GOWLING WLG

Top arbitration cases of 2022: Key lessons for Canadian in-house counsel

Introduction

2022 saw the continued increase in the use of arbitration across Canada.

For parties to international contracts, the ability to enforce an arbitration award in more than 170 countries under the New York Convention is often the driving force behind the choice of arbitration to resolve disputes. For parties to domestic contracts, it is more frequently issues such as cost, procedural flexibility, confidentiality, exclusion of appeals and choice of arbitrator that leads them to prefer arbitration over domestic courts. However, the significant backlog of hearings and trials that COVID-19 caused in Canadian courts and the resulting long wait to obtain a hearing, in particular, has made arbitration an attractive alternative route for those looking to have their disputes resolved more speedily

The popularity of arbitration has inevitably led to a vast number of court decisions across Canada related to arbitration proceedings.

With a view to helping in-house counsel stay abreast of this evolving area of law, we surveyed our Arbitration Practice Group and asked our practitioners across Canada to identify the most important arbitration-related court cases of 2022. I am delighted to present the results of that survey, with practical summaries and useful analyses of those cases.

The general theme emerging from last year's cases is one of a legislative framework and a judiciary supportive of both international and domestic arbitration, with the courts generally adopting a "hands-off" approach to preliminary questions of jurisdiction and arbitrability. The courts have also largely respected the parties' agreement to arbitrate and choice of arbitrator by upholding arbitrators' decisions and rejecting disguised appeals on the merits where such appeals have been excluded by the parties.

However, perhaps this year's most important decision, *Petrowest*, demonstrates there is still tension between the private nature of arbitration and the broader administration of justice obligations the court and legislature owe to the public as a whole. This delicate balance is hardly unique to Canada; indeed, it's one that all arbitration-friendly countries continue to struggle with.

Moreover, the fact that a number of the cases we highlight are successful appeals indicates that there is still much uncertainty and inconsistency relating to the interpretation and application of arbitration laws across Canada. It also underscores the need for expert advice and representation to help guide users, as well as the courts, to successful outcomes.

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Peace River Hydro Partners v. Petrowest Corp

Supreme Court of Canada refuses to enforce an arbitration agreement where it risked prejudicing creditors in insolvency proceedings

Facts

Peace River subcontracted construction work to Petrowest on a hydroelectric dam project in B.C. The relevant contracts contained various arbitration agreements. Petrowest became insolvent and was placed under receivership. The receiver commenced a court claim against Peace River for sums allegedly owing for completed work. Relying on the arbitration agreements, Peace River brought a motion before the B.C. Supreme Court to stay the receiver's claim in favour of arbitration. The Court dismissed the stay. The B.C. Court of Appeal affirmed the decision.

Decision

The Supreme Court of Canada upheld the decision dismissing the stay motion. It concluded the agreement was "inoperative" within the meaning of subsection 15(2) of B.C.'s Arbitration Act (identical in this respect to federal arbitration legislation and provincial international commercial arbitration legislation across Canada). Recognizing that courts should usually enforce arbitration agreements, even in the insolvency context, the Court observed that sometimes doing so risks frustrating the orderly administration of an insolvent estate to the detriment of its stakeholders.

In dismissing the appeal, the Court took care to correct and clarify several points of law:

- Whether an entity is a "party" to an arbitration agreement goes beyond whether it signed the agreement. The ordinary rules of contract law apply such that subsidiaries, assignees, trustees and others claiming through or under the signatory may properly be considered parties to the arbitration agreement.
- The separability presumption—that an arbitration agreement contained in a larger contract is presumed separate for the purposes of entertaining challenges to the arbitral tribunal's jurisdiction or the validity of the container contract or arbitration agreement—is not a basis for a receiver to disclaim only the arbitration agreement and sue on the container contract in court.
- In the insolvency context, an arbitration agreement may become inoperative when enforcing it would disturb the broader insolvency process. Relevant factors include: (a) the effect of arbitration on the insolvency proceedings' integrity; (b) the relative prejudice to the arbitral parties versus other stakeholders; (c) urgency in resolving the dispute; (d) the effect of any statutory stay of proceedings arising from the bankruptcy/insolvency proceedings; and (e) other factors the court considers material.

