THE INTERNATIONAL ARBITRATION REVIEW

NINTH EDITION

Editor
James H Carter

THE LAWREVIEWS

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PREFACE

International arbitration is a fast-moving express train, with new awards and court decisions of significance somewhere in the world rushing past every week. Legislatures, too, constantly tinker with or entirely revamp arbitration statutes in one jurisdiction or another.

The international arbitration community has created a number of electronic and other publications that follow these developments regularly, requiring many more hours of reading from lawyers than was the case a few years ago.

Scholarly arbitration literature follows behind, at a more leisurely pace. However, there is a niche to be filled by an analytical review of what has occurred in each of the important arbitration jurisdictions during the past year, capturing recent developments but putting them in the context of the jurisdiction's legal arbitration structure and selecting the most important matters for comment. This volume, to which leading arbitration practitioners around the world have made valuable contributions, seeks to fill that space.

The arbitration world often debates whether relevant distinctions should be drawn between general international commercial arbitration and international investment arbitration, the procedures and subjects of which are similar but not identical. This volume seeks to provide current information on both of these precincts of international arbitration, treating important investor–state dispute developments in each jurisdiction as a separate but closely related topic.

I thank all of the contributors for their fine work in compiling this volume.

James H Carter
Wilmer Cutler Pickering Hale and Dorr LLP
New York
June 2018

Chapter 10

CANADA

Rachel Howie, Chloe Snider and Barbara Capes[1]

I INTRODUCTION

Canada is a federal state composed of 10 provinces[2] and three territories.[3] Each of the country's provinces and territories, with the exception of Quebec, follows a common law tradition; provincial laws in Quebec are rooted in civil law.

Each province and territory has separate legislation for domestic arbitration and international commercial arbitration. For example, the province of Alberta has enacted the Arbitration Act[4] for domestic arbitration matters and the International Commercial Arbitration Act[5] (the Alberta ICAA) for international commercial arbitration matters.[6] Within the province of Quebec, however, both domestic and international commercial arbitrations are governed by different sections of the Civil Code of Quebec[7] (the Civil Code) and the Code of Civil Procedure.[8]

Federally, international commercial arbitration is governed by the Commercial Arbitration Act[9] (CAA) if Her Majesty the Queen in Right of Canada, a departmental corporation or a federal Crown corporation is a party, or if the dispute is in relation to maritime or admiralty matters.[10] Thus, any investor–state claims brought under Articles

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1 Rachel Howie and Chloe Snider are partners and Barbara Capes is an associate at Dentons. The authors also wish to thank Kurt Frederick and Steven Latos, students-at-law, for their research assistance.

2 Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan.

3 The Northwest Territories, Nunavut and Yukon.

4 RSA 2000, c A-43.

5 RSA 2000, c I-5.

6 Similarly, the province of Ontario has legislation in the Arbitration Act, 1991 SO 1991, c 17 for domestic arbitrations, and the International Commercial Arbitration Act, 2017, SO 2017, c 2, Sched 5 (Ontario ICAA) for international commercial arbitrations.

7 CQLR, c CCQ-1991.

8 CQLR, c C-25.01 at Article 649-651. Specifically, Section 649 states:
If international trade interests, including interprovincial trade interests, are involved in arbitration proceedings, consideration may be given, in interpreting this Title, to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments. Recourse may also be had to documents related to that Model Law, including (1) the Report of the United Nations Commission on International Trade Law on its eighteenth session held in Vienna from 3 to 21 June 1985; and (2) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.

9 RSC 1985, c 17.

10 Commercial Arbitration Act, RSC 1985, c 17 at Section 5(2).

1116 or 1117 of the North American Free Trade Agreement (NAFTA)[11] against Canada are governed by the federal CAA.[12] There is no separate federal legislation to govern domestic arbitration matters because the CAA applies to all matters where a federal entity is a party. The result is that matters of international commercial arbitration may fall under provincial (based in either civil or common law), territorial or federal law depending on the nature of the dispute and the jurisdiction involved.

