CANADA

Law & Practice

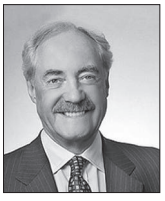
Contributed by Burnet Duckworth & Palmer LLP

CONTENTS

Contributed by Burnet, Duckworth & Palmer LLP **Authors** David R Haigh QC, Paul A Beke

Burnet, Duckworth & Palmer LLP (BD&P) has represented companies and states from a variety of industries in international commercial arbitrations. Lawyers are experienced in advising clients from sectors that include aeronautics, manufacturing, telecommunications and oil & gas. The team has represented clients in ad hoc arbitrations under the UNCITRAL Rules as well as in arbitrations administered under the rules of institutions such as the ICC, LCIA and the Stockholm Chamber of Commerce. BD&P has also appeared for arbitral parties before Canadian courts, and has represented both investors and states in disputes under the NAFTA and bilateral investment treaties over investments in the Middle East, Eastern Europe and North America.

Authors



Senior partner and arbitration practice leader, **David R Haigh QC**'s primary practice in recent years has been as an arbitrator in international commercial and investor-state arbitrations. He has served as an arbitrator on numerous cases and has also practised as an advocate in international and domestic commercial arbitration. His experience as an arbitrator and advocate includes ad hoc, institutional, private and investor-state disputes. Areas of expertise include: energy, corporate/commercial, contractual (involving sectors such as pharmaceuticals, telecommunications and intellectual property). Haigh has served as arbitrator and counsel to a variety of nationals and state entities. He is a member of British and Canadian arbitration associations. Haigh has published a number of arbitration-related articles.

Senior associate **Paul A Beke** has acted for parties in domestic and international commercial arbitration, primarily in the energy and construction sectors.

1. General

1.1 Prevalence of Arbitration

In Canada, international arbitration is a very common method for resolving international commercial disputes. The norm would be for foreign parties to insist on a neutral forum, via arbitration. They would often see international arbitration as the most streamlined dispute-resolution option, and the one with the widest scope for enforcement.

A significant number of Canadian court decisions have interpreted the Model Law (over 200 reported cases). Thus, parties understand that the choice of Canada as an arbitral seat will lead to predictable results.

For these reasons, international arbitration in Canada is a popular choice. Likely only foreign companies with sufficient experience of Canadian courts would consider choosing litigation over arbitration in Canada.

1.2 Trends

No significant new trends or issues have emerged. It remains true that Canadian courts are generally supportive of arbitration proceedings and deferential to arbitral awards. For example, the courts have recently confirmed that commencing litigation will not stop a limitation period from continuing to run and ultimately expire, when arbitration is the proper forum (*Lafarge Canada Inc. v Edmonton (City)*, 2013 ABCA 376; 2015 ABQB 56).

1.3 Key Industries

Canada is a significant producer of primary resources. As a result, many disputes arise from production and sales in the energy and mining industries. As with other developed economies, construction, insurance, infrastructure, and information technol-

ogy and software activities also give rise to dispute resolution.

1.4 Arbitral Institutions

The ICC, LCIA, AAA, and ICSID are the most common institutions. In terms of arbitration services, the following providers exist in Canada:

- ADR Institute of Canada, Inc.;
- Arbitration place (Toronto);
- British Columbia International Arbitration Centre (Vancouver);
- Canadian Commercial Arbitration Centre (Montreal);
- ADR Chambers (Toronto); and
- JAMS Canada (Toronto).

2. Governing Law

2.1 International Legislation

Because Canada is a federation, a different international arbitration statute applies in each Canadian jurisdiction, but each is based on the Model Law. Canada has ten provinces and three territories. Canada's *Constitution Act*, 1867 determines the division of powers between the Parliament of Canada and the provincial legislatures. The regulation of commercial arbitration is generally a matter of provincial jurisdiction. Canada's *Federal Arbitration Act* deals with matters involving the federal government as a party, but that act does not apply to private commercial matters.

