



**SUPREME COURT OF CANADA**

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

**APPEAL HEARD:** January 19,  
2022

**JUDGMENT RENDERED:**  
November 10, 2022

**DOCKET:** 39547

**BETWEEN:**

**Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung  
C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T  
Corporation**  
Appellants

and

**Petrowest Corporation, Petrowest Civil Services LP by its general partner,  
Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest  
Construction LP by its general partner Petrowest GP Ltd., carrying on  
business as Quigley Contracting, Petrowest Services Rentals LP by its general  
partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor  
Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP,  
Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier  
Ltd. and Ernst & Young Inc. in its capacity as court-appointed receiver and  
manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest  
Construction LP, Petrowest Services Rentals LP, Petrowest GP Ltd. and  
Trans Carrier Ltd.**  
Respondents

- and -

**Canadian Commercial Arbitration Center, Arbitration Place, Chartered  
Institute of Arbitrators (Canada) Inc., Insolvency Institute of Canada and  
Canadian Federation of Independent Business**

## Interveners

**CORAM:** Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

**REASONS FOR  
JUDGMENT:** Côté J. (Wagner C.J. and Moldaver, Rowe and Kasirer JJ.  
concurring)  
(paras. 1 to 189)

**CONCURRING  
REASONS:** Jamal J. (Karakatsanis, Brown and Martin JJ. concurring)  
(paras. 190 to 199)

**NOTE:** This document is subject to editorial revision before its reproduction in final form in the *Canada Supreme Court Reports*.

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**Peace River Hydro Partners,  
Acciona Infrastructure Canada Inc.,  
Samsung C&T Canada Ltd.,  
Acciona Infraestructuras S.A. and  
Samsung C&T Corporation**

*Appellants*

v.

**Petrowest Corporation,  
Petrowest Civil Services LP by its general partner, Petrowest GP Ltd.,  
carrying on business as RBEE Crushing,  
Petrowest Construction LP by its general partner Petrowest GP Ltd.,  
carrying on business as Quigley Contracting,  
Petrowest Services Rentals LP by its general partner Petrowest GP Ltd.,  
carrying on business as Nu-Northern Tractor Rentals,  
Petrowest GP Ltd., as general partner of Petrowest Civil Services LP,  
Petrowest Construction LP and Petrowest Services Rentals LP,  
Trans Carrier Ltd. and  
Ernst & Young Inc. in its capacity as court-appointed receiver and  
manager of Petrowest Corporation, Petrowest Civil Services LP,  
Petrowest Construction LP, Petrowest Services Rentals LP,  
Petrowest GP Ltd. and  
Trans Carrier Ltd.**

*Respondents*

and

**Canadian Commercial Arbitration Center,  
Arbitration Place,  
Chartered Institute of Arbitrators (Canada) Inc.,  
Insolvency Institute of Canada and  
Canadian Federation of Independent Business**

*Interveners*

**Indexed as: Peace River Hydro Partners v. Petrowest Corp.**

File No.: 39547.

2022: January 19; 2022: November 10.

Present: Wagner C.J. and Moldaver, Karakatsanis, Côté, Brown, Rowe, Martin, Kasirer and Jamal JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

*Bankruptcy and insolvency — Court-ordered receivership — Enforceability of arbitration agreement — Receiver commencing civil action for payment of amounts allegedly owed to debtors under agreements that include mandatory arbitration clauses — Defendants seeking stay of proceedings of receiver’s action under provincial arbitration legislation on basis that arbitration clauses govern dispute — Receiver opposing stay and arguing that court authorized to assert centralized judicial control over matter under federal bankruptcy and insolvency legislation — Whether receiver’s action should be stayed — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 183(1), 243(1) — Arbitration Act, R.S.B.C. 1996, c. 55, s. 15.*

Peace River is a partnership formed to build a hydroelectric dam in northeastern British Columbia. Peace River subcontracted work to Petrowest, an Alberta-based construction company, and its affiliates. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration (“Arbitration Agreements”). When Petrowest encountered financial

difficulties, the Alberta Court of Queen's Bench granted an order ("Receivership Order"), pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act* ("BIA"), appointing a receiver ("Receiver") to manage the assets and property of Petrowest and its affiliates. The Receiver then brought a civil claim against Peace River seeking to collect funds allegedly owed to Petrowest and its affiliates for subcontracted work. Peace River applied under s. 15 of British Columbia's *Arbitration Act* for a stay of proceedings on the ground that the Arbitration Agreements governed the dispute. The chambers judge dismissed the stay application and the Court of Appeal dismissed Peace River's appeal.

*Held:* The appeal should be dismissed.

*Per* Wagner C.J. and Moldaver, Côté, Rowe and Kasirer JJ.: The civil claim brought by the Receiver should be allowed to proceed. Section 15 of the *Arbitration Act* does not require a court, in every case, to stay a civil claim brought by a court-appointed receiver where the claim is subject to a valid arbitration agreement. A court may decline to grant a stay where the arbitration agreement at issue is "void, inoperative or incapable of being performed" within the meaning of s. 15(2). An otherwise valid arbitration agreement may, in some circumstances, be inoperative or incapable of being performed if enforcing it would compromise the integrity of court-ordered receivership proceedings. In the specific circumstances of this case, the chaotic nature of the arbitral proceedings bargained for by the parties would compromise the orderly and efficient resolution of the receivership, to the detriment of

affected creditors and contrary to the purpose of the *BIA*. Accordingly, the chambers judge was entitled to refuse to grant a stay.

Competence-competence is a principle that gives precedence to the arbitration process. Generally, arbitrators should be allowed to rule first on their own jurisdiction. The principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law or, as in this case, questions of mixed fact and law requiring only superficial consideration of the evidentiary record.

In a dispute governed by an arbitration agreement with an insolvent or bankrupt counterparty, there is a tension between arbitration law and insolvency law as regards the forum in which the dispute is to be resolved. The modern view expressed in Canadian arbitration legislation is that parties should be held to their contractual agreements to arbitrate, consistent with principles of party autonomy and freedom of contract. Generally speaking, judicial intervention in commercial disputes governed by a valid agreement clause should be the exception, not the rule. On the other hand, insolvency proceedings are creatures of statute subject to close judicial oversight. The role of courts in ensuring the equitable and orderly resolution of insolvency disputes is reflected in the single proceeding model, which favours the enforcement of stakeholder rights through a centralized judicial process. Section 183(1) of the *BIA* confers a broad scope of authority on superior courts to deal with most bankruptcy disputes. Court-ordered receiverships under s. 243 of the *BIA* are one available tool for

enhancing the judicial oversight and flexibility underlying Canadian insolvency law, whereby receivers may take various actions to preserve the debtor's assets for the benefit of all creditors. While a court order under s. 243 of the *BIA* gives a receiver wide-ranging powers, the receiver remains under a fiduciary duty to act honestly and in the best interests of all interested parties.

Notwithstanding these differences, arbitration law and insolvency law have much in common. Each prioritizes efficiency and expediency; procedural flexibility is a hallmark of both arbitration and insolvency law; and both often rely on specialized decision makers to achieve their respective objectives. In many cases, these shared interests will converge through arbitration, and parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. Valid arbitration agreements are generally to be respected. The presumption in favour of arbitral jurisdiction is supported by the Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit. However, in certain insolvency matters, it may be necessary to preclude arbitration in favour of a centralized judicial process, when arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. In such a scenario, a court may assert control over the proceedings, both to ensure the timely resolution of the parties' dispute and to protect the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors.

The exercise required to determine if a stay of proceedings should be granted in favour of arbitration is highly factual. It requires the court to review the statutory regimes and arbitration agreements in play, having regard to the principles of party autonomy and freedom of contract and to the policy imperatives underpinning bankruptcy and insolvency law. To guide this exercise, a two-part framework, implicit in provincial arbitration legislation across the country and mirrored in ss. 15(1) and (2) of the *Arbitration Act*, applies. The two general components of this framework are: (1) the technical prerequisites for a mandatory stay of court proceedings; and (2) the statutory exceptions to a mandatory stay of court proceedings. These components ought to remain analytically distinct because the burden of proof shifts between them. The applicant for a stay in favour of arbitration must establish the technical prerequisites. If the applicant discharges this burden, under the second component, the party seeking to avoid arbitration must show that a statutory exception applies.

The first component, technical prerequisites, is concerned with whether the arbitration agreement at issue engages the mandatory stay provision in the applicable provincial arbitration statute. Considerations at this stage may differ depending on the jurisdiction and the nature of the arbitration, i.e. whether it relates to domestic or international arbitration. There are typically four technical prerequisites: an arbitration agreement exists; court proceedings have been commenced by a party to the arbitration agreement; the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and the party applying for a stay does so before taking any step in the court proceedings. The applicant must only establish an arguable case that these



prerequisites are met.

For the purposes of the technical prerequisites set out in s. 15(1) of the *Arbitration Act*, a court-appointed receiver may be a party to the debtor's pre-receivership arbitration agreement through the operation of ordinary contract law. First, it is well established that an entity connected with a signatory to a contract may become bound as a party by operation of law; for example, subsidiaries, assignees, trustees and others claiming through or under the named party. There is no principled reason why this should not apply to a court-appointed receiver claiming through a debtor under a contract containing an arbitration agreement. It would violate basic principles of contract law to permit a receiver to enforce a contract on the debtor's behalf while avoiding the burdens, including the obligations to arbitrate contractual disputes. Nor does a receiver's duty as an officer of the court preclude it from being considered a party to an arbitration agreement within the meaning of s. 15(1). To the contrary, a receiver owes a fiduciary duty to all interested parties involving the debtor's assets, property, and undertakings, and may not arbitrarily break contracts entered into by the debtor with third parties prior to the receivership. Second, s. 15(1) does not expressly preclude non-signatories like receivers from being considered parties. Where legislation does not fully address a matter, courts may look to the common law to interpret the statutory language. It is a foundational contractual doctrine that all non-signatories to a contract may claim only through or under a signatory upon stepping into its contractual shoes. Nothing in the legislative record or text of the *Arbitration Act* indicates that the legislature intended to change or displace the common

law. Third, effectively preventing arbitration as soon as one of the contracting parties entered receivership would subvert the core arbitral principles of party autonomy, limited court intervention, and competence-competence.

As for determining whether the party applying for a stay took a step in the proceedings, this requires an objective approach. The court must ask itself whether, on the facts, the party should be held to have impliedly affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration. Undertaking to file a defence does not constitute a step in the proceedings, nor does requesting an extension of time to file a defence. In the context of s. 15(1), the very purpose of such a request is to decide whether or not to take a step, and there is no election to proceed with the action.

At the second stage of the analysis, the key question is whether, on a balance of probabilities, one or more of the statutory exceptions set out in the applicable provincial arbitration statute apply. If not, the court must grant a stay. A court should dismiss a stay application on the basis of a statutory exception only in a clear case. One such exception, set out in s. 15(2) of the *Arbitration Act*, is when the arbitration clause is “void, inoperative or incapable of being performed”. A court-appointed receiver cannot unilaterally disclaim an arbitration agreement, thereby rendering it void, inoperative or incapable of being performed. Section 15(2) should be interpreted narrowly to prevent parties from avoiding arbitration in favour of what they view as a preferable procedure. Allowing a receiver to avoid arbitration by unilaterally

disclaiming a debtor's pre-existing arbitration agreement conflicts with the text and intent of s. 15 and diminishes the presumptive enforceability and predictability of arbitration agreements. As s. 15(2) makes plain, the sole basis upon which a party may sue to enforce a contract and yet avoid the obligation to arbitrate is that the arbitration agreement has been found by a court to be void, inoperative, or incapable of being performed. Preferably, court-appointed receivers should seek such a judicial determination by bringing a motion for directions in the supervising court. However, when a receiver initiates court proceedings without prior judicial approval, the court must decide whether to decline to enforce the agreement under s. 15 of the *Arbitration Act*.

Section 15(2) gives a court the power to refuse a stay by finding that an arbitration agreement has become inoperative or incapable of being performed because of court-ordered receivership proceedings where arbitration would compromise the orderly and efficient resolution of a receivership. There is no conflict between the provincial *Arbitration Act* and the federal *BIA* giving rise to paramountcy concerns. In the typical case, the purposes of the *Arbitration Act* will be served by holding the parties to their agreement to arbitrate through a narrow interpretation of the words "void", "inoperative" and "incapable of being performed". An arbitration agreement will be considered "void" only in the rare circumstances where it is intrinsically defective according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation. The term "inoperative" has no universal common law definition. Possible reasons for finding an

arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties. The party seeking to avoid arbitration bears the heavy onus of showing that the exception for an inoperative arbitration agreement applies. The making of a winding-up order or a receivership order may be grounds to find an arbitration agreement inoperative. However, the term inoperative may not always cover scenarios where a court-appointed creditor representative initiates court proceedings on behalf of a debtor. This is because insolvency law generally stays legal claims brought against a debtor while permitting claims brought on its behalf to proceed. An arbitration agreement is “incapable of being performed” where the arbitral process cannot effectively be set into motion because of a physical or legal impediment beyond the parties’ control. Physical impediments may include inconsistencies, inherent contradictions, or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; the non-availability of the arbitrator specified in the agreement; the dissolution or non-existence of the chosen arbitration institution; or political or other circumstances at the seat of arbitration rendering arbitration impossible. Legal impediments include express legislative overrides of the parties’ agreement to arbitrate.

There is statutory jurisdiction arising from ss. 183(1) and 243(1)(c) of the *BIA* for a court to hold that an arbitration agreement is inoperative in the receivership context. It is therefore unnecessary for courts to resort to inherent jurisdiction, which is to be considered only after statutory jurisdiction is determined to be unavailable. The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and

efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives. Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters. Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, take any action that the court considers advisable, if the court considers it just or convenient to do so. This very expansive wording has been interpreted as giving judges the broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise in relation to court-ordered receiverships. Section 243(1)(c) thus permits a court to do not only what justice dictates but what practicality demands. Practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Factors that may be relevant in determining whether an arbitration agreement is inoperative under s. 15(2) include: (a) the effect of arbitration on the integrity of the insolvency proceedings; (b) the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; (c) the urgency of resolving the dispute; (d) the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings; and (e) any other factors the court considers material in the circumstances. Each factor may carry more or less weight depending on the circumstances of the case.

