

Arbitration (International)

RECENT DEVELOPMENTS OF IMPORTANCE

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I. Introduction

In recent years, Canada has emerged as a leader and major player in international arbitration. This leadership has developed despite a historical skepticism about international arbitration, particularly where the Canadian Government is a party, out of a concern in some quarters that foreign arbitral tribunals will undermine Canada's autonomy.

This skepticism dates back to the Alaska Boundary Dispute of 1903 between the United States, Great Britain and Canada, in which a panel of six arbitrators were tasked with drawing the boundary between Alaska and the Yukon during what is alternately called the Alaskan or Yukon Gold Rush. When the sole British arbitrator joined the three American members to outvote the Canadians, a wave of nationalist and protectionist sentiment washed across the country. More recently, this skepticism was apparent – though certainly less pronounced – in the early days of NAFTA, particularly about the investor-state arbitration provisions in Chapter 11.

Perhaps as a result of this checkered history, Canada was somewhat slow to join the world in embracing international arbitration as a preferred method of resolving cross border disputes. The Canadian Parliament ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“The New York Convention”) in 1986, some 27 years after the Convention was drafted, and after 67 other countries had already ratified the convention. Additionally, Canada only signed the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“The ICSID Convention”) in 2006. To this day, Canada

has not ratified the convention, even though over 140 other countries have.

Nonetheless, in both public and private spheres, Canada has become recognized as a leading arbitration jurisdiction. Canadian lawyers are highly sought after as arbitrators and counsel in international arbitral disputes. Canada is recognized for having a highly developed and predictable legal system, and Canadians are uniquely experienced in both the common law and civil law traditions.

Every province has enacted laws implementing the New York Convention, and adopting the *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc. A/40/17, ann. I (1985) (“*Model Law*”). Four of the 10 provinces have also implemented the ICSID Convention (British Columbia, Newfoundland and Labrador, Ontario and Saskatchewan), and there are indications that Parliament will ratify the ICSID Convention without waiting for all the provinces to implement it.

In short, Canada has become a recognized world leader in international arbitration. In 2006, Montréal hosted the conference of the International Council for Commercial Arbitration, and the very next day Toronto hosted the International Law Association's Biennial conference.

As it stands today, Canada is a leading site for holding international arbitrations, and generally speaking, is a friendly jurisdiction for the enforcement of foreign arbitral awards.

In this article, we canvas some of the most significant recent developments in the practice of international arbitration in Canada. First, we consider procedural changes to how arbitrations are conducted. Second, we comment on the most recent judicial decisions on the enforcement of foreign arbitral awards in Canadian courts.

II. Procedural Developments

One major development in recent years has been the effort to adapt the procedural rules involved in international arbitrations

to the unique challenges posed when a state actor is a party.¹ While secrecy and confidentiality may be staples of purely private arbitrations, there is increasing recognition that greater openness is required where a state is a party to the arbitration. The Canadian Government's position is that the public has a right to be kept informed of the proceedings where a state actor's conduct is being challenged since there is a risk of a significant monetary award against the state, or a limit on the state's freedom of action.²

a) Dramatic increase in the number of investor-state arbitrations

There has been an explosion in the number of investor-state arbitrations in the last decade. Writing in 2008, J. Anthony VanDuzer noted that “seventy percent of treaty-based investor state claims have been filed since 2000.”³ Claims under NAFTA are no exception to this trend.⁴

The growth in the number of investor-state cases tracks the equally dramatic increase in the number of Bilateral Investment Treatment (BITs), or Foreign Investment Protections Agreements (FIPAs) as they are called by the Department of Foreign Affairs and International Trade Canada. Over 2500 BITs have been concluded worldwide.⁵ Out of the 27 BITs to which Canada is a party, seven were signed since 2005,⁶ and a dozen additional BITs are currently being negotiated.⁷ Investor-state dispute settlement procedures are now standard provisions in Canadian BITs, modelled after the investor-state procedures found in NAFTA's Chapter 11.⁸

b) Recent Procedural Changes

In recent years, two major procedural changes have occurred in the case of investor-state arbitrations, and these are reflected in Canada's recent BITs. First, the proceedings typically are open to the public, and increasingly the public has gained access to all the documents

Arbitration (International)

RECENT DEVELOPMENTS OF IMPORTANCE

submitted to and produced by the arbitral tribunals. Second, tribunals have allowed third parties to make submissions in investor-state arbitrations as interveners or *amicus curiae*.