Except for Québec, all of Canada's provinces and territories are common law jurisdictions. Those common law jurisdictions in each instance have adopted the Model Law, except for British Columbia. Its statute is functionally similar to the Model Law. The Uniform Law Conference of Canada is working on new uniform language to adopt UNCITRAL's 2006 amendments to the Model Law.

Canada has signed the New York Convention. In turn, each province and territory (other than Ontario and Québec) has passed its own legislation adopting the Convention. Ontario considers that the Model Law has already implemented the substantive provisions of the New York Convention.

Québec is a civil law jurisdiction. The *Civil Code of Québec* and the *Code of Civil Procedure* govern commercial arbitration. Québec has not directly adopted the Model Law or the New York Convention. Still, the *Civil Code* requires courts to consider those instruments when dealing with international arbitrations in Québec.

Even though most of the provinces and territories have directly adopted the Model Law, that does not mean that all legal rules are the same. For example, limitation periods for recognising and enforcing awards will depend on the limitation statute in the specific provincial jurisdiction.

2.2 Changes to National Law

As discussed below, the *Sattva* decision of the Supreme Court of Canada has most likely made Canadian courts more deferential to international arbitration tribunals on standards of review. For appeals on jurisdiction and challenges of awards, the standard of review will likely be reasonableness, not correctness, even on pure questions of law. An exception would be when those questions deal with issues foundational to the Canadian legal system that might be outside an international arbitration tribunal's expertise.

3. The Arbitration Agreement

3.1 Enforceability

Under the Model Law, the agreement must be in writing. Written adoption of an arbitration clause in another document will suffice.

The following are important elements to include in an arbitration agreement:

(a) the seat or place of arbitration;
(b) the language of the arbitration;
(c) the applicable law;
(d) the arbitration rules; and
(e) any institution that the parties wish to administer the arbitration

(2010 *IBA Guidelines for Drafting International Arbitration Clauses*).

3.2 Approach of National Courts

Canadian courts enforce valid arbitration agreements. Canadian legislation either adopts or follows the Model Law, which requires courts to refer parties to arbitration when a party promptly applies under a valid arbitration agreement (by the time of that par-

ty's first submission on the substance of the dispute). The order that courts typically grant stays the action and refers the parties to arbitration. Under the Model Law, courts need not refer the parties to arbitration when the arbitration agreement is void, inoperative, or is incapable of being performed.

Even when the Model Law does not require the court to stay the action in favour of arbitration, the court might still exercise its discretion to do so, using its inherent jurisdiction (*Navionics v Flota Maritima Mexicana* (1989) 26 FTR 148 (TD)).

Canadian courts are willing to order parties to postpone foreign litigation, too. For instance, in *BG International Ltd v Grynberg Production*, 2009 ABQB 452, the court ordered a party to abandon its actions in American jurisdictions in favour of arbitration proceedings in Alberta. The court ordered a $1 million fine in addition to a $10,000 penalty for each day that the party failed to comply.

3.3 Validity of Arbitral Clause

Courts consider an arbitration clause to be a contract separate from the rest of the surrounding contract. The validity of an arbitration clause is therefore determinable independently of the validity of the contract itself.

4. The Arbitral Tribunal

4.1 Selecting an Arbitrator

Canadian law does not limit the parties' freedom to choose arbitrators: they do not need to be lawyers or members of the province's law society. Still, an arbitrator must be independent and impartial.

4.2 Challenging or Removing an Arbitrator

The parties can agree on a procedure for challenging an arbitrator. Otherwise, a party wishing to challenge the appointment must follow the procedure under the governing legislation (typically, the procedure under the Model Law), or under any applicable institutional rules.

Usually, a party who intends to challenge an arbitrator must send a written statement of the reasons for the challenge to the arbitral tribunal. Under the Model Law, unless the challenged arbitrator withdraws or the other party agrees to the challenge, the arbitral tribunal decides the issue. In most jurisdictions, when a challenging party is unsuccessful, it may apply to the provincial superior court (the trial-level court) to decide the challenge issue finally.

4.3 Independence, Impartiality and Conflicts of Interest

The Model Law provides that a contemplated arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence. That obligation continues from the time of appointment and throughout the arbitral proceedings.

