout argued the provision was "unconscionable" as a matter of Puerto Rican contract law.[131] The First Circuit acknowledged that certain district courts have upheld similar provisions giving a unilateral right to appoint an arbitrator. However, it emphasised a critical distinction: while

those provisions required the appointment of an "independent" arbitrator, this provision contained no such limiting language.[132] The WBO indeed conceded that, under the plain language of the agreement, it could even appoint the WBO president's personal assistant.[133] The First Circuit held that the arbitration-selection provision was unconscionable and remanded the case back to the district court for a determination as to whether the provision was severable from the rest of the arbitration agreement.[134]

**Mexico establishes Pemex monopoly, giving rise to arbitration claims**

On May 5, 2021, Mexico enacted a new Hydrocarbon Law to bring back the dominating market position of Petróleos Mexicanos (Pemex), Mexico's state-owned oil & gas company. The Hydrocarbons Reform will, among other things, allow Mexico's Secretariat of Energy ("SENER") and the Energy Regulatory Commission ("CRE") to use their discretionary powers to suspend permits of private companies for unspecified reasons of national security, energy security, the national economy or for violation of laws and permit terms. SENER and CRE can now also revoke permits of companies that are not in compliance with minimum storage policy requirements that are set by SENER. Additionally, Pemex and other Mexican state entities will receive the right to take over the facilities of companies that lost their permit; there are no provisions providing for compensation or limitation on time.

Quickly following the passage of the Hydrocarbons Reform, a U.S. oil service group, led by Finley Resources Inc., brought a US$100 million claim before the World Bank's ICSID. They allege that Mexico violated investor protections under the NAFTA trade pact by failing to honour agreements. The group, which includes Finley, MWS Management Inc., and Prize Permanen, alleges that Pemex failed to pay for services provided by the companies and that some contracts awarded to them were not honoured by Mexico. Finley's international claim is the first by a U.S. oil services company against Mexico since NAFTA was renegotiated as the USMCA in 2020.[135]

Foreign investors have two options to protect their investments against the Hydrocarbons Reform: they can either pursue domestic remedies before the Mexican courts; or seek recourse to international arbitral tribunals outside of Mexico under USMCA. Additionally, U.S. investors that invested in Mexico before July 1, 2020 (so-called "legacy investment claims") are still able to initiate arbitration under the protection provisions of NAFTA until the final cutoff date of July 1, 2023.[136]

## Canada

**Class action and arbitration legislation**

In recent years, Canadian courts have grappled with the interplay between class action and arbitration legislation, particularly in the context of consumer claims. On one hand, the provincial class action legislation provides that the court must certify a putative class action where the requirements for certification have been met.[137] On the other hand, both the domestic and international arbitration legislation in each province provides that court actions shall be stayed where parties have agreed to arbitrate their disputes, with certain exceptions,[138] and Canadian courts have consistently held that consensual arbitration should be endorsed and encouraged as an alternative dispute resolution mechanism.[139] The Supreme Court of Canada has generally resolved this tension in favour of arbitration and has recently held that any restriction of the parties' freedom to arbitrate must be found in clearly expressed legislation.[140]

The debate over the interplay between class action and arbitration legislation started with parallel putative class actions in British Columbia and Ontario against a payday loan company. In each province, the plaintiffs alleged that arbitration agreements in their standard form loan agreements were "inoperative" or "invalid" within the meaning of the provincial domestic arbitration legislation because the class action statutes required the court to certify where the statutory criteria are met.[141] The British Columbia and Ontario Courts of Appeal both held that whether a stay of a putative class action should be granted on the basis of a mandatory arbitration clause should be decided in the context of determining whether a class action is the preferable procedure for resolving the dispute, one of the statutory criteria for class certification in common law Canada.

