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Dispute Resolution in the Energy Sector: Wither Thou Goest?

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I. Introduction

The majority of international arbitrations involve disputes within the energy sector. Yet, international arbitration mechanisms of dispute resolution – whether in the private or public domain are in the midst of transformation. In recent years, a series of developments in international arbitration have prompted important questions about the cost and efficiency of this form of dispute settlement. And, even more fundamentally, whether and how arbitration is any different from other forms of dispute settlement such as litigation. In the public law domain, international investment treaty arbitration has become a lightning rod for criticism which has prompted a variety of responses from various players operating in that regime. With this context in mind, this paper considers some of the key developments taking place in both international commercial arbitration and investment treaty arbitration. Because of the significance of the commercial relationship between Canada and the United States of America (US) in the energy sector, this paper focuses on evolutions in arbitration that particularly affect the North American region. The ultimate objective of this paper is to illuminate prospective advantages and disadvantages associated with these developments.

After this introductory section (I), this paper highlights developments within Canada and the US that affect, or have the potential to affect, the international arbitration process. In so doing, it will examine efforts to harmonize international commercial arbitration legislation across Canadian jurisdictions and consider some of the issues that have recently been the subject of consideration in Canadian courts, including unconscionable arbitration agreements, third party interests, and consolidation of arbitral proceedings (Section II.A). This discussion is followed by consideration of developments taking place in the US that affect international arbitration proceedings, including arbitrability, nonsignatories, and U.S.C. Section 1782 (Section II.B). This paper next examines the reforms taking place in investment treaty arbitration. Since the inception of the *North American Free Trade Agreement* (NAFTA) in 1994 Canadian and US (and Mexican) investors operating in the energy sector have had access to the arbitration mechanism established in Chapter 11. But, the new *Canada-United States-Mexico Agreement* (CUSMA) currently foregoes any form of investor-state dispute settlement under its investment chapter as between Canada and the US. This paper outlines these changes and then discusses the implications for energy investors in the North American region (Section III). Section IV provides our concluding remarks.

II. Canadian and US Developments in International Commercial Arbitration

A. Canadian Developments

1. Legislation & Renewed Efforts to Harmonize

One of the most significant nation-wide developments in the field of international arbitration has been the Uniform Law Conference of Canada's (ULCC) recent work on the harmonization of international commercial arbitration laws across Canada.¹ The impetus for this effort was manifold. In 2006 United Nations Commission on International Trade Law (UNCITRAL) was prompted to amend its Model Law in order to address a series of developments in arbitral practice that were not addressed in its Model Law (1976).² Its 2006 amendments include provisions about the interpretation of the Model Law as an international instrument, the requirement that an arbitration agreement be written, the authority of an arbitral tribunal to make interim and *ex parte* orders, and the authority of courts to enforce interim orders.³ In addition, decades of arbitral practice highlighted incongruities in the relevant provincial legislation governing international commercial arbitrations.⁴

Those inconsistencies date back to efforts made by the ULCC to harmonize Canada's international arbitration in the mid-1980s. In 1986 Canada and its provinces adopted the *New York Convention* and UNCITRAL's Model Law (1976).⁵ But the manner in which some provinces chose to implement legislation reflecting adoption of these instruments differed.⁶ Some provinces chose to append the Model Law and New York Convention as schedules to their legislation.⁷ Other

¹ See ULCC Working Group on Arbitration Legislation, "Discussion Paper: Towards a new Uniform International Commercial Arbitration Act" (January 2013), online: <http://globalarbitrationreview.com/cdn/files/gar/Articles/ULCC_Discussion_Paper_Towards_a_New_Uniform_International_Commercial_Arbitration.pdf> (last accessed 8 July 2020) [ULCC Discussion Paper]; ULCC, Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014), online: <https://ulcc.ca/images/stories/2013_pdfs_en/2013ulcc0040.pdf> (last accessed 8 July 2020) [ULCC Final Report].

² More on UNCITRAL and its work in international commercial arbitration procedures can be found online: <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration> (last accessed 4 July 2020).

³ See UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, available online: <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09955_e_e_book.pdf> (last accessed 10 July 2020).

⁴ See ULCC Discussion Paper, *supra* note [1](#), paras 6-7.

⁵ For a discussion of Canada's place in the development of sensibilities about international commercial arbitration during this period see Errol Mendes, "Canada: A New Forum to Develop Cultural Psychology of International Commercial Arbitration" (1986) 3(3) J Int'l Arb 71.

⁶ Canada's adoption of UNCITRAL's Model Law (1976) and the New York Convention has been the subject of extensive scholarly comment: see generally RK Paterson & BJ Thompson, *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation* (Toronto: Carswell, 1987). See also Mendes, *ibid*; E Chiasson, "Canada: No man's land no more" (1986) 3(2) J Int'l Arb 67; H Alvarez, "The Role of Arbitration in Canada – New Perspectives" (1987) 21 UBCL Rev 247; JEC Brierly, "Quebec's New (1986) Arbitration Law" (1987-88) 13 CBLJ 58.

⁷ See e.g. *International Commercial Arbitration Act*, SA 1986, c I-6.6; *International Commercial Arbitration Act*, SS 1988-89, c I-10.2; *International Commercial Arbitration Act*, S.M. 1986-87, c32, C.C.S.M., c. C151; *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2; *International Commercial Arbitration Act*, R.S.N. 1990, c. I-15; *International Commercial Arbitration Act*, RSNWT 1988, c I-6; *International Commercial Arbitration Act*, RSNS

provinces, such as British Columbia and Quebec, incorporated the language of these instruments directly into their legislation.⁸ British Columbia (BC) also included a number of provisions not contemplated in the Model Law. For example, BC's *International Commercial Arbitration Act* included provisions on consolidation of proceedings, interest and costs, and the discretion of arbitral tribunals to make decisions about the rules of law applicable in any given case.⁹

Still other incongruities between Canadian provinces related to the limitation periods that apply to the recognition and enforcement of arbitral awards. Limitation periods across Canadian provinces have varied as a result of different attitudes about whether limitation periods are matters of procedure or substance.¹⁰ Common law jurisdictions typically characterise limitation periods as procedural (e.g. Alberta) while civil law jurisdictions (e.g. Quebec) consider them to be matters of substantive law.¹¹ In 2010, the Supreme Court of Canada examined whether any limitations period applies to the recognition and enforcement of foreign arbitral awards in Alberta.¹² The Court ultimately found that recognition and enforcement of foreign arbitral awards are subject to such time constraints.¹³ More particularly, it determined that in Alberta those seeking recognition and enforcement of such awards are subject to the two year limitation period outlined in section 3 of Alberta's *Limitations Act*.¹⁴ The Court's ruling provided greater certainty about the applicability of limitation periods to recognition and enforcement of foreign arbitral awards across Canada. Its determination about the length of the applicable limitations period is specific to Alberta. As a result, those seeking enforcement of foreign arbitral awards in Canada are subject to varying time constraints depending on the jurisdiction(s) in which they pursue such actions. The lack of harmony across Canada's provinces with respect to international arbitration procedures and award enforcement create complexities for foreign commercial interests looking to establish the seat of arbitration in Canada. In short, Canada needed to keep pace if it was to maintain its competitive advantage for attracting arbitration business and continue to facilitate global commerce.¹⁵

In March 2014 the ULCC's Working Group on Arbitration Legislation (Working Group) proposed a new Uniform International Commercial Arbitration Act (Uniform ICAA), which was subsequently approved by the ULCC.¹⁶ The Uniform ICAA incorporates, by way of Schedules, both the New York Convention and the 2006 Model Law. Similar to its predecessor, the Uniform ICAA permits limited judicial intervention in international commercial arbitration cases. It also adopts amendments that were made to the Model Law in 2006, which accommodate electronic

1989, c 234; *International Commercial Arbitration Act*, RSO 1990, c I.9; *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5; *International Commercial Arbitration Act*, R.S.Y. 1986 (Supp.), c. 14.

⁸ See e.g. *International Commercial Arbitration Act*, RSBC 1996, c 233 [BC ICCA (1996)]. Quebec incorporated the Model Law (1976) by making amendments to the *Civil Code of Quebec*, LRQ, c C-1991 and the *Code of Civil Procedure*, RSQ, c C-25.

⁹ BC ICCA, *ibid* at

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¹² *Yugraneft Corp v Rexx Management Corp*, [2010] 1 SCR 649.

¹³ *Ibid* at paras 16-22.

¹⁴ *Ibid* at para 37.

¹⁵ See Uniform Law Conference of Canada (Civil Law Section), "International Commercial Arbitration Report of the Working Group" (18 August 2012), online: <<https://www.ulcc.ca/en/civil-section/905-civil-section-current-topics/international-commercial-arbitration/1249-international-commercial-arbitration-2012>>.