5. Jurisdiction

5.1 Matters Excluded from Arbitration

Canadian courts are reluctant to exclude subject matters from arbitration. Even when legislation specifies the court with jurisdiction, but does not clearly exclude the possibility of arbitration by agreement, a dispute under that legislation can still be arbitrated (*Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 (**Dell**)).

Certain subject matters are not arbitrable, because they necessarily involve non-parties to arbitration agreements, or signatories without legal capacity to enter binding agreements, for instance children. Other subject matters are not arbitrable, because they do not merely involve rights between parties to an arbitration agreement, but also *public* recognition of status (for example, patent registration, or guardianship). Québec's *Civil Code* does not allow the arbitration of disputes over the status and capacity of persons.

5.2 Challenges to Jurisidiction

Under the international arbitration acts of the various Canadian jurisdictions, the arbitral tribunal can rule on its own jurisdiction. As the Model Law provides, a party may apply to a Canadian superior courts for review when the tribunal has ruled on its own jurisdiction as a preliminary issue, or in a final award. If the arbitral proceedings have not concluded, the tribunal may continue with them while a party seeks to resolve the issue of jurisdiction before a Canadian court.

While not addressed in the Model Law, a party might be able to convince a court to determine whether a tribunal holds jurisdiction even before the tribunal

could determine that question. Canadian courts generally respect the principle of competence-competence. Yet in limited circumstances, they might intervene to determine an arbitral tribunal's jurisdiction. That is so when all of the following apply:

(i) the jurisdictional challenge relates solely to a question of law or the questions of fact are superficial;
(ii) the lack of jurisdiction is clear and obvious;
(iii) the court is satisfied that the challenge is not a delaying tactic (*Dell*).

5.3 Timing of Challenge

The Model Law establishes the timing for raising jurisdictional challenges. However, as the previous answer discusses, a party may be successful with a challenge in court even before the tribunal has decided on its jurisdiction.

5.4 Standard of Judicial Review for Jurisdiction/Admissibility

The court's standard of review is generally whether the tribunal's ruling on jurisdiction is reasonable, rather than correct. Jurisdiction is generally a question of law, not one of fact, or mixed fact and law. Still, even for questions of *law* decided by a tribunal, the standard of review is reasonableness, not correctness (*Creston Moly Corp v Sattva Capital Corp*, 2014 SCC 53 (**Sattva**)). The only exception is when the question is about the Canadian constitution or other foundation of the legal system that might be outside the tribunal's expertise. (Contractual interpretation is now generally a question of mixed fact and law, not one of law alone.)

Satttva dealt with an appeal of an award in a domestic arbitration, not an appeal of a ruling on jurisdiction. However, the standard of review principles should apply by analogy. Under that interpretation of *Sattva*, the courts have become more deferential to arbitral tribunals on the applicable standard of review. Before *Sattva*, the British Columbia Court of Appeal had held that when a party calls into question a tribunal's jurisdiction, the party must overcome a "powerful presumption" that the tribunal's decision was within its jurisdiction (*Quintette Coal Ltd. v Nippon Steel Corp*, [1991] 1 WWR 219 (BCCA)). Even so, the Ontario Court of Appeal had interpreted this to mean only that:

(i) courts will intervene rarely because intervention is limited to true jurisdictional errors; and
(ii) when reviewing on the question of whether a tribunal has exceeded its jurisdiction, the court will apply a correctness standard of review (*United Mexican States v Cargill, Inc*, 2011 ONCA 622; leave to appeal denied, [2011] SCCA No 528).

After *Sattva*, a reasonableness standard seems far more likely.

5.5 Breach of Arbitration Agreement

As discussed under **1.2** and **3.2** above, Canadian courts are not receptive to such litigation. Canadian arbitration legislation requires courts to stay or dismiss court actions in favour of arbitration, except in limited circumstances. Canadian courts will act under statute or their inherent jurisdiction to protect the arbitration process, when the parties have agreed to arbitrate.