In the instant case, the technical prerequisites set out in s. 15(1) of the *Arbitration Act* are met. The impugned civil proceedings are in respect of a contractual dispute covered by valid arbitration agreements. In addition, Peace River has

established an arguable case that the Receiver is a party to the Arbitration Agreements and Peace River has not taken a step in the proceedings. As s. 15 is engaged, a stay in favour of arbitration must be granted unless the Arbitration Agreements are found to be void, inoperative or incapable of being performed under s. 15(2). The Receiver has established that the Arbitration Agreements are inoperative. The multiple arbitral processes contemplated in the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the objectives of the *BIA*. While recognizing the importance of party autonomy and freedom of contract, referral to arbitration in the unique circumstances of the instant case would jeopardize the Receiver's ability to maximize recovery for the creditors and to allow Petrowest and its affiliates to move forward with certainty.

*Per Karakatsanis, Brown, Martin and Jamal JJ.:* There is agreement that the appeal should be dismissed as the Arbitration Agreements are inoperative under s. 15(2) of the *Arbitration Act*. However, there is disagreement as to the primary basis for finding the Arbitration Agreements to be inoperative. The analysis should start with the terms of the Receivership Order itself. By suing in court as authorized under the Receivership Order, the Receiver disclaimed the Arbitration Agreements and they were thereby rendered inoperative.

The Receivership Order authorized the Receiver to receive and collect all monies and accounts owed or owing to Petrowest; to exercise all remedies of Petrowest in collecting such monies; to initiate, prosecute, and continue the prosecution of any

and all proceedings with respect to Petrowest's property, assets, and undertakings, including all proceeds thereof; and to cease to perform any contracts of Petrowest. An arbitration agreement is a contractual right of a party to have a claim referred to arbitration to the exclusion of the courts and thus could be disclaimed pursuant to the Receivership Order. The combined effect of these terms authorized the Receiver to disclaim the Arbitration Agreements and to sue in court for amounts owing to Petrowest. The terms of the Receivership Order authorized the Receiver to sue, either in court or before an arbitrator, at the Receiver's election, based on what will best promote the orderly and efficient resolution of the receivership under the *BIA*. The legal effect of the Receiver suing in court and not before an arbitrator was undoubtedly to disclaim reliance on the Arbitration Agreements.

There is agreement with the majority that to the extent that the Receivership Order did not authorize the Receiver to sue in court, the *BIA* provided a statutory basis for the chambers judge to declare the Arbitration Agreements inoperative and to dismiss the stay application. Requiring arbitration of the Receiver's collection action would compromise the orderly and efficient resolution of the receivership.

### **Cases Cited**

By Côté J.

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B.C.L.R. (2d) 113; *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, 446 D.L.R. (4th) 626; *Dalimpex Ltd. v. Janicki* (2000), 137 O.A.C. 390, aff'd (2003), 228 D.L.R. (4th) 179; *Ives & Barker v. Willans*, [1894] 2 Ch. 478; *Central Investments & Development Corp. v. Miller* (1982), 133 D.L.R. (3d) 440; *ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1996), 135 D.L.R. (4th) 130; *Petro-Canada v. 366084 Ontario Ltd.* (1995), 25 B.L.R. (2d) 19; *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3; *Canada (Attorney General) v. Reliance Insurance Co.* (2007), 87 O.R. (3d) 42; *Heyman v. Darwins, Ltd.*, [1942] A.C. 356; *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129; *James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315; *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333; *DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176; *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123; *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150; *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162.

By Jamal J.

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SCC 34, [2007] 2 S.C.R. 801; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531; *Uber Technologies Inc. v. Heller*, 2020 SCC 16.

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*Arbitration Act*, S.B.C. 2020, c. 2, s. 4(a).

*Arbitration Act, 1991*, S.O. 1991, c. 17, ss. 7(2), 17(2).

*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, ss. 71, 72(1), 183, 243.

*Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

*International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, s. 2(1) “party”.

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APPEAL from a judgment of the British Columbia Court of Appeal (Bennett, Dickson and Grauer JJ.A.), 2020 BCCA 339, 43 B.C.L.R. (6th) 8, 452 D.L.R. (4th) 535, 5 C.L.R. (5th) 31, 84 C.B.R. (6th) 174, 9 B.L.R. (6th) 163, [2021] 7 W.W.R. 195, [2020] B.C.J. No. 1940 (QL), 2020 CarswellBC 3008 (WL), affirming a decision of Iyer J., 2019 BCSC 2221, 5 C.L.R. (5th) 14, 74 C.B.R. (6th) 53, 100 B.L.R. (5th) 128, [2019] B.C.J. No. 2489 (QL), 2019 CarswellBC 3819 (WL). Appeal dismissed.

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*Kibben Jackson, Tom Posyniak and Glen Nesbitt*, for the intervener the Insolvency Institute of Canada.

*Anthony Daimsis*, for the intervener the Canadian Federation of Independent Business.

The judgment of Wagner C.J. and Moldaver, Côté, Rowe and Kasirer JJ. was delivered by

CÔTÉ J. —

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## VII. Disposition

### Appendix — Arbitration Agreements

#### I. Overview

[1] This appeal calls upon our Court to clarify whether and in what circumstances a contractual agreement to arbitrate governed by the *Arbitration Act*, R.S.B.C. 1996, c. 55 (“*Arbitration Act*”), should give way to the public interest in the orderly and efficient resolution of a court-ordered receivership under s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (“*BIA*”).

[2] A construction dispute underlies this appeal. The appellant Peace River Hydro Partners is a partnership formed to build a hydroelectric dam in northeastern British Columbia. Two members of that partnership, and their parent corporations, are also appellants in this Court (collectively, “Peace River”). The respondent Petrowest Corporation (“Petrowest”) is an Alberta-based construction company. In December 2015, Peace River agreed to subcontract certain work to Petrowest and its affiliates (“Petrowest Affiliates”), which are also respondents in this appeal. The parties executed several clauses providing that disputes arising from their relationship were to be resolved through arbitration (“Arbitration Agreements”).

[3] But Petrowest soon found itself in dire financial straits. The Alberta Court of Queen’s Bench ordered Petrowest and the Petrowest Affiliates into receivership pursuant to s. 243 of the *BIA*. The respondent Ernst & Young Inc. acts as their

court-appointed receiver and manager (“Receiver”). The Receiver brought a civil claim in the Supreme Court of British Columbia seeking to collect accounts receivable allegedly owed to Petrowest and the Petrowest Affiliates by Peace River. The latter applied to stay the civil proceedings under s. 15 of the *Arbitration Act* on the ground that the Arbitration Agreements governed the dispute. The Receiver opposed the stay application on behalf of Petrowest and the Petrowest Affiliates, arguing that the *BIA* authorized the court to assert centralized judicial control over the matter rather than send the Receiver to multiple arbitral forums.

[4] The chambers judge agreed with the Receiver and dismissed the stay application. The Court of Appeal upheld the chambers judge’s ruling on the basis that the Receiver was not a “party” to the Arbitration Agreements within the meaning of s. 15(1) of the *Arbitration Act*. It held that the doctrine of separability allowed the Receiver to disclaim the Arbitration Agreements and sue on the underlying contracts to recover payment for past performance. Peace River now asks this Court to set aside both decisions below and stay the court proceedings in favour of arbitration.

[5] I would dismiss the appeal and affirm the dismissal of the stay application by the courts below. The civil claim brought by the Receiver on behalf of Petrowest and the Petrowest Affiliates may proceed. This conclusion flows from the following two-part analysis, which is mandated by s. 15 of the *Arbitration Act* and outlined in further detail later in these reasons.



[6] First, the Court of Appeal erred in concluding that s. 15 was not engaged because the Receiver was not a “party” to the Arbitration Agreements. Permitting a court-appointed receiver to avoid arbitration on the basis that it is not a party to the debtor’s pre-existing agreement to arbitrate is inconsistent with a proper reading of s. 15, ordinary principles of contract law, party autonomy, and this Court’s longstanding jurisprudence with respect to arbitration. Nor can disclaimer or the doctrine of separability permit receivers to unilaterally render otherwise valid arbitration agreements “inoperative” or “incapable of being performed” within the meaning of s. 15. Only a court can make a finding that an arbitration agreement is inoperative or incapable of being performed.

[7] Second, although s. 15 is engaged, the chambers judge was entitled to refuse to grant a stay under s. 15(2). An otherwise valid arbitration agreement may, in some circumstances, be inoperative or incapable of being performed. For example, an arbitration agreement may be inoperative if enforcing it would compromise court-ordered receivership proceedings under s. 243 of the *BIA*. This may occur where the arbitration agreed to by the parties would preclude the orderly and efficient resolution of the receivership, contrary to the purposes of the *BIA*.

[8] To be clear, the fact that a party has entered receivership or insolvency proceedings or is financially impecunious is not, on its own, a sufficient basis for a court to find an arbitration agreement inoperative. The party seeking to avoid arbitration must establish, on a balance of probabilities, that a stay in favour of

arbitration would compromise the integrity of the parallel insolvency proceedings. The following non-exhaustive list of factors, discussed further below, may assist in the court's analysis: (a) the effect of arbitration on the integrity of the insolvency proceedings, which are intended to minimize economic prejudice to creditors; (b) the relative prejudice to the parties to the arbitration agreement and the debtor's stakeholders; (c) the urgency of resolving the dispute; (d) the effect of a stay of proceedings arising from the bankruptcy or insolvency proceedings, if applicable; and (e) any other factors the court considers material in the circumstances.

[9] Applying the above factors, I find that the chambers judge correctly dismissed the stay application. The Arbitration Agreements are inoperative within the meaning of s. 15(2) of the *Arbitration Act*. Sections 243 and 183 of the *BIA* authorize courts to do what practicality demands in the context of a receivership. In this case, practicality demands that the Arbitration Agreements not be enforced, in the interest of an orderly and efficient resolution of the receivership. In short, the chaotic nature of the arbitral proceedings bargained for by the parties would compromise the integrity of the receivership, to the detriment of affected creditors and contrary to the purposes of the *BIA*.

[10] I stress that this result is context-specific. The unique facts of this case, which pit the public policy objectives underlying the *BIA* against freedom of contract and party autonomy, justify departing from the legislative and judicial preference for holding parties to their arbitration agreements. Contrary to conventional wisdom,

however, arbitration law and insolvency law need not always exist at “polar extremes”. They have much in common, including an emphasis on efficiency and expediency, procedural flexibility, and expert decision-making. These shared interests often converge through arbitration, such that granting a stay in favour of arbitration will promote the objectives of both provincial arbitration legislation *and* federal insolvency legislation. It is for this reason that courts should generally hold parties to their agreements to arbitrate, even if one of them has become insolvent. To do otherwise would not only threaten the important public policy served by enforcing arbitration agreements and thus Canada’s position as a leader in commercial arbitration, but also jeopardize the public interest in the expeditious, efficient, and economical clean-up of the aftermath of a financial collapse.

## II. Background

[11] Peace River was formed to design and construct works at the Site C Project, a major dam and hydroelectric generating station on the Peace River in northeastern British Columbia. The partnership includes the appellants Acciona Infrastructure Canada Inc. and Samsung C&T Canada Ltd., which are the Canadian subsidiaries of the appellants Acciona Infraestructuras S.A. and Samsung C&T Corporation.

[12] Petrowest is the third member of the partnership. The following agreements between the parties are relevant to this appeal (collectively, “Main Agreements”):

- a general partnership agreement dated December 17, 2015, between Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., and Petrowest, creating Peace River (“Partnership Agreement”);
- a guarantee and cross-indemnity agreement dated December 17, 2015, between Acciona Infraestructuras S.A., Samsung C&T Corporation, and Petrowest, guaranteeing the obligations of the subsidiary partners to the Partnership Agreement (“Guarantee”);
- purchase orders under which Peace River subcontracted certain work to Petrowest and the Petrowest Affiliates (“Purchase Orders”); and
- a subcontract dated June 1, 2016, between a Petrowest Affiliate and Peace River, awarding further subcontracted work.

[13] The Main Agreements contain the Arbitration Agreements in which the parties agree to refer disputes to arbitration. It should be noted, however, that the wording of each Arbitration Agreement differs.<sup>1</sup> Each applies to a different set of

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<sup>1</sup> The Arbitration Agreements are reproduced in an appendix to these reasons.

potential disputes and provides for different arbitration procedures. And some of the Purchase Orders do not contain arbitration clauses.

[14] Less than two years into the partnership, Petrowest encountered financial difficulties. It entered receivership on August 15, 2017. The Alberta Court of Queen's Bench granted a receivership order pursuant to s. 243(1) of the *BIA* ("Receivership Order"). The Receivership Order appointed the Receiver to manage the assets and property of the debtors, Petrowest and the Petrowest Affiliates. It authorized the Receiver to do the following, among other things: (a) disclaim, abandon or renounce the debtors' interest in property; (b) initiate the prosecution of "any and all proceedings" with respect to the debtors and their property; (c) assign the debtors into bankruptcy, become their trustee in bankruptcy, and take all steps reasonably required to carry out its role as trustee in bankruptcy; (d) "cease to perform any contracts of the Debtors"; and (e) "receive and collect all monies and accounts" owing to the debtors (A.R., vol. XI, at pp. 2900-2903).

[15] On April 3, 2018, the Receiver assigned the Petrowest Affiliates into bankruptcy and became their trustee in bankruptcy. It is important to note that Petrowest itself is not bankrupt.

[16] On August 29, 2018, the Receiver brought a civil claim against Peace River in the Supreme Court of British Columbia on behalf of Petrowest and the Petrowest Affiliates. The Receiver sought to collect funds allegedly owing to Petrowest

and the Petrowest Affiliates for performance of work subcontracted under the Main Agreements.

[17] On August 30, 2018, Peace River was served with the notice of civil claim. In a letter dated September 28, 2018, counsel for Peace River undertook to file a defence. Instead, Peace River ultimately applied under s. 15 of the *Arbitration Act* for a stay of proceedings on the ground that the Arbitration Agreements governed the dispute. The Receiver resisted the application on behalf of Petrowest and the Petrowest Affiliates.

### III. Statutory Provisions

[18] This appeal concerns the interplay between two statutes: the *Arbitration Act* and the *BIA*. The key sections of these two statutes are set out below.

#### *Arbitration Act*

#### **Definitions**

**1** In this Act:

...

**“arbitration agreement”** means a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the *International Commercial Arbitration Act* applies;

...

#### **Stay of proceedings**

**15 (1)** If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

(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.

## *BIA*

### General Provisions

#### **Application of other substantive law**

**72 (1)** The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

...

### Jurisdiction of Courts

#### **Courts vested with jurisdiction**

**183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

...

(c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

...