¹⁶ ULCC, Uniform International Commercial Arbitration Act (2014), online: <http://ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf> (last accessed 3 July 2020). See also ULCC Final Report, *supra* note [], Appendix 1.

methods of communication in the formation of arbitration agreements, the authority of an arbitral tribunal to make interim and *ex parte* orders, and the authority of courts to enforce interim orders.¹⁷ The ULCC also examined a number of other issues affecting international arbitration in Canada, including limitations periods applicable to recognition and enforcement of arbitral awards. Ultimately, it recommended that a ten-year limitation apply to the recognition and enforcement of such awards across Canada.¹⁸

The ULCC's work has since been considered and prompted legislative change in some Canadian provinces. Quebec incorporated the substance of the 2006 Model Law amendments in its new *Code of Civil Procedure* in 2016.¹⁹ In 2017 Ontario updated its *International Commercial Arbitration Act* and implemented the Uniform ICCA.²⁰ British Columbia also subsequently amended its *International Commercial Arbitration Act* in 2018.²¹ As in the mid-1980s, BC incorporated amendments in the 2006 Model Law throughout its new international arbitration legislation. It also included provisions to address other developments in arbitration practice that are not dealt with in the Model Law. One such example is its treatment of third party funding. British Columbia's new International Commercial Arbitration Act expressly provides that third party funding is not contrary to public policy and therefore not a ground upon which to refuse recognition and enforcement of an arbitral award.²² A more thorough discussion of BC's legislation, including a comparison with other jurisdictions such as Ontario would undoubtedly be useful, but it is beyond the scope of this discussion. The primary point of this discussion is to highlight the fact that the remaining majority of provincial and territorial jurisdictions within Canada have not yet amended their statutes governing international commercial arbitration.²³ Even where such amendments have taken place, provinces may take different approaches with the potential for foreign users to face different rules across Canadian jurisdictions.

Despite these differences, movements within Canada to modernize and harmonize international commercial arbitration rules should not be dismissed. Such efforts signal Canada's desire to ensure that it is an appealing seat of arbitration for international businesses in all industry sectors. More fundamentally, the ULCC's renewed efforts reinforce the importance of contracting party autonomy and the limited role for judicial scrutiny in international commercial arbitrations. Moreover, the new Uniform International Commercial Arbitration Act (by adopting the Model Law 2006) clarifies the authority of arbitral tribunals over certain procedural matters – a development that ensures those who contracted for arbitration do not need to avail themselves of court processes to preserve their rights.

¹⁷ *Ibid* at section 4(1) indicating that the Model Law applies, subject to provisions of the act and section 4(2) clarifying that the definition and form of arbitration agreement adopted by the ULCC is Option I in the Model Law.

¹⁸ *Ibid* at section 11.

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²⁰ *International Commercial Arbitration Act, 2017*, SO 2017 c 2, Schedule 5.

²¹ *International Commercial Arbitration Act*, RSBC 1996, c 233.

²² See *ibid* at section 36(3).

²³ Here I note that Alberta – through its law reform institute – engaged in significant consultations on the ULCC's work and the Uniform ICCA. As a result of that work, ALRI ultimately recommended that Alberta adopt the 2014 Uniform ICCA (see ALRI, "Uniform International Commercial Arbitration Act", Final Report 114 (March 2019), online <<https://www.alri.ualberta.ca/2019/03/uniform-international-commercial-arbitration-final-report-114/>> (last accessed 4 July 2020)). However, Alberta's International Commercial Arbitration Act has yet to be amended.

2. Exceptional Jurisdictional Challenges: Unconscionable Arbitration Agreements

Canadian courts typically defer to arbitrators to clarify the jurisdictional parameters in which they operate. Indeed the Supreme Court of Canada has found that any challenge to an arbitrator's jurisdiction to hear a dispute must be decided by the arbitrator unless the challenge involves a question of law.²⁴ Where such a review involves a question of mixed law and fact, courts should only consider such challenges if questions of fact can be assessed by "superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration."²⁵ This rule has since been applied by other Canadian courts.²⁶

The recent decision of the Supreme Court of Canada (SCC) in *Uber Technologies Inc v David Heller*²⁷ clarifies that Canadian courts may intervene on jurisdictional issues where arbitration clauses are not be enforceable. Given the variety of contractual relationships underpinning Canada's energy sector, it is important to tease out the implications of this recent SCC decision. We say more about that in due course. But first, the following provides an overview of the SCC's decision in *Uber v Heller*.

In 2017 Mr. Heller, commenced a proposed class action on behalf of all drivers who have worked on the Uber platform in Ontario since 2012. Mr. Heller sought a declaration that drivers in Ontario are employees of Uber and therefore entitled to the benefits under the *Employment Standards Act, 2000* (the ESA).²⁸ In response, Uber brought a motion to stay the class action proceeding. According to Uber, Mr. Heller was bound by an arbitration clause in the Uber Services Agreement, to which all drivers must agree before performing services on the Uber platform.²⁹ That clause provides, among other things, that any dispute arising out of the Services Agreement must be resolved through mediation and if required arbitration in the Netherlands and in accordance with the applicable Rules of the International Chamber of Commerce (ICC).³⁰

The motions judge upheld the arbitration clause and granted Uber's motion for a stay.³¹ However, the Ontario Court of Appeal reversed that decision and found the arbitration clause void and unenforceable. In the Court's view, the arbitration clause in the Uber Services Agreement was void because it contracts out of the ESA. Moreover, the Court found that the clause was unconscionable. Key to this latter finding was the Court's determination that the arbitration clause amounted to an unfair bargain given the inequities in bargaining power between Mr. Heller and Uber.³² The SCC

²⁴ *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34 [*Dell*]; *Seidel v TELUS Communications Inc.*, 2011 SCC 15 [*Seidel*].

²⁵ *Rogers Wireless Inc. v Muroff*, [2007] 2 S.C.R. 921, at para. 11 (summarizing the doctrine established in *Dell*, *ibid*).

²⁶ See e.g. *Sum Trade Corp v Agricom International Inc* 2018 BCCA 379 (where the Court found that issues about the existence or validity of the arbitration agreement should be left to the arbitrator to be determined). See also *Babey v. Greer*, 2016 SKCA 45.

²⁷ *Uber Technologies Inc., et al v David Heller*, 2020 SCC 16, online: <<https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/18406/index.do>> (last accessed 1 July 2020) [*Uber v Heller (SCC)*].

²⁸ *Ibid* at para 2.

²⁹ *Ibid* at para 13.

³⁰ *Ibid* at para 8.

³¹ *Ibid* at paras 14-15.

³² *Heller v Uber Technologies Inc., et al*, 2018 ONCA 718.

agreed with the Court of Appeal.³³ As a first matter of business, the SCC found that the Ontario's domestic – rather than its international – arbitration legislation applied to the case.³⁴ As a general rule Ontario's *Arbitration Act* requires courts to stay judicial proceedings where there is an applicable arbitration agreement.³⁵ However, there are exceptions to this rule, particularly where the arbitration agreement is invalid.³⁶

The Court's analysis about the validity of the arbitration clause in this case focused on the doctrine of unconscionability.³⁷ Uber contended that the test for unconscionability should be stringent and proposed that four criteria be met in order to invalidate the arbitration clause. In its view the arbitration clause was not unconscionable unless it could be shown that: it resulted from a grossly unfair and improvident transaction; Mr. Heller did not receive legal advice or other suitable advice; there was an overwhelming imbalance in bargaining power caused by the Mr. Heller's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and Uber knowingly took advantage of this vulnerability.³⁸ However, the Supreme Court rejected this test, stating that it "unduly narrowed the [unconscionability] doctrine, making it more formalistic and less equity-focused."³⁹

Instead, the Court adopted a two-part test for unconscionability that considers whether the arbitration agreement is the result of a power imbalance between the parties and whether it results in an improvident bargain.⁴⁰ In its decision the Court is clear that inequities in bargaining power exist when a party is unable to adequately protect their interests in the contracting process. In those circumstances a party's ability to freely enter into (or negotiate) a contract is impaired permitting courts to provide relief from that bargain on equitable grounds. Relief on grounds of unconscionability also requires that the agreement lead to improvident results. According to the SCC "a bargain is improvident if it unduly advantages the stronger party or unduly disadvantages the more vulnerable."⁴¹ Considerations about the improvidence of an agreement are measured at the time the contract is formed and must be assessed contextually. The Court summarized its analysis thus:

In essence, the question is whether the potential for undue advantage or disadvantage created by the inequality of bargaining power has been realized. An undue advantage may only be evident when the terms are read in light of the surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties.⁴²

While headlines of the *Uber v. Heller* decision invalidating an arbitration clause no doubt caught the attention of many in Canada's energy sector given the prevalence of arbitration clauses in most industry agreements (such as development and joint venture agreements, transportation,

³³ *Uber v Heller* (SCC), *supra* note [].