Analysis

The Supreme Court and lower courts have many times affirmed a strong policy favouring the enforcement of arbitration agreements. This is rooted in respect for party autonomy, a fundamental tenet of arbitration law, which finds its voice in arbitration legislation across Canada. At the same time, bankruptcy and insolvency legislation creates a special regime aimed at streamlining the administration of a debtor's estate while taking into account the interests of all stakeholders. In some cases, enforcing an arbitration agreement will not hinder (and may even assist) the insolvency/bankruptcy policy objectives. Indeed, the Court noted that efficiency and procedural flexibility are hallmarks of both arbitration and insolvency proceedings. However, enforcing one or more arbitration agreements will sometimes hamper the orderly administration of a debtor's estate, or even bring it to a grinding halt. Each case will turn on its own facts. Practicality, rather than rigid formalism, will govern the analysis.

Peace River Hydro Partners v. Petrowest Corp., 2022 SCC 41

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Escape 101 Ventures Inc. v. March of Dimes Canada

British Columbia Court of Appeal determines misapprehension of evidence going to the core of the Award remains an extricable error of law giving rise to a right of appeal

Facts

The Appellant, Escape 101 Ventures Inc. ("Escape"), and the Respondent, March of Dimes Canada ("March of Dimes"), entered into an Asset Purchase Agreement (the "Agreement"), which provided for March of Dimes to make payments to Escape based on a quarterly revenues formula. Escape and March of Dimes disputed whether the formula included revenues from additional work (the "Additional Work") awarded to March of Dimes after the date of the Agreement. This dispute was referred to arbitration.

The arbitrator dismissed Escape's claim that the revenues derived from the Additional Work should be included in the formula for payments. In the award, the arbitrator noted that Escape failed to object to March of Dimes' revenue calculations in quarterly reports prior to receipt of the July 2019 quarterly report. The arbitrator made this determination despite the fact that there were no revenues derived from the Additional Work prior to that noted in the July 2019 quarterly report.

The Decision

The Court held that the arbitrator misapprehended the evidence as to when the Additional Work began to generate revenue and when that revenue should have been noted in the quarterly reports provided to Escape. This misapprehension was central to the arbitrator's reasoning and conclusions, and constituted an extricable error of law.

Appellate review under section 59 of the Arbitration Act remains limited to extricable questions of law. Extricable questions of law are not limited to those having precedential value and include misapprehension of facts central to the decision. While an arbitral tribunal has discretion in deciding evidentiary matters, mistaken evidentiary findings, are not immune to appellate review where those errors play an essential part in the reasoning process for the outcome. Further, the Court noted that errors of law are not limited to those on the "face of the award" and can include errors resulting from evidentiary matters forming part of the reasons.

Analysis

This was the first reported decision under the recently promulgated Arbitration Act S.B.C. 2020, c. 2. It affirms that the new Arbitration Act does not alter the subject matter for appellate review of an arbitrator's decision, namely extricable errors of law. It likewise confirms that a misapprehension of evidence is an extricable error of law subject to appellate review.

The main takeaway is that arbitrators are not insulated from incorrect determinations of facts, where such determinations are central to a decision and not peripheral. Parties must approach an arbitration understanding this possible ground for appellate review. If parties under the jurisdiction of the B.C. legislation wish to avoid appellate review on these grounds, they must draft their arbitration agreements to exclude appeals on questions of law.

Escape 101 Ventures Inc. v. March of Dimes Canada, 2022 BCCA 294

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Irwin v. Protiviti

Ontario Court of Appeal determines that courts should generally decline jurisdiction to assess the enforceability of an arbitration clause, even in employment agreements

Facts

Ms. Irwin sued her former employer, Protiviti, for constructive dismissal. Her employment contract included an arbitration clause, which excluded the arbitral tribunal's ability to award costs and punitive damage awards. Protiviti brought a motion to stay the court proceeding and refer the dispute to arbitration. Irwin responded that the arbitration clause was invalid due to unconscionability and for inconsistency with the Ontario Employment Standards Act, 2000 ("ESA") and Ontario Human Rights Code ("HRC").

