

Commercial Arbitration: What Every Corporate Counsel Should Know in 90 Minutes or Less

Association of Corporate
Counsel – Quebec

3 December 2008

Babak Barin, BCF

Pierre Gagnon, Hydro-Québec

Vikki Andrighetti, BCF

Sylvie Bourdon, Bombardier Transportation



Legislative Background

Civil law Jurisdictions

Quebec Articles: 2638 – 2643 C.C.Q.
Book VII, Title I: 940 – 947.4 C.C.P.
Book VII, Title II: 948 – 951.2 C.C.P.

France New Code of Civil Procedure

Switzerland Swiss Private International Law Act – Chapter 12

Germany German Arbitration Law 1998

Common law jurisdictions

Ontario *Ontario Arbitration Act, 1991*
Ontario International Commercial Arbitration Act

Alberta *Alberta Arbitration Act*
Alberta International Commercial Arbitration Act

England *Arbitration Act 1996*

U.S.A. *United States Arbitration Act*

Federal jurisdiction

Commercial Arbitration Act, R.S., 1985 c. 17 (2nd Supp.)

International Instruments

- Convention on the Recognition and Enforcement of Foreign Arbitral Awards

1958 New York Convention – 143 Member States

- UNCITRAL Model Law on International Commercial Arbitration – 64 Jurisdictions

1985 UNCITRAL Model Law – Canada was the first country in the world to enact legislation based on it.

- www.uncitral.org



Domestic vs. International

“When I use a word, it means just what I choose it to mean – neither more nor less.” – Humpty Dumpty in *Alice through the Looking Glass*

An arbitration is international if:

- (a) The parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different [countries];
- (b) One of the following places is situated outside the [country] in which the parties have their place of business:
 - (i) place of arbitration
 - (ii) place of performance or closest connection...

➤ UNCITRAL Model Law, art. 3

Article 940.6 CCP

Where matters of extra-provincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration:

- (1) the 1985 UNCITRAL Model Law;
- (2) the Report of UNCITRAL;
- (3) the Analytical Commentary.



Arbitration Agreement

Quebec

Article 2638 CCQ

An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.

1958 New York Convention

Article II

Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

1985 UNCITRAL Model law

Article 7. *Definition and form of arbitration agreement*

“Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Leading Decisions from the Supreme Court of Canada

- *Zodiak International Productions v. The Polish People's Republic*, [1983] 1 S.C.R. 529.
- *Sport Maska Inc. v. Zittner*, [1988] 1 S.C.R. 178.
- *Les Éditions Chouette (1987) Inc. v. Desputeaux* [2003] 1 S.C.R. 178.
- *GreCon Dimter Inc. v. J.R. Normand Inc.* [2005] 2 S.C.R. 401.
- *Dell Computer Corporation v. Union des consommateurs*, 2007 SCC 34 (S.C.C.), rev. [2005] J.Q. No. 7011 (C.A.).



Arbitration Pros & Cons

- Flexibility (delays, process, venue, language, choice of arbitrators)
- Neutrality
- Enforcement
- Costs

Arbitration as a choice from a ...

- State-owned / controlled party perspective (Pierre Gagnon)
- Privately / publicly owned entity perspective (Sylvie Bourdon)
- Counsel perspective (Vikki Andrighetti / Babak Barin)



Choice of Arbitrator(s)

- Importance
- One or three ?
- Expertise
- Legal background (*Civil law vs. Common law*)
- Availability

Sample Arbitration Clause No. 1

Party A (Quebec) contracts with Party B (Quebec), and the agreement contains the following clauses:

Governing law

This agreement shall be governed by the laws of the Province of Quebec and any federal laws applicable therein. The parties irrevocably attorn to the exclusive jurisdiction of the Quebec courts.

