Insurance Disputes under Arbitration Agreements in Canada

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A recent Alberta case, *Alberta Motor Association Insurance Company v. Aspen Insurance UK Limited* ("*AMA*"),[1] illustrates the knotty problems raised by consolidation and party control in domestic and international arbitrations in Canada.

AMA concerned reinsurance coverage held by the Alberta Motor Association (the "Association") in respect of the Fort McMurray wildfire of 2016. The Association had issued almost 13,000 policies covering homes, businesses and automobiles affected by the fire. Pursuant to its reinsurance coverage with the defendant reinsurers (the "Reinsurers"), the Association made a claim for a total of six separate loss occurrences arising out of the wildfire. The Reinsurers took the position that the Association could properly claim only one loss occurrence under the reinsurance agreement.

The Association indicated that it would seek summary judgment on its claim for six separate loss occurrences under the reinsurance agreement; the Reinsurers applied for a stay of proceedings on the basis that the dispute should be sent to mandatory arbitration pursuant to the arbitration clause of the reinsurance agreement.

In a preliminary application, Justice Pentelechuk (the "Application Judge") had to decide whether there was one reinsurance agreement subscribed to by all the parties, or separate agreements between the Association and the Reinsurers severally; which arbitration regime, if any, applied to the dispute – Alberta's domestic *Arbitration Act* (the "*Domestic Act*"), or the

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[1] *Alberta Motor Association Insurance Company v Aspen Insurance UK Limited*, 2018 ABQB 207 ("*AMA*").

Alberta *International Commercial Arbitration Act* (the "*International Act*"); and whether the Reinsurers should be allowed to consolidate the several arbitrations into one unified proceeding.

One Agreement or Several?

The Application Judge's treatment of this issue was foundational because if there was only one agreement, and if at least one Reinsurer was an international party, all Reinsurers would be swept into the *International Act* pursuant to section 1(3) of Schedule 2 to same (the "*Model Law*"):

> An arbitration is international if:
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> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States…[2]

If there was only one agreement and the *International Act* governed the dispute, the *Domestic Act*[3] would have no application. On the other hand, if there were separate agreements between the Association and the Reinsurers, if was possible that some Reinsurers would fall under the *International Act* and others would fall under the *Domestic Act.*[4] The arbitration clause in the reinsurance agreement between the parties was silent on which statute applied.

The starting point for the Application Judge's analysis was the contextual approach to contract interpretation mandated by the Supreme Court of Canada in *Sattva Capital Corp v. Creston Moly Corp*: the attempt to discern the reasonable intentions and the commercial purpose of a contract at the moment of formation.[5]

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[2] *International Commercial Arbitration Act*, RSA 2000 c I-5, Schedule 2: *UNCITRAL Model Law on International Commercial Arbitration*.
[3] *Arbitration Act*, RSA 2000, c A-43.
[4] *AMA*, para. 18.
[5] *AMA*, para. 19; *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53.

That contextual approach opened the way towards a consideration of the general concept and structure underlying reinsurance markets, especially the fact that reinsurers often agree to "treaty" contracts of reinsurance, knowing that they are agreeing to a subscription agreement or pool. Parties to such treaty agreements contract independently, and it is not essential to the validity of the treaties that each reinsurer knows the identity of all other reinsurers, meaning that it was arguable that the agreements in the case at bar, when bundled together, formed one overarching agreement.[6]

The Application Judge then considered what was objectively in the minds of the parties at the moment of contract formation (and especially what was in the mind of MS Amlin, the contract leader for the relevant Lloyd's Syndicates who held the lion's share of the Reinsurers' liability) when they bargained for the arbitration clause – i.e. whether it would reasonably be governed by the *Domestic Act* or the *International Act*. In finding that the application of the *International Act* best responded to the reasonable intentions of the parties at the moment of contract formation, the Application Judge was swayed by the language of the arbitration clause itself, which seemed to preclude the summary judgment avenue for adjudication that was available in the *Domestic Act*, and because Her Honour found that the parties could not have reasonably intended that any future dispute would potentially be governed by parallel proceedings under two different arbitration acts – which was a potential consequence if the *Domestic Act* applied.[7]