³⁴ *Ibid* at paras 18-28.

³⁵ *Arbitration Act, 1991*, S.O. 1991, c. 17, section 7(1).

³⁶ *Ibid* at section 7(2).

³⁷ *Uber v Heller* (SCC), *supra* note [], paras 53-100.

³⁸ *Uber v Heller* (SCC), *supra* note [], para 80.

³⁹ *Ibid* at para 82.

⁴⁰ *Ibid* at para 65.

⁴¹ *Ibid* at para 74.

⁴² *Ibid* at para 75.

processing and storage agreements, and supply chain agreements) it is important to place the Court's guidance above in the context of Uber's and Mr. Heller's specific negotiation context. The Uber Services Agreement is drafted by Uber and appears to be non-negotiable for the driver. The arbitration clause found in the Canadian version of that agreement provides for ICC mediation and then ICC arbitration, both under the respective ICC rules, and to take place in The Netherlands. And, as noted by the SCC, commencement of an ICC proceeding requires each party to post a deposit of \$14,500.⁴³ The context for commercially sophisticated energy company and/or energy supply chain company negotiations are typically much more balanced, albeit not necessary entirely equal, than the *Uber v. Heller* context. Industry parties typically have more parity in terms negotiating leverage and obtaining independent legal advice, especially in respect of the financial cost of commencing an ICC mediation and arbitration, and doing so in The Netherlands.

For energy companies, such as local distribution companies and other types of energy retailers, that contract directly with end users and, in particular, individuals like Mr. Heller where there may be potential for more extreme inequities in bargaining power, then consideration should turn to the nature and requirements of the applicable dispute resolution clause. Companies should be particularly aware of provisions that render arbitration essentially illusory by financial cost or procedural burdens in contrast to local and accessible dispute resolution fora. In these exceptional circumstances, disputes arising under the contract will not be arbitrable according to the SCC's decision in *Uber v. Heller*.

3. Accounting for Third Party Interests

As with jurisdictional issues, Canadian courts are reluctant to interfere with international commercial arbitral proceedings. When faced with disputes commenced in both arbitration and litigation fora Canadian courts will stay litigation proceedings and enforce arbitration agreements.⁴⁴ Nonetheless, complexities arise when disputes involve third parties. In such circumstances courts must balance a swathe of competing interests including contractual autonomy, prejudice to third parties, procedural efficiency and cost-effectiveness.

A recent decision of the Alberta Court of Queen's Bench is illustrative of the complexities that can arise in cross-border disputes in the energy sector. *Toyota Tsusho Wheatland Inc. v EnCana Corporation* centred around a series of agreements – a New Royalty Conveyance Agreement (NRCA), a Royalty Agreement (RA) and a Royalty Extension Agreement (REA).⁴⁵ The RA precluded the contracting parties from disposing of all or any portion of the subject royalty, the royalty lands, or any interest in the Royalty Agreement without the prior consent in writing of the other Party.⁴⁶ The RA and the REA contained a dispute resolution clause referring the parties to arbitration in the event a dispute.⁴⁷ However, a provision of the RA also gave the Alberta Court of Queen's Bench the authority to grant an order for specific performance of obligations under the RA.⁴⁸

⁴³ Supra note [].

⁴⁴ *Ibid* at para 10.

⁴⁵ *Toyota Tsusho Wheatland Inc v EnCana Corporation*, 2016 ABQB 209.

⁴⁶ *Ibid* at para 10.

⁴⁷ *Ibid* at paras 52-53.

⁴⁸ *Ibid* at para 55.

In May 2014 EnCana Corporation (EnCana) began divesting its title to its royalty lands to a wholly-owned subsidiary, PraireSky Royalty Ltd. (PraireSky). Then from May to September of that same year, EnCana divested all of its interest in PraireSky through a series of public offerings.⁴⁹ As a result of these transactions, Toyota Tsusho Wheatland Inc. (TTWI) subsequently terminated the REA with EnCana.

TTWI then proceeded to initiate court and arbitration proceedings in the fall of 2015. In the Alberta Court of Queen's Bench TTWI made a series of claims, including one for specific performance of the RA, against EnCana and PraireSky. TTWI's arbitration claims were only against EnCana as PraireSky was not a party to the arbitration agreements. In these proceedings TTWI sought, among other things, a declaration that it had validly terminated the REA with EnCana.⁵⁰ These actions launched a series of cross-applications between the three parties. EnCana sought a stay of the court proceedings in favour of all claims being addressed through arbitration. PraireSky opposed this application and instead sought stay of the arbitration in favour of common claims being determined through the court proceedings. Meanwhile TTWI favoured continuation of parallel processes given the nature of the claims and parties involved.⁵¹

In addressing these applications, the Court carefully balanced a number of interests and determined that both the arbitration and the litigation should proceed, although not without some modification in the claims and the parties. On whether to stay court proceedings against EnCana, the Court was clear that its power to interfere with the arbitration agreement between TTWI and EnCana is very limited under Alberta's *International Commercial Arbitration Act*. The Court acknowledged that disputes governed by this legislation must always be referred to arbitration, even where third parties are involved.⁵² As a result, the Court found that TTWI's claims against EnCana proceed to arbitration as this is what the arbitration clause in the RA between those parties contemplated. The only exception to this was TTWI's claim for specific performance as the RA between EnCana and TTWI explicitly contemplated the Court's jurisdiction over such claims.⁵³ In keeping with a cohesive interpretation of the agreements, the Court held that it was necessary for an arbitrator to first determine the scope of Encana's obligations under the RA and whether it was in breach of the RA before TTWI could seek specific performance of that agreement against Encana before the Court.⁵⁴

The Court then found that the litigation proceedings between TTWI and PraireSky should go forward. In so finding the Court acknowledged that it has jurisdiction to stay proceedings in favour of a party pending the outcome of a related arbitration.⁵⁵ Decisions about whether to do this must consider a series of factors including: (i) whether the issues in the arbitration and the court action are substantially similar, (ii) whether continuance of the action would result in an injustice for the defendant, and (iii) whether a stay would cause an injustice to the plaintiff.⁵⁶ In this instance, the Court acknowledged that EnCana could be inconvenienced if the proceedings between TTWI and

⁴⁹ *Ibid* at paras 12-13.

⁵⁰ *Ibid* at paras 15-16.

⁵¹ *Ibid* at paras 17-19.

⁵² *Ibid* at paras 43-50.

⁵³ *Ibid* at paras 60-65.

⁵⁴ *Ibid* at para 61.

⁵⁵ *Ibid* at para 70 (citing *UCANU Manufacturing Corp v Calgary (city)* 2015 ABCA 22).

⁵⁶ *Ibid*.

PrairieSky continued. The Court was aware that continuation of the court process could lead to duplicative proceedings and inconsistent results. Nonetheless, it found that TTWI and PrairieSky would suffer greater prejudice if the action between them were stayed.⁵⁷

The ruling in this case and the reasoning throughout this decision is illustrative of the balancing exercise that Court's will undertake when considering third party interests as against enforcement of an arbitration clause. Given the complexity of contractual relationships, as well as continuous ebb and flow of acquisition and divestiture activities, typical throughout the energy sector, there will most likely be the potential for third party interests to arise in event of an arbitration. Whether such potential third party interests are a material concern or not, however, will of course depend upon the specific facts of each transaction. Nonetheless, the Court's decision at least provides a framework of considerations for parties to assess the potential impact of third party interests even if little can be done in advance to avoid them.

4. Consolidating Arbitrations: Balancing Efficiency and Consent

The prospect of dispute settlement with multiple parties in multiple fora raises efficiency concerns. This is especially true in the energy sector, where exploration and development projects may engage a host of different contractual arrangements with a variety of parties. Businesses may find themselves party to a series of disputes (all related to the same project) in different fora with different counterparties. In these circumstances, it is understandable that a party might seek to consolidate proceedings. However, consolidation poses challenges in the arbitration context. More particularly, it highlights the tenuous balance that exists between efficiency and consent. This balance has been recently tested in the context of international arbitrations in the Alberta Courts.⁵⁸

Alberta's *International Commercial Arbitration Act* permits the Court of Queen's Bench to consolidate arbitration proceedings.⁵⁹ If the parties to one or more arbitrations have agreed to appoint a particular arbitral tribunal the Court must respect that choice. But, should the parties disagree on this point, the Court may also appoint an arbitral tribunal to hear the dispute(s).⁶⁰ In trying to balance procedural efficiency with the consensual nature of arbitration, the provision permitting Court consolidation of arbitral proceedings in Alberta's ICCA also reaffirms disputing parties' rights to consolidate arbitral proceedings by agreement.⁶¹ Interpretation of this provision has divided Alberta Courts in recent years. More particularly, Courts have disagreed about whether this provision grants them the authority to consolidate arbitral proceedings if some – not all – of the parties' consent.