Subsequently, in two cases from Quebec decided in 2007, the Supreme Court of Canada held that proposed class actions against Dell Computers and Rogers Wireless could not proceed in the face of mandatory arbitration clauses, ruling that arbitration is a substantive right that ousts the court's jurisdiction.[142] In *Dell*, the Supreme Court expressly endorsed the *kompetenz-kompetenz* principle, as discussed above.[143] Following *Dell* and *Rogers*, the British Columbia and Ontario courts came to different conclusions on the effect of the Supreme Court's decisions – decided in part based on the Quebec Civil Code – on the interplay between the provincial class action and arbitration legislation in each province. The British Columbia Court of Appeal ordered a stay of a consumer class action against another cell phone company for alleged overbilling,[144] while Ontario courts certified an Ontario class action against Dell for the sale of allegedly defective notebook computers.[145]

In the 2011 decision in *Seidel v. Telus*,[146] a majority of the Supreme Court of Canada held that statutory claims for unfair billing practices against a cell phone provider based on British Columbia's consumer protection legislation could proceed despite a mandatory arbitration clause in the cell phone contracts. The decision was based on the wording of the British Columbia consumer protection legislation, which, according to the majority, "manifest[ed] a legislative intent to intervene in the marketplace to relieve consumers of their contractual commitment to 'private and confidential' mediation/arbitration".[147] While permitting the statutory claims to proceed in court, the majority made clear that "[t]he choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature", and that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause".[148]

Recent decisions have demonstrated the willingness of Canadian courts to enforce arbitration agreements in the absence of express legislative restrictions on the parties' freedom to arbitrate. For example, in April 2019, the Supreme Court of Canada, in *TELUS Communications Inc. v. Wellman*, indicated its willingness to enforce arbitration agreements in class contexts.[149] The case involved a class action, comprised of both individual consumers and business customers, which alleged that the defendant systematically overcharged its wireless telephone consumers.[150] While the parties agreed that the contract arbitration clauses would not prevent the consumer class members from pursuing their claims in the Ontario courts due to the Ontario Consumer Protection Act, the parties disagreed as to whether the non-consumer, business customers' claims should be stayed in favour of arbitration.[151] The Supreme Court of Canada held that the Consumer Protection Act only applied to individual consumers, and as such, courts have no discretion regarding whether to enforce arbitration agreements against business customers.[152] That said, this willingness to enforce arbitration agreements does not extend to "realistically unattainable" arbitration.

On June 26, 2020, the Supreme Court of Canada issued a decision in *Heller v. Uber Technologies Inc.*, holding that Uber's arbitration

agreement, which prescribed the Netherlands as the place of arbitration and required an upfront cost of CA$14,500 regardless of the size of the dispute, was unconscionable and invalid. The Court noted that "[r]espect for arbitration is based on it being a cost-effective and efficient method of resolving disputes. When arbitration is realistically unattainable, it amounts to no dispute resolution mechanism at all…contractual rights are, as a result, illusory".[153] The Court reiterated that where only questions of fact are in dispute, courts should generally refer the case to arbitration, and reiterated that mixed questions of fact and law should also be referred to arbitration unless the issues of fact can be resolved through a "superficial" consideration of the record.[154] Here, the Court noted that Heller's case justified a departure from the general rule of arbitral referral because "staying the action in favour of arbitration would be tantamount to denying relief for the claim".[155] The decision also found that the International Commercial Arbitration Act ("ICAA") is inapplicable to labour and employment disputes and set forth a two-part test for unconscionability, that "requires both an inequality of bargaining power and a resulting improvident bargain".[156]

**Replacement of NAFTA with USMCA**

In December 2019, the United States, Mexico, and Canada entered into a new multilateral investment agreement, USMCA, which, when it entered into force in July 2020, replaced NAFTA.[157] While the basic framework of USMCA is addressed above, significantly USMCA eliminates ISDS arbitrations between Canadian parties invested in the United States and *vice versa* (*i.e.*, U.S. parties invested in Canada).[158] USMCA also does not include an ISDS provision between Canada and Mexico; however, Canada and Mexico are also both parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership ("CPTPP"), which includes ISDS provisions. Thus, investors should be able to assert investor-state claims against those countries under CPTPP. Because the United States is not a party to CPTPP, there is no forum for ISDS.[159]

