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Journal of International Arbitration

c/o Hong Kong International Arbitration Centre

38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong S.A.R., China

Tel: +852 3512 2398, Fax: +852 2877 0884, Email: editorjoia@kluwerlaw.com

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The Implementation of the New York Convention in Canada

Henri C. ALVAREZ, Q.C.*

The New York Convention came into force in Canada on August 10, 1986. Together with the UNCITRAL Model Law, the Convention provides the legal framework in Canada for the recognition and enforcement of foreign arbitral awards. This article examines the implementation of the New York Convention in Canada and discusses key court decisions interpreting Article V of the Convention. The article suggests that the adoption of the New York Convention by all Canadian provinces and territories, as well as the apparent reluctance of Canadian courts to refuse enforcement under Article V, indicates a generally favourable attitude toward the recognition and enforcement of foreign arbitral awards in Canada.

The New York Convention (“the Convention”)¹ came into force in Canada on August 10, 1986.² At that time Canada also adopted the UNCITRAL Model Law (“Model Law”)³. Together these instruments form the basis of domestic legislation governing international commercial arbitration in Canada. Since commercial disputes in Canada may be subject to either federal or provincial jurisdiction,⁴ depending on the subject matter of the dispute, legislation has been enacted to implement the Convention and the Model Law federally, as well as separately in each province and territory.⁵

At the federal level, the Convention was implemented by the United Nations Foreign Arbitral Awards Convention Act, which stipulates that the Convention applies only to disputes arising out of legal relationships, whether contractual or not.⁶ The Model Law was codified in the Commercial Arbitration Code, attached as a schedule to the federal Commercial Arbitration Act,⁷ which applies to all commercial arbitrations, whether international or domestic, but only in instances where one of the parties to the arbitration is the federal government, one of its agencies or a federal corporation, and to matters under exclusive federal jurisdiction, such as maritime and admiralty. In all other circumstances, the relevant provincial legislation will apply exclusively.⁸

* Partner, Fasken Martineau DuMoulin L.L.P. The author wishes to thank Tina Cicchetti and Tamar Meshel for their assistance in the preparation of this article.

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3, 21 U.S.T. 2517, T.I.A.S. No. 6997.

² United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd Supp.).

³ UNCITRAL Model Law on International Commercial Arbitration, U.N. Doc. A/40/17, Annex I, adopted by the United Nations Commission on International Trade on June 21, 1985.

⁴ Marc Lalonde, *Canada National Report*, in INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Canada-1 (Jan Paulsson ed., 2005).

⁵ There are 14 such jurisdictions in Canada: one federal (Canada); 10 provinces (British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador); and three territories (the Yukon, Northwest Territories and Nunavut).

⁶ United Nations Foreign Arbitral Awards Convention Act, *supra* note 2, s. 4(1).

⁷ Commercial Arbitration Act, R.S.C. 1985, c. 17 (2nd Supp.), am. R.S.C. 1985, c. 1 (4th Supp.).

⁸ Lalonde, *supra* note 4, at Canada-2.

All Canadian provinces and territories, aside from Quebec, have enacted legislation adopting both the Convention and the Model Law. Interestingly, the form of provincial implementing legislation varies across the country. Some jurisdictions, namely Alberta,⁹ Manitoba,¹⁰ New Brunswick,¹¹ Nova Scotia,¹² Prince Edward Island¹³ and the Northwest Territories and Nunavut,¹⁴ have simply attached both the Convention and the Model Law to their respective International Commercial Arbitration Acts in the form of schedules and made only minor variations.