⁵⁷ *Ibid* at para 74-75.

⁵⁸ For an interesting discussion of these developments see Kevin E Barr & Theron Davis, "Under Construction: A Close Examination of Recent Construction Law Developments and Their Impact on the Oil and Gas Industry (2019) 57(2) *Alta L Rev* 411 at 456-460.

⁵⁹ *International Commercial Arbitration Act*, RSA 2000, C I-5, Section 8(1) provides:

The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order

- (a) the arbitration proceedings to be consolidated, on terms it considers just,
- (b) the arbitration proceedings to be heard at the same time, or one immediately after another, or
- (c) any of the arbitration proceedings to be stayed until after the determination of any other

⁶⁰ *Ibid* at s 8(2).

⁶¹ *Ibid* at s 8(3).

In one series of decisions the Court of Queen’s Bench has ruled that consolidation of arbitral proceedings under Alberta’s ICCA requires consent of the disputing parties. In *Western Canada Oil Sands Inc v Allianz Insurance Company of Canada*, the Court determined that it did not have authority to order consolidation of arbitral proceedings unless all parties to the arbitration consented to consolidation.⁶² The Court’s power to consolidate arbitral proceedings is delineated in section 8(1) of Alberta’s ICCA, which provides that such authority is triggered “on application of the parties” to more than one arbitration.⁶³ In refusing to consolidate the arbitral proceedings in this case, the Court emphasized that arbitration is a consent-based form of dispute settlement intended to minimize court intrusions.⁶⁴ It therefore held that “...the term “parties” as it appears in [sic] section [8(1)] refers to all of the parties to the arbitration. It would [sic] amount to a perverse interpretation and simply not make sense to accept that the plural, “parties”, is used to refer to a single party.”⁶⁵ Subsequent rulings on consolidation have followed this decision with the Court indicating a reluctance to intervene in arbitration proceedings unless all parties consent.⁶⁶

However, a competing line of decisions calls this reasoning into question. In *Pricaspian Development Corporation v BG International Ltd*, the Court of Queen’s Bench went through a detailed consideration of the interpretive aids that must be considered when determining the meaning of section 8(1) of Alberta’s ICCA.⁶⁷ After a thorough review of those instruments, including the relevant UNICTRAL working group report, the Model Law, and the *Interpretation Act*, the Court found that use of the term “parties” in section 8(1) should not be interpreted to mean that the Court could only order consolidation of arbitral proceedings where all parties consent.⁶⁸ In so finding the Court considered section 8 as a whole and stated:

[T]here are two subsections of Alberta’s ICAA that deal with consolidation: 8(1) and 8(3). Section 8(1), the section in question, is set out above. Section 8(3) provides that: “nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation.” There would be no reason for these two separate subsections to exist if both dealt with an agreement between parties: one must necessarily deal with disagreement: s 8(1); and the other with agreement: s 8(3).⁶⁹

In the Court’s view any other interpretation of section 8(1) would result in legislative incongruities and prevent aggrieved parties from accessing the Court for help when parties abuse the arbitration process.⁷⁰

⁶² *Western Canada Oilsands Inc v Allianz Insurance Company of Canada*, 2004 ABQB 79 [*Western Canada Oilsands*].

⁶³ *Supra* note [].

⁶⁴ *Western Canada Oilsands*, *supra* note [], paras 25-28.

⁶⁵ *Ibid* at para 24.

⁶⁶ *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited* 2018 ABQB 207 at paras 155-157, 165.

⁶⁷ *Pricaspian Development Corporation v BG International Ltd* 2016 ABQB 611.

⁶⁸ *Ibid* at paras 64-73, 89.

⁶⁹ *Ibid* at 84.

⁷⁰ *Ibid* at paras 85-89.

The Alberta Court of Appeal subsequently relied on this decision in *Japan Canada Oil Sands Limited v Toyo Engineering Canada Ltd*.⁷¹ This case involved a series of contracts and disputes in relation to the expansion and redevelopment of the Hangingstone oilsands project in Northern Alberta. Numerous disputes arose over the course of the project. The parties attempted to resolve their disputes over an 18-month period, but ultimately they commenced two arbitration proceedings. The first, a domestic arbitration, was commenced by Toyo Engineering Canada Ltd (Toyo Canada) against Japan Canada Oils Sands Limited (JACOS) on July 18, 2017 (the “Domestic Arbitration”), and the second, an international arbitration, was commenced by JACOS against both Toyo Canada and its parent company Toyo Engineering Corporation (Toyo Japan) on July 24, 2017 (the “International Arbitration”).⁷² JACOS sought an order to have the two arbitrations consolidated, with the domestic arbitration being consolidated into the international arbitration (i.e., both arbitrations to proceeding as an international arbitration).⁷³

In permitting consolidation of these arbitral proceedings, the Court rejected Toyo’s contention that “arbitration proceedings” under Alberta’s ICCA should be interpreted to mean only international arbitration proceedings, thereby preventing the Court from consolidating domestic and international arbitrations. On this point, the Court noted the different wording of in Alberta’s domestic arbitration legislation and Alberta’s ICCA. Whereas the statute governing domestic arbitrations explicitly excludes from its scope arbitrations commenced under Alberta’s ICCA, the same limitation is not true for Alberta’s ICCA. In the Court’s view a narrow interpretation of Alberta’s ICCA would create a statutory gap between the statutes and so it found that it had jurisdiction to consolidate domestic and international arbitrations under section 8(1) of Alberta’s ICCA.⁷⁴

In exercising its jurisdiction, the Court considered a number of factors. In this case, the domestic and international arbitrations were related. They involved related parties, and there were similar questions of law and facts arising out of the same transaction. In addition, the Court noted that JACOS and Toyo Canada had already anticipated the issue of consolidation under the arbitration provisions of the EPC agreement. In the Court’s view, all of these factors indicated that consolidation of the arbitrations was efficient and just.⁷⁵

The above divergence in case law may at first seem unsettling.⁷⁶ Alberta courts seem uncertain about how much weight the notion of consent should be given when considering procedural matters such as consolidation of arbitral proceedings. While this is one of the many considerations that participants in the energy sector may consider when negotiating their desired seat of arbitration, we do not expect it would be determinative in ruling out Alberta. Rather, other factors, such as location and availability of the parties, counsel, witnesses, and experts, as well as the

⁷¹ *Japan Oilsands Ltd v Toyo Engineering Canada Ltd* 2018 ABCA 844, paras 108-109 [*Japan Oilsands*].

⁷² *Ibid* at paras 11-28.

⁷³ *Ibid* at paras 6-8.

⁷⁴ *Ibid* at para 77.

⁷⁵ *Ibid* at paras 110-121.

⁷⁶ Some may even characterise the ruling in *Japan Oilsands*, *supra* note [] as an “outlier” amongst a series of decisions, the general trend of which is to avoid interference in arbitral proceedings: see e.g. Robert JC Deane and Craig R Chiasson, “Canada”, *Global Arbitration Review*, (25 July 2019), online: <https://globalarbitrationreview.com/print_article/gar/chapter/1195573/canada?print=true> (last accessed 12 July 2020).

direct and indirect costs to arbitrate, will most likely be more influential in making that decision. Moreover, if Alberta reforms its ICCA (as BC and Ontario have done) to permit consolidation of arbitral proceedings only through consent of all involved parties, then any uncertainties generated by the above jurisprudence will have little impact on future arbitrations.⁷⁷

B. Developments in the United States of America

1. Arbitrability

The doctrine of “competence-competence” provides that the arbitrators have the power in the first instance to decide whether the parties’ dispute falls within the scope of their arbitration agreement, i.e. whether a certain dispute is arbitrable. The doctrine of *competence-competence*, however, is not directly incorporated into the Federal Arbitration Act (“FAA”). As a result, the United States does not handle the issue of *competence-competence* in the same manner as other jurisdictions. Because of this difference, care must be taken when drafting an arbitration provision that may need to be enforced by the courts of the United States.

Under the FAA and United States Supreme Court decisions, the question of who decides arbitrability, the court or the arbitrators, is a question of contract.⁷⁸ Applying the FAA, the Supreme Court has held that parties may agree to have an arbitrator decide not only the merits of a particular dispute but also “‘gateway’ questions of ‘arbitrability,’ such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy.”⁷⁹ The reasoning is that an “agreement to arbitrate a gateway issue is simply an additional, antecedent agreement the party seeking arbitration asks the federal court to enforce, and the FAA operates on this additional arbitration agreement just as it does on any other.”⁸⁰

Importantly, however, the delegation of threshold arbitrability questions to the arbitrator requires that the parties’ agreement delegate this power by “clear and unmistakable” evidence.⁸¹ The court determines whether a valid arbitration agreement exists. However, if a valid agreement exists, and if the agreement delegates the arbitrability issue to an arbitrator, a court may not decide the arbitrability issue.