5.6 Right of Tribunal to Assume Jurisdiction

Tribunals generally do not have that jurisdiction. However, Canadian law recognises exceptions under five theories:

(i) the relationship between a non-party controlling shareholder and a corporate party is so close that the tribunal should pierce the corporate veil;
(ii) a contract between the party and the non-party incorporates the arbitration clause by reference;
(iii) a non-signatory has become a party to the arbitration agreement by assumption or assignment;
(iv) the signatory acted as agent for a non-signatory in making the arbitration agreement; or
(v) estoppel applies to the non-party;

(J.K. McEwan and L.B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Aurora, Ontario: Canada Law Book) loose-leaf, at 2:100).

6. Preliminary and Interim Relief

6.1 Types of Relief

Neither legislation, nor the Canadian courts have restricted tribunals from granting preliminary or interim relief. Québec is an exception. Article 940.4

of its *Civil Code* permits the courts to grant interlocutory injunctions before or during arbitration proceedings. Courts have interpreted this to mean that only judges hold the power to grant injunctions (*Placements Raoul Grenier Inc v Coopérative forestière Laterrière*, [2002] JE 2002-1183 (CS)). The Québec Court of Appeal recognises this limitation, yet has also cautioned courts to consider carefully whether a particular arbitral order actually constitutes an injunction (*Nearctic Nickel Mines Inc v Canadian Royalties*, 2012 QCCA 385).

In Canada, the parties may alter the tribunal's power to award preliminary or interim relief by agreement. Otherwise, arbitral tribunals hold broad discretion to order interim relief against parties to the dispute. Tribunals will typically exercise their discretion when the following elements are present:

(a) the tribunal has *prima facie* jurisdiction over the dispute;
(b) the request for preliminary or interim relief cannot await a decision on the merits;
(c) the relief is necessary to prevent imminent harm that is not reasonably compensable by money;
(d) the balance of convenience favours the applicant (in other words, the interests of the party applying for relief outweigh those of the respondent, in the circumstances); and
(e) the applicant has established a reasonable possibility of success on the merits.

6.2 Role of Courts

Canadian courts will support arbitration by helping to fill gaps in the powers of arbitral tribunals. For example, courts will enforce interim orders of tribunals. Parties can also apply directly to the courts for interim relief, when necessary. For example, when a party seeks:

(a) relief against non-parties, who are beyond a tribunal's jurisdiction; or
(b) urgent relief, before the tribunal is constituted.

Canadian courts will grant interim relief in support of foreign arbitrations. An example is *TLC Multimedia Inc v Core Curriculum Technologies Inc* [1998] BCJ No 1656 (BCSC). The British Columbia court held that it had jurisdiction over *the person* of the respondent, a B.C. company, and could have granted interim relief to support the arbitration in Boston. (Ultimately, the court did not grant interim relief, because the applicant failed to show irreparable harm would otherwise result.)

6.3 Security for Costs

The Model Law expressly provides for security for costs only when a party is seeking an interim measure. The parties might agree to a more general power in an arbitration agreement or by adopting institutional rules. Otherwise, in egregious cases of unfair conduct, a tribunal might rely on its duty to ensure fairness and equality or its power to set procedure to impose security for costs on an applicant (*Jaffasweet Juices Ltd. v Michael Firestone & Associates*, (1997), 17 CPC (4th) 113 (Ont Gen Div); *Inforica Inc v. CGI Information Systems and Management Consultants Inc*, (2008), 311 DLR (4th) 728 (Ont CA)).

7. Procedure

7.1 Governing Rules

Arbitrators must be independent and impartial and treat the parties fairly and equally. Other than those fundamental requirements, the arbitral tribunal holds broad discretion to determine the arbitration procedure. The parties may also agree on specific arbitration procedures.

7.2 Procedural Steps

Canadian law generally follows the Model Law.

7.3 Legal Representatives

Canadian international arbitration statutes are silent on legal representatives. The provincial law societies govern the legal profession in Canada. Those societies could determine whether representation in arbitration qualifies as practising law, which would be subject to oversight. We are unaware of any provincial law society claiming an oversight function over arbitral representatives.