Applying the competence-competence principle, the motion judge held that the validity of the arbitration clause was a matter for the arbitral tribunal to decide in the first instance and stayed the court proceedings. Irwin appealed to the Court of Appeal for Ontario.

Decision

The question of whether an arbitration clause is inconsistent with the ESA or HRC is a question of mixed fact and law that is best determined by the arbitration process.

The Court cited the Supreme Court of Canada's decision in Dell Computer Corp. v. Union des consommatuers, 2007 SCC 34. In that case, the Supreme Court held that where there is a challenge to the arbitral tribunal's jurisdiction, the tribunal should assess the question in the first instance unless the challenge raises (i) pure questions of law; or, (ii) questions of mixed fact and law requiring only superficial consideration of the evidence, and where the court is convinced the challenge is not a delaying tactic or will not prejudice recourse to the arbitration. The Supreme Court confirmed in the more recent Uber Technologies Inc. v. Heller, 2020 SCC 16 ("Uber") that this analysis also applies when a party challenges the arbitration agreement's validity.

The Court of Appeal determined that the unconscionability of an arbitration clause is a "probing factual inquiry" that ought not to be determined by superficial consideration of evidence. As such, the question of unconscionability in this case needed to be decided at arbitration in the first instance.

Analysis

The Court's decision further reinforces the principle that a challenge to an arbitrator's jurisdiction must generally be decided first by the arbitrator. This is what is known as the competence-competence principle, which holds that the arbitral tribunal has the jurisdiction (the first "competence") to assess whether it has jurisdiction (the second "competence"). Moreover, courts may decline jurisdiction even when questions of unconscionability and compliance with employment-related legislation are raised.

This case also distinguished Uber, a leading case on arbitration clauses in the employment context. The Court emphasized that, unlike the individual in that case, who was an Uber driver of modest means, Irwin was well paid and had the benefit of legal advice prior to the execution of the arbitration agreement. The Court did not identify the access to justice concerns that existed in Uber, where the agreement was a click-through standard form agreement, subject to the laws of a foreign jurisdiction, and where the administrative costs of commencing and maintaining the arbitration proceedings effectively prevented the individual from pursuing their claim.

Irwin v. Protiviti, 2022 ONCA 533

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Cruickshank v. City of Kingston

Ontario Superior Court defers "jurisdictional" objections based on limitation defence and non-adherence to pre-arbitration procedural steps to arbitral tribunal

Facts

The City of Kingston ("the City") contracted Cruickshank Construction ("Cruickshank") to perform construction services for the City. Under the construction contract, the parties agreed to resolve disputes through arbitration.

When a dispute arose, Cruickshank applied to the Court to appoint an arbitrator. In response, the City did not deny that there was a valid arbitration agreement between the parties. Rather, the City cross-applied asking the Court to determine that any arbitrator would lack jurisdiction due to its limitation defence and due to Cruickshank's alleged failure to comply with mandatory procedural pre-arbitration steps.

Decision

On the issue of an arbitrator's jurisdiction regarding the limitations defence, the Court stated "the fact that there may be a defence on the merits available to a party does not undermine the jurisdiction of an arbitrator."

The Court emphasized the Supreme Court of Canada's affirmation of the competence-competence principle: "[t]he policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters." Given this, the Court stated that section 6 of the Ontario Arbitration Act, 1991 is the "dominant" approach and therefore it did not see how coming before it would be more efficient, affordable or proportionate than going to arbitration.

On the issue of procedural pre-conditions to arbitration, the Court held that a jurisdictional argument could potentially be raised if it were found that Cruickshank failed to adhere to the mandated pre-arbitration steps. However, the Court left this issue to be decided by the arbitrator, as it was of the view that summary judgement on the issue was inappropriate.

Analysis

The Court's decision further reinforces the judicial trend of enforcing arbitration agreements and assiduously respecting the competence-competence principle. It is clear that there are only "narrow circumstances" as to when a Court may rule on an arbitrator's jurisdiction in the first instance. On this point, the Court has clarified that a limitations defence is not a question of jurisdiction, but rather a question of admissibility of a claim, which is best determined by an arbitrator.