### Secured Creditors and Receivers

**Court may appoint receiver**

**243 (1)** Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

IV. Decisions Below

A. *British Columbia Supreme Court, 2019 BCSC 2221, 100 B.L.R. (5th) 128 (Iyer J.)*

[19] The first issue before the chambers judge was whether s. 15 of the *Arbitration Act* was engaged. If so, the second issue was whether the court had jurisdiction to decline a stay notwithstanding the application of s. 15(1) of the *Arbitration Act*. Under s. 15(2), the court would be required to stay the proceedings in favour of arbitration unless it found the Arbitration Agreements “void, inoperative or incapable of being performed”.

[20] On the first issue, the chambers judge held that s. 15 was engaged. She analyzed the four requirements for a mandatory stay contemplated in s. 15.



[21] First, the chambers judge found that the Receiver was a “party to an arbitration agreement” within the meaning of s. 15(1). She stated that the Receiver was “the trustee in bankruptcy of Petrowest and the Petrowest Affiliates”, such that it had acquired their contractual rights to sue on the Main Agreements pursuant to s. 71 of the *BIA* (paras. 16-17). She concluded that by suing on the Main Agreements “in its own name as the trustee”, the Receiver became a party to the Arbitration Agreements within the meaning of s. 15(1) (para. 19).

[22] Second, the chambers judge rejected the argument that Peace River had taken a “step in the proceedings” before bringing its stay application. She held that undertaking to file a defence without invoking the rules of court did not constitute a step in the proceedings (*Commonwealth Insurance Co. v. Larc Developments Ltd.*, 2010 BCCA 18, 315 D.L.R. (4th) 242).

[23] Third, the chambers judge concluded that at least some of the contractual claims advanced by the Receiver were captured under the broadly worded Arbitration Agreements.

[24] Finally, the chambers judge was “prepared to assume” that at least some of the Arbitration Agreements at issue were not void, inoperative, or incapable of performance within the meaning of s. 15(2) (para. 33).

[25] On the second issue before her, the chambers judge concluded that the court had “inherent jurisdiction”, flowing from s. 183 of the *BIA*, to override arbitration

agreements governed by s. 15 of the *Arbitration Act*. She noted that the exercise of this power could function in one of two ways: (a) it could render an arbitration clause incapable of being performed or inoperative within the meaning of s. 15(2); or (b) if s. 15(2) did not admit of that interpretation, s. 183 of the *BIA* could prevail over s. 15 of the *Arbitration Act* based on the principle of paramountcy. The chambers judge did not address this question because it had not been argued before her (para. 42).

[26] The chambers judge went on to exercise her “inherent jurisdiction” to dismiss the stay application. She found that s. 183 of the *BIA* empowers superior courts to disrupt private contractual rights where doing so is necessary to achieve fairness in the bankruptcy or insolvency process and to promote the underlying objectives of the *BIA*, such as the proper administration and protection of a bankrupt’s estate.

[27] The chambers judge noted that enforcing the Arbitration Agreements would entail multiple overlapping arbitrations and potential litigation, resulting in “significant cost and delay” when compared with a single judicial proceeding (para. 60). She emphasized that the parties agreed that overriding the Arbitration Agreements “would promote the efficient and inexpensive resolution of their dispute” (para. 56). On this basis, the chambers judge concluded that granting a stay would “significantly compromise achievement of the objectives of the *BIA*” (para. 61). She dismissed Peace River’s stay application and allowed the civil claim to proceed.

B. *British Columbia Court of Appeal, 2020 BCCA 339, 452 D.L.R. (4th) 535 (Bennett, Dickson and Grauer JJA.)*

[28] Peace River appealed the chambers judge's decision, primarily on the basis that courts do not have inherent jurisdiction under s. 183 of the *BIA* to decline a stay mandated by s. 15 of the *Arbitration Act*.

[29] The Court of Appeal dismissed the appeal but did not endorse the chambers judge's reasoning. It cautioned that inherent jurisdiction should be invoked only rarely and cannot be used to negate an unambiguous expression of legislative will (*Ontario v. Criminal Lawyers' Association of Ontario*, 2013 SCC 43, [2013] 3 S.C.R. 3; *Residential Warranty Co. of Canada Inc. (Re)*, 2006 ABCA 293, 275 D.L.R. (4th) 498; *United Used Auto & Truck Parts Ltd., Re*, 2000 BCCA 146, 16 C.B.R. (4th) 141). However, the Court of Appeal found it unnecessary to consider whether the chambers judge had discretion under the *BIA* to refuse to grant a stay notwithstanding the application of s. 15 of the *Arbitration Act*.

[30] The Court of Appeal relied on the doctrine of separability in arbitration law, which permits an arbitration clause to be treated as a "self-contained contract collateral to the containing contract" (*Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 3 W.L.R. 42 (C.A.), at p. 49; see also *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at paras. 221-25, per Côté J., dissenting, but not on this point). According to the Court of Appeal, separability allows a receiver, as a court-appointed fiduciary, to disclaim an otherwise valid arbitration agreement even though it has adopted the containing contract for the purpose of suing on it (para. 55).

[31] Applying the doctrine of separability, the Court of Appeal found that the Receiver had disclaimed the Arbitration Agreements by bringing the civil claim on behalf of Petrowest and the Petrowest Affiliates. Accordingly, the Receiver was not a party to those agreements and s. 15 of the *Arbitration Act* did not apply. In any event, if the Receiver was a party, its disclaimer rendered the Arbitration Agreements inoperative or incapable of being performed within the meaning of s. 15(2) (para. 56). Accordingly, the Court of Appeal dismissed the appeal, upholding the chambers judge's decision to refuse to grant a stay in favour of arbitration.

#### V. Issues

[32] This appeal raises the following question:

- In what circumstances is an otherwise valid arbitration agreement unenforceable under s. 15(2) of the *Arbitration Act* in the context of a court-ordered receivership under the *BIA*?

[33] This question raises the following sub-questions:

- (a) Did the Court of Appeal err in concluding that s. 15 of the *Arbitration Act* is not engaged?

- (b) If s. 15 is engaged, did the chambers judge err in finding that a court nevertheless has jurisdiction to refuse a stay of proceedings in the context of a court-ordered receivership under the *BIA*?
  
- (c) If a court has jurisdiction to refuse to grant a stay in the context of a court-ordered receivership, how should this jurisdiction be exercised in this case?

[34] In brief, I conclude that s. 15 of the *Arbitration Act* does not require a court, in every case, to stay a civil claim brought by a court-appointed receiver where the claim is subject to a valid arbitration agreement. A court may decline to grant a stay where the party seeking to avoid arbitration establishes that the arbitration agreement at issue is “void, inoperative or incapable of being performed” within the meaning of s. 15(2). In the context of a court-ordered receivership, an arbitration agreement may be inoperative if enforcing it would compromise the orderly and efficient resolution of the receivership. This analysis necessarily turns on the particular factual scenario before the court.

[35] Applying the foregoing, I find that the Receiver, on behalf of Petrowest and the Petrowest Affiliates, has established that the Arbitration Agreements are inoperative. I see no basis on which to interfere with the chambers judge’s finding that a single judicial process “will be faster and less expensive” than the multiple overlapping proceedings required by the Arbitration Agreements (para. 56). The parties agreed before the chambers judge that proceeding through the courts, rather than by

arbitration, “would promote the efficient and inexpensive resolution of their dispute” (para. 56). On this basis, I conclude that arbitration would compromise the orderly and efficient resolution of the receivership, contrary to the objectives of the *BIA*.

[36] Therefore, the chambers judge was entitled to refuse Peace River’s request for a stay in favour of arbitration under s. 15(2) of the *Arbitration Act*. I would accordingly dismiss the appeal.

## VI. Analysis

[37] My analysis below proceeds as follows. First, I explain and apply the “competence-competence” principle. Second, I discuss the relationship between arbitration law and insolvency law, including key commonalities between these bodies of law. Third, I outline the general two-part framework applicable on stay applications brought under domestic arbitration legislation in Canada. Fourth, I interpret s. 15 of the *Arbitration Act* and resolve the four interpretive issues raised. Finally, I apply the two-part s. 15 stay framework to this case.

### A. *Competence-Competence Principle*

[38] I begin with a discussion of the competence-competence principle in Canadian arbitration law, as it is germane to the issues in this appeal.

#### (1) General Principle

[39] Competence-competence is a principle that gives precedence to the arbitration process. It holds that, generally speaking, “arbitrators should be allowed to exercise their power to rule first on their own jurisdiction” (*Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 70). This preference for arbitration is a departure from the traditional approach in Canada, which favoured an interventionist judicial role (*Dell*, at para. 69). Historically, judges took a dim view of arbitration, “treating it as a ‘second-class method of dispute resolution’” (*TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144, at para. 48; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at para. 96).

[40] However, in 1986, Canada acceded to the United Nations *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Can. T.S. 1986 No. 43 (“New York Convention”), which established a single, uniform set of rules for international commercial arbitration that applied worldwide. Canada also adopted the *UNCITRAL Model Law on International Commercial Arbitration*, U.N. Doc. A/40/17, Ann. I, June 21, 1985 (“Model Law”), prepared by the United Nations Commission on International Trade Law. The Model Law was intended to guide legislative development in jurisdictions seeking to establish a modern legal framework in order to encourage commercial arbitration (J. K. McEwan and L. B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (loose-leaf), at § 1:4). Article 16 of the Model Law articulates the

competence-competence principle. British Columbia adopted the principle, as set out in the Model Law, through s. 22 of the *Arbitration Act* (*Seidel*, at para. 28).

[41] In light of the foregoing, it is well established in Canada that a challenge to an arbitrator's jurisdiction should generally be decided at first instance by the arbitrator (see *Uber*, at paras. 31-34; *Seidel*; *Dell*; *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921). This reflects the presumption that arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement (McEwan and Herbst, at § 5:10).

(2) Exceptions to the Competence-Competence Principle

[42] The competence-competence principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record (*Uber*, at para. 32; *Dell*, at paras. 84-85). This exception is justified by the particular expertise that courts have in deciding such questions. Further, it allows a legal argument relating to the arbitrator's jurisdiction "to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate" (*Dell*, at para. 84).

(3) Application of the Principle in This Case



[43] The questions in this appeal are of mixed fact and law. In the circumstances of this case, all that is required is the interpretation of arbitration and insolvency legislation and a superficial consideration of the evidentiary record. Accordingly, a court is entitled to resolve the question of arbitral jurisdiction without offending the competence-competence principle.

B. *Relationship Between Arbitration Law and Insolvency Law*

[44] To decide this appeal, I must determine the effect, if any, that the receivership of Petrowest and the Petrowest Affiliates under the federal *BIA* has on the Arbitration Agreements, which are governed by British Columbia's *Arbitration Act*. Before I do so, it is helpful to explain the interaction between arbitration law and insolvency law more generally.

[45] Arbitration law and insolvency law have long been understood to embody “opposing interests” (see, e.g., W. Kühn, “Arbitration and Insolvency” (2011), 5 *Disp. Res. Int'l* 203, at p. 203; M. A. Salzberg and G. M. Zinkgraf, “When Worlds Collide: The Enforceability of Arbitration Agreements in Bankruptcy” (2007), 27 *Franchise L.J.* 37; P. F. Kirgis, “Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis” (2009), 17 *Am. Bankr. Inst. L. Rev.* 503; D. Chan and S. Rajagopal, “To Stay or Not to Stay? A Clash of Arbitration and Insolvency Regimes” (2021), 38 *J. Int'l Arb.* 457). In an oft-cited passage, the United States Court of Appeals for the Second Circuit described the interaction between arbitration law and insolvency law as “a conflict of near polar extremes: bankruptcy policy exerts an inexorable pull towards

centralization while arbitration policy advocates a decentralized approach towards dispute resolution” (*In re U.S. Lines, Inc.*, 197 F.3d 631 (1999), at p. 640; see also *Societe Nationale Algerienne v. Distrigas Corp.*, 80 B.R. 606 (D. Mass. 1987), at p. 610).

[46] Recently, two trends have thrown this tension into sharp relief. First, arbitration has become an increasingly popular mechanism for resolving commercial disputes, both in Canada and abroad (*Wellman*, at para. 54; *Seidel*, at para. 23). Today, parties and counsel alike recognize the potential strategic and tactical advantages of arbitration as compared to traditional litigation. These may include privacy and confidentiality, efficiency and timeliness, relaxed rules of evidence, freedom to determine procedural rules and select decision makers with relevant expertise, and cross-border enforceability of awards (J. B. Casey, *Arbitration Law of Canada: Practice and Procedure* (3rd ed. 2017), at ch. 1.6).

[47] Second, economic shocks, including the 2008 financial crisis and the disruptions resulting from the COVID-19 pandemic, have placed increased demands on our insolvency laws (L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. rev. (loose-leaf)), at § 1:6; H. Esslinger, “Creditors Over Contract: A Case Comment on *Chandos*”, in J. Corraini and D. B. Nixon, eds., *Annual Review of Insolvency Law 2021* (2022), 747; V. W. DaRe and T. Prpa, “Imagine One Restructuring Act in Canada” (2021), 36 *B.F.L.R.* 363, at p. 364).

[48] It is thus not unusual now for a commercial party to find itself in a dispute governed by an arbitration agreement with an insolvent or bankrupt counterparty. In this scenario, there is a tension between arbitration law and insolvency law as regards the forum in which the dispute is to be resolved. To understand this tension, it is necessary to briefly outline the characteristics of arbitration and insolvency proceedings. Despite clear differences, these two bodies of law have much in common. Accordingly, as I will explain, courts must assess the enforceability of arbitration agreements in the context of parallel insolvency proceedings on a case-by-case basis. Below, I provide guidance in this regard.

(1) Dispute Resolution by Arbitration

[49] The modern view expressed in Canadian arbitration legislation is that parties should be held to their contractual agreements to arbitrate. This gives effect to the concept of “party autonomy”, according to which parties are free to “charter a private tribunal” to resolve their disputes (*Wellman*, at para. 52, citing *Astoria Medical Group v. Health Insurance Plan of Greater New York*, 182 N.E.2d 85 (N.Y. 1962), at p. 87; M. Pavlović and A. Daimsis, “Arbitration”, in J. C. Kleefeld et al., eds., *Dispute Resolution: Readings and Case Studies* (4th ed. 2016), 483, at p. 485). Party autonomy is closely related to freedom of contract (*Hofer v. Hofer*, [1970] S.C.R. 958, at p. 963). Modern arbitration legislation is premised on these principles, which inform the policy choices embodied in provincial arbitration statutes like the *Arbitration Act* (*Wellman*, at para. 52).