8. Evidence

8.1 Collection and Submission of Evidence

Tribunals in arbitrations seated in Canada often use the *IBA Rules on the Taking of Evidence in International Arbitration* to guide evidence procedures. Pleadings may attach documents on which the party intends to rely. The opposing party would typically request relevant and material documents,

for instances, using a Redfern Schedule. Next, the parties would exchange witness statements and expert reports. Typically, the parties would not question each other before the hearing. Instead, witnesses would adopt their statements at the hearing, and then answer cross-examination questions.

Occasionally, counsel or arbitrators in arbitrations seated in Canada may not be familiar with international arbitration practice. In that case, they might choose a procedure that largely follows Canadian litigation practice—evidentiary procedures might be far less streamlined than under the *IBA Rules*. Under a litigation-style procedure, pleadings will contain claims about the facts, but will fail to include documents or evidence. At a document discovery phase after pleadings, the parties will disclose *all* relevant and material documents. The tribunal may then permit parties to question each other under oath before the hearing. The parties will also exchange written expert reports before the hearing. Lay witnesses will simply provide their evidence orally at the hearing, and then answer cross-examination questions.

Regardless of the evidence procedures that the tribunal selects, communications between solicitor and client for the purpose of legal advice will be privileged and thus, not subject to disclosure. The same is true for records (i) prepared for the dominant purpose of furthering the arbitration while it is ongoing, and (ii) records confidentially exchanged to attempt to settle disputes.

8.2 Rules of Evidence

In Canadian litigation, both in the common law jurisdictions and civil law Québec, rules of evidence apply to ensure that evidence is highly reliable and non-prejudicial. However, the law does not require that these rules of evidence apply in arbitration. Arbitral tribunals have discretion to determine the manner for presenting evidence. Tribunals seated in Canada tend to be more relaxed about admitting evidence, instead factoring in reliability when weighing the evidence.

8.3 Powers of Compulsion

Under the Model Law, the tribunal, or a party with the approval of the tribunal, can request court assistance in compelling evidence, according to the court's rules of evidence. This includes requests for the assistance of foreign courts to compel evidence from witnesses outside of the jurisdiction. The courts of Alberta have found that the Model Law applies not only to the taking of evidence at the hearing, but is also broad enough to give the court power to compel a witness to answer questions under oath or produce records before the hearing. This applies both to parties and to non-parties. For example, in *Jardine Lloyd Thompson Canada Inc v SJO Catlin*, 2006 ABCA 18, the court compelled a third-party witness to appear for oral questioning prior to the arbitration hearing.

9. Confidentiality

Confidentiality is at risk unless the parties agree to it. In *litigation*, an implied undertaking rule applies to the pre-trial stage, while trials are public. This rule restricts parties and their counsel from using records and information received during the pre-trial phase for a purpose unrelated to that particular litigation. The Supreme Court of Canada has held that the law imposes on the parties *an undertaking to the court* not to use the documents or answers for any purpose other than the particular litigation, whether or not such documents were originally confidential (*Juman v Doucette*, 2008 SCC 8). Courts have *not* yet applied the implied undertaking rule to arbitrations seated in Canada.

Without a confidentiality agreement or an institutional rule that protects information disclosed in arbitration proceedings, confidentiality might not apply.

Even with the protection of a confidentiality agreement (through direct agreement or agreement to institutional rules) confidentiality is unavailable or lost when disclosure is:

(a) required for recognition and enforcement of an award;
(b) required by a court, for example, in the context of jurisdictional challenge or alleged procedural improprieties; or
(c) otherwise required by law, for example, in financial reporting of a material event under securities laws.

Keeping tribunal deliberations confidential is procedurally proper for arbitrators. The Québec Court of Appeal considered whether arbitrators are bound to an implied obligation of confidentiality. The Court

held that an arbitrator's disclosure to a party that the pending decision would be unanimous was a procedural irregularity, but that did not render the award null. The Court found that no implied duty of confidentiality applies in arbitrations seated in that province (*Rheaume v Societe d'investissements l'Excellence Inc,* 2010 ACCA 226; leave to appeal to the Supreme Court of Canada refused).