Likewise, on the issue of procedural pre-arbitration steps, the Court decided if the issue of adherence to such steps is heavily fact-laden, and thus arguable, the issue is best left to the arbitral tribunal to decide in the first instance. Notably, however, the parties did not appear to have referred the Court to any authority on the correct approach to assessing the legal effect of any non-compliance with mandatory pre-arbitral procedural steps. In particular, the Court was unable to resolve whether it should be treated as an issue of admissibility of the specific claim (to be determined by the arbitrator) – which we would suggest is the correct approach – or an issue of jurisdiction (to be finally determined by the court). In the end, the Court determined that even if it were an issue of jurisdiction it should first be determined by the arbitrator.

Cruickshank Construction Ltd. v. The Corporation of the City of Kingston, 2022 ONSC 5704.

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Newtech Waste Solutions v. Asselin

Québec Superior Court again confirms that an arbitration agreement can apply to non-signatories

Facts

Mr. Bélanger sold his shares in Machinex pursuant to a share purchase agreement that contained an arbitration clause. Bélanger initiated an arbitration against Machinex claiming outstanding consideration for his shares. Machinex counterclaimed, alleging Bélanger was breaching his non-compete undertakings through a company called Waste Robotics ("Robotics"), in which Bélanger was a shareholder. Machinex successfully asked the arbitral tribunal to join Robotics to the arbitration.

Machinex later sought to join another entity, Newtech Waste Solutions Inc. ("Newtech"), to the arbitration for the same reasons as those supporting the joinder of Robotics. Newtech opposed Machinex's request, but the tribunal decided to join Newtech. It found that Machinex put forward sufficient evidence that Newtech, together with Bélanger and Robotics, collaborated in the impugned unfair competition and Bélanger's breach of his non-compete undertakings.

Newtech brought an application before the Québec Superior Court to contest the decision of the tribunal to join it as an impleaded party ("mise en cause") in the arbitration.

Decision

The Superior Court of Québec dismissed Newtech's application. The Court confirmed that its task was not to "review" the decision of the arbitral tribunal. Instead, the Court had to decide for itself whether the arbitral tribunal had jurisdiction over Newtech. After review of the facts and relevant case law, the Court confirmed that the arbitral tribunal did have jurisdiction over Newtech and that it could add Newtech as a party to the arbitration.

Analysis

The Court confirmed that it is possible to join third parties to an arbitration when the circumstances require their presence. Considering the similar nature of the different relief – that pending before the arbitral tribunal and that which Machinex would have to pursue against Newtech before the Superior Court – the identity of the issues, the facts, as well as the parties involved, the Court confirmed that the presence of Newtech in the arbitration was required. Like the arbitral tribunal, the Court concluded Bélanger was at the centre of this whole affair.

The Court's key analysis points were:

- The arbitral tribunal committed no error in concluding that it was necessary to determine whether Bélanger used Newtech as a vehicle to breach his non-compete undertakings.
- The arbitral tribunal did not prejudge the merits of the case in relying on the allegations in the parties' pleadings.
- Conflicting judgments could result should the arbitral tribunal be precluded from examining the acts of Bélanger with Newtech that might be actionable before the Superior Court.
- It would be inappropriate to split the dispute, which would multiply proceedings and slow or add complexity to the adjudication process.

Newtech Waste Solutions inc. c. Asselin, 2022 QCCS 3537

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Air India, Ltd. v. CC/Devas (Mauritius) Ltd.

Québec Court of Appeal overturns decision allowing the enforcement of an arbitration award against a subsidiary of the debtor

Facts

Air India appealed a judgment of the Québec Superior Court granting, in part, its motion to quash an order allowing the Respondents, CC/Devas (Mauritius) / Devas Multimedia Services, to seize funds in the hands of the International Air Transport Association ("IATA") that were owed on behalf of the Republic of India. The issue was whether the assets of a state-owned corporation, which was not the debtor under the arbitration award, could be seized before judgment.