The legislation governing international commercial arbitration in Canadian provincial and territorial jurisdictions is largely similar to the CAA. Each statute is based on and incorporates to some extent the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985 (Model Law).[13] In March 2017, Ontario revised its international commercial arbitration legislation,[14] a key feature of which was to incorporate the Model Law as amended by the United Nations Commission on International Trade Law on 7 July 2006 (2006 Model Law),[15] making it the first jurisdiction in Canada to do so. Further, each Canadian jurisdiction has enacted in some fashion legislation that incorporates the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).[16]

Provincial and territorial international commercial arbitration legislation also provides recourse to local courts in certain limited instances, such as on applications to consolidate arbitrations[17] or on applications to set aside arbitral awards.[18] The local courts in each province and territory with jurisdiction to hear such matters are the superior courts of first instance, such as the Court of Queen's Bench in Alberta and the Superior Court of Justice in Ontario. The federal CAA provides recourse to superior, county or district courts, as the case may be, whereas the Model Law mentions a 'court' or 'competent court'.[19] As a result,

11 North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States, 17 December 1992, Can TS 1994 No. 2, 32 ILM 289 (entered into force 1 January 1994).

12 CAA at Section 5(4)(a).

13 Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985.

14 Ontario ICAA.

15 Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006.

16 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3, 21 UST 2517 (entered into force 7 June 1959). Canada ratified the New York Convention on 12 May 1986 with a declaration, on 20 May 1987, that 'it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of Canada'. This language is mirrored in Section 4(1) of the federal legislation implementing the New York Convention, the United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp), entitled 'Limited to Commercial Matters', which reads '(t)he Convention applies only to differences arising out of commercial legal relationships, whether contractual or not'. For more detail on the declaration, see United Nations Treaty Collection, Convention on the Recognition and Enforcement of Foreign Arbitral Awards: United Nations, treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec.

17 See the Alberta ICAA at Section 8(1)(a) and the Ontario ICAA at Section 7(1)(a).

18 See the Alberta ICAA at Schedule 'B', Article 34 and the Ontario ICAA at Schedule 'B', Article 34.

19 CAA at Section 6.

parties arbitrating under the CAA would be required to, for example, seek assistance from or bring an application to set aside an award before the provincial or territorial superior court of first instance based on the Canadian seat of the arbitration rather than the Federal Court.[20]

Although similar in many respects, there are certain marked differences in international commercial arbitration legislation among Canadian jurisdictions. This situation can create unforeseen risk to inter-jurisdictional entities that might ultimately resort to arbitration in more than one jurisdiction, or to those choosing a city in Canada as a seat of arbitration, if they are not fully aware of the variations.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

One of the more significant developments affecting international arbitration across Canada as a whole in recent years is the work of the Uniform Law Conference of Canada's (ULCC) Working Group on Arbitration Legislation[21] to address differences in international and domestic commercial arbitration legislation between Canadian jurisdictions.

The ULCC was established in 1918 to promote uniformity of law throughout Canada, including through the preparation of model statutes to be recommended for adoption by the various provincial legislatures.[22] In 1986, the ULCC sought to harmonise Canada's international arbitration legislation and developed a Uniform International Act as a template for Canadian jurisdictions to implement the Model Law.[23] While this template was adopted in most Canadian jurisdictions, the provinces of British Columbia and Quebec proceeded in a different fashion by enacting their own, separate legislation based on the Model Law.[24] Several other jurisdictions also made their own alterations to the ULCC's proposed legislation,

20 Before amendments that came into force on 2 July 2003, Section 6 of the CAA also provided for recourse to the 'Federal Court or any superior, county or district court, except where the context otherwise requires'. Canada brought an application before the Federal Court in *Canada (Attorney General) v. SD Myers Inc*, 2004 FC 38, to set aside the decisions in *SD Myers, Inc v. The Government of Canada*, Final Award (30 December 2002): International Trade Law, www.italaw.com/sites/default/files/case-documents/ita0754.pdf; *SD Myers Inc v. The Government of Canada*, Partial Award on the Merits (2000), 40 ILM 1408; and *SD Myers Inc v. The Government of Canada*, Second Partial Award (21 October 2001): International Trade Law, www.italaw.com/sites/default/files/case-documents/ita0752.pdf, because the former version of the CAA stipulated such an application could be brought before the Federal Court.

