

Chapter XX

CANADA

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I INTRODUCTION

Canada is a federal state. With the exception of Quebec, which maintains its civil law traditions, Canada is a common law jurisdiction. The federal government and each of Canada's 10 provincial governments and three territorial governments pass arbitration legislation within their respective jurisdictions.

Canada is an UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") jurisdiction and is a signatory to the New York Convention.¹ In acceding to the New York Convention, Canada elected to apply the New York Convention only to differences arising out of commercial legal relationships, except in the province of

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1 United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c.17 (2nd Supp.). Provincial approaches to enacting the New York Convention vary: Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, the Northwest Territories and Nunavut attach the New York Convention as a schedule to their respective International Commercial Arbitration Acts; British Columbia, Saskatchewan and Yukon have enacted stand-alone legislation (Foreign Awards Enforcement Act, RSBC 1996, c.154; Enforcement of Foreign Arbitral Awards Act 1996, SS 1996, c.E-9.12; Foreign Arbitral Awards Act, RSY 2002, c.93); Ontario originally had legislation implementing the New York Convention, but it was subsequently repealed as duplicative of the enforcement provisions of International Commercial Arbitration Act (Ontario); Quebec implements the New York Convention through its Code of Civil Procedure, Section 948 of which states, 'the interpretation of this Title shall take into account, where applicable, the [New York Convention]'.

Quebec, where this limitation does not apply.² Canada is not yet a party to the ICSID Convention.³

Legislative framework

i Federal legislation

Canada's federal Commercial Arbitration Act⁴ applies only to arbitration to which Her Majesty in Right of Canada, a departmental corporation, or a Crown corporation is a party, or which is in relation to maritime or admiralty matters.⁵

The Commercial Arbitration Act enacts the Model Law, an amended version of which is appended to the Commercial Arbitration Act as the 'Commercial Arbitration Code'. A major substantive change to the Model Law is the deletion of 'international' from Article 1(1), and the deletion of Article 1(3) and (4), as the Commercial Arbitration Act applies to both domestic and international commercial arbitration.⁶

ii Provincial and territorial legislation

Each of Canada's common-law provinces and territories has enacted its own laws governing domestic⁷ and international arbitration.⁸ However, there is a significant degree of consistency among provincial arbitration statutes, thanks in large part to the work of the Uniform Law Conference of Canada, which has developed uniform domestic and international arbitration statutes.⁹

2 See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

3 Canada signed the ICSID Convention in December 2006 and passed implementing legislation – the Settlement of International Investment Disputes Act, SC 2008, c.8 – in March 2008. Canada has not yet ratified the ICSID Convention and the implementing legislation is not yet in force.

4 RSC 1985, c17 (2nd Supp.).

5 *Ibid.* Section 5(2).

6 The Commercial Arbitration Act defines 'commercial arbitration' to include investor-state claims under the North American Free Trade Agreement, the Canada–Chile Free Trade Agreement and the Canada–Peru Free Trade Agreement.

7 Arbitration Act, RSNL 1990, c.A-14; Arbitration Act, RSPEI 1974 Cap. A-14; RSY 2002, c.8; Arbitration Act, RSNWT 1988, c.A-5; Arbitration Act, RSNWT (Nu.) 1988, c.A-5; Commercial Arbitration Act, RSBC 1996, c.55; Arbitration Act, RSA 2000, c.A-43; Arbitration Act, SS 1992, c.A-24.1; Arbitration Act, CCSM c.A120; Arbitration Act, 1991, SO 1991, c.17; Arbitration Act, SNB 1992, c.A-10.1; Arbitration Act, RSNS 1989, c.19.

8 International Commercial Arbitration Act, RSBC 1996, c.233; RSA 2000, c.I-5; SS 1998-1999, c.I-10.2; CCSM c.C151; RSO 1990, c.I.9; SNB 1986, c.I-12.2; RSNS 1989, c.234; RSNL 1990, c.I-15; RSPEI 1988, c.I-5; RSY 2002, c.123; RSNWT 1988, c.I-6; RSNWT (Nu.) 1988, c.I-6.

9 See www.ulcc.ca/en/us.

Each of Canada's provinces, with the exception of Quebec,¹⁰ has enacted international commercial arbitration legislation that is based on the Model Law. In most cases,¹¹ the Model Law is simply attached as a schedule to the legislation, with any variance from the Model Law described in the body of the legislation.

Provincial domestic arbitration statutes have also been influenced by the Model Law,¹² with the exception of Newfoundland, Prince Edward Island and Canada's northern territories, the domestic arbitration laws of which are modelled on the old United Kingdom Arbitration Act.¹³

Structure of the courts, including any specialist tribunals

Each Canadian province and territory has its own court structure. Generally, each province will have a provincial court, a superior court¹⁴ and a court of appeal. Canada also has federal courts, which have limited jurisdiction granted to them by federal statute. Appeal from the Federal Court Trial Division is with the Federal Court of Appeal. Final appeal from both the provinces' courts and the Federal Court rests with the Supreme Court of Canada.

Canada also has numerous specialist administrative tribunals, which are created by statute. Appeals from administrative tribunal decisions generally rest with the provincial superior courts in the case of tribunals created under provincial statute, and with the Federal Court in the case of tribunals created under federal statute.