In arriving at this conclusion, the Application Judge was clearly influenced by the "commercial reasonableness" approach to contract interpretation stemming from *Sattva*. The upshot was that

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[6] *AMA*, para. 25, citing PT O'Neill & JW Woloniecki, eds, *The Law of Reinsurance in England and Bermuda* 3rd ed (London: Sweet & Maxwell, 2010), pp. 87-89.
[7] *AMA*, paras. 49-51.

only one overarching agreement existed between the Association and the Reinsurers. The next issue to be decided was whether any of the parties was an "international" one for the purposes of the *Model Law*.

Which Act Applied?

Articles 1(3) and (4) of the *Model Law* provide that:

> (3) An arbitration is international if:
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> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
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> (b) one of the following places is situated outside the State in which the parties have their places of business:
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> (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
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> (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
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> (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
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> (4) For the purposes of paragraph (3) of this article:
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> (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
>
> (b) if a party does not have a place of business, reference is to be made to his habitual residence.

The Association's place of business was in Edmonton, Alberta. Two of the Reinsurers asserted that they were international parties to the arbitration process contemplated by the reinsurance agreement because they had places of business in a different state than the Association's place of

business within the meaning of the *Model Law*: The Toa Reinsurance Company of America ("Toa") and the Lloyd's Syndicates ("Lloyd's").

TOA

Toa argued that it was an international party because its sole relevant place of business was its head office in New Jersey and that, even if it were found to have more than one place of business, New Jersey had the closest relationship to the arbitration agreement within the meaning of article 1(4)(a) of the *Model Law*. Toa also argued that a substantial part of the obligations of its commercial relationship with the Association was to be performed in New Jersey within the meaning of article 1(3)(b)(ii) of the *Model Law*, and that the parties had agreed that the arbitration agreement related to more than one country, therefore triggering article 1(3)(c) of the *Model Law*.

The Application Judge noted that the term "place of business" was not defined in the *Model Law* and that there was little guidance in the cases about the scope of the term.[8] Her Honour examined the previous Alberta decision *Toyota Tsusho Wheatland Inc v. Encana Corp* ("*Toyota Tsusho*") and the UNCITRAL 2012 *Digest of Case Law on the Model Law on International Commercial Arbitration* for the proposition that "place of business" includes any location from which a party participates in economic activities in an independent manner.[9]

Notwithstanding that Toa's head office was located at New Jersey, which was where claims were approved or denied, the Application Judge also found that Toa had a place of business in Canada by virtue of its Toronto office, where the decision to underwrite the relevant risk was made:

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[8] *AMA*, para. 60.
[9] *AMA*, paras. 63-65; *Toyota Tsusho Wheatland Inc v Encana Corp*, 2016 ABQB 209, para 32; UNCITRAL 2012 *Digest of Case Law on the Model Law on International Commercial Arbitration*, section 3.

"[t]hese are economic activities that … appear to be performed autonomously and clearly involve 'business decisions'."[10] The Application Judge then arrived at the further conclusion that, of Toa's two places of business (New Jersey and Toronto), the place of business with the closest relationship to the arbitration agreement within the meaning of article 1(4)(a) of the *Model Law* was the place where the reinsurance agreement was underwritten and signed, i.e. Toronto.[11]

The Application Judge rejected Toa's argument that the parties had agreed that the arbitration agreement related to more than one country, finding that the arbitration agreement was completely silent on the issue of whether it related to more than one country.[12]

Curiously, the Application Judge also rejected Toa's position that the arbitration was international based on the argument that a) a substantial part of the obligations of Toa's commercial relationship with the Association was to be performed in New Jersey so that b) even if the parties were found to have their places of business in the same state (Canada), the arbitration would nevertheless be international because of the "substantial performance" test in article 1(3)(b)(ii) of the *Model Law*. Her Honour decided this point by saying:

> … this test for internationality has no application. The referenced subsection applies to expand the concept of internationality *if key aspects of the commercial relationship are international and but the parties' places of business are in different States.*[13] (sic)

This conclusion seems like a misreading of the *Model Law* article 1(3)(b)(ii) which, *per* the disjunctive "or" that separates it from article 1(3)(a), applies when the parties have their places of

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[10] *AMA*, para. 72.
[11] *AMA*, para. 79.
[12] *AMA*, para. 83.
[13] *AMA*, para. 75.

business in the *same* state but where a substantial part of the obligations between them is performed outside the state where they have their common place of business. It perhaps behoved the Application Judge at this passage of the decision to give greater attention to the implications of her conclusion that Toa's place of business for the purposes of articles 1(3) and 1(4) of the *Model Law* was Canada alone (because, as between Toronto and New Jersey, Toronto had the closest relationship to the arbitration agreement), meaning that article 1(3)(b)(ii) was indeed engaged in the manner suggested by Toa.

Lloyd's

Lloyd's international status in Canada for the purposes of the *Model Law* has been complicated by amendments to Part XIII of the federal *Insurance Companies Act* ("*ICA*") implemented in early 2010; prior to the 2010 amendments, Lloyd's was clearly an international party with its place of business in London, England.[14]

The *ICA* was amended to clarify that the federal regulatory insurance regime applies to foreign entities that "insure in Canada a risk" and that it no longer applies to foreign entities that "in Canada insure a risk." The purpose of these amendments is to protect Canadian policyholders by ensuring that assets vested in trust under the *ICA* regime are available to satisfy claims made by those policyholders in the event of a foreign insurer's insolvency.[15]

In order to satisfy the "insure in Canada a risk" test for the purposes of the *ICA*, Lloyd's collaborated with the Office of the Superintendent of Financial Institutions ("OSFI") to develop

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[14] *AMA*, paras. 85-86; *Insurance Companies Act*, SC 1991, c 47.
[15] *AMA*, para. 95.

an Attorney in Fact ("AIF") process, which essentially converts a signed London contract of reinsurance to a Canadian contract of reinsurance for the purposes of the *ICA*.

In this process, the managing agent of a Lloyd's syndicate requests and authorises Lloyd's Underwriters' attorney and chief agent in Canada ("the AIF") to confirm coverage, in the manner prescribed by s. 578(5) of the *ICA*, in respect of risks where the parties have agreed that Lloyd's insurance or reinsurance coverage be provided in a manner requiring Lloyd's Underwriters to vest assets in respect of their risks pursuant to the *ICA*. This "mandate" to the AIF also states that the Canadian policy will contain the terms and conditions set out in the London contract and that the AIF is not authorized to amend, alter or change the terms and conditions of the London contract.[16]

The Association argued that as a result of the *ICA* amendments and the AIF process, Lloyd's had established a second place of business in Toronto, the location of its AIF, which deprived it of internationality for the purposes of the *Model Law*. In addressing this argument, the Application Judge again considered the commentary in section 3 of the UNCITRAL 2012 *Digest* which interprets the term "place of business" in the sense of "any location from which a party participates in economic activities in an independent manner."[17]

Viewed through the prism of "independence" the Application Judge held that the Syndicates' AIF in Toronto did not establish a "place of business" for the purposes of the *Model Law* because the AIF had no real autonomy and because the critical business decisions – the decision to underwrite the risk and to set the terms and conditions of the coverage offered – were all made

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[16] *AMA*, paras. 100-103.
[17] *AMA*, para. 109.

in London. The AIF had no authority to renegotiate the coverage or change or amend any terms. The mandate gave the AIF no authority to decline coverage; rather it provided authorization solely to confirm coverage.