It is thought that Canada did not join Annex 14-D because, under NAFTA's Chapter 11, Canada had been subject to more investor-state claims than either the United States or Mexico and had lost eight such cases, while the United States has never lost a Chapter 11 case. Additionally, Canadian investors had a low success rate in bringing claims against foreign states. Thus, Canada had little incentive to join Annex 14.[160]

Two forms of dispute resolution remain for Canadian investors in the United States and U.S. investors in Canada. First, Canada remains a party to Chapter 31 of the USMCA, which addresses state-to-state dispute resolution provisions. Canadian investors with a claim that falls under the scope of Chapter 31 can try and convince the Canadian government to commence a claim against the United States government, such as governmental interference in violation of the treaty. Similarly, U.S. investors with a claim that falls under the scope of Chapter 31 can try and convince the United States government to commence a claim against the Canadian government. Second, Canadian and U.S. investors with a claim that substantive investment rights were breached can still commence a claim in domestic courts.[161]

On May 13, 2021, Canada announced a new, modernised FIPA Model. The new FIPA model is the result of public consultations with stakeholders from civil society and legal experts, which began in 2018.[162] The FIPA model benefits from recent free trade agreements, including USCMA.[163] Several provisions of the FIPA Model provide alternative methods for dispute resolution and, in the wake of USCMA, commit Canada to ISDS in principle, but only in addition to, and alongside, other methods of dispute resolution. The FIPA Model sets out the steps required before a claim may be submitted to arbitration: investors must first seek to resolve the dispute through consultations.[164] Should the consultations fail, 180 days later, an investor may bring a claim under the ICSID Convention, the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules or any other rules on agreement of the disputing parties.[165] The FIPA Model also requires parties to consider other ISDS mechanisms, "consisting of a first instance investment tribunal or an appellate mechanism", should such mechanisms be "developed under other institutional arrangements and [are] open to the Parties for acceptance".[166] For now, the only such appellate mechanism is the one developed under the Comprehensive Economic and Trade Agreement ("CETA"). The FIPA Model also includes provisions focused on arbitration transparency and efficiency. One provision requires that a claimant benefiting from a third-party funding arrangement disclose the name of the third party early in the arbitration,[167] and puts the onus on parties to select (or at least consider) diverse candidates to be arbitrators.[168] Arbiters will also be bound by a mandatory arbiter code of conduct, which, among other things, requires that during a proceeding, the arbiter refrain "from acting as counsel or party-appointed expert or witness in any pending or new investment dispute under this Agreement or any other international investment treaty".[169] Additionally, the FIPA Model includes a "small claims"-like arbitration for claims under CA$10 million, which have a streamline process before a single arbiter.[170]

## Conclusion

The United States and Canada are each home to mature and arbitration-friendly legal regimes. Although the laws regarding arbitration continue to evolve, the United States and Canada remain important sites of international arbitration.

## Endnotes

1. *See* Office of the U.S. Trade Representative, *Free Trade Agreements*, http://www.ustr.gov/trade-agreements/free-trade-agreements (listing free trade agreements to which the United States is a party); Global Affairs Canada, *Trade and Investment Agreements*, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng&_ga=2.112356812.93491933.1523285118-835169481.1520885063 (listing free trade agreements to which Canada is a party).
2. *See Id.*
3. *See* USMCA, Chapter 14 (*Investment*), https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/14-Investment.pdf.
4. *Id.* at 14-E-3.
5. *See* Congressional Research Service, *USMCA: Investment Provisions*, https://fas.org/sgp/crs/row/IF11167.pdf.
6. *Id.*
7. *See* USMCA Chapter 14, *supra* note 3 at 14-D-5.8.
8. Daniel Garcia-Barragan *et al.*, *The New NAFTA: Scaled-Back Arbitration in the USMCA*, 36 *J. of Int'l Arb.* 6 at 739–754 (2019).
9. Minister Ng announces launch of Canada's Foreign Investment Promotion and Protection Agreement Model, https://www.canada.ca/en/global-affairs/news/2021/05/minister-ng-announces-launch-of-canadas-foreign-investment-promotion-and-protection-agreement-model.html.
10. 2021 Model FIPA, Article 27.
11. 9 U.S.C. § 1 *et seq.*
12. *Nitro-Lift Techs., L.L.C. v. Howard*, 568 U.S. 17, 20–21 (2012) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).
13. *See* 9 U.S.C. § 1.
14. 9 U.S.C. § 1 *et seq.*