For parties involved in arbitration – whether domestic or international – the provincial superior courts are generally the initial point of contact with Canada's domestic courts. Under federal and provincial domestic arbitration legislation, the provincial superior courts are empowered to intervene in arbitrations.

Under Canada's international arbitration legislation, the provincial superior courts are empowered to provide assistance to international tribunals sitting in Canada, hear

10 In keeping with Quebec's civil law traditions, the Civil Code and the Code of Civil Procedure govern domestic and international arbitration in Quebec. The Code of Civil Procedure provides at Article 940.6 that, '[w]here matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration (1) the Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985...'. Excerpts of the provisions of the Civil Code that govern arbitration can be found at www.mcgill.ca/files/arbitration/Codcivil-en.pdf. For the relevant provisions of the Code of Civil Procedure, see www.mcgill.ca/files/arbitration/Codedeprocedurecivile-en.pdf.

11 The exception is British Columbia, which does not attach the Model Law as a schedule, but rather has drafted legislation based on the Model Law.

12 See generally, J Kenneth McEwan and Ludmila B Herbst, *Commercial Arbitration Law in Canada*, looseleaf (Aurora: Canada Law Book, 2009) at 1-8 to 1-13.

13 1889 (UK), 52 & 53 Vict., c.49.

14 The name given to the superior court varies by province. For example, BC has the Supreme Court of British Columbia, Alberta has the Alberta Court of Queen's Bench, while Ontario and Quebec have Superior Courts.

applications to set aside international arbitral awards rendered in Canada,¹⁵ and enforce foreign arbitral awards.

International arbitration in Canada

International commercial arbitration in Canada is consistent with convergent trends found in most other jurisdictions. The practice of international tribunals sitting in Canada, as well as counsel appearing before those tribunals, is substantially similar to the practices one would find elsewhere.

The purpose of the remainder of this section is to provide the international arbitration practitioner with an overview of significant features of Canadian practice as it relates to court intervention in the international commercial arbitration process and enforcement of international arbitral awards. The following section is organised by major themes that correspond to the stages of the arbitration process from composition of the tribunal through to enforcement of awards.

i Commencement of arbitration and stay-of-court proceedings

Commencement procedures generally follow the Model Law. In administered arbitrations, Canadian institutional rules deem the date on which the request or submission is filed with the institution to be the commencement date of the arbitration.¹⁶

The stay provisions in Canadian international arbitration statutes follow the Model Law. Canadian courts also have inherent jurisdiction to stay actions before them to avoid duplicative proceedings and may choose to exercise this jurisdiction to refer matters to arbitration, even if they are not required to do so under the legislation governing international commercial arbitration. For example, in *Navionics*,¹⁷ the defendant brought a motion to stay court proceedings after it had filed its statement of defence. The court nevertheless stayed its proceedings, finding that although it was not required to stay proceedings, '[A]rticle 8 of the [Commercial Arbitration] Code, which makes the stay mandatory, in no way affects or impinges upon the permissive jurisdiction of the court under Section 50 [of the Federal Courts Act]’.

The Ontario Superior Court of Justice applied a similar analysis in *Reliance Insurance*,¹⁸ but arrived at a different result. In that case, the court found that the Model Law did not require that the court stay its proceedings, as the arbitration agreement was inoperative. The court then considered whether it should exercise its residual discretion under the Courts of Justice Act¹⁹ to stay the court proceedings, but found that to do so

15 Note, however, that in *Canada (Attorney General) v. SD Myers, Inc.* [2004] FCJ No. 29 (Fed. Ct), Canada initiated set-aside proceedings in Canada’s Federal Court.

16 BCICAC International Commercial Arbitration Rules (‘BCICAC Rules’), Article 17(2); ADR Chambers International Arbitration Rules (‘ADR Chambers Rules’), Article 4.1; Canadian Commercial Arbitration Centre International Arbitration Rules (‘CCAC Rules’), Article 11(2).

17 *Navionics Inc. v. Flota Maritima Mexicana S.A.*, (1989), 26 FTR 148 (TD).

18 *Canada (Attorney General) v. Reliance Insurance Co.*, (2007) 87 OR (3d) 42 (Sup. Ct).

19 RSO 1990, c.C43, Section 106.

in the circumstances of that case – which involved the bankruptcy of a party – would not be appropriate.

The bankruptcy or insolvency of a party is perhaps the most common circumstance in which a Canadian court will find the arbitration agreement to be inoperative.²⁰

The Alberta Court of Appeal has also found that a party's failure to make an advance payment to an arbitration institution rendered an arbitration agreement inoperative. In *Resin Systems*,²¹ the claimant commenced proceedings in the Alberta courts after the defendant failed to pay its share of the advance of costs in ICC proceedings. The defendant brought a motion to have the matter stayed. Contrary to usually accepted ICC practice, the Alberta Court of Appeal refused to stay the proceedings, finding that the defendant's refusal to pay its share of costs rendered the arbitration agreement inoperative. The defendant could not rely on its own breach of the arbitration rules to deny the plaintiff access to the courts.²²

ii *Composition of the tribunal*

Under Canada's international commercial arbitration statutes the parties are free to determine the number of arbitrators, with the default being three arbitrators if the parties are unable to reach agreement. Under Quebec's Code of Civil Procedure,²³ a tribunal must consist of three arbitrators unless the parties agree otherwise.