The Respondents argued that property belonging to a state-owned company could be seized based on an alter ego theory, namely that Air India was the alter ego of the Republic of India. They advanced this alter ego theory, despite the state owned company not being an award debtor. According to Air India, the motion judge lacked the authority to lift the corporate veil and disregard its separate legal personality solely because the Republic of India was its alter ego. Article 317 of the Civil Code of Québec lists three circumstances that would authorize such lifting of the corporate veil:

1. Dissembling fraud,

2. Abuse of right; or

3. Contravention of a rule of public order.

The Respondents acknowledged that their application did not establish any of the three circumstances listed in Article 317. Instead, they argued that foreign arbitral awards ought to be enforceable against the property of a government-owned corporation when it is the alter ego of the state against which the order was made.

Decision

The Court of Appeal of Québec granted Air India's appeal, finding the Respondents failed to satisfy any of the veil-piercing conditions defined in Article 317. As a result, the Court could not authorize the Respondents to seize Air India's property in satisfaction of its debt. The Court concluded that Article 317 applies to foreign arbitral awards rendered against a foreign state. In reaching its conclusion, the Court held that the alter ego test had no application to this case because India did not use Air India as an instrument to dissemble fraud, abuse rights or contravene a rule of public order.

Analysis

The enforcement of awards (and judgments) against foreign states can be very difficult due to issues of sovereign immunity. Whilst the Canadian courts generally favour enforcing foreign arbitral awards, in *Air India* the Court confirmed that arbitral awards against foreign states do not – in and of themselves - provide a right to pierce the corporate veil to seize assets held by state-owned corporations. Moreover, it is important for parties to consider the effect of provincial or territorial rules and laws on the enforceability of arbitral awards, in particular against entities who are not parties to the arbitration and against whom no award is made.

Air India, Ltd. v. CC/Devas (Mauritius) Ltd., 2022 QCCA 1264

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Optiva v. Tbaytel

Ontario Court of Appeal upholds arbitrator's $4.39M award and validates use of summary judgment-like procedures in domestic arbitrations

Facts

Optiva sold an $8.5M software package to Tbaytel. A dispute arose resulting in Tbaytel terminating the contract and the parties referring their disputes to arbitration under the Arbitration Act, 1991 (the "Act"). A further agreement on the arbitration procedure was negotiated and agreed by the parties. It described the powers of the arbitrator, including the power to decide all motions and determine all procedural matters. However, no explicit reference to "summary judgment" was included in this agreement.

Tbaytel elected to bring a motion for "summary judgment" on the basis that the executives of Optiva had made admissions that established the material facts for its claim. The arbitrator permitted Tbaytel to proceed with a summary judgment motion, despite Optiva's "concerns" with that procedure. Optiva made submissions on the motion that the arbitrator had no jurisdiction to use summary judgment as a procedure, absent consent of the parties. Nevertheless, the arbitrator granted Tbaytel a partial award of $4.39M.

Optiva moved to set aside the award under s. 17 and s. 46 of the Act by application to the Ontario Superior Court of Justice. The applications judge dismissed the application on the basis that (1) Optiva was out of time under s. 17(8) of the Act to set aside the decision, and (2) that the grounds for setting aside the award were without merit. Optiva appealed to the Court of Appeal for Ontario.

Decision

The appeal was dismissed. The Court of Appeal disagreed with the lower court finding that Optiva was out of time under s. 17(8) of the Act. The Court of Appeal found that the time limit under s. 17(8) applies only to jurisdictional decisions of the arbitrator, not to challenges relating to procedural fairness under s. 46(1) 6 of the Act, which was the correct basis to challenge the arbitrator's use of a summary procedure. As such, Optiva was not out of time. However, the Court of Appeal dismissed the balance of the grounds for appeal. The Court concluded that Optiva had agreed that the arbitrator could determine the procedures governing the arbitration and this included summary procedures. Furthermore, there was no evidence that Optiva was either denied the opportunity to present any evidence that it wanted to present before the arbitrator or that it did not have a full and fair opportunity to challenge the case put forward by Tbaytel.