21 For more detail, see the fourth edition of this Review.

22 For more information about the ULCC, see www.ulcc.ca/en.

23 The template proposes 15 sections of legislation and appends, in full, at Schedules A and B respectively, the New York Convention and Model Law. See ULCC, Uniform Acts, International Commercial Arbitration Act 1987: ULCC, www.ulcc.ca/en/uniform-acts-en-gb-1/462-international-commercial-arbitration-act/292-international-commercial-arbitration-act-1987.

24 In British Columbia, this was accomplished through the International Commercial Arbitration Act, RSBC 1996, c 233. Quebec, however, incorporated the Model Law through amending both the Civil Code of Quebec, CQLR, c CCQ-1991 and the Code of Civil Procedure, CQLR, c C-25.01. See also the ULCC Working Group on Arbitration Legislation, 'Discussion Paper: Towards a New Uniform International Commercial Arbitration Act' (January 2013): *Global Arbitration Review*, www.globalarbitrationreview.com/cdn/files/gar/Articles/ULCC_Discussion_Paper_Towards_a_New_Uniform_International_Commercial_Arbitration.pdf.

leading to differences in form and substance for international commercial arbitration across the country. As a result, the lack of complete uniformity among the provinces has led to some discrepancies in how the courts have addressed arbitration issues.

In response to the amendments contained in the 2006 Model Law, the ULCC undertook a review of the existing legislation, with the goal of developing recommendations for uniform legislation in Canada. As a result, a proposed Uniform International Commercial Arbitration Act (Uniform ICAA) was developed, and approved by the ULCC in 2014.[25] The Uniform ICAA attaches the New York Convention as Schedule I,[26] and the 2006 Model Law as Schedule II,[27] both of which allow limited judicial intervention in international commercial arbitration disputes. In addition, the Uniform ICAA incorporates language similar to Article 34 of the Model Law to direct a uniform 10-year limitation period for applications to recognise and enforce awards under Articles III, IV and V of the New York Convention or Articles 35 and 36 of the 2006 Model Law.[28] The Uniform ICAA also addresses the inter-jurisdictional enforcement of arbitral awards, proposing that once one Canadian court has recognised the award, it should be enforced elsewhere as a judgment of that court rather than as an arbitral award.

While there is no obligation on the provinces, territories and federal government to adopt the Uniform ICAA, its influence has already been felt. In March 2017, Ontario enacted a new ICAA, incorporating central recommendations of the Uniform ICAA (including the incorporation of the New York Convention and the 2006 Model Law, and the adoption of a 10-year limitation period for applications to recognise and enforce arbitral awards).

ii Arbitration developments in local courts

Jurisprudential developments in recent years have affirmed Canada's status as an arbitration-friendly jurisdiction. Recent decisions have confirmed the availability of a stay of legal proceedings in favour of arbitration and judicial respect for the jurisdiction and decisions of arbitral tribunals.

In 2018, a number of courts across Canada issued decisions staying litigation proceedings in favour of arbitration. For example, in *Trade Finance Solutions Inc v. Equinox Global Limited*,[29] the Court of Appeal for Ontario granted a stay of certain insurance-related litigation in favour of arbitration based on its interpretation of the dispute resolution clause in the underlying trade credit insurance agreement. The agreement provided: 'Any dispute arising in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration…'[30] However, the agreement also contained an 'action against insurer' endorsement that stated that it applied '[i]n any action to enforce the obligations of the Underwriters'.[31] The plaintiff argued that the 'action against insurers' endorsement excluded the application of the arbitration clause and required that the parties litigate instead.

25 ULCC, Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014): www.ulcc.ca/images/stories/2014_pdf_en/2014ulcc0014.pdf.

26 Ibid., pages 35–40.

27 Ibid., pages 41–58.

28 Ibid., page 52.

29 2018 ONCA 12 [*Equinox*].