Court intervention in appointment of arbitrators is governed by the Model Law. While in most provinces the party seeking court assistance makes an application to the provincial superior court, in British Columbia the Chief Justice of the Supreme Court hears such requests.²⁴ The Chief Justice must not appoint an arbitrator who has the nationality of one of the parties unless the parties have previously agreed.²⁵

Institutional arbitration rules provide that the Institution or an appointing committee of that institution will serve as appointing authority.²⁶

In all jurisdictions, with the exception of Quebec, an arbitrator may be challenged on the grounds set out in the Model Law. In Quebec, the Code of Civil Procedure

20 See e.g., *Canada (Attorney General) v. Reliance Insurance Co.*, (2007) 87 OR (3d) 42 (Sup. Ct). See also *In Re Smokey River*, [1999] AJ No. 272, 1999 ABQB 202. In this decision under British Columbia's domestic arbitration legislation, the court found (at Paragraph 19) that, '[T]he agreement to arbitrate was incapable of being performed due to the incapacity of Smokey'. Smokey River's incapacity arose at it was under court supervision while it was being reorganised under the Companies' Creditors Arrangement Act, RSC 1985 c.C-36.

21 *Resin Systems Inc. v. Industrial Service and Machine Inc.*, [2008] AJ No. 238 (CA).

22 It remains to be seen whether courts of other provinces will adopt this approach.

23 Article 941.

24 International Commercial Arbitration Act (BC), Section 11.

25 International Commercial Arbitration Act (BC), Section 11(9).

26 BCICAC Rules, Article 6(2) and Article 7(4); ADR Chambers Rules, Rule 5; CCAC Rules Article 16 (note that the CCAC rules require that each arbitrator be confirmed by the CCAC).

provides that an arbitrator may be recused on the same grounds as judges, or if he does not have the qualifications agreed by the parties.²⁷

The challenge procedure in all Canadian jurisdictions generally follows the Model Law.

iii Jurisdiction

Canada's international arbitration legislation recognises that an arbitral tribunal has jurisdiction to determine its own jurisdiction. However, at least in the realm of domestic arbitration, it is debatable whether that jurisdiction is exclusive. In *Dell*,²⁸ the majority of the Supreme Court of Canada held:

First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law... [Even] when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.²⁹

While this and similar Canadian cases³⁰ are based on domestic arbitration statutes, in an international arbitration governed by Canadian law and seated in Canada, it may also be possible to raise a jurisdictional challenge directly before the courts, rather than with the arbitral tribunal. In any event, the Model Law provides a clear right to seek court review after the fact of an arbitrator's decision on jurisdiction.

iv Arbitral procedure

Arbitral procedure is governed by the Model Law.

v Consolidation

While the Model Law does not provide for consolidation, a number of Canadian jurisdictions have set out a consolidation procedure in their respective international

27 Article 942. The grounds on which judges may be recused are set out in Articles 234 and 235 of the Code of Civil Procedure, which – in addition to the general ground of ‘reasonable cause to fear that the judge will not be impartial’ – set out 10 specific circumstances that may lead to recusal.

28 (2007), *Dell Computer Corp. v. Union des consommateurs*, 284 DLR (4th) 577 (SCC).

29 *Ibid.* at Paragraphs 84-86. In a dissenting opinion, Justices Bastarache and LeBel state (at para. 178) that ‘In some circumstances, particularly in those that truly merit the label “international commercial arbitration”, it may be more efficient to submit all questions regarding jurisdiction for the arbitrator to hear at first instance. In other circumstances, such as in the present case where we are faced with the need to interpret provisions of the Civil Code, it would seem preferable for the court to fully entertain the challenge to the arbitration agreement’s validity’.

30 See e.g., *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40; *Ontario First Nations Limited Partnership v. Ontario* (2004), 245 DLR (4th) 689 (Ont. CA).

commercial arbitration statutes.³¹ In each case, consolidation requires the consent of all the parties to the arbitrations.

vi Court assistance in taking evidence

The Court of Appeal of Alberta has interpreted Article 27 of the Model Law to extend to pre-hearing discovery. In *JLT*,³² a party to an arbitration seated in Calgary, Alberta sought the pre-hearing discovery of third parties, including individuals located outside of Canada. The court of first instance refused to grant the order, citing two foreign cases – *BNP Paribas*³³ and *Vibroflation*³⁴ – in support of the proposition that Article 27 was only to be used as a means of securing evidence at a hearing, and not for pre-hearing discovery or disclosure. On appeal, the Court of Appeal, after reviewing Alberta law and Article 27 of the Model Law, and relying on the parties' putative consent to follow the Alberta Rules of Court, found otherwise:

*[L]imiting the scope of examinations for discovery in arbitration proceedings cannot be justified on the basis that arbitration is not a parallel to the court system. It is the forum that the parties have determined and arbitration litigation is not some lesser form of litigation than that being conducted in the courts. There are, of course, many distinguishable features but the ability to procure relevant evidence should not necessarily be one of them.*³⁵

As a result, the court referred the matter back to the lower court to issue the appropriate orders, including issuing a commission for taking evidence outside of Canada, if necessary. It remains to be seen whether other courts will follow this interpretive approach, or whether it will be limited to the facts of the case.³⁶

vii Interim measures of protection

British Columbia and Ontario, in their international commercial arbitration statutes,³⁷ have provided that interim measures of protection are subject to the provisions of the Model Law as if they were awards.