Ontario has attached as a schedule to its International Commercial Arbitration Act¹⁵ only the Model Law. Originally, the province enacted a Foreign Arbitral Awards Act, 1986, which adopted the Convention. However, the 1986 Act was repealed with the passage of the International Commercial Arbitration Act. As a result, the current provincial legislation relies only on the provisions of the Model Law for the recognition and enforcement of foreign arbitral awards, and the Convention has effect only to the extent its provisions are repeated in the Model Law.¹⁶ Nonetheless, this legislative amendment was carried out on the premise that the provisions of the Ontario International Commercial Arbitration Act covered all of the provisions of the Convention.¹⁷

British Columbia, Saskatchewan, and the Yukon, in addition to enacting International Commercial Arbitration Acts introducing the Model Law,¹⁸ have also enacted separate statutes implementing the Convention.¹⁹ As for Quebec, while it has not directly incorporated the Convention in any legislation, its Code of Civil Procedure²⁰ provides that the Convention is to be considered in the interpretation of the provisions of the code relating to “recognition and execution of arbitration awards made outside Quebec.”²¹

With respect to the scope of application of the Convention, the provincial International Acts apply only to “international”²² and “commercial”²³ arbitration agreements and

⁹ International Commercial Arbitration Act, R.S.A. 2000, c. I-5.

¹⁰ *Id.* S.M. 1986–87, c. 32.

¹¹ *Id.* S.N.B. 1986, c. I-12.2.

¹² *Id.* R.S.N.S. 1989, c. 234.

¹³ *Id.* R.S.P.E.I. 1988, c. I-5.

¹⁴ *Id.* R.S.N.W.T. 1988, c. I-6.

¹⁵ *Id.* R.S.O. 1990, c. I-9.

¹⁶ J. BRIAN CASEY & JANET MILLS, *ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE* 22 (2005).

¹⁷ *Id.* at 31, n. 48.

¹⁸ International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 in British Columbia; International Commercial Arbitration Act, R.S.S. 1988, c. I-10.2 in Saskatchewan; and International Commercial Arbitration Act, S.Y.T. 1987, c. 14 in the Yukon.

¹⁹ Foreign Arbitral Awards Act, R.S.B.C. 1996, c. 154 in British Columbia; Enforcement of Foreign Arbitral Awards Act, S.S. 1996, c. E-9.12 in Saskatchewan; and Foreign Arbitral Awards Act, R.S.Y.T. 1986, c. 70 in the Yukon.

²⁰ Quebec Code of Civil Procedure, R.S.Q., c. C-25, Book VII, Title I, art. 948.

²¹ Quebec adopts a similar approach with respect to the Model Law. Code of Civil Procedure, art. 940.6, provides that where matters of extraprovincial or international trade are involved, the interpretation of the provisions of the Code shall take into consideration the Model Law, the Report of UNCITRAL on June 21, 1985 and the Analytical Commentary on the draft text of the Model Law.

²² As defined in Model Law, art. 1(3).

²³ Canadian courts have interpreted “commercial” broadly to include the arbitration of an investment dispute between a private investor and a state under the NAFTA (United Mexican States v. Metalclad Corp., (2001) 89 B.C.L.R. 3d 359, 14 B.L.R. 3d 285), as well as tort claims where they arise out of a commercial relationship which is within the scope of the arbitration clause (Dunhill Personnel System Inc. v. Dunhill Temps Edmonton Ltd., (1993) 13 Alta. L.R. 3d 241, 144 A.R. 272). See also Borowski v. Heinrich Fiedler Perforierttechnik GmbH, [1994] 10 W.W.R. 623 (Alta. Q.B.) and Carter v. McLaughlin, (1996) 27 O.R. 3d 792 (Gen. Div.).

awards.²⁴ An exception to these reservations exists in Quebec, where the law implementing the Convention applies to matters of extraprovincial or international trade, commercial or otherwise.²⁵ Also, unlike the Model Law²⁶ and other Canadian provincial Acts, the Ontario International Commercial Arbitration Act²⁷ has a more limited application with respect to “international” arbitrations, as it provides that an arbitration conducted in Ontario between parties that have their places of business in Ontario is not international only because the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.²⁸

It is worth noting that the manner in which the Convention and the Model Law have been adopted in the various Canadian jurisdictions has led to significant overlapping of their respective provisions on the enforcement of arbitration clauses and awards.²⁹ Given the similarity of these provisions in each of the Convention and Model Law, parties often have recourse to both, and the developing case law is generally relevant to the interpretation of both.