15. 9 U.S.C. § 2.
16. 9 U.S.C. §§ 9, 10.
17. 9 U.S.C. § 201 *et seq.*; *see also* UNCITRAL, *Status: Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2.
18. *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1648 (2020).
19. *Id.* at 1645–46, 1648.
20. 9 U.S.C. § 301 *et seq.*
21. 9 U.S.C. § 305.
22. 9 U.S.C. § 2.
23. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006).
24. 9 U.S.C. § 5.
25. 9 U.S.C. § 7.
26. *Servotronics, Inc. v. Rolls-Royce PLC*, 975 F.3d 689, 691-692 (7th Cir. 2020).
27. *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, International Chamber of Commerce, 4–5 (Apr. 9, 2020), https://iccwbo.org/publication/icc-guidance-note-on-possible-measures-aimed-at-mitigating-the-effects-of-the-covid-19-pandemic/.
28. *Id.* at 5–6.
29. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).
30. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).
31. *Howsam*, 537 U.S. at 85 (emphasis omitted).
32. 9 U.S.C. § 10.
33. 9 U.S.C. § 11.
34. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).
35. *Id.*
36. *Stolt-Neilsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 672 n.3 (2010).
37. *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).
38. *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567–69 (7th Cir. 2015); *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012); *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121–22 (2d Cir. 2011); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418–19 (6th Cir. 2008).
39. *Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 63–65 (1st Cir. 2015); *Bellantuono v. ICAP Secs. USA, LLC*, 557 F. App'x 168, 173–74 (3d Cir. 2014); *Schafer v. Multiband Corp.*, 551 F. App'x 814, 818–19 (6th Cir. 2014).
40. *See Renard*, 778 F.3d at 567–68; *Wachovia Secs.*, 671 F.3d at 483; *Biller*, 668 F.3d at 665; *Jock*, 646 F.3d at 121 n.1; *Coffee Beanery*, 300 F. App'x at 418; *see also Raymond James Fin. Servs.*, 780 F.3d at 64; *Bellantuono*, 557 F. App'x at 174; *Schafer*, 551 F. App'x at 819–20.
41. Commercial Arbitration Act, R.S.C. 1985, c 17 (Can.).
42. International Commercial Arbitration Act, R.S.B.C. 1996, c 233 (Can. B.C.); International Commercial Arbitration Act, R.S.A. 2000, c I-5 (Can. Alta.); The International Commercial Arbitration Act, S.S., c I-10.2 (Can. Sask.); The International Commercial Arbitration Act, C.C.S.M., c C.151 (Can. Man.); International Commercial Arbitration Act 2017, S.O. 2017, c 2, Sched. 5 (Can. Ont.); Code of Civil Procedure, c C-25.01, Article 649 (Can. Que.); International Commercial Arbitration Act, R.S.N.B. 2011, c 176 (Can. N.B.); International Commercial Arbitration Act, R.S.P.E.I. 1998, c I-5 (Can. P.E.I.); International Commercial Arbitration Act, R.S.N.S. 1989, c 234 (Can. N.S.); International Commercial Arbitration Act, R.S.N.L. 1990, c I-15 (Can. Nfld.); International Commercial Arbitration Act, R.S.Y. 2002, c 123 (Can. Yukon); International Commercial Arbitration Act, R.S.N.W.T. 1988, c I-6 (Can. Nu.).