[50] Party autonomy and freedom of contract go hand in hand with the principle of limited court intervention in arbitral proceedings. This latter principle is “fundamental” to modern arbitration law and “finds expression throughout modern Canadian arbitration legislation” (*Wellman*, at paras. 52-55; McEwan and Herbst, at § 10:2; Casey, at ch. 7.1). For instance, s. 4(a) of British Columbia’s new *Arbitration Act*, S.B.C. 2020, c. 2, provides that “[i]n matters governed by this Act, a court must not intervene unless so provided in this Act”. Similar expressions of principle are found in provincial arbitration legislation across the country. It follows that, generally speaking, judicial intervention in commercial disputes governed by a valid arbitration clause should be the exception, not the rule.

(2) Dispute Resolution in Insolvency

[51] On the other hand, insolvency proceedings are creatures of statute subject to close judicial oversight.

[52] Insolvency engages broad public interests. It “affects all of the stakeholders of the insolvent business enterprise”, including creditors, employees, landlords, suppliers, shareholders, and customers (K. P. McElcheran, *Commercial Insolvency in Canada* (4th ed. 2019), at ¶1.1). In the case of very large companies, an insolvency may even “threaten the existence of whole communities” (¶1.1). Canadian legislation therefore offers stakeholders a wide range of judicial procedures to resolve problems presented by an insolvency (¶¶1.1-1.12).

[53] This procedural flexibility has allowed Canadian courts to become instrumental in (a) providing a forum for the orderly resolution of the competing rights and objectives of individual stakeholders of insolvent business enterprises, and (b) creating mechanisms for the preservation of the value of the insolvent business or its assets for the benefit of all stakeholders (*Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 379, at paras. 2 and 22; McElcheran, at ¶¶1.1-1.14). I elaborate on these two points below.

(a) *Single Proceeding Model*

[54] The central role of courts in ensuring the equitable and orderly resolution of insolvency disputes is reflected in the “single proceeding model”.

[55] This model favours the enforcement of stakeholder rights through a centralized judicial process. The legislative policy in favour of “single control” is reflected in Canadian bankruptcy, insolvency, and winding-up legislation (*Century Services*, at paras. 22-23). The single proceeding model is intended to mitigate the inefficiency and chaos that would result if each stakeholder in an insolvency initiated a separate claim to enforce its rights. In other words, the single proceeding model protects the clear “public interest in the expeditious, efficient and economical clean-up of the aftermath of a financial collapse” (*Sam Lévy & Associés Inc. v. Azco Mining Inc.*, 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 27, citing *Stewart v. LePage* (1916), 53 S.C.R. 337). This Court has held that s. 183(1) of the *BIA* confers a “broad scope of authority” on superior courts to deal with most bankruptcy disputes, as “[a]nything less

would unnecessarily complicate and undermine the economical and expeditious winding up of the bankrupt's affairs" (*Sam Lévy*, at para. 38).

(b) *Court-Ordered Receiverships Under the BIA*

[56] Court-ordered receiverships under s. 243 of the *BIA*, like the receivership in the present case, are one available tool for enhancing the judicial oversight and flexibility underlying Canadian insolvency law. Section 243(1) of the *BIA* confers broad authority on a court to appoint a receiver if the court "considers it to be just or convenient to do so". Under s. 243(1), a court may appoint a receiver to do any of the following, with a view to enhancing and facilitating the preservation and realization of the debtor's assets for the benefit of all creditors: (a) take possession of all or substantially all of the debtor's inventory, accounts receivable or other property that was acquired for or used in relation to a business carried on by the debtor; (b) exercise any control that the court considers advisable over that property and over the debtor's business; or (c) take "any other action that the court considers advisable" (R. J. Wood, *Bankruptcy and Insolvency Law* (2nd ed. 2015), at pp. 553-54).

[57] Given the breadth of their powers, court-appointed receivers are necessarily subject to close judicial oversight. Receivers represent neither a security holder nor the debtor; they are officers of the court whose "sole authority is derived from . . . Court appointment and from the directions given [to them] by the Court" (*Ostrander v. Niagara Helicopters Ltd.* (1973), 1 O.R. (2d) 281 (H.C.), at p. 286). In

most cases, including the one at bar, a court order under s. 243 of the *BIA* gives a receiver wide-ranging powers.

[58] Despite this flexibility, court-appointed receivers have a fiduciary duty to act honestly and in the best interests of *all* interested parties. For example, a receiver is generally not permitted to terminate existing contracts between third parties and the debtor, but must apply to the court to discharge onerous contracts, such as those which would be unduly costly to perform (F. Bennett, *Bennett on Receiverships* (3rd ed. 2011), at p. 42; *Parsons v. Sovereign Bank of Canada*, [1913] A.C. 160 (P.C.), per Viscount Haldane L.C.). This demonstrates the key supervisory role that courts play in receivership proceedings.

(3) Commonalities Between Arbitration Law and Insolvency Law

[59] Notwithstanding the differences just described, arbitration law and insolvency law also have much in common. Below, I address three commonalities that are particularly relevant to this appeal.

(a) *Efficiency and Expediency*

[60] First and foremost, arbitration law and insolvency law each prioritize efficiency and expediency.

[61] Commercial arbitration is a “process designed to enable parties to deal with disputes efficiently, effectively and economically” (McEwan and Herbst, at § 2:1, citing *Hayes Forest Services Ltd. v. Weyerhaeuser Co.*, 2008 BCCA 31, 289 D.L.R. (4th) 230, at para. 1). As such, it is expected to be “less formal, more expeditious and therefore faster than a court determination of issues” (*Rosenberg v. Minster*, 2014 ONSC 845, 119 O.R. (3d) 27, at para. 58).

[62] Likewise, the *raison d’être* of the single proceeding model in Canadian insolvency law is the “expeditious, efficient and economical clean-up of the aftermath of a financial collapse”. To maximize global recovery for creditors, this model avoids “inefficiencies and chaos” by “favouring an orderly collective process” (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 33; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 7).

[63] As noted, the single proceeding model applies to proceedings under the *BIA*, the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (“*CCAA*”), and other insolvency legislation. For example, s. 243 of the *BIA* authorizes a court to appoint a receiver with the power to act nationally. This promotes efficiency “by removing the need to have a receiver appointed in each jurisdiction in which the debtor’s assets are located” (Houlden, Morawetz and Sarra, at § 12:3).

(b) *Procedural Flexibility*



[64] Further, procedural flexibility is a hallmark of both arbitration law and insolvency law.

[65] Chief among the reputed advantages of arbitration is the freedom of parties to choose their own procedural rules rather than being bound by rules of court (*Seidel*, at para. 22; *Wellman*, at paras. 48-56; L. Y. Fortier, “Delimiting the Spheres of Judicial and Arbitral Power: ‘Beware, My Lord, of Jealousy’” (2001), 80 *Can. Bar Rev.* 143). This enhances expediency and cost-effectiveness in arbitral proceedings, where discovery procedures can be curtailed, written submissions can be used instead of witness testimony, and strict evidentiary rules can be relaxed (McEwan and Herbst, at §§ 2:1 and 7:12).

[66] Flexibility is likewise a characteristic of Canadian insolvency law. But in the insolvency context, both the court *and* the parties can tailor proceedings to fit a particular case. Indeed, the *BIA* and the *CCAA* both accord broad judicial discretion to, among other things, authorize the assignment and disclaimer of contracts and the sale of assets, impose and lift stays of proceedings, grant extensions of time, terminate proceedings, and approve creditor proposals (Wood, at pp. 432-33). Much like arbitration law does for arbitrating parties, Canadian insolvency law thus allows debtors, creditors, and courts “to design a process and [an] outcome that is appropriate for individual . . . cases” (McElcheran, at ¶¶5.11-5.12).

(c) *Decision Makers With Specialized Expertise*

[67] Finally, both arbitration law and insolvency law often rely on specialized decision makers to achieve their respective objectives.

[68] One “great merit” of arbitration is that parties are able to select a decision maker with “special expertise in the field of their dispute” (*3GS Inc. v. Altus Group Ltd.*, 2011 ONSC 5755, 96 B.L.R. (4th) 268, at para. 19; McEwan and Herbst, at § 4:1).

[69] Similarly, specialized judicial expertise is essential to meet the challenges of complex restructuring and insolvency proceedings, often called the “hothouse of real-time litigation” (*Century Services*, at para. 58, quoting R. B. Jones, “The Evolution of Canadian Restructuring: Challenges for the Rule of Law”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2005* (2006), 481, at p. 484).

[70] The interests of expediency and procedural flexibility inform the need for judicial specialization in the realm of bankruptcy and insolvency. Indeed, in many provinces, there are specialist judges who take carriage of restructuring proceedings and all related issues. Their expertise and “file knowledge” allow them to find the right balance of procedural formality while meeting the need for timely resolution of disputes within the overall restructuring process (McElcheran, at ¶5.85).

[71] In sum, reliance on a decision maker with expertise in the relevant field is a core feature of both arbitration law and insolvency law, and for good reason. Specialized expertise can assist in capitalizing on other attributes that are also common to both bodies of law, such as expediency and procedural flexibility.

(d) *Conclusion on the Interplay Between Arbitration Law and Insolvency Law*

[72] In many cases, the shared interests in expediency, procedural flexibility, and specialized expertise will converge through arbitration. In such a scenario, the parties should be held to their agreement to arbitrate notwithstanding ongoing insolvency proceedings. In other words, the court should grant a stay of legal proceedings in favour of arbitration, and any dispute as to the scope of the arbitration agreement or the arbitrator's jurisdiction should be left to the arbitrator to resolve. As is evident from the foregoing, valid arbitration agreements are generally to be respected. This presumption in favour of arbitral jurisdiction is supported by this Court's longstanding jurisprudence, the pro-arbitration stance adopted in provincial and territorial legislation nationwide, and the foundational principle that contracting parties are free to structure their affairs as they see fit.

[73] However, in certain insolvency matters, it may be necessary to preclude arbitration in favour of a centralized judicial process. This may occur when arbitration would compromise the orderly and efficient conduct of a court-ordered receivership. In such a scenario, a court may assert control over the proceedings, both to ensure the timely resolution of the parties' dispute and to protect the public interest in the orderly restructuring or dissolution of the debtor and the equal treatment of its creditors. This authority arises from the statutory jurisdiction conferred on superior courts under ss. 243(1) and 183(1) of the *BIA*.

[74] This exercise is necessarily a highly factual one. It requires the court to carefully review the particular statutory regimes and arbitration agreements in play, having regard to the principles of party autonomy and freedom of contract as well as the policy imperatives underpinning bankruptcy and insolvency law.

[75] To guide this exercise, I will briefly summarize the two-part stay framework that is implicit in provincial arbitration legislation like the *Arbitration Act*.

### C. *Two-Part Framework for Stays of Proceedings in Favour of Arbitration*

[76] There are two general components to the stay provisions in provincial arbitration legislation across the country. As the framework is similar across jurisdictions, it will be useful to provide a general overview before turning to the interpretation of s. 15 of the *Arbitration Act* itself. The two components are as follows:

- (a) the technical prerequisites for a mandatory stay of court proceedings; and
- (b) the statutory exceptions to a mandatory stay of court proceedings.

[77] Though interrelated, these two components ought to remain analytically distinct. This distinction is necessary because the burden of proof shifts between the first component and the second.

[78] Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof (McEwan and Herbst, at § 3:43; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, at paras. 29-30 (CanLII)).

[79] If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused (McEwan and Herbst, at § 3:43; Casey, at ch. 3.4). Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal.

[80] I will briefly elaborate on each component and its respective standard of proof.

(1) Technical Prerequisites

[81] The first component is concerned with whether the applicant for a stay has established that the arbitration agreement at issue engages the mandatory stay provision in the applicable provincial arbitration statute.

[82] Considerations at this stage may differ depending on the jurisdiction and the nature of the arbitration (i.e., whether it relates to domestic or international arbitration). Broadly speaking, however, this threshold inquiry requires the court to

determine whether the party seeking to rely on the arbitration agreement has established the technical prerequisites for a stay in favour of arbitration.

[83] There are typically four technical prerequisites relevant at this stage:

- (a) an arbitration agreement exists;
- (b) court proceedings have been commenced by a “party” to the arbitration agreement;
- (c) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and
- (d) the party applying for a stay in favour of arbitration does so before taking any “step” in the court proceedings.

If all the technical prerequisites are met, the mandatory stay provision is engaged and the court should move on to the second component of the analysis.

[84] It is important to note that the standard of proof applicable at the first stage is lower than the usual civil standard. To satisfy the first component, the applicant must only establish an “arguable case” that the technical prerequisites are met (McEwan and Herbst, at § 3:47; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379, 18

B.C.L.R. (6th) 322, at paras. 26 and 32, citing *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), at paras. 39-40).

[85] I acknowledge that, in *Dell*, this Court characterized the applicable standard of proof as that of proof on a “*prima facie*” basis (para. 82). However, as the Court of Appeal for British Columbia has noted, there is no substantive difference between the arguable case test in *Gulf Canada Resources* and the *prima facie* test in *Dell*:

The significance of both standards is that there is room for a judge to dismiss a stay application when there is no nexus between the claims and the matters reserved for arbitration, while referring to the arbitrator any legitimate question of the scope of the arbitration jurisdiction. This avoids duplication and respects the competence-competence principle.

(*Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117, 446 D.L.R. (4th) 626, at para. 30)

[86] Notwithstanding this less onerous standard of proof, court proceedings are not automatically stayed in favour of arbitration where the technical prerequisites are met. Rather, the court must move on to the second component and assess whether any of the statutory exceptions apply (*Dell*, at para. 87; *Clayworth*, at paras. 31-32).

## (2) Statutory Exceptions

[87] Certain exceptions, such as whether the arbitration clause is “void, inoperative or incapable of being performed”, arise from the Model Law and the

New York Convention and appear in several provincial arbitration statutes, including the *Arbitration Act*. I will discuss these particular exceptions in the context of this appeal in further detail below. Other statutory exceptions may also be relevant, depending on the jurisdiction (see, e.g., *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7(2)).

[88] At this second stage, the key question is whether, even though the technical requirements for a stay are met, the party seeking to avoid arbitration has shown on a balance of probabilities that one or more of the statutory exceptions apply. If not, the court *must* grant a stay. The mandatory nature of stay provisions across jurisdictions in Canada reflects the presumptive validity of arbitration clauses and the principle of party autonomy.