Openness and transparency

The text of NAFTA guarantees only minimal transparency for investor-state arbitrations. It provides that a public register of arbitration claims will be maintained by the NAFTA Secretariat. Additionally, Canada and the United States are permitted to disclose awards against them without the consent of the investor party and *vice versa*, which is a departure from the ordinary rule under both the ICSID and UNCITRAL rules that are otherwise applied under NAFTA.⁹ However, aside from these two rules there are no other transparency guarantees in the agreement, and no provision is made for open proceedings or the disclosure of the parties' evidence or written submissions.

However, in recent years, the practice of the Canadian Government has been to publish information about the arbitrations it is involved in, and this is now the prevailing practice for NAFTA Chapter 11 arbitrations. Starting 1998, Canada's position has been that transparency was permitted under Chapter 11 disputes even if it is not mandatory. For instance, many of the key documents to its arbitrations are made available on the DFAIT Canada's website.

This approach was effectively endorsed by the NAFTA Free Trade Commission (FTC), which adopted an interpretive note on transparency in 2001, recognizing that while NAFTA does not mandate disclosure, neither does it "impos[e] a general duty of confidentiality on the disputing parties to a Chapter Eleven arbitration."¹⁰

Perhaps mindful of Canada's past skepticism about international arbitrations, NAFTA tribunals have recognized that greater openness in Chapter 11 arbitrations will improve the public's perception of the

legitimacy of the process.¹¹ In recent cases, Tribunals have made public the parties' submissions and the transcripts from the hearings, along with the communications between the tribunal and the parties, the orders of the tribunals and arbitral awards.¹²

These procedural changes to how NAFTA Chapter 11 arbitrations are conducted were entrenched by the 2006 amendments to the ICSID Arbitration Rules and Additional Facility Rules. These amendments stated that tribunals have the power to open up hearings to the public unless a party objects. This is significant since the ICSID Rule and Additional Facility Rules are two of three sets of arbitral rules contemplated under Chapter 11, the other being UNCITRAL Arbitration Rules.

However, these practices under NAFTA remain optional. While most arbitrations involving Canada are conducted openly and transparently, parties retain the power to object to public disclosure.

Canada's recent BITs with other countries provide for much firmer guarantees of transparency. In the Model Foreign Investment Protections Agreement ("Model Agreement") found on DFAIT Canada's website, full transparency in arbitrations is mandated, not just permitted. Article 38 of the Model Agreement – titled "Public Access to Hearing and Documents" – establishes that investor-state arbitrations "shall be open to the public," and portions may be held *in camera* only where it is "necessary to ensure the protection of confidential information." It also provides that "[a]ll documents submitted to, or issued by, the Tribunal shall be publicly available unless the disputing parties otherwise agree, subject to the deletion of confidential information." Instead of having to agree to make the proceedings open, the parties must agree to have them closed, meaning that Canada can now guarantee openness.

Moreover, Canada has ensured that

these specific provisions are included in its most recent BITs. These exact provisions, or very similar ones, are found in Canada's agreements with Slovakia (2010), Romania (2009), the Czech Republic (2009), Latvia (2009), Jordan (2009) and Peru (2006).¹³

The importance of increased transparency in investor-state arbitrations highlights one of the key differences between investor-state arbitration and private commercial arbitrations. In private arbitrations, confidentiality often is a mutually important goal for the parties. The ability to elect a decision-maker, and conduct the resolution of a dispute privately, are key advantages in commercial arbitrations. By contrast, in investor-state arbitrations the cross-border aspects of the dispute resolution process, and the lack of any alternate process such as a court with clear jurisdiction over both parties, gives rise to the need for arbitration as a consensual dispute resolution mechanism. Transparency becomes the goal to be achieved as an integral part of that process. Nevertheless, the need for transparency may conflict in some cases with a desire by private parties to use arbitration to resolve disputes in a confidential forum.

Participation of Third Party Interveners and Amicus Curiae

Another recent procedural change in investor-state arbitrations is the involvement of third party interveners and *amicus curiae*. Once again, Chapter 11 makes no mention of third parties playing a role in arbitrations and initially, neither did any of the sets of arbitral rules incorporated by NAFTA. Nonetheless, there is a growing practice of tribunals allowing third parties to make submissions in Chapter 11 arbitrations.

The first such occasion was the 2001 decision in *Methanex v. United States*, where environmental groups participated in an arbitration about the removal of certain additives from gasoline.¹⁴ This was followed closely that year by the decision in *UPS v. Canada*, where the Canadian

Arbitration (International)

RECENT DEVELOPMENTS OF IMPORTANCE

Union of Postal Workers successfully applied to make third party submissions.¹⁵

The FTC subsequently endorsed the practice in 2003, and set out criteria to be considered when deciding whether to allow third party interveners. In 2006, this practice was incorporated into the ICSID rules, along the lines set out by the FTC.¹⁶ Consequently, since NAFTA contemplates the use of the ICSID rules, the third party rules are now an entrenched feature in Chapter 11 arbitrations.