43. Alberta, Manitoba, Ontario, New Brunswick, Prince Edward Island, Nova Scotia, Newfoundland, and the Northwest and Nunavut Territories.
44. British Columbia, Saskatchewan and Yukon Territory.
45. Code of Civil Procedure, c C-25.01, Article 649 (Can. Que.) ("[if] international trade interests, including inter-provincial trade interests, are involved in arbitration proceedings, consideration may be given, in interpreting this Title, to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments"). Article 649 also provides that recourse may be had to documents related to the Model Law, including the Report of the United Nations Commission on International Trade Law on its 18th session held in Vienna from 3 to 21 June 1985 and the Analytical Commentary on the draft Model Law contained in the report to the Secretary-General to the 18th session of the United Nations Commission on International Trade Law. *Id.*
46. New York Arbitration Convention, *Contracting States*, http://www.newyorkconvention.org/countries.
47. United Nations Foreign Arbitral Awards Convention Act, R.S.C., 1985, c 16 (2nd Supp.) (Can.).
48. Most provinces have implemented the New York Convention in their international commercial arbitration statutes listed in note 29 above. British Columbia, Saskatchewan and the Yukon Territory enacted separate statutes implementing the New York Convention. *See* Foreign Arbitral Awards Act, R.S.B.C. 1996, c 154 (Can. B.C.); The Enforcement of Foreign Arbitral Awards Act, 1996, c E-9.12 (Can. Sask.); Foreign Arbitral Awards Act, R.S.Y. 2002, c 93 (Yukon).
49. United Nations Foreign Arbitral Awards Convention Act, R.S.C., 1985, c 16, s. 4(1) (Can.).
50. Foreign Arbitral Awards Act, R.S.B.C. 1996, c 154, s. 3 (Can. B.C.); International Commercial Arbitration Act, R.S.A. 2000, c I-5, s. 2(2) (Can. Alta.); The Enforcement of Foreign Arbitral Awards Act, 1996, c E-9.12, s. 5 (Can. Sask.); The International Commercial Arbitration Act, C.C.S.M., c C.151, s. 2(2) (Can. Man.); International Commercial Arbitration Act 2017, S.O. 2017, c 2, Sched. 5, s. 2(1) (Can. Ont.); International Commercial Arbitration Act, R.S.N.B. 2011, c 176, s. 3(2) (Can. N.B.); International Commercial Arbitration Act, R.S.P.E.I. 1998, c I-5, s. 2(2) (Can. P.E.I.); International Commercial Arbitration Act, R.S.N.S. 1989, c 234, s. 3(2) (Can. N.S.); International Commercial Arbitration Act, R.S.N.L. 1990, c I-15, s. 3(2) (Can. Nfld.); Foreign Arbitral Awards Act, R.S.Y. 2002, c 93, s. 3 (Yukon); International Commercial Arbitration Act, R.S.N.W.T. 1988, c I-6, s. 4(2) (Can. N.W.T.).
51. Code of Civil Procedure, c C-25.01, Article 652.
52. UNCITRAL Model Law on Int'l Commercial Arbitration, Article 7(2) (1985), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf.
53. UNCITRAL Model Law on Int'l Commercial Arbitration, Article 7(3) (as amended in 2006), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_ebook.pdf.
54. *Id.*, Article 7(4).
55. *Id.*, Articles 17A-J.