[89] It follows that a court should dismiss a stay application on the basis of a statutory exception only in a “clear” case (McEwan and Herbst, at § 3:55; A. J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981), at p. 155). A clear case is, for example, one in which the party seeking to avoid arbitration has established on a balance of probabilities that the arbitration agreement is void, inoperative, or incapable of being performed. Where the invalidity or unenforceability of the arbitration agreement is not clear (but merely arguable), the matter should be resolved by the arbitrator. Such an approach accords due respect to arbitral jurisdiction, in light of the competence-competence principle, as well as to the parties’ intention to refer their disputes to arbitration (McEwan and



Herbst, at § 3:55; *Dalimpex Ltd. v. Janicki* (2000), 137 O.A.C. 390 (S.C.J.), at paras. 3-5, aff'd (2003), 228 D.L.R. (4th) 179 (C.A.).

[90] As I have indicated, the application of the above two-part framework in a particular case must begin with a proper interpretation of the governing stay provision. This brings me to the focal point of this appeal: s. 15 of the *Arbitration Act*.

D. *Section 15 of the Arbitration Act*

[91] The modern approach to statutory interpretation requires us to read the words of s. 15 in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the *Arbitration Act* and the intention of the legislature.

(1) Text of Section 15

[92] The text of s. 15(1) and (2) of the *Arbitration Act* mirrors the two-part analytical framework just described. The sections read as follows:

**15** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings [the *technical prerequisites*].

(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 [the *statutory exceptions*].

(2) Proper Interpretation of Section 15

[93] The parties disagree on four issues of statutory interpretation regarding s. 15 of the *Arbitration Act*. Two relate to the technical prerequisites set out in s. 15(1):

- (a) whether undertaking to file a defence constitutes a “step in the proceedings”; and
- (b) whether a court-appointed receiver may be a “party” to a debtor’s arbitration agreement.

[94] The other two relate to the statutory exceptions provided for in s. 15(2):

- (c) whether a receiver’s purported disclaimer of an arbitration agreement renders it “void, inoperative or incapable of being performed”; and
- (d) whether the *Arbitration Act* permits a court to find an arbitration agreement “inoperative” or “incapable of being performed” due to a receivership.

[95] All four interpretive issues must be resolved before s. 15 is applied to the case at bar.

(a) *Section 15(1) — Undertaking to File a Defence Is Not a “Step in the Proceedings”*

[96] First, the Receiver resurrects its submission before the chambers judge that undertaking to file a defence may constitute a “step in the proceedings” within the meaning of s. 15(1). This proposed interpretation was explicitly rejected by the chambers judge and not pursued before the Court of Appeal.

[97] Determining whether a step in the proceedings has been taken requires an objective approach. The court must ask itself whether, on the facts, the party should be held impliedly to have affirmed the correctness of the proceedings and its willingness to go along with a determination by a court of law instead of arbitration (McEwan and Herbst, at § 3:27). A step in the proceedings means “something in the nature of an application to the Court, and not mere talk between solicitors . . . nor the writing of letters” (*Larc Developments*, at para. 15, citing *Ives & Barker v. Willans*, [1894] 2 Ch. 478 (C.A.), at p. 484).

[98] I acknowledge that the Receiver now argues in this Court, for the first time, that requesting the other party’s consent to an *extension of time* to file a defence constitutes a step in the proceedings. Assuming, without deciding, that this submission is properly before our Court, I reject it. In my view, requesting an extension of time

cannot be considered a “step”. In the context of s. 15(1), the very purpose of such a request is to decide whether or not to take a step, and there is no election to proceed with the action (McEwan and Herbst, at § 3:31). Indeed, the result of an extension “might well be quite to the contrary, and have the effect of removing [the action] entirely from the Court” (*Central Investments & Development Corp. v. Miller* (1982), 133 D.L.R. (3d) 440 (P.E.I.S.C.), at p. 442).

[99] In sum, I see no merit in the interpretation of the words “step in the proceedings” proposed by the Receiver.

(b) *Section 15(1) — A Court-Appointed Receiver May Be a “Party” to an Arbitration Agreement*

[100] The second interpretive issue concerns the term “party” in s. 15(1) of the *Arbitration Act*. Can a court-appointed receiver be a party to the debtor’s pre-existing arbitration agreement?

[101] The Receiver says no. It agrees with the Court of Appeal that a court-appointed receiver cannot be a party because it is a legal entity separate from the debtor with a fiduciary duty to the appointing court.

[102] Peace River disagrees. It says that a court-appointed receiver, like other non-signatories, may be a party to the debtor’s pre-receivership arbitration agreement through the operation of ordinary contract law.

[103] I agree with Peace River. I say this for three reasons.

(i) Ordinary Contractual Principles Indicate That a Receiver May Be a “Party” to an Arbitration Agreement

[104] First, the Receiver’s narrow interpretation of the term “party” conflicts with basic principles of contract law. It says that a receiver may advance claims only *through* the debtor in exercising its power to institute proceedings for the benefit of all stakeholders in an insolvent corporation. It further says that s. 15(1) of the *Arbitration Act* must be interpreted in light of the fact that in 1986 the reference to a person claiming “through” a party to an arbitration agreement was removed from the stay provision in the province’s domestic arbitration legislation. The provision — now s. 15(1) of the *Arbitration Act* — thus differs from s. 2(1) of the province’s *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 (“*ICAA*”), which defines “party” as including “a person claiming through or under a party” to an arbitration agreement. The Receiver asks this Court to give effect to the “narrower wording” in the *Arbitration Act* and the “important textual distinction” between the *Arbitration Act* and the *ICAA* (R.F., at paras. 89-90).

[105] I disagree. The interpretation of the term “party” under arbitration legislation falls to be “determined in accordance with the ordinary principles for construction of a contract” (McEwan and Herbst, at § 2:28; Casey, at ch. 3.5.1). It is well established that an entity connected with a signatory to a contract containing an arbitration agreement may become bound as a “party” by operation of law. Such

associated entities may include “subsidiaries, assignees, trustees and others claiming through or under the named party to the arbitration agreement” (McEwan and Herbst, at § 2:37 (emphasis added)). These entities, although non-signatories, “may have all of the rights and obligations under the arbitration agreement by operation of law” (Casey, at ch. 3.5.1).

[106] Two examples are instructive here. The first is assignment. It is a “fundamental” and “universal commercial legal principle” that an assignor may not assign contractual rights in such a way as to “convey the benefits and nullify the burdens”. Stated differently, a party seeking to enforce assigned rights under an agreement “can only do so subject to the terms and conditions therein”, including the condition that disputes are to be resolved by arbitration (*ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH* (1996), 135 D.L.R. (4th) 130 (Ont. C.J. (Gen. Div.)); see also Casey, at ch. 3.5.1; *Petro-Canada v. 366084 Ontario Ltd.* (1995), 25 B.L.R. (2d) 19 (Ont. C.J. (Gen. Div.)), at para. 55).

[107] The second example is trusteeship in bankruptcy. When a trustee in bankruptcy adopts a contract containing an arbitration clause and a dispute later arises, “the arbitration agreement is enforceable by or against the trustee in the same manner as any other commercial contract adopted by the trustee” (Casey, at ch. 3.8.2).

[108] In both of these scenarios, a non-signatory “steps into the shoes of the original contracting party” and thereby becomes “bound by the terms of the contract to

which he or she has succeeded as a trustee in bankruptcy . . . or assignee” (A. Swan, J. Adamski and A. Y. Na, *Canadian Contract Law* (4th ed. 2018), at §3.10).

[109] I see no principled reason why the foregoing should not apply, *mutatis mutandis*, to a court-appointed receiver claiming through a debtor under a contract containing an arbitration agreement. I agree with the Receiver that it “advances claims through [Petrowest and] the Petrowest [Affiliates]” (R.F., at para. 59 (emphasis added)). Indeed, a court-appointed receiver, by initiating legal proceedings on behalf of a debtor, “steps into the shoes” of the debtor as the original contracting party, much like an assignee or a trustee in bankruptcy does. While a court-appointed receiver may have the power to sue on the debtor’s behalf, “the receiver acquires no cause of action in its own name” and therefore “must . . . sue in the debtor’s name to recover accounts receivable” (Bennett, at p. 257). In short, a court-appointed receiver has no independent cause of action to assert. It may only rely on the *debtor’s* rights to recover, for example, accounts receivable owed by a third party. It would violate basic principles of contract law to permit a receiver to enforce a contract on the debtor’s behalf while avoiding the debtor’s burdens, including the obligation to arbitrate contractual disputes.

[110] Nor am I persuaded that a receiver’s duty as an officer of the court precludes it from being considered a party to an arbitration agreement within the meaning of s. 15(1) of the *Arbitration Act*. To the contrary, a court-appointed receiver owes a fiduciary duty to “all interested parties involving the debtor’s assets, property, and undertaking” (Bennett, at p. 38 (emphasis added)). For this reason, the receiver

may not “arbitrarily” break contracts entered into by the debtor with third parties prior to the receivership. Rather, the receiver must exercise “proper discretion in doing so”, including by seeking “leave of the court” to terminate such contracts (Bennett, at p. 434). This supports my view that a receiver’s court-appointed role cannot insulate it from being considered a party under s. 15(1) where the contractual principles outlined above apply.

(ii) Interpretive Principles Confirm That a Receiver May Be a “Party” to an Arbitration Agreement

[111] Second, I reject the Receiver’s argument that, by not referring in s. 15(1) of the *Arbitration Act* to a person claiming through or under a party to an arbitration agreement, the legislature intended to preclude non-signatories like receivers from being considered parties under that section. This interpretation would be inconsistent with two applicable principles of statutory interpretation.

[112] The first principle is that where legislation does not fully address a matter relating to its subject, courts may look to the common law to interpret the statutory language (R. Sullivan, *The Construction of Statutes* (7th ed. 2022), at §17.02). In such a scenario, the common law is presumed to apply, absent persuasive evidence that the legislature intended to change or displace it by enacting the statute at issue (Sullivan, at §17.02).



[113] The *Arbitration Act* does not define the term “party”. I acknowledge that the reference to a person claiming through a party to an arbitration agreement was removed from the stay provision in domestic arbitration legislation. But if this Court accepted the Receiver’s proposed interpretation, no non-signatory could ever be a party to an arbitration agreement under the *Arbitration Act*. This is because *all* non-signatories, whether they are agents, trustees in bankruptcy, receivers, or assignees, may claim *only* through or under a signatory, upon stepping into its contractual shoes. Such an interpretation would plainly undermine these foundational contractual doctrines. I see nothing in the legislative record or the text of the *Arbitration Act* to indicate that the legislature intended to change or displace the common law in such a radical manner.

[114] The second principle is that statutes such as the *Arbitration Act* and the *ICAA* must be interpreted harmoniously. As Gonthier J. held in *Therrien (Re)*, 2001 SCC 35, [2001] 2 S.C.R. 3, “[i]nterpretations favouring harmony between the various statutes enacted by the same government should indeed prevail. This presumption is even stronger when the statutes relate to the same subject matter” (para. 121; see also Sullivan, at §13.04).

[115] This presumption further undermines the Receiver’s proposed interpretation of the term “party”. I do not accept that the removal of the reference to a person claiming through a party to an arbitration agreement from the stay provision in domestic arbitration legislation reflects a legislative intent to exclude all entities

claiming through or under a party. The *ICAA* was passed concurrently with the *Arbitration Act* by the same legislature to deal with the same subject matter. The *ICAA* thus provides useful interpretive guidance in ascertaining the scope of the term “party” in the *Arbitration Act*. The term should be interpreted harmoniously under both statutes. In other words, a “party” under s. 15(1) of the *Arbitration Act* includes “a person claiming through or under a party”, in accordance with the definition in s. 2(1) of the *ICAA*. As I explained above, this may include a court-appointed receiver claiming through or under a debtor.

(iii) Interpreting the Term “Party” as Including a Court-Appointed Receiver Claiming Through or Under a Debtor Is Consistent With a Central Purpose of the *Arbitration Act*

[116] Finally, accepting the Receiver’s interpretation would be inconsistent with a central purpose of the *Arbitration Act*: ensuring that parties abide by valid arbitration agreements.

[117] Indeed, the interpretation urged on us by the Receiver could effectively prevent arbitration of *any* dispute as soon as one of the contracting parties entered receivership. This would subvert the core arbitral principles of party autonomy, limited court intervention, and competence-competence. Most notably, commercial parties seeking to mitigate risk through arbitration agreements would be deprived of the dispute resolution mechanism they bargained for when they arguably need it the most: when their counterparty cannot meet its obligations due to insolvency. I decline to make such a wide-ranging finding.

[118] Accordingly, I conclude that a court-appointed receiver may be a party within the meaning of s. 15(1) of the *Arbitration Act* by claiming through or under a party to a valid arbitration agreement. In short, a receiver, like other non-signatories, may become bound by an arbitration agreement in accordance with ordinary principles of contract law.

(c) *Section 15(2) — Disclaimer Cannot Render an Arbitration Agreement “Void, Inoperative or Incapable of Being Performed”*

[119] The third interpretive issue flows from the second. If a court-appointed receiver can be a party to a debtor’s pre-existing arbitration agreement, can it nevertheless avoid the obligation to arbitrate by initiating court proceedings under the main contract? In other words, can a receiver unilaterally disclaim an arbitration agreement, thereby rendering it “void, inoperative or incapable of being performed” within the meaning of s. 15(2) of the *Arbitration Act*?

[120] The Court of Appeal appeared to answer this question in the affirmative. It concluded that, even if a court-appointed receiver could be a party to a debtor’s arbitration agreement, it would have the power to disclaim that agreement by commencing court proceedings and thereby render an otherwise valid arbitration agreement void, inoperative, or incapable of being performed within the meaning of s. 15(2). The Receiver endorses the Court of Appeal’s reasoning.

[121] In my respectful view, the Court of Appeal erred in its interpretation of s. 15(2), for two reasons.

[122] First, the Court of Appeal's analysis rested on a palpable and overriding error. The Receiver conceded before the Court of Appeal, as it does in this Court, that it "has not expressly disclaimed" the Arbitration Agreements (R.F., at para. 102; A.F., Appendix B, at paras. 3 and 13). During the oral hearing before this Court, counsel for the Receiver reiterated this concession. Thus, the Receiver has not disclaimed the Arbitration Agreements by commencing court proceedings. Therefore, the Court of Appeal's interpretation of s. 15(2) cannot stand.

[123] Second, and even setting the Court of Appeal's factual error aside, I agree with Peace River that a receiver's unilateral disclaimer cannot render an arbitration agreement void, inoperative, or incapable of being performed. In *Seidel, LeBel and Deschamps JJ.* (dissenting, but not on this point) held that the terms "void", "inoperative", and "incapable of being performed" in s. 15(2) should be interpreted "narrowly" to prevent parties from avoiding arbitration in favour of what they view as a "preferable procedure" (paras. 117-18). I agree with the Chartered Institute of Arbitrators (Canada) Inc. that allowing a receiver to avoid arbitration by unilaterally disclaiming a debtor's pre-existing arbitration agreement conflicts with the text and intent of s. 15 and "diminishes the presumptive enforceability and overall predictability of arbitration agreements, which was the purpose for Canada ratifying the New York Convention and for British Columbia adopting the Model Law" (I.F., at para. 9).