10. The Award

10.1 Legal Requirements

The award must (i) be written, (ii) be dated, (iii) state the seat of arbitration, and (iv) be signed by the arbitrators. Unless the parties otherwise agree, the award must also include the reasons for the tribunal's determination. The tribunal or institution must deliver a copy of the award to each party.

10.2 Types of Remedies

Either directly or through the choice of institutional rules, parties may agree to limit the powers of the tribunal. Otherwise, the arbitrators can award any remedies that the substantive law allows, such as interest, punitive damages, rectification, specific performance, and injunctions.

10.3 Recovering Interest and Legal Costs

Subject to the agreement of the parties, tribunals generally award interest and costs. Tribunals have broad discretion to award costs, guided by reasonableness. Tribunals typically award costs based on the relative success of each party in their claims or defences. Tribunals might consider other factors, such as the complexity of the case, and the conduct of the parties during the arbitration.

As a practical matter, parties must itemise the costs incurred in some detail. Generally, the arbitrators will ask for a statement of costs, showing the legal fees incurred and disbursements. Tribunals would only award costs for in-house counsel fees in extraordinary circumstances. When institutional rules apply, they would set the components of costs, and would include institutional fees as one of the recoverable components.

11. Review of an Award

11.1 Grounds for Appeal

Parties cannot appeal an award. They can only challenge an award on the grounds set out in the Model Law—generally, over the following:

- invalidity of the arbitration agreement;
- incapacity of a party;
- denial of notice or of an opportunity to present one's case;
- any portions of an award that are beyond the scope of the submission;
- improper composition of the tribunal (if not waived);
- the subject matter not being arbitrable; or
- a conflict with the public policy of the place of arbitration.

Parties may also challenge for egregious procedural unfairness.

On those grounds, the court has discretion to set aside the award. Canadian courts narrowly interpret those grounds. For example, a denial of an opportunity to present one's case must rise to the level of a denial of justice, and a conflict with public policy must fundamentally undermine justice and fairness.

For most of the Model Law's specified challenge grounds, the burden of proof clearly lies with the party making the challenge. That may or may not also be the case for the public policy and arbitrability grounds (*Assam Co. India Ltd. v Canoro Resources Ltd*, 2014 BCSC 270 (*Assam*); Schreter *v Gasmac Inc*, [1992] OJ No. 257 (*Schreter*)).

11.2 Excluding/Expanding the Scope of Appeal

One Ontario trial level court has interpreted the challenge provisions of the Model Law in a way to allow parties to exclude challenges of international awards. In other Canadian jurisdictions, that decision would be persuasive, but non-binding.

In particular, the Ontario superior court interpreted the challenge provisions (Article 34) of the Model Law as non-mandatory (*Noble China Inc v Lei*, 1998 CarswellOnt 4386 (Gen Div)). The court interpreted the freedom "to agree on the procedure to be followed by the arbitral tribunal in conducting

the proceedings" (Article 19(1)) as applying also to procedures in the courts. The court held that parties may agree to exclude the right to challenge an award under the Model Law.

Though non-binding, this interpretation might be persuasive with courts throughout Canada. Still, this interpretation differs from the approach in New Zealand (*Methanex Motonui Ltd v Joseph Spellman and Ors*, (2004) NZLR 95 (HC)). Potentially another Canadian court's interpretation could place less weight on the absence of mandatory language (for example, "shall") in Article 34, and greater weight on which provisions expressly specify that parties are "free to agree" on various matters—the provisions on challenge and on the appeal of preliminary rulings on jurisdiction fail to include "free to agree" language.

11.3 Standard of Judicial Review

The *Sattva* case (discussed in section 5.4 above) dealt with an appeal from a domestic arbitration award, not a challenge of an international arbitration award. Still, by analogy, the courts would most likely apply a standard of review of reasonableness, not correctness, to challenges of international arbitration awards. An exception would be on issues foundational to the Canadian legal system that might be outside the tribunal's expertise.

Certain additional factors may apply for particular grounds of challenge. For grounds relating to lack of due process, the tribunal's conduct must offend the Canadian legal system's basic notions of justice. For conflicts with public policy, courts will consider both the award and the procedure that led to the award. Canadian courts construe public policy narrowly. Conflict with public policy must fundamentally undermine justice and fairness.