56. Uniform Law Conference of Canada, Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014), https://www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf.
57. International Commercial Arbitration Act, 2017, S.O. 2017, c 2, Sched. 5 (Can. Ont.).
58. *Yugraneft Corp. v. Rexx Mgmt. Corp.*, 2010 SCC 19, ¶¶ 14–34 (Can.).
59. International Commercial Arbitration Act, 2017, S.O. 2017, c 2, Sched. 5, s. 10 (Can. Ont.).
60. In Quebec, the Code of Civil Procedure provides that the Model Law "and its amendments" may be given consideration in international commercial arbitrations. *See* Code of Civil Procedure of Quebec, c C-25.01, Article 649 (Can.).
61. International Commercial Arbitration Act, RSBC 1996, c 233 (Can. B.C.).
62. Model Law, Articles 10–11.
63. *Id.* Articles. 11(3)–(4).
64. *Id.* Articles 12, 13.
65. *See IBA Rules on the Taking of Evidence in International Arbitration*, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#taking evidence.
66. Model Law, Article 27.
67. IBA, *IBA Rules on the Taking of Evidence in International Arbitration*, https://www.ibanet.org/MediaHandler?id=def0807b-9fec-43ef-b624-f2cb2af7cf7b.
68. *Id.* Article 8.2; IBA, *Commentary on the revised text of the 2020 IBA Rules on the Taking of Evidence in International Arbitration*, https://www.ibanet.org/MediaHandler?id=4F797338-693E-47C7-A92A-1509790ECC9D.
69. *Id.* Article 16.
70. *Id.* Article 8(1).
71. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, ¶ 84 (Can.).
72. *Id.* at ¶ 85.
73. *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16, ¶ 46 (Can.).
74. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, ¶ 86 (Can.).
75. See, *e.g.*, *Haas v. Gunasekaram*, 2016 ONCA 744 at ¶ 15 (Can.); *Dancap Productions Inc. v. Key Brand Entertainment, Inc.*, 2009 ONCA 135 at ¶¶ 32–33 (Can.); *Gulf Canada Resources Ltd. v. Arochem Int'l Ltd.* (1992), 66 B.C.L.R. (2d) 113 at ¶¶ 39–40 (Can. B.C.C.A.).
76. *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 at ¶ 40 (Can. B.C.C.A.).
77. Model Law, Article 34(2)(a).
78. *Id.*, Article 36(1)(a)(iv). *See also*: New York Convention, Article V(1)(e).
79. Model Law, Article 36(1)(b); New York Convention, Article V(2).
80. *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 201 (Can. B.C.S.C.), *aff'd* [1991] 1 W.W.R. 219 (Can. B.C.C.A.), leave to appeal refused, [1990] S.C.C.A. No. 431 (Can.); *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (1999), 45 O.R. (3d) 183 (Can. Ont. S.C.), *aff'd* (2000), 49 O.R. (3d) 414 (Can. Ont. C.A.), leave to appeal refused, [2000] S.C.C.A. No. 581 (Can.); 1552955 *Ontario Inc. v. Lakeside Produce Inc.*, 2017 ONSC 4933 at ¶ 79 (Can.).
81. *Popack v. Lipszyc* (2016), 129 O.R. (3d) 321 (Can. Ont. C.A.); *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.*A., 2017 ONCA 939 at ¶ 102 (Can.).