[124] As s. 15(2) makes plain, the sole basis upon which a party may sue to enforce a contract and yet avoid the obligation to arbitrate is that the arbitration agreement has been found by a court to be void, inoperative, or incapable of being performed. Preferably, court-appointed receivers should seek such a judicial determination by bringing a motion for directions before the supervising court (see, e.g., *Canada (Attorney General) v. Reliance Insurance Co.* (2007), 87 O.R. (3d) 42 (S.C.J.), at paras. 7, 9 and 21). I note that the Receiver did not bring such a motion before the Alberta Court of Queen's Bench, the supervising court with carriage of this matter. Instead, it filed a civil claim in the Supreme Court of British Columbia. Contrary to the Court of Appeal's reasoning, I do not accept that the bare act of filing suit in a court unfamiliar with the insolvency proceedings is a sufficient basis on which to find an arbitration agreement unenforceable under s. 15(2). Given the clear expression of legislative will in favour of arbitral jurisdiction embodied in the *Arbitration Act*, the enforceability of an otherwise valid arbitration agreement should not be subject to the whims of any single party, even a court-appointed receiver.

[125] Rather, where a court-appointed receiver attempts to initiate court proceedings without prior judicial approval in a dispute covered by a valid arbitration agreement, the court must decide whether to exercise its jurisdiction arising from the *BIA* to decline to enforce the arbitration agreement under s. 15 of the *Arbitration Act*. This requires a proper reading of the words "void, inoperative or incapable of being performed" in accordance with the modern approach to statutory interpretation and in

light of the relevant insolvency policy interests. The Court of Appeal did not set out its reasoning in this regard. Accordingly, I turn now to this interpretive exercise.

(d) *Section 15(2) — A Court May Find an Arbitration Agreement “Inoperative” Due to a Receivership*

[126] The final interpretive issue lies at the heart of this appeal. It boils down to the following question: Where the technical prerequisites in s. 15(1) of the *Arbitration Act* are met, does s. 15(2) give a court the power to refuse a stay under s. 15(2) by finding that an arbitration agreement has become “inoperative” or “incapable of being performed” because of court-ordered receivership proceedings?

[127] According to Peace River, the answer is no. It accepts that s. 15(2) requires a court to assess whether an arbitration agreement is “void, inoperative or incapable of being performed”. However, it argues that these terms must be narrowly interpreted and that courts do not have the power to “simply render” otherwise valid arbitration agreements inoperative or incapable of being performed, whether by virtue of their statutory jurisdiction over receiverships under s. 243 of the *BIA* or by virtue of the inherent jurisdiction to oversee bankruptcy and insolvency proceedings preserved in s. 183 of the *BIA*. Peace River says that even if such a power existed under the *BIA*, it would conflict with s. 15 of the *Arbitration Act*, thus creating a paramountcy conflict between federal legislation and provincial legislation, which the Receiver fails to address.

[128] The Receiver takes a more nuanced view. It agrees with Peace River that there was no need for the chambers judge to rely on inherent jurisdiction. Instead, it argues that s. 15(2) of the *Arbitration Act* grants a court the authority, in certain circumstances, to find an otherwise valid arbitration clause inoperative or incapable of being performed in the context of bankruptcy or insolvency proceedings. It says that this power is “also founded” in a court’s statutory jurisdiction pursuant to ss. 183(1) and 243 of the *BIA* (R.F., at para. 118). Since s. 15 expressly authorizes a court to decline a stay in favour of arbitration on the basis that an arbitration agreement is inoperative or incapable of being performed, there is no conflict between federal law and provincial law to be resolved through the doctrine of federal paramountcy. This submission was endorsed by several interveners in this appeal, including the Chartered Institute of Arbitrators and the Insolvency Institute of Canada.

[129] I agree with the Receiver and the above-noted interveners. A court may find an arbitration agreement inoperative where arbitration would compromise the orderly and efficient resolution of a receivership. Accordingly, there is no conflict between the provincial *Arbitration Act* and the federal *BIA* giving rise to paramountcy concerns.

[130] As I will explain, this interpretation is supported by (a) the text, scheme, and purposes of the *Arbitration Act*; (b) the judicial and academic treatment of the term “inoperative”; and (c) the broad statutory jurisdiction conferred on superior courts in bankruptcy and insolvency matters, such as court-ordered receiverships under s. 243 of

the *BIA*. I will then conclude by outlining several non-exhaustive factors to guide courts in determining whether an arbitration agreement is inoperative due to parallel bankruptcy or insolvency proceedings.

(i) The Text, Scheme, and Purposes of the *Arbitration Act* Permit Courts to Find Arbitration Agreements “Inoperative” in the Insolvency Context

[131] When the modern approach to statutory interpretation is applied, it is clear that courts have the power to decline a stay in favour of arbitration under s. 15(2) of the *Arbitration Act* even where all the technical prerequisites in s. 15(1) are met.

[132] Both Peace River and the Receiver agree that, plainly read, s. 15(2) requires a court to assess whether an arbitration agreement is “void, inoperative or incapable of being performed” before granting a stay in favour of arbitration. This language is drawn from the Model Law, art. 8(1) of which states that a court “shall” refer the parties to arbitration unless it finds that the arbitration agreement is “null and void, inoperative or incapable of being performed”. Similar language is also found in art. II(3) of the New York Convention. This language is commonly understood as requiring the court to pronounce upon the validity and enforceability of the arbitration agreement before referring the dispute to the arbitrator (McEwan and Herbst, at § 3:55, citing *Heyman v. Darwins, Ltd.*, [1942] A.C. 356 (H.L.); *Kaverit Steel and Crane Ltd. v. Kone Corp.* (1992), 87 D.L.R. (4th) 129 (Alta. C.A.)).



[133] That said, courts must be careful not to overstep their role on a stay application under s. 15. They must bear in mind the competence-competence principle, the intention of the parties to refer their disputes to arbitration, and the legislative purposes underlying the *Arbitration Act*. As I have noted, the text and scheme of s. 15 make it *mandatory* for a court to defer to arbitral jurisdiction where the technical prerequisites in s. 15(1) are met, subject only to the narrow statutory exceptions in s. 15(2). This deferential approach accords with the purposes of the *Arbitration Act*, which were identified by the enacting legislature as follows: (a) providing a “simpler, faster, less expensive and less formal process” for resolving disputes, thereby minimizing costly and time-consuming court procedures; and (b) limiting judicial review in respect of disputes that parties have agreed to resolve by arbitration (British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, vol. 16, No. 7, 4th Sess., 33rd Parl., April 21, 1986, at p. 7865 (Hon. Brian Smith, Attorney General)).

[134] In the typical case, both legislative objectives will be served by holding the parties to their agreement to arbitrate. Indeed, a narrow interpretation of the words “void, inoperative or incapable of being performed” promotes the enforcement of arbitration agreements, which generally leads to streamlined dispute resolution with minimal judicial intervention (see *Seidel*, at para. 117; S. Kröll, “The ‘Incapable of Being Performed’ Exception in Article II(3) of the New York Convention”, in E. Gaillard, D. Di Pietro and N. Leleu-Knobil, eds., *Enforcement of Arbitration*

*Agreements and International Arbitral Awards: The New York Convention in Practice* (2008), 323, at p. 324).

[135] But when do these narrow statutory exceptions apply? The terms “void”, “inoperative”, and “incapable of being performed” are not defined in the *Arbitration Act*, nor in the Model Law or the New York Convention from which they originate. It is therefore necessary to briefly define each term.

1. “Void”

[136] The meaning of the term “void” is relatively settled. An arbitration agreement will be considered void only in the rare circumstances where it is “intrinsically defective” (and therefore void *ab initio*) according to the usual rules of contract law, including when it is undermined by fraud, undue influence, unconscionability, duress, mistake, or misrepresentation (C. B. Lamm and J. K. Sharpe, “Inoperative Arbitration Agreements Under the New York Convention”, in E. Gaillard, D. Di Pietro and N. Leleu-Knobil, eds., *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (2008), 297, at p. 300; McEwan and Herbst, at § 3:56; Casey, at ch. 3.7.1). The Supreme Court of British Columbia has confirmed that the term “void” in s. 15(2) of the *Arbitration Act* provides a court with a narrow discretion to decline a stay where there are “sufficient materials before the court on which to base a summary determination that the arbitration agreement itself is void” on one or more of the recognized grounds (*James v. Thow*, 2005 BCSC 809, 5 B.L.R. (4th) 315, at para. 99).

There is no dispute that the Arbitration Agreements in the present case are not void within the meaning of s. 15(2).

2. “Inoperative”

[137] Less settled — and more significant to the case at bar — is the proper interpretation of the terms “inoperative” and “incapable of being performed”, particularly in the context of a bankruptcy or insolvency. I turn first to the meaning of “inoperative”.

[138] The term “inoperative” has no universal common law definition (*Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.), at para. 33, citing M. J. Mustill and S. C. Boyd, *The Law and Practice of Commercial Arbitration in England* (2nd ed. 1989), at pp. 464-65). In arbitration law, however, the term has been used to describe arbitration agreements which, although not void *ab initio*, “have ceased for some reason to have future effect” or “have become inapplicable to the parties and their dispute” (McEwan and Herbst, at § 3:57; Lamm and Sharpe, at p. 301; see also Casey, at ch. 3.7.2).

[139] Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties. The cases interpreting s. 15(2) of the *Arbitration Act* make it clear that matters such as inconvenience, multiple parties, intertwining of issues with non-arbitrable disputes, possible increased cost, and potential delay generally will not, standing alone,

be grounds to find an arbitration agreement inoperative (*Prince George*, at para. 37; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 50 B.L.R. (3d) 291, at para. 34). Indeed, like all the statutory exceptions, the exception for an inoperative arbitration agreement is to be narrowly interpreted, with the party seeking to avoid arbitration bearing the heavy onus of showing that it applies. This serves “the interests of freedom of contract, international comity and expected efficiency and cost-savings” from enforcing otherwise valid arbitration agreements (McEwan and Herbst, at § 3:57; *MacKinnon*, at para. 36).

[140] The application of this exception where the defendant in litigation that has been commenced is subject to bankruptcy or insolvency protection is straightforward. For instance, the making of a winding-up order or a receivership order may be grounds for a court to find an arbitration agreement inoperative (Casey, at ch. 7.18.2; McEwan and Herbst, at § 3:57). Indeed, in either scenario, all proceedings *against* the debtor are stayed under the applicable bankruptcy or insolvency legislation. Accordingly, an agreement to arbitrate ceases, in most circumstances, to have effect for the future and may not be relied upon. It is inoperative, and the matter is left to be resolved in the relevant bankruptcy or insolvency proceedings.

[141] This is not to say that a court *must* decline a stay in favour of arbitration based on inoperability in these circumstances. As Casey notes, it “may well be that the bankruptcy judge will refer the matter to arbitration as the most expeditious way to prove the creditor’s claim” (ch. 7.18.2). As I will explain further below, the court must

assess, in light of all the circumstances, whether to refer the matter to arbitration or to maintain centralized judicial oversight.

[142] It must be noted, however, that the term “inoperative” may not always cover scenarios where a court-appointed creditor representative, like a receiver, *initiates* court proceedings on behalf of a debtor. This is because insolvency law generally stays legal claims *brought against* a debtor under court protection, while permitting claims *brought on its behalf* to proceed, in the interest of maximizing creditor recovery and salvaging the debtor’s business as a going concern. Again, in these circumstances, the court must assess whether to permit the receiver to proceed with the debtor’s claim in court rather than through the arbitral process bargained for by the parties.

[143] A helpful example of inoperability in the insolvency context is provided by *Reliance*. In that case, a liquidator appointed under the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 (“*WURA*”), initiated court proceedings to collect monies allegedly owed to the debtor by third parties. The third parties invoked their arbitration agreements with the debtor and asked the court to refer the dispute to arbitration. Pepall J. (as she then was) concluded that, in these circumstances, the arbitration agreements ceased to have future effect and were inoperative within the meaning of the applicable arbitration legislation. To hold otherwise would have compromised the “expeditious and inexpensive” resolution of the insolvency proceedings, contrary to the *WURA* (para. 34). Pepall J. observed that referral to

arbitration would result in undue delay given the “three separate adjudications” that would be required under the arbitration agreements, and also pointed to the “attendant danger of inconsistent rulings” (para. 34).

### 3. “*Incapable of Being Performed*”

[144] An arbitration agreement is considered “incapable of being performed” where “the arbitral process cannot effectively be set in motion” because of a physical or legal impediment beyond the parties’ control (McEwan and Herbst, at § 3:58; Casey, at ch. 3.7.3; *Prince George*, at para. 35; Lamm and Sharpe, at p. 300; Kröll, at p. 326; van den Berg, at p. 159; D. Schramm, E. Geisinger and P. Pinsolle, “Article II”, in H. Kronke et al., eds., *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (2010), 37, at p. 108).

[145] Physical impediments rendering an arbitration agreement incapable of being performed may include the following: (a) inconsistencies, inherent contradictions, or vagueness in the arbitration agreement that cannot be remedied by interpretation or other contractual techniques; (b) the non-availability of the arbitrator specified in the agreement; (c) the dissolution or non-existence of the chosen arbitration institution; or (d) political or other circumstances at the seat of arbitration rendering arbitration impossible (McEwan and Herbst, at § 3:58; Casey, at ch. 3.7.3; van den Berg, at p. 159; Kröll, at pp. 330-42). In all these circumstances, the arbitration agreement is incapable of being performed because it is impossible for the parties to obtain the specific arbitral procedures for which they bargained. Importantly, financial

impecuniosity alone does not render an arbitration agreement incapable of being performed (D. St. John Sutton, J. Gill and M. Gearing, *Russell on Arbitration* (24th ed. 2015), at p. 379; Casey, at ch. 3.5.1; D. Joseph, *Jurisdiction and Arbitration Agreements and Their Enforcement* (2nd ed. 2010), at p. 355). Legal impediments may also lead to an incapacity to perform an arbitration agreement. For example, an arbitration agreement may be incapable of being performed because the subject matter of the dispute is covered by an express legislative override of the parties' right to arbitrate (see *Seidel*, at para. 40).

