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IN THIS ISSUE

This article, prepared from notes for a presentation to a monthly meeting of the International Arbitration Committee, is the first of what is planned to be series examining different jurisdictions' experience with recognition and enforceability of arbitral awards made in other jurisdictions.

Enforcement of and Challenge to Arbitral Awards in Canada

ABOUT THE AUTHOR

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ABOUT THE COMMITTEE

The International Arbitration Committee serves all members involved or interested in international arbitration as in-house and outside counsel and/or as arbitrators. This extends to actions for or against the enforcement of arbitral awards in their jurisdiction and actions aiming at setting aside arbitral awards. Members publish newsletters and journal articles and present educational seminars for the IADC membership-at-large, offering expertise on drafting arbitration provisions, choosing arbitral institutions and rules, and the do's and don'ts in international arbitration. The Committee presents significant opportunities for networking and business referrals. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article, contact:

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Introduction

This paper summarizes notes of a presentation made by the author to a monthly teleconference meeting of the International Arbitration Committee. The presentation, discussing the Canadian experience, was the first of a comparative series to be presented at the Committee's meetings on enforcement, appeals and setting aside of international arbitral awards in various national jurisdictions.

Canada is a federal state, under the constitution of which private commercial and contractual disputes, including the arbitration of those disputes, are most often governed by provincial law. Federal law governing arbitration will apply when the commercial activity in which the dispute has arisen (for example, shipping) is a subject-matter over which jurisdiction is assigned to the national Parliament. Therefore, international instruments on the subject of arbitration must be adopted by both the central government and by each of the provinces in order to be given full domestic effect in Canada.

International Arbitration in Canada

All of the Canadian provinces have adopted in domestic legislation, more or less *verbatim*, both the New York Convention 1958 and the UNCITRAL Model Law 1985. However, under provincial laws the substantive provisions of the UNCITRAL Model Law apply only to international arbitrations (generally, disputes in which the parties reside or are based in different States) and domestic arbitrations are governed in each province by other legislation which is neither uniform between the provinces nor in many respects consistent with the UNCITRAL Model Law.

Canadian federal legislation does apply the UNCITRAL Model Law to maritime arbitrations and to domestic arbitrations to which the government of Canada or one of its agencies is a party.

Challenge to International Arbitral Awards in Canada

In Canada courts are empowered to decline to enforce international arbitral awards only on the very limited grounds for which provision is made in New York Convention Art V or to set aside international arbitral awards only on the equally limited grounds set out in UNCITRAL Model Law Art. 34. Thus, judicial intervention in respect of international arbitral awards is limited essentially to issues of jurisdiction or of process. In consideration of similar grounds of challenge set out in provincial legislation[1] governing a domestic arbitration, the Ontario Superior Court stated unequivocally that "These sections do not provide for a substantive review of the decision reached".[2]

UNCITRAL Modal Law Art 16(3) does permit, in Canada as elsewhere, judicial review of an interim award dealing with the arbitral panel's determination of its own jurisdiction. There is

[1] *Arbitration Act* of the Province of Ontario, SO 1991 c. 17, ss. 19, 46

[2] *Highbury Estates Inc*. v. *Bre-Ex Limited* 2015 ONSC 4966

no reported decision of a Canadian court conducting or deciding such a review. As will be seen below in context of substantive review, where permitted, of domestic arbitral awards in Canada Canadian courts almost invariably are highly deferential to arbitrators' decisions on the merits of a dispute. Although the question remains open in Canada, the author considers it probable that the same curial deference[3] as applies in substantive appeals in Canadian domestic arbitrations would be found and applied in a review concerning an arbitrator's preliminary ruling on jurisdiction, and that such a decision would be upheld in Canada on a "reasonableness", rather than a "correctness", standard.

Enforcement of International Arbitration Awards in Canada

There have been two noteworthy decisions, both at appellate levels of court, involving the enforcement in Canada of awards made elsewhere in international arbitrations.

In *Yugraneft Corporation* v. *Rexx Management Corporation*[4] a Russian claimant had obtained against a respondent in Alberta, Canada a substantial damages award in an arbitration conducted in Russia. The award was issued September 6, 2002. The claimant initiated proceedings under the New York Convention seeking recognition and enforcement of the award by the Alberta courts on January 27, 2006. The Canadian courts, ultimately the Supreme Court of Canada, dismissed these proceedings on grounds that their commencement was beyond the two-years time bar for which Alberta provincial legislation[5] provided. That statute prescribed the two-years time bar in respect of claims for a "remedial order"[6] subject to certain exceptions including a ten-years time bar for a "claim based on a judgment or order for the payment of money"[7]. The Supreme Court held that "an arbitral award is not a judgment or a court order" and so not subject to the 10-year time bar for commencement of enforcement proceedings. Thus, the two-years general time bar period applied.