Virtually every major arbitral institutions’ rules provide that the arbitrators have the jurisdiction to determine their own jurisdiction. *i.e.*, to determine the arbitrability of the dispute. Because arbitral institution rules delegate the question of arbitrability to the arbitrators, most United States federal courts have held that an agreement to arbitrate pursuant to institutional rules constitutes a clear and unmistakable delegation of the issue to the arbitrators. The United States Supreme Court, however, has not directly decided the issue.

⁷⁷ *International Commercial Arbitration Act*, RSBC 1996, c 233, s 27.0; *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sched 5, s 8.

⁷⁸ *Henry Schein, Inc. et al. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 527 (2019).

⁷⁹ *Id.* at 529; *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 130 S.Ct. 2772 (2010); see also *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 115 S.Ct. 1920 (1995).

⁸⁰ *Rent-A-Center*, 561 U. S., at 70.

⁸¹ *First Options*, 514 U. S., at 944; see also *Rent-A-Center*, 561 U. S., at 69, n. 1.

In *Henry Schein, Inc. v. Archer & White Sales, Inc.*, Archer & White filed suit in the Federal District Court of Texas alleging violations of federal and state antitrust laws and sought both monetary damages and injunctive relief. The contract between the parties, provided in pertinent part:

[a]ny dispute arising under or related to this Agreement (except for actions seeking injunctive relief . . .), shall be resolved by binding arbitration in accordance with the arbitration rules of the American Arbitration Association [AAA].

Schein, based on the FAA, requested that the District Court refer the antitrust suit to arbitration, contending that the contract's express incorporation of the AAA's rules meant that an arbitrator—not the court—had to decide whether the arbitration agreement applied to the particular dispute. Archer and White objected, asserting that the dispute was not subject to arbitration because the complaint sought injunctive relief, at least in part. Archer and White further argued that in cases where a defendant's argument for arbitration is wholly groundless, the district court was empowered to resolve the threshold question of arbitrability.

Relying on Fifth Circuit precedent, the district court agreed with Archer and White about the existence of a “wholly groundless” exception, ruled that Schein's argument for arbitration was wholly groundless and denied Schein's motion to compel arbitration. The Fifth Circuit affirmed. Schein then filed a petition for writ of certiorari with the Supreme Court.

The Supreme Court reversed and remanded, holding that the courts could not bypass the arbitrability issue by finding a claim wholly groundless. In the face of a proper delegation of the issue of arbitrability, whether a claim is groundless is for the arbitrators to decide.

We must interpret the Act [FAA] as written, and the Act [FAA] in turn requires that we interpret the contract as written. When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.⁸²

In remanding the case the Fifth Circuit, the Supreme Court further stated:

We express no view about whether the contract at issue in this case in fact delegated the arbitrability question to an arbitrator. The Court of Appeals did not decide that issue. Under our cases, courts “should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so.” *First Options*, 514 U. S., at 944 (alterations omitted). On remand, the Court of Appeals may address that issue in the first instance, as well as other arguments that Archer and White has properly preserved.⁸³

On remand, the Fifth Circuit found the carve-out language precluded arbitration reasoning that because the parties did not clearly and unmistakably delegate all questions of jurisdiction to the

⁸² Schein, 139 S.Ct. at 529.

⁸³ *Ibid* at 531.

arbitrators, the question of whether Archer & White's claims fell within the carve-out, was outside the scope of the agreement to arbitrate. Thus whether the injunction claim was arbitrable was a question for the court in the first instance.

Focusing on the fact that the provision carved out "actions seeking injunctive relief," not "actions seeking only injunctive relief" or merely "claims for injunctive relief," the Court also rejected Schein's argument that the money damages claims must be arbitrated.

Shein filed a petition for writ of certiorari to the United States Supreme Court raising the question of "[w]hether a provision in an arbitration agreement that exempts certain claims from arbitration negates an otherwise clear and unmistakable delegation of questions of arbitrability to an arbitrator."

Archer and White, in turn, filed a conditional cross-petition for writ of certiorari raising a number of issues including whether an arbitration agreement identifying a set of arbitration rules to apply clearly and unmistakably delegates to the arbitrator disputes about whether the parties agreed to arbitrate in the first place. This conditional writ was supported by the amicus brief of Professor George Bermann, a leading arbitration practitioner and the chief reporter of the American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration. In the amicus, Professor Bermann stated:

Although a majority of courts have found the incorporation of rules containing such a provision to satisfy First Options' "clear and unmistakable" evidence test, the ALI's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration has concluded, after extended debate, that these cases were incorrectly decided because incorporation of such rules cannot be regarded as manifesting the "clear and unmistakable" intention that First Options requires.

On 15 June 2020, the United States Supreme Court granted the petition for writ of certiorari filed by Shein and denied the cross-petition filed by Archer and White.

2. Forcing Parties to Arbitrate: The Power of Non-Signatories

Disputes involving nonsignatories are inevitable in the context of modern international business transactions that typically involve complex webs of interwoven agreements, multilayered legal obligations and the interposition of numerous, often related, corporate and other entities.⁸⁴

This past year, the international arbitration community watched the case of *GE Energy Power Conversions France SAS v. Outokumpu Stainless USA, LLC* with great interest. At issue was whether a nonsignatory to an arbitration agreement can rely on the state-law doctrine of equitable estoppel to compel arbitration of an international dispute. On 1 June 2020, the Supreme Court held that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under the domestic-law equitable estoppel doctrines.

⁸⁴ James M. Hosking, *Non-Signatories and International Arbitration in the United States: the Quest for Consent*, (2004) 20 Arb Int'l 289, 289.

The genesis of the dispute was the alleged failure of motors supplied by GE Energy Conversions France SAS (“GE Energy”). ThyssenKrupp Stainless USA, LLC (“ThyssenKrupp”) entered into three separate agreements with F.L. Industries, Inc. (“F.L. Industries”) for the construction of cold rolling mills. Each contract contained an identical arbitration clause (“Contracts”). The Contracts defined the terms “Seller” and “Parties” to include subcontractors.

After executing the Contracts, F.L. Industries entered into a subcontractor agreement with GE Energy, whereby GE Energy agreed to design, manufacture and supply the motors for the cold rolling mills. Thereafter, Outokumpu acquired ownership of the ThyssenKrupp plant.

Outokumpu filed a state court lawsuit against GE Energy alleging failure to supply the motors. GE Energy removed the case to federal court pursuant to 9 U.S.C §205 and moved to dismiss the lawsuit and compel arbitration. The district court granted GE Energy’s motions and denied Outokumpu’s motion to remand. The district court reasoned that while the New York Convention, “*require[s] some writing to render an arbitration agreement enforceable,*” the requirement was met because the terms “*Seller*” and “*Parties*” were defined to include subcontractors.⁸⁵

The Eleventh Circuit reversed, interpreting the New York Convention to include “*a requirement that the parties actually signed an agreement to arbitrate their disputes in order to compel arbitration.*”⁸⁶ Because GE Energy was not a signatory, the court held the requirement was not satisfied. The court further held that GE Energy, as a nonsignatory, could not rely on state-law equitable estoppel doctrines to enforce the arbitration agreement because the doctrine of equitable estoppel conflicts with the New York Convention’s signatory requirement.

Applying familiar tools of treaty interpretation, the United States Supreme Court held that the New York Convention does not conflict with the enforcement of arbitration agreements by nonsignatories under domestic-law estoppel doctrines. In reaching this conclusion, the Supreme Court noted that Chapter 1 of the FAA permits courts to apply state-law doctrines related to the enforcement of arbitration agreements and that Chapter 2 states that “*Chapter 1 applies to actions and proceeding brought under this chapter to the extent that [Chapter 1] is not in conflict with this chapter of the Convention.*”⁸⁷

The Supreme Court found nothing in the text of the Convention that could be read to prohibit the application of domestic equitable estoppel doctrines. In fact, the Supreme Court observed that provisions of Article II of the Convention contemplate the use of domestic doctrines to fill gaps in the Convention.

The Supreme Court also considered the negotiation and drafting history of the Convention stating that “nothing in the drafting history suggests that the Convention sought to prevent contracting states from applying domestic law that permits nonsignatories to enforce arbitration agreements in additional circumstances.” Similarly, the Supreme Court found that post-ratification understanding of the Convention by other contracting States to the Convention, “indicates that the

⁸⁵ *Outokumpu Stainless USA LLC v. Converteam SAS*, 2017 WL 401951*4 (SD Ala., Jan. 30, 2017).

⁸⁶ *Outokumpu Stainless USA, LLC v. Converteam SAS*, 902 F. 3d 1316, 1326 (2018).

⁸⁷ 9 U.S.C. §208.