(ii) The BIA Provides Jurisdiction to Find an Arbitration Agreement “Inoperative”

[146] The broad and flexible powers granted to superior courts under the *BIA*, particularly in the receivership context, provide further support for the foregoing interpretation of s. 15(2) of the *Arbitration Act*. The *Arbitration Act* and the *BIA* are not incompatible, such that no paramountcy concerns arise.

[147] The *BIA* is remedial legislation that is intended, in part, to provide for an orderly and efficient distribution of a bankrupt's funds to various creditors. As such, it is to be given a liberal interpretation in order to facilitate its objectives (*Century Services*, at para. 15; *Third Eye Capital Corporation v. Dianor Resources Inc.*, 2019 ONCA 508, 435 D.L.R. (4th) 416, at para. 43). Section 183(1) of the *BIA* confirms that superior courts have jurisdiction in bankruptcy and insolvency matters which may be exercised concurrently with their jurisdiction in ordinary civil matters (Houlden,

Morawetz and Sarra, at § 8:2; *Cantore v. Nemaska Lithium Inc.*, 2020 QCCA 1333, at para. 8 (CanLII).

[148] Further, under s. 243(1)(c) of the *BIA*, a court may appoint a receiver to, among other things, “take any . . . action that the court considers advisable”, if the court considers it “just or convenient to do so”. This very expansive wording has been interpreted as giving judges the “broadest possible mandate in insolvency proceedings to enable them to react to any circumstances that may arise” in relation to court-ordered receiverships (*DGDP-BC Holdings Ltd. v. Third Eye Capital Corporation*, 2021 ABCA 226, 459 D.L.R. (4th) 538, at para. 20; see also Houlden, Morawetz and Sarra, at § 12:18; *Dianor*, at paras. 57-58). Section 243(1)(c) thus permits a court to do not only what “justice dictates” but also what “practicality demands” (*Dianor*, at para. 57; *Canada (Minister of Indian Affairs and Northern Development) v. Curragh Inc.* (1994), 114 D.L.R. (4th) 176 (Ont. C.J. (Gen. Div.)), at p. 185).

[149] In my view, practicality demands that a court have the ability, in limited circumstances, to decline to enforce an arbitration agreement following a commercial insolvency. Said differently, ss. 243(1)(c) and 183(1) provide a statutory basis on which a court may, in certain circumstances, find an arbitration agreement inoperative within the meaning of s. 15(2) of the *Arbitration Act*.

[150] Peace River resists this interpretation, relying on s. 72(1) of the *BIA* as interpreted by this Court in *GMAC Commercial Credit Corp. — Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123. In short, it argues that s. 243(1)(c)



of the *BIA* cannot empower a court to find an arbitration agreement unenforceable, as this would “abrogate” a contracting party’s substantive right to a stay in favour of arbitration under s. 15 of the *Arbitration Act*, contrary to s. 72(1) of the *BIA*.

[151] I disagree. Section 72(1) merely confirms the constitutional doctrine of federal paramountcy, affirming that the *BIA* prevails where there is a “genuine inconsistency” between provincial laws relating to property and civil rights and the *BIA* (*Moloney*, at para. 40). It is well established that harmonious interpretations of federal and provincial legislation should be favoured over interpretations that result in incompatibility (*Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, [2019] 1 S.C.R. 150, at paras. 64 and 66). Peace River’s proposed interpretation of s. 72(1) of the *BIA* overlooks the fact that a party’s “right” to have its dispute referred to arbitration under s. 15 of the *Arbitration Act* arises only where the court finds that the arbitration agreement at issue is not void, inoperative, or incapable of being performed. I have already explained that the statutory exception for inoperability may apply in certain insolvency scenarios. In other words, there is no “genuine inconsistency” between the *Arbitration Act* and the *BIA*. I therefore agree with both Peace River and the Receiver that the paramountcy doctrine is not engaged.

[152] Accordingly, I find that there is statutory jurisdiction arising from ss. 183(1) and 243(1)(c) of the *BIA* for a court to hold that an arbitration agreement is inoperative in the receivership context. It is therefore unnecessary in this case to resort to inherent jurisdiction, which is to be considered only after statutory jurisdiction is

determined to be unavailable (*Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162, at para. 24; G. R. Jackson and J. Sarra, “Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters”, in J. P. Sarra, ed., *Annual Review of Insolvency Law 2007* (2008), 41).

[153] In sum, the foregoing interpretation of s. 15(2) of the *Arbitration Act* recognizes that the legislative and judicial preference for the enforcement of arbitration agreements is not set in stone. Rather, in limited circumstances, the *BIA* provides courts with jurisdiction to find an arbitration agreement inoperative in the face of parallel insolvency proceedings.

[154] I will now consider how to ascertain whether an otherwise valid arbitration agreement is inoperative in the context of insolvency proceedings. To date, this question has not been directly addressed by our Court. I will therefore briefly outline a set of factors arising from the authorities reviewed above that may be relevant in this exercise.

(iii) Factors for Assessing Whether an Arbitration Agreement Is “Inoperative” Under Section 15(2) of the *Arbitration Act* Due to Insolvency Proceedings

[155] As I have explained, a court may find an arbitration agreement “inoperative” within the meaning of s. 15(2) of the *Arbitration Act* where enforcing it would compromise the orderly and efficient resolution of insolvency proceedings,

including a court-ordered receivership under s. 243 of the *BIA*. The following non-exhaustive list of factors may be relevant in determining whether a particular arbitration agreement is inoperative in this context:

- (a) *The effect of arbitration on the integrity of the insolvency proceedings.* Party autonomy and freedom of contract must be balanced with the need for an orderly and equitable distribution of the debtor's assets to creditors. An arbitration agreement may therefore be inoperative if it would lead to an arbitral process that would compromise the objective of the insolvency proceedings, namely the orderly and expeditious administration of the debtor's property. The court should have regard to the role and expertise of the court-appointed creditor representative, if any, in managing the insolvency proceedings.
- (b) *The relative prejudice to the parties from the referral of the dispute to arbitration.* The court should override the parties' agreement to arbitrate their dispute only where the benefit of doing so outweighs the prejudice to them.
- (c) *The urgency of resolving the dispute.* The court should generally prefer the more expeditious procedure. If the effect of a stay in favour of arbitration would be to postpone the resolution of the

dispute and hinder the insolvency proceedings, this militates in favour of a finding of inoperability.

(d) *The applicability of a stay of proceedings under bankruptcy or insolvency law.* Bankruptcy or insolvency legislation may impose a stay that precludes any proceedings, including arbitral proceedings, *against* the debtor. If such a stay applies, the debtor cannot rely on an arbitration agreement to avoid the bankruptcy or insolvency; the agreement becomes inoperative.

(e) *Any other factor the court considers material in the circumstances.*

[156] Each of the foregoing factors may carry more or less weight depending on the circumstances of the case. But it bears repeating that the party seeking to avoid arbitration bears a heavy onus to establish a clear case of inoperability or incapacity to perform the impugned arbitration agreement. To discharge this onus, it must prove on a balance of probabilities that one or more of the statutory exceptions set out in s. 15(2) of the *Arbitration Act* apply. Otherwise, the court must grant a stay in favour of arbitration.

(e) *Conclusion on Section 15*

[157] In sum, a proper interpretation of s. 15 of the *Arbitration Act* leads to the following conclusions:

- The chambers judge was correct that undertaking to file a defence without invoking the rules of court is not a “step in the proceedings” within the meaning of s. 15(1);
- The chambers judge was correct that a court-appointed receiver may be a “party” to a debtor’s pre-existing arbitration agreement within the meaning of s. 15(1);
- The Court of Appeal erred in holding that a court-appointed receiver may disclaim an arbitration agreement and thereby render it “void, inoperative or incapable of being performed” within the meaning of s. 15(2); and
- The chambers judge was correct that she had the authority to find an arbitration agreement inoperative in light of bankruptcy and insolvency proceedings. This power arises from the broad statutory jurisdiction accorded to superior courts in bankruptcy and insolvency matters by ss. 183 and 243 of the *BIA*. A court may find an arbitration agreement inoperative where the arbitral proceedings bargained for by the parties would compromise the orderly and efficient resolution of a receivership.

[158] In light of these interpretive conclusions, I now apply the two-part stay analysis under s. 15 of the *Arbitration Act* to the facts of the case at bar.

E. *Application of Section 15 of the Arbitration Act*

(1) Technical Prerequisites: Section 15 Is Engaged

[159] At the first stage of the stay analysis, the party seeking to rely on the arbitration agreement must establish an arguable case that all the technical prerequisites contemplated in s. 15(1) are met.

[160] There is no dispute that two of the technical prerequisites are met in this case: the Arbitration Agreements exist, and the impugned civil proceedings are in respect of a contractual dispute covered by them.

[161] I conclude that Peace River has also established an arguable case that the remaining technical prerequisites are met: (a) the Receiver is a “party” to the Arbitration Agreements, contrary to the Court of Appeal’s conclusion; and (b) Peace River did not take a “step in the proceedings”.

(a) *The Receiver Is a “Party” to the Arbitration Agreements*

[162] It is at least arguable that the Receiver is a party to the Arbitration Agreements. I say this for the following reasons.

[163] First, the Receiver would have no cause of action to assert without Petrowest or the Petrowest Affiliates. The Court of Appeal recognized that “nominally, the claims remain those of Petrowest and its affiliates” (para. 43). In other words, the Receiver stepped into their shoes by initiating a civil claim on their behalf. Similarly to an assignee or a trustee in bankruptcy, the Receiver arguably became bound by operation of law by claiming through or under Petrowest and the Petrowest Affiliates. As I explained above, a receiver should not be permitted to seek the benefits of a contract in the debtor’s name while avoiding the burdens.

[164] Second, contrary to the submissions of both Peace River and the Receiver, the distinction between a trustee in bankruptcy and a receiver is immaterial here. Under para. 3(j) of the Receivership Order, the Receiver is authorized to bring a civil claim on behalf of Petrowest and the Petrowest Affiliates by relying on the Main Agreements. Doing so is arguably sufficient to bind the Receiver, a non-signatory, as a party by operation of law to the Arbitration Agreements. I see no reason to discuss the distinction between trustees and receivers further.

[165] Third, contrary to the Receiver’s submission, it did not need to “adopt” or “perform” the contracts to become a party. A receiver’s obligation to either adopt or disclaim arises only in respect of executory contracts. Here, the parties agree that there are no remaining obligations for the Receiver to perform. Further inquiry into adoption or performance is not only unnecessary but would also clearly conflict with the arguable case threshold and the competence-competence principle, which together

prevent a court on an application under s. 15 of the *Arbitration Act* from conducting anything more than a *superficial* review of the record.

[166] Fourth, contrary to the Court of Appeal’s conclusion, disclaimer and separability do not affect the Receiver’s status as a party to the Arbitration Agreements. As noted, the Receiver concedes that it never disclaimed the Main Agreements or the Arbitration Agreements.

[167] Even setting this concession aside, I am of the view that the Court of Appeal misapplied the doctrine of separability. Separability does not apply absent a challenge to the validity of the main contract or of the arbitration agreement itself (*Uber*, at para. 224, per Côté J., dissenting, but not on this point). No issue is taken in this case with the validity of the Main Agreements or the Arbitration Agreements. Indeed, before the Court of Appeal, the Receiver argued that separability was “irrelevant” in this case (C.A. reasons, at para. 48). It now concedes that this Court does not need to consider separability to resolve this appeal. I accept this concession.

[168] I would add that the Court of Appeal’s approach to separability would undermine the central purpose of the *Arbitration Act*. In essence, the Court of Appeal held that receivers are permitted to revoke arbitration agreements unilaterally, without any judicial inquiry into their validity or enforceability. But separability is intended to safeguard arbitration agreements, not imperil them (see, e.g., T. Meshel, “*Petrowest v. Peace River Hydro: The Revocability and Separability of Commercial Arbitration Agreements*” (2022), 65 *Can. Bus. L.J.* 329). As I have explained, it is for a court — not



a receiver — to determine whether an arbitration agreement is valid and enforceable according to the narrow statutory exceptions set out in s. 15(2).

[169] Finally, I emphasize the low arguable case threshold applicable at the first stage of the s. 15 analysis. I recognize that receivership is a flexible remedy which may require interfering with the contractual rights of third parties in certain circumstances. However, accepting the Receiver's position at this stage of the s. 15 analysis would permit all court-appointed receivers to avoid pre-existing arbitration agreements with impunity. I do not believe this would be appropriate in view of the clear legislative and judicial preference in favour of party autonomy and arbitral jurisdiction.

(b) *Peace River Did Not Take a "Step in the Proceedings"*

[170] The Receiver has not identified a reviewable error in the chambers judge's finding that Peace River did not take a step in the proceedings. That finding was not challenged before the Court of Appeal. As such, it is not properly before this Court. Even if it were, I see no basis to question the chambers judge's reasoning. She correctly held that undertaking to file a defence without invoking the rules of court is not a step in the proceedings. Nor is requesting an extension of time, as I explained above. Peace River did not take a step in the proceedings within the meaning of s. 15(1) of the *Arbitration Act*.

[171] Accordingly, s. 15 of the *Arbitration Act* is engaged. I must therefore grant a stay in favour of arbitration *unless* I find the Arbitration Agreements to be “void, inoperative or incapable of being performed” under s. 15(2).

(2) Statutory Exceptions: The Arbitration Agreements Are “Inoperative” Under Section 15(2)

[172] At the second stage of the s. 15 framework, the burden shifts to the party seeking to avoid arbitration to establish on a balance of probabilities that the arbitration agreement at issue is void, inoperative, or incapable of being performed within the meaning of s. 15(2), as explained above.

[173] I conclude that the Receiver has established that the Arbitration Agreements are inoperative. Stated differently, the arbitral processes contemplated in the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the objectives of the *BIA*. Further, while recognizing the importance of party autonomy and freedom of contract, referral to arbitration in the unique circumstances of this case would jeopardize the Receiver’s ability to maximize recovery for the creditors and to allow Petrowest and the Petrowest Affiliates to move forward with certainty. This conclusion is based on the following factors.

(a) *Effect of Arbitration on the Integrity of the Insolvency Proceedings*

[174] The inexpediency of the multiple overlapping arbitral proceedings contemplated in the Arbitration Agreements, as compared to a single judicial process, is the determinative factor in this case. In these circumstances, I conclude that enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership proceedings.