On that basis, the Application Judge found that Lloyd's sole place of business is London.[18] The Application Judge further held that if she was wrong in that conclusion, and that Lloyd's had a second place of business in Toronto, the Toronto place of business was not the one with the closest connection to the arbitration agreement for the purposes of article 1(4)(a) of the *Model Law*. Accordingly, the Application Judge found that the Lloyd's Syndicates were an international party whose arbitration fell under the *International Act*. Further, and because of the prior conclusion that there was only one overarching agreement between the Association and the Reinsurers, Lloyd's status as an international party meant that all of the arbitration proceedings between the parties to the dispute fell under the *International Act*. The *Domestic Act* therefore had no application and the Association's statement of claim and application for summary judgment were accordingly stayed.[19]

Consolidation

The Reinsurers argued that the Application Judge had jurisdiction to consolidate all the several arbitration proceedings into one arbitration under the *International Act*. The Association resisted, arguing that consolidation under the *International Act* requires the consent of all parties.

Section 8 of the *International Act* provides as follows:

> (1) The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order

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[18] *AMA*, para. 120.
[19] *AMA*, paras. 121-129.

> (a) the arbitration proceedings to be consolidated, on terms it considers just,
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> (b) the arbitration proceedings to be heard at the same time, or one immediately after another, or
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> (c) any of the arbitration proceedings to be stayed until after the determination of any other of them.
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> (2) Where the Court orders arbitration proceedings to be consolidated pursuant to subsection (1)(a) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if all the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.
>
> (3) 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.

Two divergent lines of authority exist in Alberta about the jurisdiction to consolidate arbitration proceedings under the *International Act*, absent the consent of all the parties. In the older case, *Western Oil Sands Inc v. Allianz Insurance Co of Canada* ("*Western Oil*"), Justice Hawco held that "parties" in section 8(1) of the *International Act* refers to all parties to the arbitration and it would "simply not make sense" to accept that the plural, "parties," could be used to refer to a single party – i.e., it would make no sense to allow one party to consolidate multiple arbitrations over the objections of a non-consenting party.[20]

Justice Hawco arrived at this conclusion in *Western Oil* on the basis of the outcome to a consolidation application under Ontario's equivalent to section 8 of the *International Act* in *Liberty Reinsurance Canada v QBE Insurance & Reinsurance*, where Justice Day said:

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[20] *Western Oil Sands Inc v Allianz Insurance Co of Canada*, 2004 ABQB 79, para. 24 ("*Western Oil*"); *AMA*, para. 137.

> Despite the desirability for arbitrations under all four contracts to be conducted under one roof, the court has no jurisdiction to consolidate arbitrations unless all parties agree. Here, the parties do not agree. [21]

A different approach was taken by Wittmann CJQB in *Pricaspian Development Corporation v BG International Ltd* ("*Pricaspian*"), who determined that section 8 of the *International Act* contemplates an application for consolidation by one party alone.[22] Justice Wittmann noted that, as the law of the arbitral seat, the law of Alberta applied to the arbitration agreement under consideration before him and he therefore turned to the local *Interpretation Act* in construing it. In applying section 26(3) of the *Interpretation Act* – "In an enactment, words in the singular include the plural, and words in the plural include the singular" – Justice Wittmann concluded that "parties" would include "party", making it permissible for one party to make a consolidation application to the court.[23]

In *Pricaspian* Justice Wittmann also supported his decision on the permissibility of unilateral consolidation applications by pointing to the litigation mischief that might otherwise accrue:

> If the section indeed did require the consent of both parties, the result would be that there would be no available avenue for an aggrieved party to bring a contested consolidation application to the Court (although it could be made to an arbitral panel). This would mean that a party to an arbitration could bring multiple, similar arbitrations, and then withhold their consent to consolidate unreasonably, without the aggrieved party having recourse to the Court.[24]

In *AMA*, the Application Judge was tempted by the practical approach to consolidation adopted by Justice Wittmann in *Pricaspian*:

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[21] *Liberty Reinsurance Canada v. Qbe Insurance And Reinsurance (Europe) Ltd.*, 2002 CanLII 6636, para. 23 (ONSC); *Western Oil*, para. 25.
[22] *Pricaspian Development Corporation v BG International Ltd*, 2016 ABQB 611 ("*Pricaspian*").
[23] *Pricaspian*, para. 72.
[24] *Pricaspian*, para. 88.