I. PROCEDURE FOR ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN CANADA

Under federal and provincial legislation, an arbitral award must be recognized as binding and, on application to the competent court, must be enforced in accordance with the relevant provisions of the court.³⁰

Under the federal legislation, application for recognition and enforcement of an arbitral award may be made to the Federal Court³¹ or any provincial court.³² On application to the federal court, the Federal Courts Rules³³ will govern the application procedure. Under these rules, a request for enforcement of a foreign arbitral award must be brought by a notice of application.³⁴ On an ex parte application, the court may direct that notice of the application be served on the foreign judgment debtor and may give such directions respecting the manner of service as it considers just.³⁵

The provincial International Acts determine the provincial court that will have jurisdiction over the recognition and enforcement of awards, and the procedural rules of that court will govern the application.³⁶ The Quebec Code of Civil Procedure³⁷ provides that an application for recognition and execution is made by way of a motion for homologation

²⁴ CASEY & MILLS, *supra* note 16, at 31–34.

²⁵ *Id.* at 30.

²⁶ See art. 1(3)(c).

²⁷ See s. 2(3).

²⁸ CASEY & MILLS, *supra* note 16, at 32.

²⁹ This overlapping exists in all jurisdictions except in the provinces of Quebec and Ontario since all remaining jurisdictions have either two separate statutes implementing the Convention and the Model Law or a single statute which appends each of these instruments.

³⁰ CASEY & MILLS, *supra* note 16, at 357.

³¹ Commercial Arbitration Act, *supra* note 7, s. 6.

³² *Id.* s. 6 and United Nations Foreign Arbitral Awards Convention Act, *supra* note 2, s. 6.

³³ Federal Courts Rules (SOR/98-106).

³⁴ *Id.* s. 324(1).

³⁵ *Id.* s. 328(2).

³⁶ Lalonde, *supra* note 4, at Canada-41.

³⁷ Quebec Code of Civil Procedure, *supra* note 20, art. 949.1.

to the court which would have had competence in Quebec to decide the matter in dispute submitted to the arbitrators.³⁸

Pursuant to the Model Law,³⁹ as adopted by the federal and provincial statutes, the party applying for the enforcement of an arbitral award must supply the duly authenticated original arbitral award or a duly certified copy.⁴⁰ However, there has been some case law indicating that this requirement will not necessarily be strictly enforced by the courts, and a party seeking enforcement may be given an opportunity to cure defects in its application where an arbitral award is found to be otherwise valid.⁴¹

II. KEY PRACTICES AND COURT RULINGS RELATING TO ARTICLE V OF THE NEW YORK CONVENTION

As previously mentioned, Canada and its provinces have implemented both the Convention and the Model Law into domestic legislation. As a result of the similarities between the two, applications concerning enforcement of foreign arbitral awards in Canada are often brought under both instruments. Accordingly, jurisprudence regarding the interpretation of Article V of the Convention has also derived from applications for enforcement under Article 36 and applications for setting aside under Article 34 of the Model Law.

The general approach of Canadian courts to enforcement of foreign arbitral awards has been very favourable to the enforcement of such awards. The courts accept as a general rule of interpretation that the grounds for refusal of recognition and enforcement are to be viewed as permissive rather than mandatory,⁴² and that they ought to be construed narrowly.⁴³ Moreover, enforcement of an award could still be ordered through the exercise of judicial discretion even if one of the listed circumstances in Article V of the Convention or Articles 34 and 36 of the Model Law exists.⁴⁴

The following is a summary of some of the more relevant rulings of the Canadian courts concerning the interpretation of Article V of the Convention and the issues arising from it.⁴⁵

³⁸ Lalonde, *supra* note 4, at Canada-41.