31 International Commercial Arbitration Act, RSBC 1996, c.233, Section 27; RSA 2000, c.I-5, Section 8; SS 1998-1999, c.I-10.2, Section 7; CCSM c.C151, Section 8; RSO 1990, c.I.9, Section 7; SNB 1986, c.I-12.2, Section 8; RSNS 1989, c.234, Section 9; RSNL 1990, c.I-15, Section 9; RSPEI 1988, c.I-5, Section 8; RSY 2002, c.123, Section 6.

32 *Jardine Lloyd Thompson Canada Inc. v. SJO Catlin*, [2006] AJ No. 32 (CA).

33 *BNP Paribas & Others v. Deloitte & Touche LLP*, [2003] EWHC 2874 (Comm. Ct).

34 *Vibroflation AG v. Express Builders Co. Ltd*, [1994] 3 HKC 263.

35 *JLT* at Paragraph 42.

36 The court found that the parties had agreed to a discovery procedure along the lines of the Alberta Rules of Court. Query whether, but for this finding of fact, the court would have arrived at the same conclusion.

37 International Commercial Arbitration Act, RSBC 1996, c.233, Section 2(1)(a); International Commercial Arbitration Act, RSO 1990, c.I.9, Section 9.

viii *Termination and awards*

The provisions of the Model Law generally apply. In Quebec, the Code of Civil Procedure requires that settlements be recorded in an arbitration award.³⁸

ix *Set-aside*

The grounds on which an international award may be set aside are those set out in the Model Law.

The leading Canadian case on the scope of these grounds is *Corporacion Transnacional de Inversiones*.³⁹ With respect to excess of jurisdiction, the court found that when a party calls into question the tribunal's jurisdiction, it must overcome a 'powerful presumption' that the tribunal's decision was within its jurisdiction.

The court also found that in order to support a violation of 'due process' requirements, the tribunal's conduct must be 'sufficiently serious to offend our most basic notions of morality and justice'.

Finally, when considering whether an award violates public policy, public policy should be interpreted to include consideration of both the substantive aspects of the award, as well as the method used to arrive at the award.⁴⁰ Canadian courts construe public policy narrowly. In order to violate Canadian public policy, the decision must 'fundamentally offend the most basic and explicit principles of justice and fairness... or evidence intolerable ignorance or corruption on the part of the Arbitral Tribunal'.⁴¹

x *Enforcement*

Since Canada became a member of the New York Convention, awards rendered outside of Canada as a result of differences arising out of commercial relationships can be enforced in Canada by invoking its provisions.⁴²

There is no need to confirm the arbitral award in the courts of the seat of the arbitration before bringing enforcement proceedings in Canada. Indeed, doing so may raise questions as to whether the proper means of enforcement is under the New York Convention or under mechanisms for the enforcement of foreign judgments. In *Bad Ass Coffee*,⁴³ the Alberta Court of Queen's Bench found that confirmation of an award by the courts of Utah converted the arbitral award into a judgment and that it was appropriate to seek enforcement in Alberta by filing a statement of claim.

Parties seeking to enforce an award in Alberta should be aware that, absent specific legislative provisions to the contrary, international arbitral awards are subject to a two-year limitation period (subject to discoverability).⁴⁴

38 Article 945.1.

39 *Corporacion Transnacional de Inversiones v. Stet International, SpA* (1999), 45 OR (3d) 183 (SCJ), aff'd 49 OR (3d) 414 (CA), leave to appeal to the SCC refused.

40 *Ibid.*

41 *Ibid.*

42 Quebec will also enforce foreign awards that arise out of non-commercial differences.

43 *Bad Ass Coffee Co. of Hawaii Inc. v. Bad Ass Enterprises Inc.* (2008), 97 Alta LR (4th) 232 (QB).

44 *Yugraneft Corp. v. Rexx Management Corp.*, 2008 ABCA 274, affirmed on appeal, 2010 SCC 19.

Differences from domestic arbitration

The greatest difference between domestic and international arbitration in Canada is the level of court supervision over the arbitration process.

Under domestic statutes, tribunals or parties (with the consent of the tribunal) may ask the courts to rule on a question of law. A party who is dissatisfied with an award may appeal questions of law with leave. The arbitration agreement may also provide for appeals on questions of fact or mixed fact and law. In both cases, the court may require the tribunal to explain any matter, and may confirm, vary or set-aside the award, remit it to the tribunal with the court's opinion on the question of law, and give directions about the conduct of the arbitration.

These appeal rights are in addition to set-aside procedures that allow a party to apply to set aside an award on similar grounds to those found in the Model Law.

Perhaps because of the level of supervision courts have over domestic arbitration, the enforcement process is simpler than for enforcement of an international award. Unless the 30-day appeal/set-aside period has not expired, the award is under appeal, or the award has been set aside or the arbitration declared invalid, courts are generally required to enforce awards regardless of their province of origin.