Analysis

This case establishes a clear precedent for arbitrators to use summary judgment as a procedural mechanism where such a procedure has not been explicitly excluded by the parties. This is an important case for empowering arbitrators with the tools already in the hands of the courts by virtue of decisions such as Hryniak v. Mauldin, 2014 SCC 7. As noted by the Court of Appeal, "The advantages flowing from a properly invoked summary judgment process have equal application in the arbitration and the civil trial context." If a party wants to exclude the use of summary judgment in an arbitration, then clear language in the arbitration agreement to that effect will be required.

The potential lack of a summary process in arbitration (or more accurately the lack of willingness of arbitrators to adopt a summary process because of due process concerns) has often been a criticism of arbitration. Hopefully, this decision will encourage arbitrators to adopt a summary process in the future, where appropriate, subject to the need to treat all the parties equally and fairly and to allow each party an opportunity to present its case or to respond to the other party's case.

Optiva Inc. v. Tbaytel, 2022 ONCA 646

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Aroma Franchise v. Aroma Espresso Bar

Ontario Court confirms that once an arbitrator issues a Final Award, even a Partial Final Award, allegations of arbitrator bias under Article 34 of the Model Law are properly before the Court

Facts

The parties were involved in an arbitration over the termination of the Applicant's Aroma Franchise Company Inc. ("Aroma Franchise") master franchise agreement with the Respondent, Aroma Espresso Bar Canada Inc. ("Aroma Canada"). The dispute was arbitrated under the Ontario International Commercial Arbitration Act, 2017, which adopts the UNCITRAL Model Law (with its 2006 amendments) in Ontario.

The arbitrator delivered a Partial Final Award requiring the Applicant to pay the Respondent $10.2 million in damages. The arbitrator reserved the issues of interest and costs for a further award. In delivering the Partial Final Award by email, the arbitrator inadvertently copied another lawyer at the Respondent's law firm. This prompted the Applicant to ask the arbitrator a series of questions by email, revealing the arbitrator was appointed on an unrelated matter by another counsel at the Respondent's firm.

The Applicant brought an application to set aside the award, inter alia, on the basis of "a reasonable apprehension of bias." The Respondent brought a motion to stay or dismiss the application. The Respondent argued that the Court lacked jurisdiction to set aside an award for bias since the arbitration was not terminated under Article 32 of the Model Law (because issues in respect of interest and costs remained to be decided). The Respondent contend that, because the arbitration was ongoing, this required the Applicant to proceed under Article 13(2) of the Model Law and submit the bias allegation to the arbitrator for his determination in the first instance.

Decision

The Court dismissed the Respondent's motion and held that the Applicant was not required to challenge the arbitrator's impartiality under Article 13 of the Model Law before bringing an application to set aside an award under Article 34. Specifically, the Court held that Articles 12 and 13 of the Model Law do not apply to a challenge of an award after a final award on the substantive issues has been released and the arbitrator is "functus officio" (that is, having performed his or her office).

Analysis

The court affirmed that challenges to an award based on reasonable apprehension of bias amount to claims of unequal treatment, which violates Article 18 of the Model Law. Accordingly, the Applicant was correct to proceed under Article 34 in applying to set aside the Partial Final Award. Once a final award is rendered on the substantive issues in the proceeding, a party to an arbitration can bring a court application to set aside that award on the grounds of bias, before the arbitration is terminated, notwithstanding the fact that the party has not challenged the arbitrator's impartiality in the first instance under Articles 12 and 13 of the Model Law.

Aroma Franchise Company, Inc., v. Aroma Espresso Bar Canada Inc., 2022 ONSC 6188 (CanLII)