Arbitration

Any dispute, difference, disagreement, controversy or claim arising out of, in connection with or relating to this agreement, including any question regarding its existence, negotiation, interpretation, application, performance, validity, breach or termination shall be finally settled by arbitration pursuant to the Quebec *Code of Civil Procedure*, Book VII, Title I.



Sample Arbitration Clause No. 2

Party A (Quebec) contracts with Party B (Quebec), and the agreement contains the following clauses:

Dispute Resolution

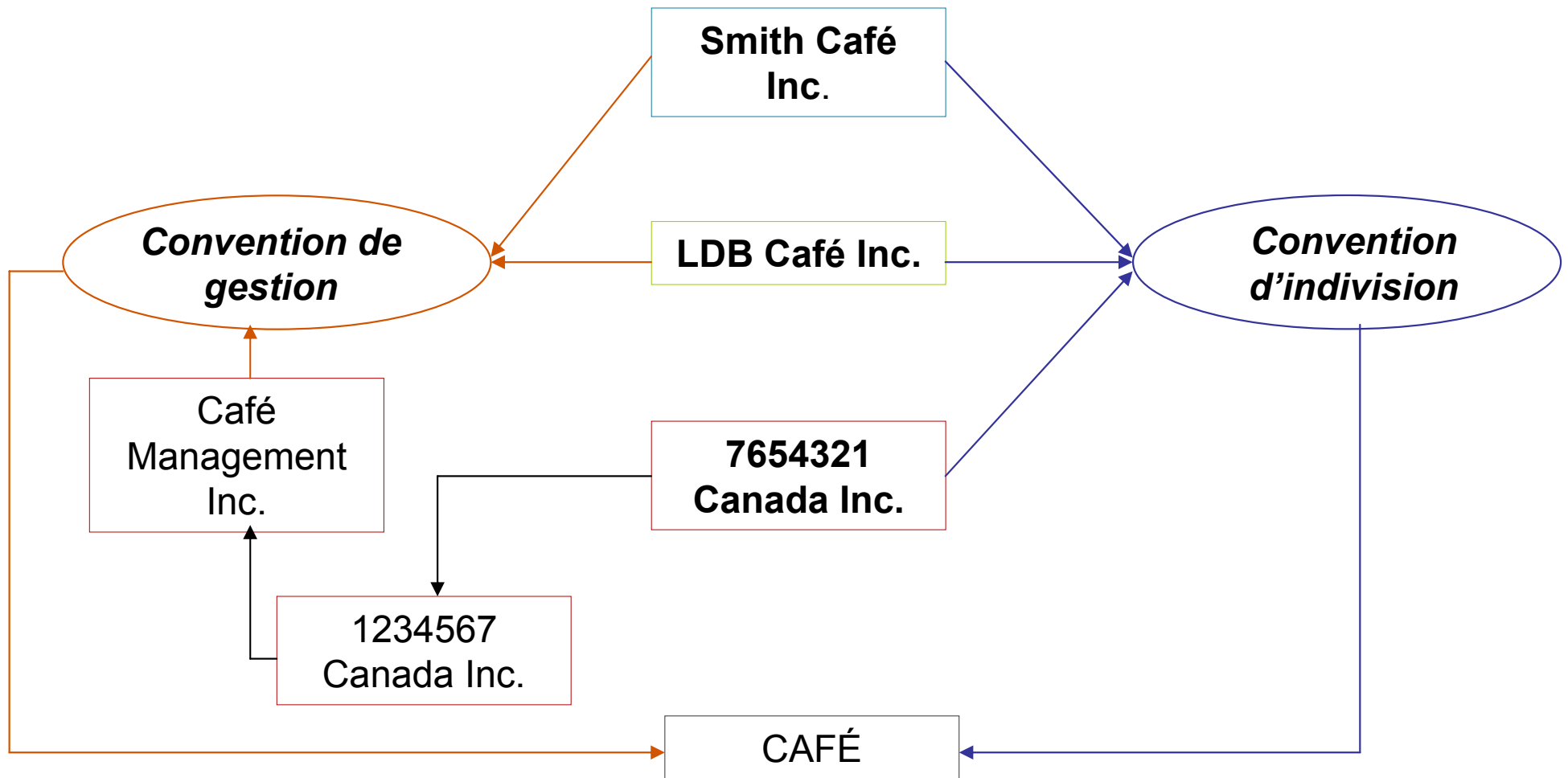
(a) Negotiation. In the event of any dispute or disagreement between any of the parties hereto as to the interpretation of this Agreement or any agreement incorporated herein, the performance of obligations hereunder or any other disputed matter relating hereto (“Dispute”), such Dispute, upon the written request of parties hereto, shall be referred to an authorized representative of each party or their respective designee. Such persons shall promptly meet in good faith to resolve the Dispute. If they do not agree upon a decision within 30 calendar days after the reference of the Dispute to them, any party thereto shall be free to exercise the remedies available to it under Section (b).