> … the broad, purposive interpretation employed by Wittmann CJQB is tempting, particularly in the context of these arbitrations. The same treaty wording containing the same arbitration clause applies to all parties. The Reinsurance Agreement states the law of Alberta applies, so no potential conflict of laws issues arise. A single event, the Fort McMurray wildfire, gives rise to the dispute, and nature of the dispute between AMA and each Reinsurer involves common questions of law or fact. The Reinsurers differ only in their respective monetary shares of the limits of liability.
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> Consolidation would avoid multiplicity of proceedings, save arbitral and party resources and avoid possibly inconsistent results arising from multiple arbitration proceedings. This application is brought before any arbitration proceedings have commenced, so all parties are at the same stage.
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> Parties elect to proceed with arbitration of their disputes, rather than resorting to the courts for a number of reasons, including efficiency, finality, privacy and the ability to hear the dispute by an arbitrator or arbitral panel with expertise in the subject-matter of the dispute. It does seem counter-intuitive to allow one party (in this case AMA) to refuse consolidation, and insist on multiple arbitrations which serve to erode many of the inherent benefits of consolidation.
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> It is tempting to adopt the conclusion reached in *Pricaspian*, particularly when the factors overwhelmingly support consolidation…[25]

The Application Judge resisted this temptation, however, based on respect for party control, which was "a fundamental principle of arbitration proceedings":

> The Court's involvement with either arbitration act should reflect the policy that arbitration agreements should be honored and the court's involvement kept to a minimum. Party control, the hallmark of the arbitration process, would be sacrificed with too much court involvement. The Model Law and the International Act evidence the need to respect arbitration agreements within international commercial agreements and to allow parties to an arbitration to control their own process …
>
> Looking at this issue holistically, and having regard to the fundamental principles of minimal court involvement and party control that govern arbitration law, I prefer the reasoning in *Western Oil* that, in international arbitrations, the consent of the parties is a pre-requisite to consolidation. That may mean that from time to time, ambiguity within the arbitration agreement will create a potentially impractical result. The answer is to encourage the drafting of detailed arbitration clauses, where foreseeable issues are considered in advance and uncertainty is mitigated.[26]

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[25] *AMA*, paras. 150-153.
[26] *AMA*, paras. 161-162.

Accordingly, the Application Judge held that section 8 of the *International Act* requires the consent of all parties as a pre-requisite to consolidation. Because the Association did not consent, the Reinsurers' applications for consolidation were dismissed. Interestingly, the Application Judge expressly made no comment on whether the arbitral panel could address the issue of consolidation.

Party Control

The decision in *AMA* honours the primacy of party control in commercial arbitrations, where parties are expected and encouraged to devise their own procedure. This modern trend is exemplified in section 1 of the English *Arbitration Act 1996* where it is said that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest."[27] And it is notable that this statute enshrines the idea of party control by offering a very limited set of exceptions, tracking the *Model Law on International Commercial Arbitration*, to the mandatory stay of legal proceedings that will ensue when a dispute is governed by an arbitration clause: the court shall grant a stay of proceedings unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.[28]

Previously, under a "controversial" provision in the English *Arbitration Act 1975*, it was possible to avoid a mandatory stay and proceed with litigation in circumstances where "there is not in fact any dispute between the parties with regard to the matter agreed to be referred."[29] This effectively created a summary judgment exception to mandatory arbitration, where a litigation route could be pursued:

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[27] *Arbitration Act 1996*, section 1(b).
[28] *Arbitration Act 1996*, section 9(4). See article 8(1) of the *Model Law*.
[29] *Arbitration Act 1975*, section 1. See *Russell on Arbitration* 24th ed. (2015), ch. 7-032, p. 380.