Another significant difference between domestic and international arbitration relates to the courts' willingness to stay multi-party litigation proceedings where some, but not all, of the parties to those proceedings have agreed to arbitrate their disputes. Applying international law, Canadian courts will typically stay those portions of the proceedings relating to issues and parties subject to an arbitration agreement.⁴⁵ However, when applying the stay provisions contained in domestic arbitration statutes, a number of courts have held that their inherent jurisdiction to prevent a multiplicity of proceedings gives them jurisdiction to require parties to litigate even if they have agreed to arbitrate disputes with some of the parties to the court proceedings.⁴⁶

Local institutions

ADR Chambers⁴⁷ is a privately owned and administered Ontario-based organisation that is one of the leading institutional arbitration and mediation centres in Canada. ADR Chambers administers both domestic and international arbitrations. Its rules are based on the UNCITRAL Rules, modified for use in an institutional setting. It should be distinguished from the ADR Institute of Canada, which is a non-profit body that issues National Arbitration Rules and provides services for parties as requested.

The British Columbia International Commercial Arbitration Centre ("BCICA")⁴⁸ is a non-profit organisation located in Vancouver, British Columbia. It administers arbitrations under its domestic and international arbitration rules. The BCICA's domestic

45 See e.g., *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 85 Alta. LR (2d) 287.

46 *Lamb v. Alan Ridge Homes Ltd.*, 2009, ABQB 170, aff'd 2009 ABCA 343, leave to appeal to SCC refused [2009] SCCA No. 520.

47 <http://adrchambers.com>.

48 www.bcicac.com.

arbitration rules are incorporated by reference into BC's Commercial Arbitration Act and serve as the default domestic arbitration rules in that province.

The Canadian Commercial Arbitration Centre ("CCAC")⁴⁹ is based in Montreal, Quebec. It administers both international and domestic arbitrations under its institutional rules.

II THE YEAR IN REVIEW

Arbitration developments in local courts

The year 2009 saw Canadian courts grappling with the interaction between arbitration and other statutory regimes, although Canadian courts continue to give significant deference to the parties' choice to arbitrate their disputes through international arbitration

i Jurisdiction

In 2007, in the *Dell* case discussed *supra*, the Supreme Court of Canada released a significant decision in which it interpreted the Quebec Civil Code's domestic arbitration provisions and upheld the *kompetenz-kompetenz* principle, stating that where there is uncertainty about whether the parties agreed to arbitrate a particular matter, the arbitration panel should first determine its jurisdiction, unless the case raises important questions of law and only a cursory reference to the evidence is necessary. In *Dell*, the Supreme Court considered whether Quebec's class action legislation could require parties to litigate a dispute they had agreed to arbitrate, and concluded it did not: the procedural rights granted in class action legislation could not override the parties' substantive right to arbitrate.

In 2009, a number of courts addressed whether *Dell* applied outside of Quebec. Significantly, the Supreme Court of Canada will hear two appeals from the British Columbia Court of Appeal on this issue in May 2010: *MacKinnon*⁵⁰ (decided under Article 8 of the Model Law), and *Seidel*⁵¹ (decided under British Columbia's domestic arbitration legislation). In both cases, the British Columbia Court of Appeal determined that the Supreme Court of Canada's decision in *Dell* did apply to overrule the law in British Columbia, so that courts are required to refer a dispute subject to an arbitration agreement to arbitration, even where class action legislation would otherwise apply.⁵² Saskatchewan courts have reached a similar conclusion.⁵³ Ontario is a notable exception in the area of class actions, as its legislature has prohibited mandatory arbitration clauses in consumer agreements (which are often the subject of class action proceedings).⁵⁴ Ontario courts have determined that *Dell* does not apply given Ontario's specific statutory regime.⁵⁵

49 www.cacniq.org.

50 *MacKinnon v. National Money Mart Co*, 2009 BCCA 103.

51 *Seidel v. Telus Communications Inc.*, 2009 BCCA 104.

52 At Paragraphs 68-72.

53 *Frey v. BCE Inc.*, 2010 SKCA 35 [denying leave to appeal].

54 Consumer Protection Act 2002, SO 2002, c.30, Schedule A, Sections 7 and 8.

55 *Griffin v. Dell Canada Inc.* (2009), 72 CPC (6th) 158, 76 CPC (6th) 173, aff'd 2010 ONCA 29.

Canadian courts also assessed the interaction between the jurisdiction of arbitral tribunals and other statutory regimes. The Ontario Court of Appeal recently considered whether consumer protection provisions contained in the Solicitors Act would apply where the parties had agreed to arbitrate.⁵⁶ The court concluded that the parties could choose arbitration rather than the court resolution contemplated by the Solicitors Act to resolve their dispute, but that the arbitrator would have to apply the substantive provisions of the Solicitors Act. A similar result was reached with respect to the Personal Property Security Act, which contains substantive provisions governing security agreements; parties can include arbitration clauses in agreements governed by the PPSA, and thereby agree to arbitrate issues governed by statute.⁵⁷

In contrast, the British Columbia Supreme Court held that its jurisdiction under the Companies Creditors' Arrangement Act allowed it to substitute its own determination about the interpretation of a contract, even though the parties had agreed to arbitrate the issue.⁵⁸ In determining whether a statute can override an agreement to arbitrate, much will turn on the specific statutory language considered.