[175] The Receiver's affidavit evidence outlines the chaotic arbitral processes that would result if this Court were to grant a stay under s. 15 of the *Arbitration Act*. First, the Receiver would need to participate in and fund at least four different arbitrations involving "seven different sets of counterparties" (A.R., vol. XI, at p. 2895). The funding for these proceedings would necessarily come from the estates of Petrowest and the Petrowest Affiliates, to the detriment of their creditors. Second, at least some of the respondents' claims involve entities not subject to any of the Arbitration Agreements. As the chambers judge properly recognized, these claims may have to be determined by a court, in parallel with the arbitral proceedings described above. Finally, in the scenario just described, I agree with the Receiver that "[f]acts and argument would be repeated in different forums, before different decision makers, creating piecemeal decisions and a serious risk of conflicting outcomes" (R.F., at para. 6).

[176] The inefficient and protracted nature of the contemplated arbitral processes would plainly compromise the integrity of the receivership proceedings. I acknowledge the chambers judge's finding that arbitration would not "derail" the insolvency

proceedings (para. 51). However, this must be read alongside her finding that “the significant cost and delay inherent in the multiple [arbitral] proceedings that would occur in this case as compared to judicial determination is unfair to the creditors and contrary to the objects of the *BIA*” (para. 60). I agree.

[177] In light of the foregoing, I see no basis on which to interfere with the following factual findings made by the chambers judge:

- the parties agreed that declining the requested stay “would promote the efficient and inexpensive resolution of their dispute”, and no one suggested that the issues were “not appropriate for judicial determination” (para. 56);
- there was “no evidence” of any “realistic likelihood” that the parties would agree to streamline the arbitral proceedings through consolidation, notwithstanding their ability to do so (para. 57); and
- a single judicial process would “be faster and less expensive than four arbitrations and a possible court case” (para. 56).

[178] Accordingly, expediency and efficiency concerns militate strongly in favour of a finding that the enforcement of the Arbitration Agreements would compromise the objects of the *BIA* and that the Agreements are therefore inoperative under s. 15(2) of the *Arbitration Act*.

(b) *Relative Prejudice to the Parties From the Referral of the Dispute to Arbitration*

[179] I agree with the chambers judge that Peace River has failed to show any prejudice it would suffer if the Arbitration Agreements were not enforced (para. 58). To the contrary, as already indicated, it conceded that a single judicial proceeding would be the most efficient and cost-effective route. This supports my view that enforcing the Arbitration Agreements would compromise the receivership proceedings.

(c) *Urgency of Resolving the Dispute*

[180] As noted, the parties agree that proceeding through the courts is the more expeditious option. I see no basis for interfering with the chambers judge's finding that "[i]t will not be possible to distribute the proceeds" of the property of Petrowest and the Petrowest Affiliates to their creditors "until these disputes are resolved" (para. 60). This urgency further militates in favour of finding the Arbitration Agreements inoperative.

(d) *Applicability of a Stay of Proceedings Under Bankruptcy or Insolvency Law*

[181] In light of the foregoing, it is unnecessary to consider the effect of the stay of proceedings under the Receivership Order on the enforceability of the Arbitration Agreements.

[182] Finally, I have had the benefit of reading my colleague's reasons. His view that the analysis should start with the terms of the Receivership Order is a sensible one. Further, it cannot be said that his interpretation of the terms of the Receivership Order is without merit. However, in the particular circumstances of this case, I would decline to resolve the appeal on this basis. I say this for two reasons.

[183] First, the argument that the combined effect of paras. 3(c), 3(f) and 3(j) authorizes the Receiver to proceed in court despite the Arbitration Agreements was not squarely before the Court. While the parties made some submissions on the interpretation of the terms of the Receivership Order, for instance about the scope of the Receiver's power to cease to perform the debtors' contracts under para. 3(c), none suggested that it was the combined effect of paras. 3(c), 3(f) and 3(j) that enabled the Receiver to act so as to render the Arbitration Agreements inoperative. As a result, the Court did not have the benefit of assistance from the parties, nor the interveners, on this specific interpretive question. We also lack the benefit of analysis on this point from the courts below. This is significant because, in my respectful view, more than one interpretation of the Order remains plausible. It is not clear, for example, that the terms either expressly or impliedly authorize the Receiver to take the benefits of the agreements while avoiding their procedural burdens, such as the obligations arising from their arbitration clauses. Nor is it clear that the Receiver's powers to initiate "proceedings" and exercise "remedies" render the Arbitration Agreements *inoperative* in this case. It is plausible to interpret the language of the Receivership Order as

consistent with “proceeding”, and seeking “remedies”, through arbitration rather than in court.

[184] Second, resolving the question of the proper interpretation of the terms of the Receivership Order would have no impact on the disposition of the appeal. My colleague and I agree that the separability doctrine, as relied upon by the Court of Appeal, has no application here. We also share the view that the Arbitration Agreements are inoperative. Ultimately, whether they are inoperative because the Receivership Order authorizes the Receiver to act in a certain way or because a stay in favour of arbitration would compromise the orderly and efficient resolution of the receivership, the result is the same.

[185] Given that the interpretation of the terms of the Receivership Order was not fully argued by the parties and that the appeal can be resolved without addressing this issue, it is prudent to leave it to another day.

(3) Conclusion on Section 15

[186] I agree with the courts below that Peace River’s application for a stay of proceedings under s. 15 of the *Arbitration Act* must be dismissed.

[187] The prerequisites for a mandatory stay in s. 15(1) are met. However, enforcing the Arbitration Agreements would compromise the orderly and efficient resolution of the receivership, contrary to the purposes of the *BIA*.

[188] Accordingly, the Arbitration Agreements are inoperative within the meaning of s. 15(2).

## VII. Disposition

[189] For the foregoing reasons, I would dismiss the appeal with costs throughout. In the result, the civil claim of Petrowest and the Petrowest Affiliates may proceed in the Supreme Court of British Columbia.

The reasons of Karakatsanis, Brown, Martin and Jamal JJ. were delivered by

JAMAL J. —

[190] I have had the benefit of reading the reasons of my colleague Justice Côté. I agree with my colleague that Peace River's application for a stay of proceedings under s. 15 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, should be dismissed, and thus the appeal should be dismissed, because the Arbitration Agreements are inoperative under s. 15(2) of the *Arbitration Act*.

[191] My point of departure from my colleague concerns the primary basis for finding the Arbitration Agreements to be inoperative. In my view, by suing in court to collect the accounts receivable allegedly owing, as authorized under the Receivership



Order, the Receiver disclaimed the Arbitration Agreements. The Arbitration Agreements were thereby rendered inoperative. The analysis should start with the terms of the Receivership Order itself.

[192] Several provisions of the Receivership Order authorized the Receiver to sue in court to collect the accounts receivable allegedly owing and to disclaim the Arbitration Agreements, thus effectively rendering them inoperative:

- The Receivership Order authorized the Receiver to sue to collect the accounts receivable that Peace River allegedly owed Petrowest. Paragraph 3(f) of the Order authorized the Receiver “to receive and collect all monies and accounts now owed or hereafter owing to the Debtors [i.e., Petrowest] and to exercise all remedies of the Debtors in collecting such monies”. Paragraph 3(j) of the Order similarly authorized the Receiver “to initiate, prosecute and continue the prosecution of any and all proceedings” with respect to the “Property”, broadly defined in para. 2 of the Order as including “all of the Debtors’ current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate[d], including all proceeds thereof”.
- The Receivership Order authorized the Receiver to disclaim the Arbitration Agreements. Paragraph 3(c) of the Order authorized

the Receiver to “cease to perform any contracts of the Debtors”. An arbitration agreement is a contractual right of a party to have a claim referred to arbitration to the exclusion of the courts (see *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, at para. 160; *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, [2011] 1 S.C.R. 531, at paras. 137-38), and thus came within the scope of para. 3(c) of the Order, even if all the other contractual obligations had been performed.

[193] In my view, the combined effect of paras. 3(c), 3(f), and 3(j) of the Receivership Order is to authorize the Receiver to disclaim the Arbitration Agreements and to sue in court for amounts owing to the Debtors. These provisions authorize the Receiver to sue, either in court or before an arbitrator, at the Receiver’s election, based on what will best promote the orderly and efficient resolution of the receivership under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3.

[194] This interpretation of the Receivership Order does not rely on the arbitration doctrine of separability. The separability doctrine is recognized, for example, in s. 17(2) of the Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17, and provides that, for the purposes of ruling on arbitral jurisdiction, an arbitration agreement “shall . . . be treated as an independent agreement that may survive even if the main agreement is found to be invalid” (see also *Uber Technologies Inc. v. Heller*, 2020 SCC

16, at para. 96, per Abella and Rowe JJ.). As Professor Tamar Meshel notes in her helpful article on the decision of the British Columbia Court of Appeal under appeal, the separability doctrine provides that “an arbitration clause does not necessarily become invalid merely because the underlying agreement is found to be invalid, and *vice versa*” (“*Petrowest v. Peace River Hydro: The Revocability and Separability of Commercial Arbitration Agreements*” (2022), 65 *Can. Bus. L.J.* 329, at p. 345 (footnote omitted)). Without the separability doctrine, “a contracting party could avoid arbitration simply by alleging that the underlying agreement was void or invalid” (Meshel, at p. 345 (footnote omitted)). I agree with Professor Meshel’s view that, because “neither party challenged the validity of the agreements in which the arbitration clauses were found, but rather only the arbitration clauses themselves”, the result is that “the separability doctrine, which simply operates to separate the validity analysis of an arbitration clause from that of the underlying agreement, [is] not relevant to [this] case” (Meshel, at p. 346 (footnote omitted)). I am not relying on the separability doctrine. I am simply interpreting the Receivership Order at issue in this case.

[195] I also disagree with my colleague’s view that reliance on the terms of the Receivership Order is precluded by *Petrowest* and the Receiver’s position before the Court of Appeal and this Court that the Receiver “has not expressly disclaimed” the Arbitration Agreements (para. 122, citing R.F., at para. 102, and A.F., Appendix B, at paras. 3 and 13). In my view, the *legal effect* of the Receiver suing in court and not before an arbitrator to collect the accounts receivable was undoubtedly to disclaim

reliance on the Arbitration Agreements — conduct which, I repeat, was authorized by the Receivership Order itself. Indeed, although before this Court counsel for the Receiver erroneously relied on the doctrine of separability, her position was that “by its conduct the Receiver has disclaimed [the] Arbitration Agreements” (transcript, at p. 110).

[196] I also disagree with my colleague’s claim that this Court should not interpret the Receivership Order because this issue “was not squarely before the Court” and was “not fully argued by the parties” (Côté J.’s reasons, at paras. 183 and 185). The interpretation of the Receivership Order was amply debated before the Court, both in written submissions and during the oral hearing. The Receiver argued in its factum, for example, that “[a] court-appointed receiver authorized by court order to disclaim any contracts of the debtor may cease to perform arbitration agreements” (R.F., at para. 101, citing para. 3(c) of the Receivership Order). The Receiver submitted that “the Receiver was appointed with the court-ordered power to cease to perform any of the Petrowest Respondents’ contracts” (R.F., at para. 104, citing para. 3(c) of the Receivership Order). The proper interpretation of the Receivership Order also occupied a significant part of the oral hearing (see transcript, at pp. 9-12, 15-17, 41-42, 81-87, 97 and 105). This Court can and should interpret such a template court order. As I have already noted, courts must start with the terms of the relevant receivership order. Declining to address this issue leaves the insolvency and arbitration bars in a regrettable state of uncertainty.

[197] To be clear, I am not suggesting that a receiver can unilaterally “revoke” an otherwise valid arbitration agreement. I agree with my colleague that “[o]nly a court can make a finding that an arbitration agreement is inoperative or incapable of being performed” (para. 6). However, the courts’ exclusive power to declare an arbitration agreement inoperative is distinct from the question of whether a receivership order authorizes a receiver to act in a certain way in a court-appointed receivership. When a receiver’s action is challenged, as it has been here, it is a court that will ultimately determine whether the receiver has acted under the authority of the receivership order, and thus whether the arbitration agreement is inoperative or incapable of being performed.

[198] To the extent that the Receivership Order did not authorize the Receiver to sue in court, I otherwise agree with my colleague’s reasons for concluding that ss. 183 and 243 of the *Bankruptcy and Insolvency Act* provided a statutory basis for the chambers judge to declare the Arbitration Agreements inoperative and to dismiss the stay application. As my colleague explains, in this case, requiring arbitration of the collection action would compromise the orderly and efficient resolution of the receivership.

[199] I would dismiss the appeal with costs throughout.

## APPENDIX

### Arbitration Agreements

#### Partnership Agreement

##### **32. SETTLEMENT OF PARTNERSHIP DISPUTES**

...

32.6 If the Management Committee does not elect to proceed with mediation, or if the Management Committee is unable to agree with the mediator's decision, the Dispute shall be finally and exclusively settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC"). The arbitration proceeding shall take place in Vancouver, British Columbia. The arbitrator's decisions shall be final and shall not be subject to appeal. The arbitrator's decisions shall be binding upon the Partners and the Partnership, and compliance therewith shall be obligatory for the Partners and the Partnership. The Partners agree that the arbitrator's award may be enforced in any court of competent jurisdiction. . . .

#### Guarantee

12. This Guarantee shall be governed by the laws of the Province of British Columbia and the federal laws of Canada applicable therein. Any dispute arising out of or in connection with this Guarantee shall be finally and exclusively settled by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce ("ICC"). The seat, or legal place, of arbitration shall be Vancouver, British Columbia. The arbitrator's decisions shall be final and shall not be subject to appeal. The arbitrator's decisions shall be binding upon the Partners and Guarantors, and compliance therewith shall be obligatory. The Partners and Guarantors agree that the arbitrator's award may be enforced in any court of competent jurisdiction. . . .

#### Purchase Order

##### **CLAUSE 19 — SETTLEMENT OF DISPUTES**

. . . In the event that the parties are unable to resolve a Dispute within 7 days, either party shall be entitled to require that the Dispute is submitted to binding arbitration to be finally resolved. If a Dispute is

submitted to arbitration, such arbitration shall be conducted pursuant to the arbitration provisions in Schedule D (*Supplementary Conditions*).

Minor Works/Services Subcontract

## **16. DISPUTE RESOLUTION**

...

### **16.2 Dispute Resolution — Subcontract**

...

(e) *Arbitration*: If either (1) the Parties do not agree that such Dispute should be referred to mediation within 10 days following the Target Dispute Resolution Date, or (2) the Dispute is not completely resolved by agreement between the Parties within 14 days of the appointment of a mediator or within 5 days following the conclusion of the mediation, then such Dispute shall be submitted to arbitration and such arbitration shall be conducted pursuant to Section 10 (Dispute Resolution) of Schedule F (Main Contract Related Provisions).

*Appeal dismissed with costs throughout.*

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*Solicitors for the intervener the Canadian Commercial Arbitration Center:  
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