Additionally, Canada's Model Agreement expressly allows for third party participation. Article 39, titled "Submissions by Non-Disputing Party" roughly replicates the criteria set out by the FTC for allowing third party interveners. These provisions, or very similar ones, are found in Canada's agreements with Slovakia (2010), Romania (2009), the Czech Republic (2009), Latvia (2009), Jordan (2009) and Peru (2006).¹⁷

III. Jurisprudence on Enforcement

International commercial arbitrations between private parties have consistently increased in recent years. This may reflect the general increase in cross-border trade, and the activity of commercial enterprises across national borders. Arbitration permits parties to a commercial transaction to select a dispute resolution process so that they have certainty before any dispute arises, and the ability to understand and allocate risks and possible dispute outcomes as part of the transaction. They can agree on the decision-making tribunal, the process to be followed, the rules of evidence, the procedure to be followed, and even the method for allocating costs of the dispute resolution process. As a result, the relationship between arbitral awards and domestic legal systems has become increasingly important.

Two recent appellate decisions on the enforcement of arbitral awards in Canada are worthy of note. The first is *Yugraneft Corp. v. Rexx Management Corp.*, which asked whether domestic limitation periods

apply to the enforcement of foreign awards.¹⁸ The second is *Accentuate Ltd v. Asigra Inc.*, which considered whether a party could enforce an award in Canada while simultaneously challenging it in the UK.¹⁹

a) Limitation Periods for the Enforcement of International Arbitral Awards

The Supreme Court of Canada's judgment in *Yugraneft* is the most important decision on the enforcement of international arbitral awards in Canada.

Factual background

Rexx Management is an Albertan corporation that sold oil field equipment to Yugraneft, a Russian corporation that develops and operates Russian oilfields. Their contract established that disputes would be resolved by arbitration in Russia. A dispute arose, and the two parties commenced arbitration proceedings before the International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation. In 2002, the tribunal ordered Rexx to pay an award of just under C\$1 million to Yugraneft. More than three years later, Yugraneft sought to enforce the award in Alberta, and Rexx Management resisted enforcement, arguing that the two-year limitation period in the Alberta *Limitations Act* had expired.

As noted above, Canada has ratified the New York Convention, and every province (including Alberta) had enacted laws implementing the Convention. The central object of the Convention is to make arbitral awards uniformly and reciprocally enforceable in all 142 signatory states. However, Article III of the Convention creates a major exception to this uniformity, specifying that arbitral awards shall be enforced "in accordance with the rules of procedure of the territory where the award is relied upon." Local rules are permitted to interfere with enforcement if they qualify as "rules of procedure." Indeed,

the *UNCITRAL Model Law on International Commercial Arbitration*, UN Doc. A/40/17, ann. I (1985) ("*Model Law*") does not specify procedural rules for enforcing arbitral awards, nor does it set out limitation periods.

The issue to be decided in the *Yugraneft* case was whether foreign arbitral awards are subject to the limitation periods in force in Canadian provinces. More broadly, the Court was asked to determine the degree to which each of the different provinces could interfere with the enforcement of international arbitral awards.

Rexx was successful both at trial in the Alberta Queen's Bench and in the Alberta Court of Appeal, both of which held that a foreign arbitral award is subject to a two-year limitation period. The Court of Appeal's decisions was the object of criticism and ridicule throughout the international legal community, with one commentator referring to Alberta as the "the new Old West," and calling on "the sheriff" Chief Justice McLachlin of the Supreme Court of Canada to "restore law and order."²⁰ Recognizing the importance of this case to the field of International Arbitration in Canada, a number of arbitral institutions intervened and made submissions to the Supreme Court, including the London Court of International Arbitration and the Canadian Arbitration Congress.

Arguments before the Supreme Court

The question for the Supreme Court was whether limitation periods qualify as "rules of procedure," and therefore fall within the power of local governments to enact.

The LCIA argued that the Alberta *Limitations Act* should not apply to arbitral awards because no limitation period was contained in the *Model Law*. It argued that the *Model Law* was intended to set out a comprehensive and exhaustive list of the circumstances in which a local court may decline to enforce awards.²¹ The Canadian Arbitration Congress argued that the

Arbitration (International)

RECENT DEVELOPMENTS OF IMPORTANCE

failure to include limitation periods in the *Model Law* could only mean that arbitral awards could be enforced at perpetuity. Further, it argued that limitation periods were not just procedural rules under Canadian law since they were determinative of a party's substantive legal claim. Consequently, applying a local limitation period would be contrary to the New York Convention, which only exempted local "rules of procedure."²²

Rexx responded that limitation periods have historically been treated as procedural in common law courts. It further argued that since limitation periods are found in many jurisdictions around the world, the silence of the *Model Law* could only mean that it was left up to the local government to decide.