New York Convention does not prohibit the application of domestic law addressing the enforcement of arbitration agreements.”

The case has now been remanded to the Eleventh Circuit to determine whether GE Energy can enforce the arbitration clauses under the principles of equitable estoppel and which law governs that determination. Thus, while nonsignatories can attempt to enforce arbitration agreements, whether that attempt will be successful will be based on the facts and the state-law doctrines relied upon.

3. Obtaining Evidence from Abroad via U.S.C. Section 1782

In cross-border commercial disputes, the taking of evidence abroad may be crucial to the fair resolution of the dispute. A United States federal statute, 28 U.S.C. § 1782, in some instances, may allow parties to an arbitration seated outside the United States to petition a United States federal court to obtain evidence located in the United States.

Section 1782 permits courts to order a person “to give [] testimony . . . or to produce a document . . . for use in a proceeding in a foreign or international tribunal” The federal courts, however, are divided on whether a private, commercial arbitration is a “foreign tribunal” for purposes of § 1782.

Prior to 2004, § 1782 was rarely used. In fact, in the 40-year period from 1964 to 2004 the courts decided only 94 applications for discovery under § 1782.⁸⁸ But the United States Supreme Court’s decision in *Intel Corporation v. Advanced Micro Devices, Inc.*,⁸⁹ coupled with the continuing growth of international commerce created a valuable international dispute resolution tool that parties have employed with frequent success. Section 1782 is facile, with its true complexity turning, in large part, on the definition of “tribunal” and a split among courts on application of that term.

At issue in *Intel* was Advanced Micro Devices’ (“AMD”) request for a court order directing Intel to produce documents relating to an action brought in Alabama (“*Alabama Documents*”). AMD had filed an antitrust complaint with the Directorate-General for Competition of the European Commission (“*European Commission*”). AMD sought the Alabama Documents in aid of the antitrust complaint before the European Commission. Among the questions the United States Supreme Court was called upon to address in *Intel* was whether the documents AMD sought were “for use in a foreign or international tribunal.” The Supreme Court had little difficulty in concluding that the European Commission, to the extent it acts as a first-instance decision maker, fell within the ambit of § 1782.

Relying on that section’s legislative history, the Supreme Court observed that in 1958, when the Rules Commission was established, Congress “instructed the Rules Commission to recommend procedural revisions ‘for the rendering of assistance to foreign courts and quasi-judicial

⁸⁸ “Based on a Westlaw search of cases from 1964, when the statute was amended, to 2004, when *Intel* was decided, there . . . [were] 94 reported cases addressing Section 1782 requests in forty years.” Roger P. Alford, *Ancillary Discovery to Prove Denial of Justice*, 53 Va. J. Int’l L., 155 n.149 (2012).

⁸⁹ *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241 (2004).

agencies.”⁹⁰ The Supreme Court, quoting from scholarly commentary by Hans Smit, further stated in *dicta*, that “[t]he term ‘tribunal’ . . . includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.”⁹¹ The inclusion of the words “arbitral tribunals” in the Hans Smit definition of “tribunals” is the genesis of the division among the courts of the United States as to whether § 1782’s use extends to private international arbitration.

Before the Supreme Court decided *Intel*, the Second Circuit in *Nat’l Broad. Co. v. Bear Stearns & Co., Inc.*⁹² held that § 1782 does not provide a vehicle for obtaining discovery in a private international arbitration. The Fifth Circuit in *Republic of Kazakhstan v. Biedermann Int’l*,⁹³ reached a similar conclusion. Following *Intel* the Fifth Circuit revisited the issue in an unpublished *per curiam* opinion, *El Paso Corporation v. La Comision Ejecutiva Hidroelectrica del Rio Lempa*,⁹⁴ holding that nothing in the *Intel* decision affected the analysis of the *Biedermann* court. In reaching this conclusion, the Fifth Circuit remarked that the Supreme Court never considered the question of whether private arbitral tribunals fell within the statute:

The question of whether a private international arbitration tribunal also qualifies as a “tribunal” under § 1782 was not before the Court. The only mention of arbitration in the *Intel* opinion is in a quote in a parenthetical from a law review article by Hans Smit. That quote states that “the term ‘tribunal’ ... includes investigating magistrates, administrative and arbitral tribunals, and quasi-judicial agencies, as well as conventional civil, commercial, criminal, and administrative courts.” Nothing in the context of the quote suggests that the Court was adopting Smit’s definition of “tribunal” in whole.⁹⁵

Most recently, the Second Circuit in *Hanwei Guo v. Deutsche Bank Securities* was also called upon to revisit its earlier National Broadcasting Company decision. The Second Circuit held on July 8, 2020 that the Supreme Court holding in *Intel* did “not cast ‘sufficient doubt’ on the reasoning or holding of *NBC*.”⁹⁶

Thus the Second and Fifth Circuits align, holding that § 1782 cannot be used in aid of private international arbitration.

Not all federal appellate courts agreed. In 2019, the Sixth Circuit took a contrary view in *Abdul Latif Jameel Transportation Co. v. FedEx*,⁹⁷ finding that “tribunal” included a private arbitral tribunal. To reach this decision, the Sixth Circuit relied on “several reputable legal dictionaries”⁹⁸ and criticized the pre-*Intel* decisions as “turn[ing] to legislative history too early in the

⁹⁰ *Ibid* at para 258.

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⁹² 165 F.3d 184 (2d Cir. 1998).

⁹³ 168 F.3d 880 (5th Cir. 1999).

⁹⁴ 341 Fed. Appx. 31 (5th Cir. 2009).

⁹⁵ *Ibid* at 34.

⁹⁶ Cause No. 19-781, *Hanwei Guo v. Deutsche Bank Securities Inc.*, Second Circuit Court of Appeals (July 8, 2020).

⁹⁷ 939 F.3d 710 (6th Cir. 2019).

⁹⁸ *Ibid* at 720.

interpretations process.”⁹⁹ The Sixth Circuit further noted that even if it were to consider the legislative history, “what the statements make clear is Congress’s intent to *expand* § 1782(a)’s applicability.”¹⁰⁰

Similarly in March of 2020, in *Servotronics, Inc. v. Boeing Co.*,¹⁰¹ the Fourth Circuit joined the Sixth Circuit in holding that a tribunal established pursuant to the rules of the Chartered Institute of Arbitrators (CIArb) constituted a “tribunal” within the meaning of § 1782. The Court reasoned that the current version of the statute manifested Congressional intent to provide “U.S. assistance in resolving disputes before not only foreign *courts* but before all foreign and international *tribunals*.”¹⁰² The Court additionally compared the FAA with the UK Arbitration Act of 1996, observing arbitration in both the United States and England is a regulated process with judicial supervision.¹⁰³

Most recently, on 13 April 2020, a Delaware district judge in *In re Application of STORAG ETZEL GMBH*¹⁰⁴ concluded that private arbitration tribunals do not fall within the scope of § 1782. The court acknowledged the word “tribunal” was ambiguous and resolved that ambiguity by focusing on authority relied upon in *Intel*:

The 1964 amendment that added “tribunal” to § 1782 (a) was drafted at Congress’s request by the Commission on International Rules of Judicial Procedure (Rules Commission). Congress created the Rules Commission in 1958 “to recommend procedural revisions ‘for the rendering of assistance to foreign courts *and quasi-judicial agencies*.’” *Intel*, 542 U.S. at 257-58 (quoting § 2, 72 Stat. 1743) (emphasis added by Supreme Court). Thus, it is reasonable to conclude that Congress understood when it adopted the Rules Commission’s revisions to § 1782(a), *see id.* at 248, that those revisions extended only to courts and government agencies, not to private arbitral bodies.¹⁰⁵

Given the wide divergence of court decisions, it is inevitable that the United States Supreme Court will be called upon to answer definitively whether the word “tribunal” includes a private arbitration tribunal, thereby obviating the inherent inequities applicants face. Until that time, the threshold viability of a § 1782 application will continue to be wholly dependent upon the court in which the application is filed. Because a §1782 application must be filed in the district court of a district where a person “resides or is found,”¹⁰⁶ if a witness or evidence is located in a district where a

⁹⁹ *Ibid* at 726.

¹⁰⁰ *Ibid* at 728 (emphasis in original).

¹⁰¹ 954 F.3d 209 (4th Cir. 2020).

¹⁰² *Ibid*.

¹⁰³ Following the court’s ruling, intervenor-appellee Rolls-Royce PLC filed a motion to stay issuance of the mandate pending the filing of a petition for writ of certiorari which was denied on April 22, 2020. The petition for writ of certiorari is due June 28, 2020.

¹⁰⁴ 2020 U.S. Dist. LEXIS 63940. Court records indicate an appeal has been filed in the Third Circuit.

¹⁰⁵ *Ibid* at *6.