82. *Belokon v. The Kyrgyz Republic et al.*, 2015 ONSC 5918 at 43 (Can.), *aff'd*, 2016 ONCA 981 (Can. Ont. C.A.), leave to appeal refused sub. nom. *Entes Indus. Plants Constr. & Erection Contracting Co. Inc. v. Kyrgyz Republic*, 2017 CanLII 36656 (Can.) and 2017 CanLII 36653 (Can.), quoting *Schreter v. Gasmac Inc.*, [1992] O.J. No. 257 (Can. Ont. Ct. J. (Gen. Div.)). *See also Depo Traffic v. Vikeda International*, 2015 ONSC 999 at ¶¶ 45–47 (Can.).
83. *Schreter v. Gasmac Inc.*, [1992] O.J. No. 257 at ¶ 50 (Can. Ont. Ct. J. (Gen. Div.)).
84. *Urgent COVID-19 Message to DRS Community*, International Chamber of Commerce (Mar. 17, 2020), https://iccwbo.org/media-wall/news-speeches/covid-19-urgent-communication-to-drs-users-arbitrators-and-other-neutrals/.
85. *ICC Guidance Note on Possible Measures Aimed at Mitigating the Effects of the COVID-19 Pandemic*, *supra* note 27.
86. *Id.* at 4–5.
87. *Id.* at 5.
88. *Id.* at 5–6.
89. *Id.* at 2–3.
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91. *A Brief Guide to Online Hearings at ICSID*, International Centre for Settlement of Disputes (Mar. 24, 2020), https://icsid.worldbank.org/news-and-events/news-releases/brief-guide-online-hearings-icsid.
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93. Restatement of The U.S. Law of International Commercial and Investor-State Arbitration (2019).
94. The American Law Institute, *The U.S. Law of International Commercial and Investor-State Arbitration*, https://www.ali.org/publications/show/us-law-international-commercial-arbitration/#drafts (last visited July 10, 2019).
95. Restatement of The U.S. Law of International Commercial and Investor-State Arbitration § 4.27(b) (2019).
96. *Id.*
97. *Id.*
98. *Servotronics, Inc. v. Rolls-Royce PLC*, No. 20-794, 2021 WL 1072280, at *1 (U.S. Mar. 22, 2021).
99. *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 258 (2004).
100. *Id.* at 243.
101. *National Broadcasting Co. v. Bear Stearns & Co.*, 165 F.3d 184 (2nd Cir. 1999); *Hanwei Guo v. Deutsche Bank Sec.*, 965 F.3d 96, 100 (2nd Cir. 2020); *Republic of Kazakhstan v. Bidermann Int'l*, 168 F.3d 880, 883 (5th Cir. 1999); *El Paso Corp. v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*, 341 F. App'x 31, 34 (5th Cir. 2009); *Servotronics Inc., v. Rolls-Royce PLC*, 975 F.3d 689 (7th Cir. 2020); *Servotronics, Inc. v. Boeing Co.*, 954 F.3d 209 (4th Cir. 2020); *Abdul Latif Jameel Transp. Co. v. FedEx Corp.*, 939 F.3d 710 (6th Cir. 2019).
102. *Servotronics*, 975 F.3d 689 (7th Cir. 2020); *Servotronics,* 954 F.3d 209 (4th Cir. 2020).
103. *Servotronics*, 975 F.3d 689, 693 (7th Cir. 2020).
104. *Servotronics,* 954 F.3d 209, 214 (4th Cir. 2020).
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106. *Id.* at 9.
107. *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 543–44 (2019).
108. *Id.* at 536.
109. *Id.*
110. *Id.*
111. *Id.* at 544.