The court did note that the commencement of the time bar period under the Alberta legislation, similar to that in most Canadian jurisdictions, was subject to a "discoverability" rule. Thus, in the case of proceedings to enforce a foreign arbitral award the prescribed period does not necessarily commence to run on the date of the award (here, 40 months prior to initiation of court proceedings) but rather from the date on which the successful claimant knew or ought to have known that it possesses enforcement rights in (here) the province of Alberta. There could be no argument of delayed discovery of the presence of assets in Alberta because that province is the respondent's principal place of

[3] See *Sattva Capital Corporation* v. *Creston Moly Corporation* 2014 SCC 53, discussed in more detail below
[4] 2010 SCC 19
[5] *Limitations Act*, RSA 2000 c. L-12
[6] *Ibid*., s. 3(1)(a), a court order requiring (among other things) compliance with a duty
[7] *Ibid*., s. 11

business[8] but in this case, as it appears in all cases to which it applies, the UNCITRAL Model Law permits in Art 34(2) the initiation of limited challenges to the award within three months after it is made. Thus, as determined by the Supreme Court of Canada, the time bar would not commence until expiry of that three months post-award in which challenge remains a possibility or, if such a challenge is brought, until final determination of that challenge.[9]

In *Sociedade-de-formento Industrial Private Limited* v. *Pakistan Steel Mills Corporation (Private) Limited*[10]an Indian claimant obtained in 2010 a substantial award against a Pakistani respondent in an ICC arbitration, the seat of which is not stated in the Court's decision. The award was unpaid and an investigator retained by the claimant identified a cargo of coal owned by the respondent about to be shipped by sea from Canada to the respondent in Pakistan. The claimant obtained in the British Columbia Supreme Court a Mareva injunction restraining export of the cargo; the cited decision of the British Columbia Court of Appeal upheld the injunction following the respondent's challenge to its validity. The point to be made for purposes of this article is the Court's review of the grounds on which a Mareva injunction may be granted in British Columbia one of which is the existence of a "strong *prima facie* case" on the merits favoring the claimant. On this point the Court, referring to the limited grounds on which an enforcement of an award may be refused under New York Convention Art V, commented[11] that "the merits of [the claimant's] claim were very strong, approaching certainty given the limited grounds upon which the claim could be defended".

This last comment is representative in the author's opinion of Canadian courts' respect for and support of arbitral awards and the process by which they are obtained, which judicial positions are more frequently demonstrated in context of domestic than of international arbitrations. A very summary review of grounds on which challenge to the merits of domestic arbitral awards may be attempted in Canada is therefore here presented.

Challenge to Domestic Arbitral Awards in Canada

As will be seen some Canadian provincial statutes which govern domestic arbitration contemplate appeals to courts challenging the substantive merits of the awards. The grounds of availability of appeal are diverse among the provinces but the most material point to be noted for purposes of this article is the high degree of deference that Canadian courts give to arbitral awards.

Even when an appeal is available, courts review arbitral awards, generally speaking, on a standard of “reasonableness” rather than “correctness”, even on a pure question of law, subject to certain very narrow exceptions:

[8] *Yugraneft Corporation*, above note 4, para 62
[9] *Ibid*., paras 54, 57
[10] 2014 BCCA 205
[11] *Ibid*., para 47

> This requires a preliminary assessment of the applicable standard of review. As I will explain later, reasonableness will almost always apply to commercial arbitrations … except in the rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise.[12]

Application of the "reasonableness" standard has been defined by the Supreme Court of Canada[13]:

> [C]ertain questions do not lend themselves to one specific, particular result. Indeed, they may give rise to a number of possible, reasonable conclusions. … In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

In circumstances, and in provinces, in which appeal from an arbitral award is restricted to questions of law, further shielding of the arbitral award from judicial intervention on the merits is provided by Canadian law's treatment of issues of contractual interpretation, whether in arbitration or in litigation, as questions of mixed fact and law, not of law alone[14]. Additionally, where resolution of the dispute requires the arbitrator to make findings of contested fact, it is said in Canada that review of an arbitrator's fact findings is "forbidden"[15] and that an arbitrator's findings of fact are "absolute and not reviewable"[16].

As a final note there is significant diversity of grounds on which appeals on the merits are available in domestic arbitrations in Canada. The following provisions of statutes of British Columbia, Ontario and Nova Scotia are offered as examples only:

In British Columbia[17] provision is made for appeals as follows:

> 31. (1) A party to an arbitration … may appeal to the court on any question of law arising out of the award if
>
> (a) all of the parties to the arbitration consent, or
>
> (b) the court grants leave to appeal.
>
> (2) In an application for leave under subsection (1)(b) the court may grant leave if it determines that

[12] *Sattva Capital Corporation*, above note 3, at para 75
[13] *Dunsmuir* v *New Brunswick* 2008 SCC 9, at para 47
[14] *Sattva Capital Corporation*, above note 3, at para 50
[15] *Ibid*., at para 104
[16] *Urban Communications Inc*. v *BCNET Networking Society* 2015 BCCA 297, at para 22
[17] *Arbitration Act* RSBC 1996 c. 55 s. 31 – the statute that was at issue before the Supreme Court in *Sattva Capital Corporation*

> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class of body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.

In Ontario[18] an appeal is available by leave or by agreement, albeit with different expressions of the applicable tests than in British Columbia:

> 45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.
>
> (2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.
>
> (3) If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.

In Nova Scotia[19] an appeal is available only by agreement of the parties:

> 48(1) Unless the parties otherwise agree, there is no appeal of an award.
>
> (2) Where an arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

Conclusion

It is hoped that the above brief summary of the general finality of arbitral awards under Canadian law is of interest to readers. It is hoped also that future similar articles will provide counterpart commentary concerning the laws of other jurisdictions in which members of the International Arbitration Committee practice.

[18] *Arbitration Act, 1991* SO 1991 c. 17 s. 45

[19] *Commercial Arbitration Act* SNS 1999 c. 5 s. 48