³⁹ See art. 35(2).

⁴⁰ CASEY & MILLS, *supra* note 16, at 357.

⁴¹ Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd., (1992) 7 O.R. (3d) 779, 4 B.L.R. (2d) 108, *aff'd* (1995) 22 O.R. (3d) 576.

⁴² Europcar Italia S.p.A. v. Alba Tours Int'l Inc., [1997] O.J. No. 133, 23 O.T.C. 376 (Ont. Ct. J. (Gen. Div.)) (QL).

⁴³ Corporacion Transnacional de Inversiones, S.A. de C.V. et al. v. STET International, S.p.A. et al., (2000) 49 O.R. (3d) 414, [2000] 136 O.A.C. 113.

⁴⁴ Schreter v. Gasmac Inc., (1992) 7 O.R. (3d) 608, 89 D.L.R. (4th) 365, 6 B.L.R. (2d) 71, 10 C.P.C. (3d) 92, 41 C.P.R. (3d) 509.

⁴⁵ Fuller summaries of the most relevant Canadian decisions relating to international commercial arbitration applying the New York Convention or the Model Law can be found at Kluwer Law International, available at <www.kluwerarbitration.com> and in HENRI C. ALVAREZ, NEIL KAPLAN, & DAVID W. RIVKIN, MODEL LAW DECISIONS: CASES APPLYING THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (1985-2001) (2003).

ARTICLE V(1)(a): A PARTY WAS UNDER SOME INCAPACITY

Cases where a party has resisted enforcement of a foreign arbitral award on the basis of incapacity have been relatively rare in Canada. One notable case where the respondent argued against enforcement of the award on this ground is *D.L.T. Holdings Inc. v. Grow Biz Int'l, Inc.*⁴⁶ In this case, a U.S. franchisor applied for recognition and enforcement of an arbitral award rendered in, and confirmed by the courts of, the United States against a Canadian franchisee. The respondent resisted enforcement based, among other grounds, on its lack of legal representation and lack of financial resources. The court dismissed the respondent's arguments, holding that it had the opportunity to receive legal advice when the franchise agreement was signed, and that there was no inequality in bargaining positions between the parties.⁴⁷

ARTICLE V(1)(b): A PARTY WAS UNABLE TO PRESENT ITS CASE

Claims with respect to a party's inability to present its case before the arbitral tribunal have been more frequently argued as grounds for resisting enforcement of a foreign arbitral award in Canada. Although such claims have been raised in various factual circumstances, the courts have consistently interpreted this ground for refusing enforcement restrictively.

For example, the court in the *Grow Biz* case held that where a party to an arbitration claimed that it was unable to present its case because it could not afford to attend the arbitration hearing due to its location, but did not place any evidence before the court to prove its lack of funds, the arbitration award should be upheld. The court concluded that the fact that one party cannot go to an agreed location is not the other party's responsibility.⁴⁸

This ground for refusal of enforcement was also narrowly interpreted in the *Corporacion Transnacional* case,⁴⁹ in which the court held that where a party refused to participate in an arbitration, it was deemed to have deliberately forfeited the opportunity to be heard. This, the courts concluded, did not amount to a lack of opportunity to present one's case or to be treated with equality.⁵⁰

The restrictive application of this ground was further applied in *United Mexican States v. Karpa*,⁵¹ where the court dismissed Mexico's claim that it was unable to present its case as a result of being prevented from disclosing confidential information protected under its tax laws. The court held that Mexico was not required to produce information it did not wish to produce, and that the evidence that it did provide was insufficient to persuade the tribunal. The court further held that in its claim Mexico was essentially requesting that

⁴⁶ *D.L.T. Holdings Inc. v. Grow Biz Int'l, Inc.*, (2000) 194 Nfld. & P.E.I.R. 206.

⁴⁷ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 233.

⁴⁸ *D.L.T. Holdings*, *supra* note 46.

⁴⁹ *Corporacion Transnacional*, *supra* note 43.