In most of these cases, the court did not first refer the matter to the arbitrator to determine jurisdiction. Applying *Dell*, the interaction between various statutory regimes is considered an important legal issue that can be determined at first instance by the courts. By contrast, in *Dancap Productions Inc.*, the Ontario Court of Appeal held that, since it is 'at least arguable' that some of the matters sought to be litigated were subject to an arbitration agreement, the court action would be stayed, and the issue of jurisdiction referred to the arbitrator for determination.⁵⁹

Canadian courts considered other aspects of the *kompetenz-kompetenz* principle in 2009, with the British Columbia Supreme Court in *H&H Marine Engine Service Ltd*⁶⁰ determining that the International Commercial Arbitration Act grants jurisdiction to the courts to determine at first instance whether an arbitration agreement exists at all; it is only the scope of an arbitration agreement that should first be determined by the arbitrator. This decision conforms with existing Canadian law on the point.

The *kompetenz-kompetenz* principle is not always applied. For example, in *Penbold* (a domestic arbitration),⁶¹ the Alberta Master determined that a party was not entitled to have an arbitrator appointed because the limitation period applicable to the underlying claim had expired. This result seems contrary to usual arbitral practice where the limitations issues are squarely within the jurisdiction of the arbitrator. This case may not stand as a precedent, however, as neither party appears to have objected to having this issue determined by the courts.

56 *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339.

57 *Bobcat of Regina Ltd v. Powersports Regina Ltd*, 2009 SKQB 354, applying Alberta law: *Crystal Rose Home Ltd v. Alberta New Home Warranty Program* (1994), 163 AR 96 (Master).

58 *Re Hayes Forest Services Ltd*, 2009 BCSC 1169.

59 *Dancap Productions Inc. v. Key Brand Entertainment Inc.*, 2009 ONCA 135.

60 *H&H Marine Engine Service Ltd v. Volvo Penta of the Americas Inc.*, 2009 BCSC 1389.

61 *Penbold (Town) v. Boulder Contracting Ltd*, 2009 ABQB 550.

Canadian courts also considered how taking steps in court proceedings, which would otherwise have been subject to arbitration, can preclude a party from later seeking a stay of those proceedings in favour of arbitration. Notably, in early 2010, the British Columbia Court of Appeal held that a party taking a step in a court proceeding (in this case, a demand for particulars of a claim) could not at the same time reserve its right to later object to the courts' jurisdiction.⁶² By contrast, an Ontario court, relying on domestic legislation, set the standard differently: the party has to be aware of the arbitration agreement and display an unequivocal intent to abandon its right to arbitrate.⁶³

ii Interpretation of arbitration clauses

Court decisions in 2009 continued the Canadian approach of deferring to arbitral jurisdiction. In *Popack*,⁶⁴ the Ontario Court of Appeal considered two agreements entered into by parties. The plaintiff argued that the second agreement had rendered the arbitral provisions in the first inoperative. The Court of Appeal disagreed, holding that, where it is clear that the parties intended to submit all disputes to arbitration, a clause in a subsequent agreement will not render inoperative a similar clause in a previous agreement.⁶⁵

iii Challenges to arbitrators

In *Tepei*,⁶⁶ the British Columbia Court of Appeal held that, in matters of procedural fairness and reasonable apprehension of bias, the rules of the BCICAC could not trump the protections afforded in the domestic arbitration act. The court relied on the legislation to vacate an arbitrator's awards, where that arbitrator was disqualified for reasonable apprehension of bias.

iv Arbitrators' fees

Two recent cases address situations in which a party has refused to advance fees to the arbitrator. In *Mericle*, decided under domestic legislation, the court held that an arbitrator committed a breach of natural justice when he refused to allow a respondent to present its case when that party had refused to provide the arbitrator with a security deposit for his fees.⁶⁷ In *Santen*,⁶⁸ the court upheld an arbitrator's order directing parties to equally advance costs, in spite of a party's objection that the arbitrator had no authority to compel advancement of costs until he determined that party's preliminary objections to the arbitration.

62 2010 BCCA 18; see similarly *Bodnar v. Payroll Loans Ltd*, 2009 BCSC 1205.

63 [2009] OJ No. 5200 (Sup. Ct J).

64 *Popack v. Mosche Lipszyc*, 2009 ONCA 365, leave to appeal to SCC dismissed, [2009] SCCA No. 268.

65 See Henri Alvarez' discussion of this case in *Kluwer Arbitration*.

66 *Tepei v. Insurance Corp. of British Columbia*, 2009 BCCA 28.

67 *Mericle v. Basement Systems (Calgary) Inc.*, 2010 ABQB 137; in that case, the reviewing judge held that refusal to provide the deposit prevented the party from putting forward its own claim..

68 *Santen v. Tarasenko*, 2009 CarswellOnt 896 (Sup. Ct J).

v *Review of awards*

Canadian courts continue to affirm that the scope of review of arbitral decisions will be limited.