¹⁰⁶ There are four threshold requirements: (1) the request must be made “by a foreign or international tribunal,” or by “any interested person” and an “interested person” need not be a litigant; (2) the request must seek evidence, whether it be the “testimony or statement” of a person or the production of “a document or other thing”; (3) the evidence must be “for use in a proceeding in a foreign or international tribunal”; and (4) the person from whom discovery is sought must reside or be found in the district of the district court ruling on the application for assistance. In addition, there

court has interpreted the word “tribunal” to include private arbitration, a §1782 application may be granted. In short, §1782 can be a powerful discovery tool allowing parties in foreign arbitral proceedings to obtain evidence located in the United States that may not otherwise be obtainable under local laws.

III. Developments in International Investment Arbitration: NAFTA Chapter 11 to CUSMA Chapter 14

Thus far this paper has focused on developments in the Canada and the US that impact private international arbitrations and energy sector users of that form of dispute settlement. Still, it is important to remember that energy sector participants investing globally also often have access to arbitration under investment treaties.¹⁰⁷ This form of arbitration is both similar to, and distinct from, private international commercial arbitration.¹⁰⁸ Investor-state arbitration permits foreign investors to sue governments for damages caused as a result of government measures that violate substantive protections in an investment treaty (e.g. expropriation, fair and equitable treatment, non-discrimination obligations).¹⁰⁹ Until recently, the relevant investment treaty governing these types of claims as between US and Canada was NAFTA Chapter 11.¹¹⁰

With its signing on 20 November 2018, and its entry into force on 1 July 2020, the *Canada-United States-Mexico Agreement*¹¹¹ (“CUSMA”) marks the beginning of a new chapter in North American global economic governance. Some have even called it a “state-of-the-art” instrument that will have lasting beneficial impacts for the North American Economy. Whether CUSMA will live up to this designation is debatable.¹¹² What seems readily apparent is that CUSMA provides fewer

are five discretion factors to consider even if the four threshold requirements are met, to wit: (1) Is the person from whom discovery sought a participant in the foreign proceeding?; (2) considering the nature and character of the foreign proceeding is judicial assistance appropriate?; (3) Will the foreign government, court or agency be receptive to U.S. federal-court judicial assistance?; (4) Is the discovery request a veiled attempt to avoid foreign evidence gathering restrictions or other policies?; and (5) Is the request is unduly intrusive and burdensome?

¹⁰⁷ Not all states enter into investment treaties (e.g. Brazil) and some have withdrawn from the ICSID Convention (e.g. Bolivia, Ecuador, Venezuela).

¹⁰⁸ Many refer to investment treaty arbitration as a hybrid form of dispute settlement: see e.g. Jack J Coe, Jr, “Taking Stock of NAFTA Chapter 11 in Its Tenth Year: An Interim Sketch of Selected, Themes, Issues and Methods” (2003) 36 Vand J Transnat’l L. 1381, 1389-1391; Todd Weiler, “Balancing Human Rights and Investor Protection: A New Approach for a Different Legal Order” (2004) 27 BC Int’l & Comp L Rev 429, 430-31; William W. Park, “The Specificity of International Arbitration: The Case for FAA Reform” (2003) 36 Vand J Transnat’l L 1241, 1299-301. See also Bernardo M Cremades & David J.A. Cairns, “The Brave New World of Global Arbitration” (2002) 2 J World Inv 173, 183 (referring to investment treaty arbitration as “a hybrid between private arbitration and inter-State arbitration”).

¹⁰⁹ For a discussion of Elizabeth Whitsitt & Nigel Bankes, “Evolution of International Investment Law and its Application to the Energy Sector” (2013) 51(2) Alta L Rev 1.

¹¹⁰ NAFTA, *supra* note 1.

¹¹¹ *Canada-United States-Mexico Agreement* (entered into force 1 July 2020), online: < <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng> > (last accessed 15 July 2020).

¹¹² See e.g. Jennifer A Ivers and Alyssa Howard, “Another New Normal? How the USMCA’s State-of-the-Art Investment Chapter Can Guide Broader Change in Investor-State Dispute Resolution” (2020) *cf* Kate McNulty, “Peculiarity or Paradigm? Why the USMCA Investment Chapter Does Not Represent the State-of-the-Art in Investment Treaty Protections” (2020).

avenues for foreign investors in Canada and the US to pursue treaty violation claims against host state governments than did NAFTA.

Recall that CUSMA's predecessor agreement – NAFTA — came into force in 1994. Largely influenced by the US' treaty practice,¹¹³ NAFTA's investment chapter includes prohibitions against unlawful expropriation and obligations of non-discrimination.¹¹⁴ NAFTA Chapter 11 also includes investor-state dispute settlement mechanism as a means by which to enforce state parties' investment commitments.¹¹⁵ NAFTA ushered in a new era of investment treaty practice in which treaty protections and their enforcement mechanisms were part of the regulatory framework that operated between developed states. For example, the investment protections housed in NAFTA Chapter 11 protected a Canadian investor and its investment operating in the United States (and vice versa). This presented a new dynamic in the inter-state regulation of foreign investment, which had historically operated to solidify enforceable commitments to protect a developed state investor doing business in a developing host state economy.¹¹⁶

With substantive protections that were broadly and ambiguously constructed, foreign investors had the opportunity to challenge complex regulatory schemes in both the Canada and the US (and Mexico) with the very real possibility that the goal of investment protection would override other considerations. The full weight of this possibility was not understood at the time NAFTA came into force. In fact, all the evidence suggests that the NAFTA parties paid little attention to the regulation of investment as NAFTA was, first and foremost, a trade agreement that aimed liberalize substantial portions of the North American economy.¹¹⁷ In contrast to its quiet beginnings, the interpretation and application of NAFTA Chapter 11 has been controversial with critics broadly contending that arbitral tribunals have consistently favoured investor interests at the expense of regulatory autonomy.¹¹⁸

Review of CUSMA's investment chapter (Chapter 14) suggests that the treaty parties were cognizant of these criticisms when constructing the new investment regime that will operate in North America for the foreseeable future. As in NAFTA Chapter 11, CUSMA Chapter 14 outlines

¹¹³ For an overview of NAFTA Chapter 11, including background and commentary on its provisions see Andrea Bjorklund, "NAFTA Chapter 11" Chester Brown, ed, *Commentaries on Selected Model Investment Treaties* (Oxford: Oxford University Press, 2013) at 464-533 [Bjorklund].

¹¹⁴ See NAFTA, *supra* note 113, Articles 1102 (National Treatment), 1103 (Most-Favoured-Nation Treatment), 1104 (Standard of Treatment), 1105 (Minimum Standard of Treatment) and 1110 (Expropriation and Compensation).

¹¹⁵ *Ibid* at Article 1115. The constitutionality of NAFTA Chapter eleven tribunals under the *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, s 96, reprinted in RSC 1985, App II, No 5 and *Canadian Charter of Rights and Freedoms*, ss 7 & 15, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 was unsuccessfully challenged in 2006: see *Council of Canadians v Canada (Attorney General)*, [2006] OJ No 4751 (Ont CA).

¹¹⁶ For a similar view see Jurgen Kurtz, *The WTO and International Investment Law: Converging Systems* (Cambridge: Cambridge University Press, 2016) at 62.

¹¹⁷ See generally MA Cameron & B W Tomlin, *The Making of NAFTA: How the Deal was Done* (Cornell University Press, 2000).

¹¹⁸ See e.g. Ari Afilalo, "Meaning, Ambiguity and Legitimacy: Judicial Construction of NAFTA Chapter 11" (2005) 25(2) *Northwestern J Int'l L & Bus* 279; Ari Afilalo, "Towards a Common Law of International Investment: How NAFTA Chapter 11 Panels should Solve their Legitimacy Crisis" (2004) 17(1) *Georgetown Int'l Env L Rev* 51; Charles Brower, "Structure, Legitimacy and NAFTA's Investment Chapter" (2003) 36 *Vanderbilt J Trans'n L* 37; Jeffrey Atik, "Repenser NAFTA Chapter 11: A Catalogue of Legitimacy Critiques" (2003) 3 *Asper Review of Int'l Bus & Trade L* 215.

a series of investor protections including obligations of non-discrimination, guarantees of a minimum standard of treatment, and a duty not to expropriate.¹¹⁹ However, the extent to which investors can enforce these protections is either limited as in the case of US-Mexico or completely eliminated as in the case of Canada-US.