⁵⁰ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 214.

⁵¹ *United Mexican States v. Karpa*, (2005) 74 O.R. (3d) 180, (2005), 248 D.L.R. (4th) 443, (2005), 30 Admin. L.R. (4th) 272, (2005), 193 O.A.C. 216.

the court review the findings of fact made by the arbitral tribunal. The court rejected this application, holding that although the Additional Facility Rules of the International Centre for Settlement of Investment Disputes (ICSID), which governed the arbitration, did not preclude judicial review, such review was limited to the grounds in Article 34 of the Model Law and the standard of review under these grounds was at the high end of the spectrum of judicial deference.

Most recently, in *Bayview Irrigation District #11 v. Mexico*,⁵² the court rejected an application to set aside an arbitral award in which the tribunal held that it did not have jurisdiction to decide the case under Chapter 11 of NAFTA. The court dismissed the applicant's claim that the tribunal changed the agreed rules of procedure and did not allow the applicant a fair opportunity to present its case. The court found that according to the transcripts of the proceedings, the applicant had an opportunity to argue its position and that it did not object or request that the tribunal re-open the proceedings on the grounds that it required an opportunity to make further submissions. Therefore, the applicant's claim for setting aside the award was rejected.

ARTICLE V(1)(C): AWARD CONTAINED DECISIONS BEYOND THE SCOPE OF THE SUBMISSION
TO ARBITRATE

This ground has been somewhat more effective for setting aside or resisting enforcement of foreign arbitral awards in Canada. In the important, early case of *Quintette Coal Ltd. v. Nippon Steel Corp.*,⁵³ the court held that the question of whether an arbitral award contains decisions on matters beyond the scope of the submission to arbitrate is a threshold question. As such, it must be decided before the court can assess whether the award should be set aside on this ground. If the award did not go beyond the scope of the submission to arbitrate, the court had no jurisdiction to set it aside, even if it could be shown that the arbitral tribunal erred in interpreting the contract.⁵⁴ This is so because of a powerful presumption that the tribunal acted within its powers. The court further held that as a matter of policy, it should adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitration awards. Accordingly, the court chose not to intervene in this case.⁵⁵

On the other hand, this ground was accepted as justifying the partial setting aside of an arbitral award in the *Metalclad* case,⁵⁶ which involved a dispute under Chapter 11 of NAFTA. The court in this case held that an award could only be set aside on grounds of excess of jurisdiction where the award dealt with a dispute not falling within the terms

⁵² *Bayview Irrigation District #11 v. Mexico*, [2008] O.J. No. 1858, 2008 CanLII 22120 (ON S.C.).

⁵³ *Quintette Coal Ltd. v. Nippon Steel Corp.*, (1990) 47 B.C.L.R. (2d) 201 (S.C.), [1991] 1 W.W.R. 219, *aff'd* 50 B.C.L.R. (2d) 207 (C.A.), *leave to appeal dismissed* 50 B.C.L.R. (2d) xxviii.

⁵⁴ *Id.*; CHRISTINE J. MINGIE, *BRITISH COLUMBIA COMMERCIAL ARBITRATION: AN ANNOTATED GUIDE* 194 (2004).

⁵⁵ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 218.

⁵⁶ *United Mexican States v. Metalclad Corp.*, (2001) 89 B.C.L.R. (3d) 359, 14 B.L.R. (3d) 285.

of the submission to arbitration or it contained decisions on matters beyond the scope of the submission to arbitration. The court found that the arbitral tribunal went beyond the submission to arbitrate when it misstated the applicable law to include transparency obligations which were found outside the substantive obligations of Chapter 11 of NAFTA.⁵⁷