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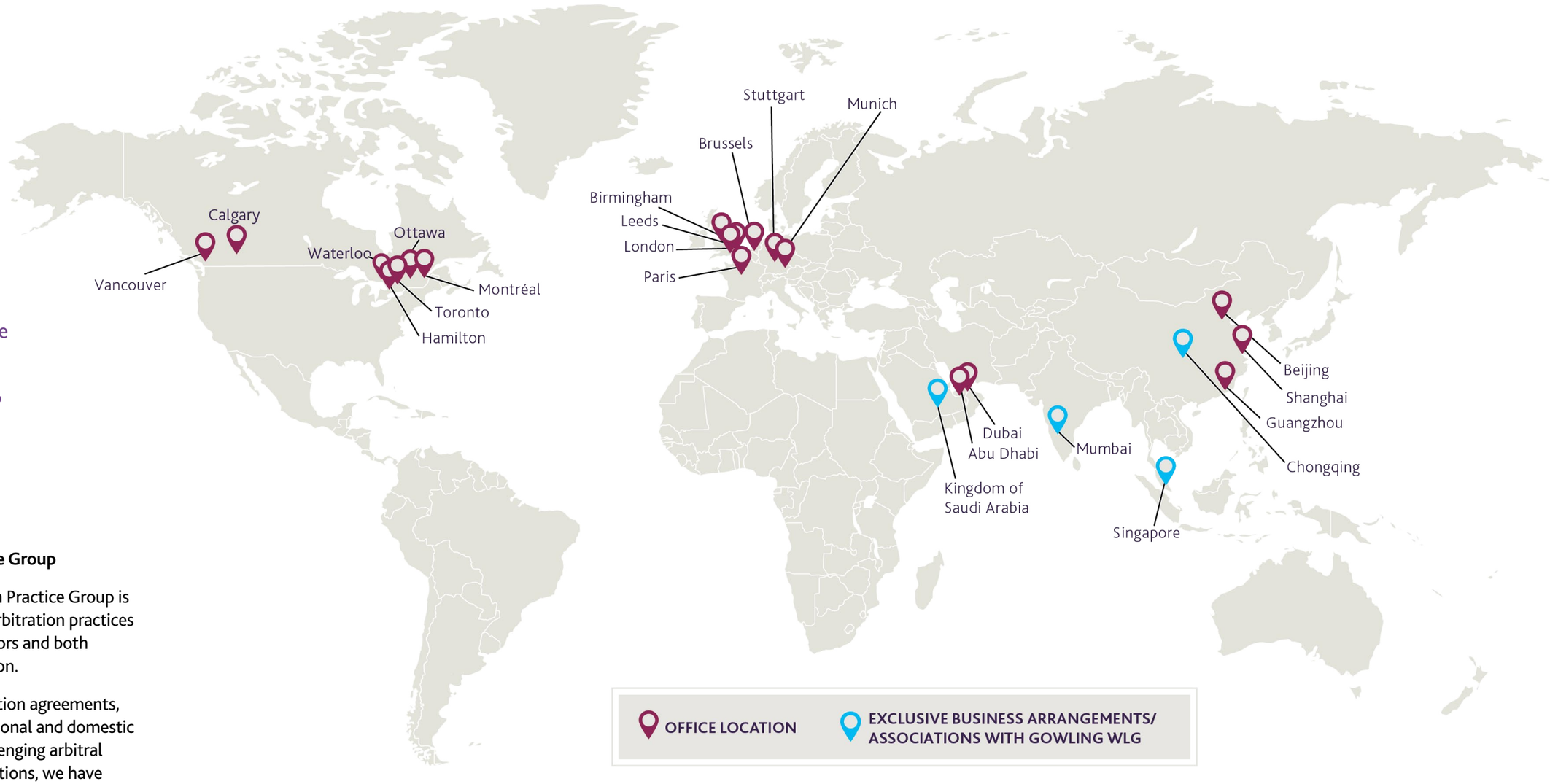
Gowling WLG's Arbitration Practice Group

Gowling WLG's Canadian Arbitration Practice Group is one of the largest and most active arbitration practices in Canada, covering all industry sectors and both domestic and international arbitration.

Our services include drafting arbitration agreements, representing clients in both international and domestic arbitrations, and enforcing and challenging arbitral awards. In addition to ad hoc arbitrations, we have represented clients in institutional arbitrations under the rules of all major arbitration institutions, including the LCIA, ICC, SIAC, UNCITRAL, IDCR-AAA and ADR-IC.

The Canadian Arbitration Practice Group forms part of Gowling WLG's International Arbitration Practice Group, serving clients' needs across the globe.



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