12. Enforcement of an Award

12.1 New York Convention

In most Canadian jurisdictions, the New York Convention is in force for international *commercial* arbitration. The exceptions are Ontario, which instead relies on the Model Law alone, and Québec, which treats the New York Convention as a guide for its *Civil Code* provisions covering both commercial and *non-commercial* international arbitration.

Canada ratified the New York Convention in 1985. Nearly all provinces and territories followed by incorporating the Convention into their international arbitration legislation. Exceptionally, Ontario removed the Convention from the Ontario act to avoid duplication of award enforcement as between the Convention and the Model Law. Thus, the Convention is not an express part of the law covering Ontario's jurisdiction. As for Québec, its incorporation of the Convention is not in the form of adoption; instead, Québec's Civil Code generally tracks the terms of the Model Law and provides that Québec courts are to take into consideration the Convention and the Model Law.

When it ratified the New York Convention, Canada elected to declare that the Convention would apply only to *commercial* differences or disputes, except in Québec, where that reservation does not apply. Canada did not adopt the reciprocity reservation, so Canadian courts must recognise and enforce awards made even in states that have failed to ratify the New York Convention.

As of December 1, 2013, Canada ratified the Convention on the Settlement of Investment Disputes between States and Nationals of other States. About half of the provinces and territories have so far implemented that ICSID convention through legislation.

12.2 Enforcement Procedure

The New York Convention provides for the recognition and enforcement of international final awards. The Model Law does, too. Courts must recognise and enforce arbitral awards, subject to judicial discretion to refuse when specified grounds apply. Those grounds and burden of proof are generally the same as those for challenges to an award, under Article 34 (covered under section **11.1** above). An additional ground applies when the award is not yet binding, or the court at the place of arbitration has set aside or suspended the award.

Canadian courts interpret the grounds for refusal narrowly, and view the list of specified grounds as exhaustive. For example, an Ontario court has made an *obiter* (nonbinding) comment that Article 36 of the Model Law does not specify that the absence from the jurisdiction of the award debtor and its assets is a refusal ground (*Yaiguaje v Chevron Corp*, 2013

ONSC 2527; reversed on other grounds, 2013 ONCA 758; leave to appeal allowed, 2014 CarswellOnt 4152 (SCC)).

For recognition and enforcement, a summary procedure applies. An enforcing party may apply to the court with an affidavit. It must exhibit as evidence (i) the authenticated original or a certified copy of the award, (ii) the original or certified copy of the arbitration agreement, and (iii) any necessary translations. The summary process will run its course relatively quickly, unless complications arise. One possible complication would be the case of enforcement proceedings against a state or its agency (*State Immunity Act*, RSC 1985, c S-18).

Generally for enforcement, the standard limitation periods (often two years) in the various Canadian jurisdictions apply, running from the time that the award was no longer at risk of being set aside at the place of arbitration (see *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19). Longer limitation periods for enforcement of judgments might apply when, as in British Columbia, the limitation act defines "judgment" to include arbitral awards. The *Yugraneft* decision relied upon the reference in Article III of the New York Convention to "local rules of procedure", which included local time limits for purposes of the article. Thus, local limitation periods might not apply in Ontario, because it did not adopt the New York Convention.

12.3 Approach of the Courts

Canadian courts are generally supportive and orthodox in recognising and enforcing awards. The courts narrowly interpret the specified grounds for refusing to recognise and enforce. For example, a denial of an opportunity to present one's case must rise to the level of a denial of justice, and as mentioned, a conflict with public policy must fundamentally undermine justice and fairness.

For most of the Model Law's specified challenge grounds, the burden of proof clearly lies with the party making the challenge. As mentioned, that may or may not also be the case for the public policy and arbitrability grounds (*Assam*; *Schreter*).

Burnet Duckworth & Palmer LLP
2400, 525 8th Avenue SW, Suite 1400
Calgary, Alberta
Canada, T2P 1G1
Tel +1 403 260 0100
Fax +1 403 260 0332
Email counsel@bdplaw.com
Web www.bdplaw.com