Article V(1)(d): LACK OF REASONS OF THE ARBITRAL TRIBUNAL

While recognizing the importance of giving reasons for the purpose of reviewing an arbitral tribunal's jurisdiction in setting aside and enforcement applications,⁵⁸ Canadian courts have limited the ability of a party to argue that lack of written reasons in support of an arbitral award justified refusal of enforcement of the award. For instance, in *Schreter v. Gasmac*,⁵⁹ the respondent claimed a denial of natural justice since the arbitral tribunal had not given reasons for a portion of the award. The court held that the failure of an arbitral tribunal to include reasons was not in itself a ground for refusing to enforce an award. Moreover, on the facts of this case the court was able to review the arbitral tribunal's jurisdiction and reasons, as both the arbitrator and the foreign court confirming the award had considered the respondent's arguments. The court concluded that there was sufficient information concerning the award available for it to be satisfied with respect to the validity of the award and, therefore, the absence of reasons did not constitute sufficient grounds for refusing enforcement of the arbitral award on the facts of this case.

In *Food Services of America Inc. v. Pan Pacific Specialties Ltd.*,⁶⁰ the respondent resisted enforcement of the arbitral award on the basis that the arbitral procedure was "not in accordance with the agreement of the parties" pursuant to Article 36(1)(a)(iv) of the Model Law, since the arbitral tribunal failed to provide written reasons for its decision. The court held that since providing reasons is not part of the "arbitral procedure" for the purposes of Article 36 of the Model Law, it was not in itself sufficient reason to refuse enforcement. Moreover, since the failure to give reasons in this case did not bring into question the fairness of the decision-making process, it was not sufficiently serious to violate the parties' agreement. Therefore, the respondent's application for resisting enforcement of the arbitral award failed.⁶¹

However, the court's concern, as expressed in *Schreter*, that an arbitral tribunal's failure to provide adequate reasons may impede the court's ability to review the tribunal's jurisdiction and reasoning, has materialized in another instance and resulted in refusal of enforcement. In the recent case of *Smart Systems Technologies Inc. v. Domotique Secant Inc.*,⁶² the Quebec Court of Appeal found that lack of reasons in support of a foreign arbitral

⁵⁷ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 7. The court only set aside one of the bases for the arbitral tribunal's award, which was largely upheld on other grounds.

⁵⁸ *Schreter v. Gasmac Inc.*, *supra* note 44.

⁵⁹ *Id.*

⁶⁰ *Food Services of America Inc. v. Pan Pacific Specialties Ltd.*, (1997) 32 B.C.L.R. (3d) 225.

⁶¹ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 236–37.

⁶² *Smart Systems Technologies Inc. v. Domotique Secant Inc.*, [2008] J.Q. No. 1782, 2008 QCCA 444.

award may give rise to refusal of recognition and enforcement in Quebec. In doing so, the Court of Appeal confirmed the Superior Court's decision to refuse recognition and enforcement of an arbitral award granted by the arbitral tribunal, and recognized by a court at the seat of arbitration, without reasons. The court held that in this case, since the parties had chosen the Model Law to govern the arbitration, they had intended for the award to state the reasons upon which it was based. Further, the tribunal's failure to provide reasons impeded the court's ability to consider the validity of the award, in circumstances where a number of serious errors in the award and the conduct of the proceedings had been alleged. In these circumstances, the court found that the failure to give reasons amounted to a violation of public order in Quebec and justified a refusal of recognition and enforcement.

ARTICLE V(1)(e): AWARD HAS BEEN SUSPENDED OR SET ASIDE IN THE ORIGINATING
JURISDICTION

Generally, the courts have held that there is no requirement under Articles 35 and 36 of the Model Law that an arbitral award be "final" at the place of arbitration in order for it to be recognized as binding and enforceable in another jurisdiction.⁶³ In the *Europcar Italia* case,⁶⁴ the arbitral award was appealed to the courts at the seat of arbitration while enforcement was sought in Canada. The Canadian court adjourned its decision on the application for enforcement pending a determination of the appeal in the foreign court. Nonetheless, the Canadian court noted that even if the award was suspended by the foreign court, enforcement could still be ordered in the exercise of judicial discretion.⁶⁵