(b) Arbitration. The parties hereto agree that if a Dispute arises between them that is not resolved by good faith negotiation as provided in Section (a), then, such Dispute, upon 10 days’ prior written notice from one party to the other of its intent to arbitrate, shall be submitted and settled exclusively by final and binding arbitration in lieu of any judicial proceedings.



Sample Arbitration Clause No. 3

The following parties enter in one or both of the following agreements:



A dispute arises concerning the “Convention de gestion”.

Sample Arbitration Clause No. 3, continued

The “Convention d’indivision” contains the following clause:

Toute réclamation entre les Indivisaires découlant de la présente Convention qui fait l’objet d’un différend, tout désaccord entre les Indivisaires concernant l’exécution de quelque disposition des présentes, y compris son annulation, ainsi que tout différend entre les Indivisaires résultant d’un problème d’interprétation ou d’application de cette Convention est soumis à l’arbitrage, à l’exclusion des tribunaux de droit commun.

Malgré les dispositions des présentes, les Indivisaires se réservent le droit, jusqu’à ce que l’arbitre rende sa décision, de s’adresser aux tribunaux de droit commun pour engager tout recours réservé exclusivement aux tribunaux de droit commun, y compris, notamment, des requêtes en injonction.

Pendant la durée d’un arbitrage, les Indivisaires s’engagent à continuer à agir de manière compétente et diligente en vue de la meilleure gestion conformément aux normes sectorielles les plus élevées et conformément aux modalités et dispositions de la présente Convention.



Sample Arbitration Clause No. 4

Party A (Quebec) contracts with Party B (New York), and the agreement contains the following clauses:

Governing law

This agreement shall be governed by the laws of the State of New York.

Arbitration

All disputes, controversies or claims arising out of or relating to this agreement shall be settled by UNCITRAL arbitration. There shall be one arbitrator. The place of arbitration shall be Toronto, Ontario. The language of the arbitration shall be English.

Sample Arbitration Clause No. 5

Party A (Quebec) contracts with Party B (France) and Party C (New York), and the agreement contains the following clauses:

Governing law

This agreement shall be governed by the laws of the State of New York.

Arbitration

All disputes arising out of or in connection with this agreement shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules. The language of the arbitration shall be English, but there shall be simultaneous French translation. The parties agree to split the costs of the arbitration equally.

Interim Measures (Provisional Remedies) from an arbitral tribunal

In Quebec, if parties to an arbitration agreement wish to be able to seek “Provisional Remedies” or interim measures from an arbitral tribunal, they are best advised to explicitly entrust the tribunal with such powers.

- 1985 UNCITRAL Model Law, Articles 9 and 17
- Ontario Arbitration Act, 1991, Section 31

See: B. Barin, “Provisional Remedies” in domestic arbitrations: Time perhaps for a fresh look in Quebec?” (2004) 64 *Revue du Barreau* 137.