Decision of the Supreme Court

The Supreme Court (per Rothstein J.) unanimously held that the New York Convention allows (but does not require) domestic governments to enact limitation periods for the enforcement of arbitral awards.²³

Justice Rothstein held that the term "rules of procedure" in Art. III of the New York Convention had a broader meaning than the term "procedural rules" under Canadian law.²⁴ Consequently, regardless of whether limitation periods were procedural or substantive, they were "rules of procedure", under Article III of the Convention. He agreed with Rexx that the *Model Law* intentionally left limitation periods up to the local authority. As such each Canadian province has the authority to enact its own limitation periods for foreign arbitral awards.

The Court further held that arbitral awards are not akin to judgments or court orders. Quoting from its own decision in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, the Court wrote that "[a]rbitration is part of no state's judicial system" and "owes its existence to the will of the parties alone."²⁵ Accordingly, arbitral

awards are subject to the ordinary limitation period in Alberta, namely two years from the time the plaintiff discovers that it has a claim.

Implications

As a consequence of the decision, there is a risk that foreign arbitral awards will now become subject to the patchwork of different limitations periods in Canada depending on the province where enforcement is sought. Under the division of powers between the federal and provincial governments in the Canadian constitution, the provinces have the exclusive authority to enact such limitation periods, so there is no prospect of the federal government enacting a uniform rule for the whole country.

Additionally, it is unclear just how broadly the Supreme Court will interpret the phrase "rules of procedure" in the future. The reasons of Justice Rothstein come close to saying that a local rule will qualify as a "rule of procedure" whenever the legislature wants it to. As he wrote for the unanimous Court:

"The only material question is whether or not the competent legislature intended to subject recognition and enforcement proceedings to a limitation period. If it did, the limitation period in question will be construed as a "rule of procedure" as that term is understood under the Convention."²⁶

If carried to its logical extreme, this argument could allow legislatures to effectively neutralize the reciprocal enforcement rights guaranteed by the New York Convention.

There is one encouraging note in the decision for those interested in enforcing foreign arbitral awards in Canada. The Court underlined that the clock only starts to run for the limitation period once the arbitral creditor discovers that the debtor

has assets in that particular province. In practice, this will greatly reduce the risk that practical difficulties in discovering the location of a party's assets would defeat the claim.

b) Can a party challenge an arbitral award in one jurisdiction while enforcing it in another?

Another decision of note is *Accentuate*, this time from Ontario. The case addressed whether a court should refuse to enforce an international arbitral award because the party that seeks to enforce the award in Ontario is simultaneously challenging the very same award in a foreign court. The Ontario Court of Appeal held that this was not a ground for refusing to enforce the award in Ontario.

This question arose in a dispute between Asigra, an Ontario company, and Accentuate, a United Kingdom company that acted as reseller of Asigra's products in the UK. The parties agreed that their contract would be governed by the laws of Ontario, and that any dispute would be resolved by a panel of three arbitrators under the UNCITRAL rules.

A dispute arose in 2006 when Asigra announced to Accentuate that it intended to terminate their contract immediately. It gave notice of its intention to arbitrate the matter. Accentuate responded with a counter-claim, and sought compensation for wrongful dismissal. It claimed that it was entitled to £310,426.94 compensation under the terms of its contract with Asigra, and additionally that it was entitled to £1,750,000.00 under the Commercial Agents Regulations of the UK.

As agreed to in their contract, the arbitration took place in Toronto. The tribunal held that it had jurisdiction to rule on Accentuate's UK claim as well. The three-member panel went on to hold that Accentuate was not entitled to compensation under the UK regulations because it had contracted to be bound by the laws of Ontario, to the exclusion of other jurisdictions. The panel ultimately

Arbitration (International)

RECENT DEVELOPMENTS OF IMPORTANCE

held that Accentuate was nonetheless entitled to C\$14,112.32 compensation under the terms of its agreement.

Accentuate moved to enforce this arbitral award in Ontario, while simultaneously also challenging the award in UK courts. Asigra objected. It argued that the Ontario court should refuse to enforce the award because it would be contrary to public policy within the meaning of Article 36(1)(b)(ii) of the *UNCITRAL Model Law* to allow the UK company to both enforce and challenge an arbitral award in different jurisdictions. It also asked for an anti-suit injunction prohibiting Accentuate from pursuing its UK claim.