112. *Id.* at 537.
113. *Id.*
114. *Id.* at 539.
115. *Id.* at 544.
116. *Id.*
117. *Id.* at 536.
118. 29 U.S.C. § 157.
119. *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018). The case was consolidated under *Epic Systems* from appeals arising out of the Fifth, Seventh and Ninth Circuits. *See Murphy Oil USA, Inc. v. N.L.R.B.*, 808 F.3d 1013 (5th Cir. 2015); *Lewis v. Epic Sys. Corp.*, 823 F.3d 1147 (7th Cir. 2016); *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016).
120. *Amazon Faced 75,000 Arbitration Demands. Now It Says: Fine, Sue Us*, *supra* note 84.
121. *Id.*
122. *Id.*
123. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA*, LLC, 140 S. Ct. 1637, 1644 (2020).
124. *Id.* at 1645.
125. *Id.*
126. *Id.* at 1648.
127. Ronald Mann, *Opinion Analysis: Justices Reject Limitations On Enforcement Of Arbitration Agreements By Nonsignatory Businesses* (June 2, 2020), https://www.scotusblog.com/2020/06/opinion-analysis-justices-reject-limitations-on-enforcement-of-arbitration-agreements-by-nonsignatory-businesses/.
128. *Trout v. Organizacion de Boxeo, Inc.*, 965 F.3d 71 (1st Cir. 2020).
129. *Id.* at 78–79.
130. *Id.* at 79.
131. *Id.* at 79–80.
132. *Id.* at 80–81.
133. *Id.* at 81.
134. *Id.* at 81–82.
135. Marianna Parraga and Gary Williams, *U.S. oil service group seeks $100 million from Mexico in arbitration claim*, Reuters (May 18, 2021), https://www.reuters.com/article/mexico-oil-arbitration-idAFL2N2N414K.
136. USMCA Chapter 14, *supra* note 3.
137. *See, e.g.*, Class Proceedings Act, R.S.B.C. 1996, c 50, s. 4 (Can. B.C.); Class Proceedings Act, 1992, S.O. 1992, c. 6, s. 5 (Can. Ont.). The class proceedings legislation in all other common law provinces is very similar. The requirements for certification – called "authorization" in Quebec – are somewhat different, and are set out in Article 575 of the Quebec Code of Civil Procedure. *See* C.C.P., Article 575.
138. The grounds on which a stay may be refused in domestic arbitration legislation differ by province. For instance, British Columbia's domestic arbitration legislation contains grounds similar to Article 8(1) of the Model Law, providing that "the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed". Arbitration Act, R.S.B.C. 1996, c 55, s. 15(2) (Can. B.C.). By contrast, Ontario's domestic arbitration legislation provides that the court may refuse a stay where a party entered into the agreement while under legal incapacity, the arbitration agreement is invalid, the subject matter of the dispute is not capable of being the subject of arbitration under Ontario law, the motion was brought with undue delay or the matter is a proper one for default or summary judgment. Arbitration Act, 1991, S.O. 1991, c. 17, s. 7(2) (Can. Ont.).
139. *Seidel v. TELUS Comm'cns Inc.*, [2011] 1 S.C.R. 531 at ¶ 89 (Can.) (Lebel, Deschamps, Abella and Charron JJ., dissenting, but not on this point).
140. *Id.* at ¶ 2.
141. *See, e.g.*, *MacKinnon v. Nat'l Money Mart Co.* (2004), 203 B.C.A.C. 103 (Can. B.C.C.A.); *Smith v. Nat'l Money Mart Co.* (2005), 258 D.L.R. (4th) 453 (Can. Ont. C.A.), *leave to appeal refused*, [2005] S.C.C.A. No. 528 (Can.).
142. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 (Can.); *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921 (Can.).
143. *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801 at ¶¶ 84–85 (Can.).
144. *MacKinnon v. Nat'l Money Mart Co.* (2009), 304 D.L.R. (4th) 331 (Can. B.C.C.A.); *Seidel v. TELUS Communications Inc.* (2009), 267 B.C.A.C. 266 (Can. B.C.C.A.).
145. *Griffin v. Dell Canada Inc.*, (2009), 72 C.P.C. (6th) 158 (Can. Ont. S.C.), *reconsideration denied*, (2009), 76 C.P.C. (6th) 173 (Can. Ont. S.C.), *aff'd* (2010), 98 O.R. (3d) 481 (Can. Ont. C.A.), *leave to appeal refused*, [2010] S.C.C.A. No. 75 (Can.). *See also Wellman v. TELUS Comm'cns Company*, 2017 ONCA 433 (Can.).
146. [2011] 1 S.C.R. 531 (Can.).
147. *Id.* at ¶ 2.
148. *Id.* at ¶ 2.
149. *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 (Can.).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Uber Technologies Inc. v. Heller*, [2020] S.C.J. No. 16 (Can.).
154. *Id.* at ¶ 31–46.
155. *Id.* at ¶ 39.
156. *Id.* at ¶ 65.
157. *See* USMCA, Preamble, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/00_Preamble.pdf.
158. *See* USMCA Chapter 14, *supra* note 3 at 14-D-5.
159. Daniel Garcia-Barragan *et al.*, *The New NAFTA: Scaled-Back Arbitration in the USMCA*, 36 J. of Int'l Arb. 6 at 749 (2019).
160. *Id.* at 742.
161. *Id.* at 749–750.
162. Minister Ng announces launch of Canada's Foreign Investment Promotion and Protection Agreement Model, https://www.canada.ca/en/global-affairs/news/2021/05/minister-ng-announces-launch-of-canadas-foreign-investment-promotion-and-protection-agreement-model.html.
163. Canada's 2021 Foreign Investment Promotion and Protection Agreement Model, https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng.
164. 2021 Model FIPA, Article 25.
165. *Id.* at Article 27.
166. *Id.* at Article 46.
167. *Id.* at Article 42.
168. *Id.* at Article 30.
169. *Id.* at Section 1, Article 3(4).
170. *Id.* at Section F.

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