Confidentiality

Article 30.1 of the London Court of International Arbitration (LCIA) Rules:

Unless the parties expressly agree in writing to the contrary, the parties undertake as a general principle to keep confidential all awards in their arbitration, together with all materials in the proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain - save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority.

See: B. Barin, “Confidentiality and Commercial Arbitration in Canada – A Tale with a Cautious Ending” (2005) 65 *Revue du Barreau* 333.



Confidentiality (Continued)

A Shorter and narrower provision is offered in Article 13 of Schedule B (Expedited Arbitration Procedure) of the *Commercial Arbitration Act* of the Province of Nova Scotia:

“All oral hearings and meetings shall be held in private and all written documents shall be kept confidential by the arbitrator and the parties and shall not be disclosed to any other person, except with the consent of all parties.”

If you want your bargain and expectations to be upheld, better to be safe than sorry!



Sample Clause – Quebec (For discussion only)

Any dispute, difference, disagreement, controversy or claim arising out of, in connection with or relating to this agreement (“Dispute”), including any question regarding its existence, negotiation, interpretation, application, performance, validity, breach or termination shall be finally settled by arbitration pursuant to the *Quebec Code of Civil Procedure*, Book VII (Arbitrations). There shall be three arbitrators. Each party shall appoint one arbitrator. The two so appointed shall appoint the presiding arbitrator. If either party fails to appoint an arbitrator within fifteen (15) days of receiving notice of the appointment of an arbitrator by the other party, or if the two arbitrators fail to agree upon the presiding arbitrator within fifteen (15) days of the appointment of the second arbitrator, the appointment shall be made by the Quebec Superior Court. Where there are multiple parties, whether as claimant or as respondent, the multiple claimants jointly, and the multiple respondents jointly, shall appoint an arbitrator. The place of arbitration shall be Montreal, Quebec, and the language of the arbitration shall be English. The arbitral tribunal may order any interim, provisional or conservatory remedy it deems appropriate. The arbitrators may award the costs of the arbitration, including the parties’ reasonable legal fees, disbursements and/or expenses, their own fees, disbursements and/or expenses and any other reasonable fees, disbursements and/or expenses relating to the arbitration. The arbitrators may also direct the payment of interest in respect of any award at such rate and from such date as they deem appropriate.

The parties undertake as a general principle to keep confidential all information concerning the existence of the arbitration, all awards in the arbitration, all materials in the proceedings created or used for the purpose of the arbitration, and all materials and information produced during the arbitration (“Confidential Arbitration Information”) and not in the public domain – save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce, set aside or apply for annulment of an award in bona fide legal proceedings before a competent court. Each party shall obtain and deposit with the arbitrators a signed confidentiality undertaking from its legal counsel, independent experts and consultants regarding the Confidential Arbitration Information.



Recognition and Setting Aside Proceedings

QUEBEC

Awards made in Quebec (seat of the arbitration was in Quebec) – whether domestic or international: Articles 946-947.4 C.C.P. apply.

947. The only possible recourse against an arbitration award is an application for its annulment.

Awards made outside Quebec: Articles 948-951.2 C.C.P. apply.

ONTARIO

Award obtained in an international arbitration (seat of the arbitration was in Ontario): Articles 34-36 of the 1985 UNCITRAL Model Law apply.

Award obtained in a domestic arbitration: Section 46 of the Ontario *Arbitration Act, 1991* applies.



Recognition and Setting Aside Proceedings (Continued)

APPEAL PROCEEDINGS

- Possibility of an appeal on a question of law
- Section 45 of the *Ontario Arbitration Act, 1991*
- Ability of the parties to exclude appeals on questions of law
- Exclusion must be explicit

See: B. Barin, “Enforcement and Annulment of Arbitral Awards in Quebec – Vive la difference” (2004) 64 *Revue du Barreau* 431.

Arbitration Costs: How to Manage them?

QUESTIONS ?

BCF **LAWYERS**
PATENT & TRADE
MARK AGENTS