Investment arbitration is, to some degree, available to US investors in Mexico and Mexican investors in the US.¹²⁰ However, availability of investor-state arbitration is circumscribed by investor class (i.e. the industry sector in which the investment is made). Under CUSMA Chapter 14 investors in the oil and natural gas, power generation, telecommunications and transportation sectors, who have entered into a “covered government contract”, may initiate arbitration claims for violations of CUSMA’s investment treaty protections. If an investor does not meet these criteria, it may only pursue investor-state arbitration for certain treaty violations. For example, non-discrimination claims may be subject to arbitration as long as those claims do not relate to the “establishment or acquisition of an investment.” Moreover, an investor in this class can only initiate arbitration on the basis of direct – rather than indirect – expropriation claims. The effect of these limitations is to significantly curtail many of the substantive investment protections available to investors under NAFTA Chapter 11. Some of the most often invoked protections (e.g. fair and equitable treatment and indirect expropriation) will no longer be the subject of investment treaty arbitration under CUSMA.¹²¹

Even where investment treaty arbitration is available, CUSMA Chapter 14 introduces a series of procedural restrictions that give priority to the domestic courts within the US and Mexico. Under NAFTA, investors could elect whether to pursue their claims in local courts of the host state or whether to pursue those claims by way of arbitration. In the latter case investors were required to waive their rights to seek remedies in local courts.¹²² In contrast, CUSMA requires investors to first pursue their claims in the national courts of the US or Mexico. They can only commence investor-state arbitration after two and half years (30 months) have elapsed from initiation of those court proceedings or if a final decision has been rendered in the court of last resort.¹²³ Direct recourse to arbitration is only permitted where dispute settlement in national courts would be “obviously futile”.¹²⁴

In contrast to the above classifications and restrictions imposed on US and Mexican investors, CUSMA Chapter 14 essentially eliminates investor-state dispute settlement for Canadian investors operating in the US and *vice versa*. Instead, investors from Canada and the US are required to submit their disputes to local courts or rely on an arbitration provision in an investment contract with the foreign state. Only for the next three years Canadian and US investors may rely on the legacy claims provision in CUSMA, which permits certain time-limited resolution of investor-

¹¹⁹ CUSMA, arts 14.4 – 14.6, and 14.8.

¹²⁰ *Ibid* at Annex 14-D. Investor-state arbitration remains as between Canada and Mexico under the Comprehensive and Progressive Trans-Pacific Partnership

¹²¹ Investors are also precluded from initiating arbitration on the basis of claims for violation of the minimum standard of treatment, full protection and security, the imposition of performance requirements or claims related to money transfers (compare CUSMA Article 14.D.3.1 with NAFTA, Arts 1105, 1106 and 1109).

¹²² NAFTA, *supra* note [], Art 1121.

¹²³ CUSMA Art 14.D.5.1(a)-(b).

¹²⁴ CUSMA Art 14.D.5.1(b), n25. See also Article 14.D.1 which restricts investor-state arbitration if investors are owned or controlled by state considered to be a non-market economy.

state disputes through arbitration.¹²⁵ Specifically, only claims arising within three years of the termination of NAFTA and in relation to investments existing at the time of CUSMA's entry into force constitute legacy claims under CUSMA.¹²⁶

Elimination of investor-state arbitration in the context of Canada-US investment relations is a significant shift for Canada and US investors. Broadly speaking this development signals discomfort (on one or both sides) with authority being granted to an international dispute settlement mechanism, the legitimacy of which has come under increasing criticism through the years. It may also signal discord between Canada and the US about the type of dispute settlement mechanism each would like to see developed in the current international investment law regime, with a failure to reach consensus resulting in a turn to the domestic courts of each jurisdiction. On this point, it is important to note that Canada has supported recent reform initiatives that would see investor-state arbitration transformed into something more akin to a court-like process in its recent regional agreements with the EU.¹²⁷ This development is important because Canada's position on reform runs counter to current views in the US regarding the settlement of investment treaty disputes – a reality which may inform the outcome we see in CUSMA.

Whatever factors may have contributed to the elimination of investment treaty arbitration as between Canada and the United States, the fact remains that this development limits the strategic options Canadian and US investors have to pursue investment treaty claims against governments of the US and Canada, respectively. In the approximately 25 years that NAFTA Chapter 11 was in force, 85 Chapter 11 claims were filed, with Canada being a respondent in almost half (i.e. 41) of those claims.¹²⁸ The US was a respondent in 21 claims.¹²⁹ Of those 62 claims brought against Canada or the US, only eight claims (approximately 12 percent) were brought by claimants in the energy sector.¹³⁰ When we consider these numbers, one could fairly question whether energy sector investors on either side of the 49th parallel will even notice the absence of an investor-state dispute settlement mechanism in CUSMA.

Nonetheless, the absence of investor-state arbitration in CUSMA does eliminate a strategic option for Canadian and US investors that may have value beyond the actual arbitration. For example, on January 6, 2016 TransCanada Corp. (now TC Energy) filed a Chapter 11 claim against the US based on the Obama administration's denial of a presidential permit for the Keystone XL pipeline project. That type of claim would not be available to TC Energy in the event that a Biden administration (if elected) follows through on its commitment to stop Keystone XL unless the legacy claims provisions in CUSMA apply.

¹²⁵ *Ibid* at Annex 14-C.

¹²⁶ *Ibid* at paras 3-6.

¹²⁷ *Comprehensive and Economic Trade Agreement between Canada and the European Union* (entered into force with provisional application 21 September 2017), online: <<https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng>> (last accessed 15 July 2020).

¹²⁸ Scott Sinclair, "Canada's Track Record Under NAFTA Chapter 11: North American Investor-State Disputes to January 2018" (CCPA, 2018) at 46, online: <<https://www.policyalternatives.ca/sites/default/files/uploads/publications/National%20Office/2018/01/NAFTA%20Dispute%20Table%20Report%202018.pdf>> (last accessed 13 July 2020).

¹²⁹ *Ibid*.

¹³⁰ *Ibid*.

IV. Conclusion

The above discussion has outlined a series of developments in Canada and the US that affect private international arbitrations. As a broad proposition, it seems fair to say that both Canada and the US are arbitration friendly jurisdictions. Efforts in Canada to harmonize and modernize legislation governing international commercial arbitrations evinces a continued commitment to promotion of arbitration as an alternative means of dispute settlement in cross-border disputes. In addition, the jurisprudential developments outlined above highlight the deferential posture Canadian courts typically have toward arbitral proceedings. Canadian courts respect an arbitral tribunal's authority to determine its own jurisdiction and will only interfere with that authority in exceptional circumstances (e.g. unconscionability as was seen in *Uber*). Where third party interests may be affected by arbitration, Canadian courts have demonstrated a willingness to engage in a balancing exercise that respects the rights of parties to an arbitration agreement as well as those who may have claims outside of that agreement (*Toyota Tsusho*). Even where there is some discord about whether to consolidate arbitral proceedings despite the absence of unanimous consent of the parties, the reasoning of the Courts demonstrates a concern about balancing respect for the contractual agreement of the parties to arbitrate with the interests of justice and procedural efficiency (*JACOS*).

Review of recent jurisprudence in the US reveals a concern for underlying themes (e.g. consent, competence-competence, and third party interests) similar to those informing Canadian courts. The manner in which these themes present themselves is, however, distinct. In contrast to Canada where the authority of arbitrators to determine their own jurisdiction is outlined in legislation, in the US issues of competence-competence are determined by agreement between parties. This distinction has led courts in each jurisdiction to address a different set of questions. Thus, in the US we see jurisprudence that centres on what the parties agreed to in their arbitration clause and whether reference to arbitral rules in such a clause is a clear and explicit indication that an arbitral panel has competence-competence (*Schein*). However, in Canada, we see jurisprudence question the legality of the arbitration clause as a way of challenging an arbitral tribunal's jurisdiction (*Uber*). While different, the underlying concern addressed by the Courts is the same – that is the consensual nature of arbitration as a form of dispute settlement. Similar concerns about consent permeate the decisions of US courts in their ongoing debate about whether nonsignatories can force resolution of a dispute through arbitration (*GE Energy*). Finally we see US courts – through consideration of §1789 – wrestling with questions that fundamentally address the fair resolution of disputes in other jurisdictions, including international commercial arbitrations (e.g. *Intel*, *NBC*, *Hanwei Gou*, *Abdul*, *Servotronics*).

Regarding recent developments in Canada-US international investment arbitration, the replacement of NAFTA by CUSMA is most significant. In particular, while CUSMA continues to provide for investor protections (obligations of non-discrimination, guarantees of a minimum standard of treatment and a duty not to expropriate), the elimination of a dispute resolution mechanism for a Canadian or US investor to enforce those protections against the US or Canadian government, as the case may be, is arguably a loss. Even though Canadian and US energy sector investors only initiated eight Chapter 11 claims under NAFTA, CUSMA eliminates that strategic option to the detriment of investors.

All of the foregoing developments are relevant to energy sector participants to the extent that they help clarify how to manage their contractual arrangements and the arbitration clauses therein, as well as their available strategic options. Moreover, many of the above cases shed light on the strategies that parties to a dispute may employ in order to protect their interests.