Interpreting domestic legislation, the Ontario Court of Appeal held that an arbitrator's decision to order security for costs was not a question subject to review on jurisdictional grounds and could not otherwise be reviewed on an interim basis.⁶⁹

vi *Enforcement*

In December 2009, the Supreme Court of Canada heard an appeal from the Alberta Court of Appeal as to the limitation period applicable to the recognition and enforcement of international arbitration awards under the New York Convention.⁷⁰ The Alberta Court of Appeal held that the Alberta Limitations Act applies to require a two-year limitation period (subject to discoverability). It concluded that international arbitration awards should be enforced in the same manner as foreign judgments, through an 'action upon a debt', rather than as a domestic judgment, which would have been subject to a 10-year limitation period. The Supreme Court of Canada confirmed that provincial courts in Canada may apply local limitation periods to New York Convention-based applications for recognition and enforcement of foreign arbitral awards.⁷¹ Although neither the New York Convention nor the Model Law expressly imposes a limitation period on recognition and enforcement, Article III of the Convention stipulates that recognition and enforcement shall be 'in accordance with the rules of procedure of the territory where the award is relied upon'. On its analysis, the Supreme Court of Canada determined that that phrase should be understood as indicating application of domestic law on such matters. It concluded that 'notwithstanding Article 5, which sets out an otherwise exhaustive list of grounds on which recognition and enforcement may be resisted, the courts of a contracting state may refuse to recognise and enforce a foreign arbitral award on the basis that such proceedings are time barred'.⁷²

In *Znamensky Selkcionno-Gibridny Center*, an Ontario court determined that a party cannot challenge the enforcement of an award on grounds that could have been raised before the tribunal, but were not.⁷³

An Ontario court also rejected a party's claim that enforcement of an arbitration award should be stayed pending resolution of an arbitration between related entities. The court held that the enforcement of equitable set-off (even if it was available) does not rise to the level of a public policy reason for refusing to enforce an award.

69 *Inforica Inc. v. CGI Information Systems and Management Consultants Inc.*, 2009 ONCA 642.

70 *Yugraneft Corp. v. Rexx Management Corp.*, *supra*, at footnote 44.

71 2010 SCC 19.

72 2010 SCC 19 at Paragraph 18.

73 *Znamensky Selkcionno-Gibridny Centre LLC v. Donaldson International Livestock Ltd*, [2009] OJ No. 4011.

vii *Confidentiality*

One of the significant issues parties to an arbitration face in having awards reviewed by the courts is ensuring that matters are kept confidential (or as confidential as possible) in such a public forum. In *Telesat Canada*,⁷⁴ the Ontario court considered whether a sealing order would be issued over documentation filed with the court on an application to challenge an arbitral tribunal's order. The court applied the common law test for sealing orders, set out by the Supreme Court of Canada in *Sierra Club*,⁷⁵ which requires the court to balance the public interest in open court proceedings against other interests. In performing this balance, the court recognised the public interest in encouraging arbitration by upholding the parties' reasonable expectations of privacy and issued a sealing order covering the evidence filed on the substantive merits of the arbitration.

Investor–state disputes

At the date of writing, the following investor-state cases were pending against the government of Canada. All of the cases are arbitrations under Chapter 11 of the NAFTA.

i *AbitibiBowater Inc.*

The US Company AbitibiBowater Inc. served Canada with a notice of intent to submit a claim to Arbitration in April 2009 and a notice of arbitration in February 2010. AbitibiBowater alleges that legislation passed by the government of Newfoundland and Labrador expropriated most of its assets in the province without appropriate compensation and denied it the usual judicial avenues of legal redress. As a result, AbitibiBowater alleges that Canada breached Article 1102 (National Treatment), Article 1103 (MFN Treatment), Article 1105 (Minimum Standard of Treatment and Article 1110 (Expropriation) of the NAFTA.⁷⁶

ii *Centurion Health Corporation*

Melvin Howard, a US citizen, served Canada with a notice of intent in July 2008, a notice of arbitration in January 2009, and a revised notice of arbitration in February 2009 on behalf of the Centurion Health Corporation and the Howard Family Trust. The claimants allege that Canada violated Article 1102 (National Treatment), Article 1103 (MFN Treatment), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation) of the NAFTA in relation to the claimants' proposed private surgical facility in Calgary, Alberta.

74 *Telesat Canada v. Boeing Satellite Systems International Inc.*, 2010 ONSC 22.

75 *Sierra Club of Canada v. Canada* (Minister of Finance), [2002] SCR 442.

76 Further information about these arbitrations can be found at www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/gov.aspx?lang=en.

iii Chemtura Corp.

Chemtura Corp. (formerly Crompton Corp.), a US corporation, served Canada with notices of Intent in November 2001, April 2002 and September 2002, with corresponding notices of arbitration served in October 2002 and February 2005. The claimant alleges that the withdrawal of the insecticide 'Lindane' from the Canadian market violated Article 1103 (MFN Treatment), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation) of the NAFTA.