The Court of Appeal disagreed. The

court delivered a unanimous oral judgment holding that re-litigating the arbitral award in the UK “does not rise to the level of public policy sufficient to defeat the respondent’s right to enforce the arbitration award within the meaning of art. 36(1)(b)(ii).”²⁷ To hold otherwise would weaken the guarantee that Ontario would enforce foreign arbitration awards in accordance with the New York Convention.

IV. Conclusions

The trend towards increasing use of arbitration as a dispute resolution mechanism, both in public and private commercial disputes, will continue. Canadian legal systems will face new issues

resulting from the proliferation of arbitration to resolve commercial disputes. While there is always a tension between recognizing the autonomy of private litigants to select a consensual dispute resolution process, and the interests of the public in an open and transparent legal system to resolve commercial disputes, it appears that courts will continue to place a priority on facilitating and protecting the autonomy of litigants to choose arbitration. One challenge for Canadian legal systems will be to facilitate that autonomy and protect the integrity of the process by assisting in the enforcement of arbitral awards in Canada. ■

1. J. Anthony VanDuzer, “Enhancing the Procedural Legitimacy of Investor-State Arbitration Through Transparency and Amicus Curiae Participation” (2007) 52 McGill L.J. 681-723 [*VanDuzer*].
2. This was the position advanced by Canada to the Free Trade Committee in an issues paper. Perhaps ironically, the paper was never made public, but was reproduced in “Canadian Memo Identifies Options for Changing NAFTA Investment Rules” Inside U.S. Trade 17:6 (12 February 1999). See also *VanDuzer, ibid.* at para. 29.
3. *VanDuzer, supra* note 1 at para. 15.
4. *Ibid.*
5. United Nations Conference on Trade and Development, The Entry into Force of Bilateral Investment Treaties (BITs) UN Doc. UNCTAD/WEB/ITE/IIA/2006/9 (2006), online: UNCTAD www.unctad.org/en/docs/webiteia20069_en.pdf.
6. Agreements were signed with Kuwait (2011), Slovakia (2010), Romania (2009), the Czech Republic (2009), Latvia (2009), Jordan (2009) and Peru (2006).
7. The DFAIT Canada website states that it is currently in negotiations with China, Ghana, India, Indonesia, Kazakhstan, Mali, Mongolia, Pakistan, Poland, Tanzania, Tunisia and Vietnam, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?view=d>.
8. DFAIT Canada has made a public its model BIT on its website, online: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?view=d>.
9. NAFTA Article. 1137.4; *VanDuzer, supra* note 1 at para. 28. Where Mexico is a party, awards may only be may public with the consent of all parties.
10. NAFTA Free Trade Commission, “Notes of Interpretation of Certain NAFTA Chapter 11 Provisions” (31 July 2001), online Foreign Affairs and International Trade Canada www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=eng.
11. See *United Parcel Service of America v. Canada*, Decision of the Tribunal on Petitions for Intervention and Participation as Amici Curiae (17 October 2001) (Arbitrators: Dean Ronald A. Cass, L. Yves Fortier, Justice Kenneth Keith.) [*UPS*]; *Methanex v. United States*, Decision of the Tribunal on Petitions from Third Persons to Intervene as “Amici Curiae” (15 January 2001) (Arbitrators: William Rowley, Warren Christopher, V.V. Veeder.) [*Methanex*].
12. *VanDuzer, supra* note 1 at para. 33.
13. The text of these BITs is available on DFAIT Canada’s website online: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa_list.aspx?lang=en&menu_id=14&view=d
14. *Methanex, supra* note 11.
15. *UPS, supra* note 11.
16. *VanDuzer, supra* note 1 at para. 48.
17. Found at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa_list.aspx?lang=en&menu_id=14&view=d
18. 2010 SCC 19, [2010] 1 S.C.R. 649 [*Yugrasetf*].
19. 2010 ONSC 3364; 2011 ONCA 99 [*Accentuate*].
20. Stephen Drymer, “The new Old West: international arbitration in Alberta” *Lawyers Weekly* Vol 29, no. 7 (June 19, 2009).
21. *Yugrasetf, supra* note 18 at para. 40.
22. *Ibid.* at para. 25.
23. *Ibid.* at para. 18.
24. *Ibid.* at para. 27.
25. *Ibid.* at para. 44.
26. *Ibid.* at para. 28.
27. *Accentuate, supra* note 19 at para. 4.

Arbitration (International)

RECENT DEVELOPMENTS OF IMPORTANCE



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