In *Powerex Corp. v. Alcan Inc.*,⁶⁶ while an application for enforcement of the award was made in Canada, a party to the arbitration had asked the court at the place of arbitration to set aside the arbitral award. In determining whether to enforce the award immediately or adjourn the application to enforce pending the completion of the foreign proceedings, the court considered the following factors: the estimated time to complete the application to set aside at the place of arbitration; whether the respondent was merely delaying the inevitable; whether a court at the place of arbitration had already refused to set aside the award; the availability of security and the possibility of asset removal prior to enforcement; and the willingness of the respondent to diligently pursue its legal action to set aside the award at the place of arbitration. The court decided to adjourn the enforcement proceedings on the unusual condition that the respondent pay the full amount in dispute into trust for the use of the applicant, upon the posting of security by the applicant for its repayment if the action for setting aside succeeded. Leave to appeal was granted by the Court of Appeal, on the grounds that the judge below had given the

⁶³ *Agros Trading Spolka z.o.o. v. Dalimpex Ltd.*, [2001] O.J. No. 3986.

⁶⁴ *Europcar Italia S.p.A. v. Alba Tours Int'l Inc.*, *supra* note 42.

⁶⁵ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 239.

⁶⁶ *Powerex Corp. v. Alcan Inc.*, 2004 B.C.S.C. 876, [2004] B.C.J. No. 1349 (QL).

most liberal interpretation so far of the relevant federal and provincial statutes and that this approach could constitute a marked departure from international jurisprudence.⁶⁷

ARTICLE V(2)(b): PUBLIC POLICY

This ground for setting aside and resisting enforcement of arbitral awards has been particularly narrowly construed by Canadian courts. In cases such as *Schreter*⁶⁸ and *Corporacion Transnacional*,⁶⁹ the courts have held that for a party to succeed on this ground an award must offend the most basic notions of morality and justice, or demonstrate intolerable ignorance or corruption on the part of the arbitral tribunal. In both of these cases, the courts held that whether or not an award is legally or factually wrong is not a basis for setting it aside as being contrary to public policy.

In *Corporacion Transnacional*,⁷⁰ the arbitral tribunal's failure to order disclosure of certain portions of an agreement, thereby arguably depriving the applicant of a fair hearing, did not meet the requirements of the public policy test. The court held that the purpose of the public policy ground was to guard against the enforcement of awards that were morally repugnant, or that were arrived at in a manner contrary to the fundamental notions of morality and justice.⁷¹

In *Schreter*,⁷² the court held that reopening the merits of an arbitral decision on legal issues decided in accordance with the law of a foreign jurisdiction, under the guise of ensuring conformity with the public policy of the enforcing jurisdiction's court, could bring the enforcement procedure of the Model Law into disrepute.

Allegations of improper acts committed by a party to an arbitration, such as corruption of a witness or payment of bribes, have also failed to satisfy the public policy test where the evidence tendered was insufficient to meet the applicable standard, and where the arbitral tribunal had made its own determination on evidence and credibility, which the court held it should not disturb.⁷³ Similarly, a claim of an unfair damages award in *Karpa*⁷⁴ was dismissed where the court reiterated the principle that only where procedure or substance diverged markedly from local standards, or where there was intolerable ignorance or corruption, will courts intervene on grounds of public policy.

The Supreme Court of Canada has also limited the application of the public policy ground for refusing enforcement of arbitral awards. In *Dell Computer Corp. v. Union des consommateurs*,⁷⁵ the respondent attempted to argue that because he commenced a class

⁶⁷ Ultimately, the matter was resolved in the Canadian proceedings and the appeal did not proceed.

⁶⁸ *Schreter v. Gasmac Inc.*, *supra* note 44.

⁶⁹ *Corporacion Transnacional*, *supra* note 43.

⁷⁰ *Id.*

⁷¹ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 214.

⁷² *Schreter v. Gasmac Inc.*, *supra* note 44.