The hearing took place in 2009 and a decision is pending.

iv Clayton/Bilcon

The claimants served Canada with a Notice of Intent on 5 February 2008 and a Notice of arbitration on 26 May 2008. The claimants allege that Canada violated Article 1102 (National Treatment), Article 1103 (MFN Treatment) and Article 1105 (Minimum Standard of Treatment) by reason of the conduct of an environmental review and subsequent rejection of the claimants' proposed basalt quarry and marine terminal project in Nova Scotia.

v Detroit International Bridge Company

The claimant served Canada with a notice of intent on 25 January 2010, alleging that Canada's International Bridge and Tunnels Act violates Article 1102 (National Treatment) and Article 1103 (MFN Treatment), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation).

vi Dow AgroSciences LLC

Dow AgroSciences served Canada with a notice of intent in August 2008 and a Notice of arbitration in March 2009. Dow AgroScience alleges that Quebec's ban on the sale of products containing the pesticide 2,4-D for use on lawns violates Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation) of the NAFTA.

vii Merrill & Ring Forestry LP

Merrill & Ring Forestry LP served Canada with a notice of intent in September 2006 and a notice of arbitration/statement of claim in December 2006. Merrill & Ring alleged that Canada's Export and Import Permits Act and Regulations and related administrative practices, as they relate to the export of logs from the Province of British Columbia, violate Article 1102 (National Treatment), Article 1103 (MFN Treatment), Article 1105 (Minimum Standard of Treatment), Article 1106 (Performance Requirements) and Article 1110 (Expropriation) of the NAFTA.

The hearing on the merits took place in May 2009. The tribunal's award, dated 31 March 2010, dismissed all claims against Canada.

viii Mobil Investments Canada Inc. and Murphy Oil Corporation

Mobile Investments and Murphy Oil served Canada with separate Notices of Intent in August 2007 and a joint notice of arbitration in November 2007. The claimants allege that the Canada-Newfoundland Offshore Petroleum Board (a body composed of

representatives of the federal and provincial governments) imposed new requirements to spend money on local research and development in Newfoundland, in alleged violation of Article 1105 (Minimum Standard of Treatment) and Article 1106 (Performance Requirements) of the NAFTA.

ix *Vito G Gallo*

Vito Gallo served Canada with a notice of intent on 12 October 2006 and a notice of arbitration on March 30, 2007. He alleges that the Government of Ontario's Act to Prevent the Disposal of Waste at the Adams Mine Site violates Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation) of the NAFTA by cancelling environmental approvals, extinguishing certain agreements for the sale of Crown lands, and extinguishing causes of action at domestic law that might arise from the Act.

x *William Jay Greiner and Malbaie River Outfitters Inc.*

William Jay Greiner and Malbaie River Outfitters Inc. served Canada with a notice of intent in September 2008. The claimants, which operate an outfitting service offering fishing and hunting trips in Quebec, allege that changes to Quebec's fishing license lottery system and revocation of certain 'authorisations of commerce' for certain rivers in Quebec were violations of Article 1102 (National Treatment), Article 1103 (MFN Treatment), Article 1105 (Minimum Standard of Treatment) and Article 1110 (Expropriation) of the NAFTA.

The claimants have not yet filed a notice of arbitration.

Cases decided locally involving investors and other states

There were no Canadian cases decided locally involving investors and other states in 2009. Historically, Canada has hosted a number of set-aside proceedings brought in the context of NAFTA Chapter 11 claims.⁷⁷

Other notable cases in the realm of investor state arbitration

Canadian courts have notably had occasion to address the constitutionality of investor-state arbitration. In *Council of Canadians, CUPW and the Charter Committee on Poverty Issues v. the Attorney General of Canada*,⁷⁸ the applicants alleged that the dispute resolution provisions of Chapter 11 of the NAFTA violated rights guaranteed under the Canadian Charter of Rights and Freedoms and violated Canada's Constitution by usurping the jurisdiction of Canadian courts. Both the Ontario Superior Court and the Court of Appeal of Ontario found the dispute resolution provisions in Chapter 11 of the NAFTA to be constitutional.

77 *Mexico v. Metalclad Corp.*, [2001] BCJ No. 950 (BCSC); *Canada (Attorney General) v. SD Myers, Inc.* [2004], FCJ No. 29 (Fed. Ct); *Mexico v. Karpa* [2003] OJ No. 5070 (Ont. Sup. Ct J), aff'd [2005] OJ No. 16 (Ont. CA); *Bayview Irrigation District #11 v. Mexico*, [2008] OJ No. 1858 (Ont. Sup. Ct).

78 [2005] OJ No. 3422 (Ont. Sup. Ct), aff'd [2006] OJ No. 4751 (Ont. CA), leave to appeal to SCC refused [2007] SCCA No. 48.

III OUTLOOK AND CONCLUSIONS

As noted, there are a number of interesting matters pending before Canadian courts, which will potentially provide helpful guidance to arbitration practitioners. The recent decision of the Supreme Court of Canada in *Yugraneft*, which confirms that provincial courts in Canada may apply local limitation periods to applications for recognition and enforcement of foreign arbitral awards, has clarified an important issue in relation to the New York Convention. By upholding the applicability of local limitation laws to New York Convention-based applications for recognition and enforcement of foreign arbitral awards, the Supreme Court of Canada has acted in accord with the restraint shown by the original drafters of the Convention, who did not include any restriction on a state's ability to impose time limits on recognition and enforcement proceedings. The international arbitration community may ultimately want to embrace some amendment to the Convention and the Model Law, which will override local limitation laws, but until then each state will continue to define its own approach.

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