> Only in the simplest and clearest cases, i.e. where it is readily and immediately demonstrable that the respondent has no good grounds for disputing the claim, should that party be deprived of his contractual right to arbitrate.[30]

A relic of that attitude to arbitration, which has been discarded in the most recent English arbitration legislation, survives in the summary judgment exceptions to mandatory arbitration that endure in many Canadian common law provinces, British Columbia excepted.[31]

The Association attempted to avail of this summary judgment route in *AMA* and might have been successful had the Application Judge decided that the arbitrations fell under the *Domestic Act* rather than the *International Act*. Section 7(2)(e) of the Alberta *Domestic Act* provides that:

> The court may refuse to stay the proceeding in only the following cases …
>
> (e) the matter in dispute is a proper one for default or summary judgment.

The jurisprudence in Alberta allowing this litigation exception to mandatory arbitration is influenced by the test under the equivalent provision in section 7(2)5 of the Ontario *Arbitration Act*, and indicates that an application judge will only rarely employ his or her discretion to grant summary judgment in a dispute that is governed by an arbitration clause:

> the discretion granted to the court to refuse to grant a stay of an action in respect of the summary judgment exception should only be exercised in simplest and clearest of cases where it is readily and immediately demonstrable on the record that the responding party to the proposed summary judgment motion has no basis whatsoever for disputing the claim or claims of the moving party. It is only in

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[30] *Hayter v Nelson* [1990] 2 Lloyd's Rep. 265 at 271; see also *Home and Overseas Insurance Co Ltd v Mentor Insurance Co (UK) Ltd* [1990] 1 WLR 153 at 159 (CA); *Channel Tunnel Group v. Balfour Beatty Ltd.* [1992] 2 All ER 609 (CA).

[31] See *Arbitration Act, 1991*, S.O. 1991, c. 17. s. 7(2)5; *Arbitration Act*, RSA 2000, c A-43, s. 7(2)(e); *The Arbitration Act*, C.C.S.M. c. A120, s. 7(2)(e); *The Arbitration Act, 1992*, Statutes of Saskatchewan c. A-24.1. s. 8(2)(e). But see *Arbitration Act*, [RSBC 1996] CHAPTER 55, s. 15(2): "In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed."

> such circumstances, in my view, that a party should be deprived of its agreed to arbitration rights.[32]

Notwithstanding judicial caution in employing the discretion to give summary judgment in disputes subject to arbitration, the continued survival of a summary judgment option on the statute books in Canada does seem anomalous, especially in light of the modern trend globally across common law jurisdictions to fully empower party control and to track section 8 of the *Model Law*, which does not provide for a summary judgment exception to mandatory arbitration.[33]

[32] *Sehdev v. Colours by Battistella Inc.*, 2008 ABQB 248, paras 22-23, referring *to Apotex Inc. v. Virco Pharmaceuticals (Canada) Co.*, [2007] O.J. No. 4817, para. 19 (ONSC). For Alberta see also *Balancing Pool v. TransAlta Utilities Corp.*, 2009 ABQB 631, para. 40; *Triple D & G. L. Ranches Ltd. v. Duncan*, 2011 ABQB 401, para. 71; *Yaworski v. Gowling Lafleur Henderson LLP*, 2012 ABQB 424, para 40; and *Serendipity Ventures Inc. v. Winters*, 2016 ABQB 398, para. 25. For Ontario, see the cases at Alexander Gay and Alexandre Kaufman, *Annotated Arbitration Act, 1991* 1st ed. (Thomson Reuters: 2016), pp. 51-54 ("*Annotated Arbitration Act*").

[33] See, for example, in addition to the B.C. and English statutes, the Irish *Arbitration Act 2010*, section 11, and section 8(1) of the New South Wales *Commercial Arbitration Act 2010*.