⁷³ *United Mexican States v. Metalclad Corp.*, *supra* note 56.

⁷⁴ *United Mexican States v. Karpa*, *supra* note 51.

⁷⁵ *Dell Computer Corp. v. Union des consommateurs*, (2007) 284 D.L.R. (4th) 577, 34 B.L.R. (4th) 155.

action, the dispute was of a public order or policy nature and therefore could not be submitted to arbitration. However, the court held that “a class action is a procedure, and its purpose is not to create a new right.”⁷⁶ Although the court acknowledged that class actions have a social dimension and are of public interest insofar as they facilitate access to justice, it concluded that the class action “cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so.”⁷⁷ The court further reiterated the principle that the concept of public policy must be interpreted narrowly and that in cases emanating from Quebec, this concept is limited to matters enumerated in the Civil Code of Quebec, namely the status and capacity of persons, family law, or analogous matters.

However, the Quebec Court of Appeal in the *Smart Systems Technologies*⁷⁸ case mentioned above, has recently refused to enforce an award on the ground that the arbitral tribunal’s failure to provide any reasons for its decision was contrary to public policy in Quebec. The court qualified its decision by holding that an unreasoned arbitral award is not in itself against public policy, however it concluded that where the parties’ intention was for the tribunal to provide the reasoning for its decision, and where a failure to do so would impede the court’s review of the award, such a failure would constitute a breach of public policy in Quebec.

III. WAIVER

Consistent with the general trend favouring the enforcement of arbitral awards, Canadian courts have broadly interpreted waivers by parties to arbitration agreements of their right to oppose enforcement of the award. In the *Food Services* case,⁷⁹ the arbitration agreement contained an express waiver of the right to resist enforcement under Article 36 of the Model Law. The court held that it would not be appropriate to go beyond the clear meaning of the waiver and to interpret the words in such a way as to render the waiver clause meaningless. Accordingly, the court found that the parties had waived their right to oppose enforcement under Article 36 of the Model Law.⁸⁰ Similarly, in *Noble China Inc. v. Lei*,⁸¹ the court held that, provided the arbitral tribunal had not breached a mandatory provision of the Model Law, the parties were free to exclude recourse to the courts to set aside an award, and that such an agreement was not contrary to public policy. Accordingly, the court dismissed the application to set aside the award.⁸²

⁷⁶ *Id.* s. 105.

⁷⁷ *Id.* s. 108.

⁷⁸ *Smart Systems Technologies*, *supra* note 62.

⁷⁹ *Food Services of America*, *supra* note 60.

⁸⁰ ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 237.

⁸¹ *Noble China Inc. v. Lei*, (1998) 42 O.R. (3d) 69, 42 B.L.R. (2d) 262, 28 C.P.C. (4th) 30.

⁸² ALVAREZ, KAPLAN, & RIVKIN, *supra* note 45, at 217.

IV. CONCLUSION

Canada has adopted and implemented both the Convention and the Model Law into its domestic legislation and Canadian courts have had a number of opportunities to consider both instruments. The clear tendency of Canadian courts has been toward enforcement of foreign and international arbitral awards and strict interpretation of the grounds for refusal of enforcement enumerated in Article V of the Convention and mirrored in Articles 34 and 36 of the Model Law.⁸³

⁸³ Of the considerable number of Canadian cases considering the New York Convention and the Model Law, the author was able to identify only four decisions where the courts refused recognition and enforcement of a foreign arbitral award. These are *Amaco Transmissions Inc. v. Kunz*, (1991) 97 Sask. R. 5; *Javor v. Francoeur*, 2003 BCSC 350; *Smart Systems Technologies Inc. v. Domotique Secant Inc.*, [2008] J.Q. No. 1782, 2008 QCCA 444; and partially in *United Mexican States v. Metalclad Corp.*, (2001) 89 B.C.L.R. (3d) 359, 14 B.L.R. (3d) 285.

Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at editorjoia@kluwerlaw.com
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3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
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