30 Ibid. at Paragraph 11.

31 Ibid.

The court addressed the interpretation of the insurance contract on appeal. It disagreed with the motion judge that the arbitration clause was rendered inoperative by the endorsement and concluded that the action against insurer endorsement did not clearly provide for an alternative right to commence a domestic action against the insurers. Rather, the action against insurer clause was a service of suit clause that 'simply defines the circumstances under which the insurers will accept service of a suit'.[32] The court held that 'when the insurance policy is interpreted objectively, in a manner that gives meaning to all of its terms, mandatory arbitration in London, England was agreed to by the parties as the sole method of dispute resolution.'[33]

The court emphasised that 'alternative dispute resolution mechanisms, including arbitration, are among the means the international community has adopted to increase efficiency in economic relationships' and that 'unless there is legislative intention, the courts will generally give effect to the terms of a commercial contract freely entered into, including an arbitration clause'.[34] The court also relied on the 2006 Model Law, which is a schedule to the International Commercial Arbitration Act, 2017[35] (as well as the prior legislation) and is in force in Ontario. Article 8 of the 2006 Model Law 'requires a court before which an action is brought in a matter that is the subject of an arbitration agreement to refer the parties to arbitration if it is arguable that: (i) the arbitration agreement is binding on the parties; and (ii) the claims at issue fall within the scope of the agreement.'[36] The court concluded that both requirements were met in this case.

Likewise, in the last year, the courts of the Northwest Territories and British Columbia also stayed litigation proceedings in favour of arbitration under the International Commercial Arbitration Act (Northwest Territories)[37] and International Commercial Arbitration Act (British Columbia)[38] respectively. For example, in *Miller Sales et al v. Metso Minerals et al*,[39] the Court of Appeal of the Northwest Territories stayed litigation in favour of arbitration as a result of an arbitration clause in a distribution agreement, which provided that '[a]ny and all disputes of whatever nature arising between the parties of this Agreement… shall be submitted for final settlement by arbitration …'.[40] The court relied on the Model Law (which is also a schedule to the Northwest Territories' International Commercial Arbitration Act) in staying the action. The court emphasised that the law favours giving effect to arbitration agreements.

Similarly, the British Columbia Supreme Court stayed litigation in favour of arbitration in both *Northwestpharmacy.com Inc v. Yates*[41] and in *Sum Trade Corp v. Agricom International Inc*[42] under Section 8(1) of the British Columbia International Commercial Arbitration Act, which provides that 'if a party to an arbitration agreement commences legal proceedings in a

32 Ibid. at Paragraph 39.
33 Ibid. at Paragraph 3.
34 Ibid. at Paragraph 50, citing *Seidel v. Telui Communications Inc, 2011 SCC 15*.
35 Ontario ICAA.
36 *Equinox* at Paragraphs 4 and 50.
37 RSNWT 1988, c I-6.
38 RSBC 1996, c. 233.
39 2017 NWTCA 3.
40 Ibid. at Paragraph 23.
41 2017 BCSC 1572.
42 2017 BCSC 2213.

court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before service of any pleadings or taking any other steps in the proceedings, apply to that court to stay the proceedings'.[43]

By contrast, in *Pixhug Media Inc. v. Steeves*,[44] the British Columbia Supreme Court declined to grant a stay under Section 8(1) in favour of arbitration. In this case, the defendants or moving parties did not meet the requirements of Section 8(1) because the defendants had taken a step in the proceedings, by filing various applications in the proceeding and serving their responses to the civil claims. The court held: '[I]n short, a party that takes a step in the proceedings forfeits its right to apply for a stay under s. 8(1), regardless of whether it has expressed an intention to refer the dispute to arbitration.'[45]

Canadian courts have also enforced foreign arbitral awards in the last year. For example, in *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals SA*,[46] the appellant challenged an international arbitration award on the basis that the award was made without jurisdiction, breach of procedural fairness and violated public policy. The application judge dismissed the application. The Court of Appeal for Ontario dismissed the appeal. The court relied on Articles 5 and 34 of the 2006 Model Law, which limit the scope of judicial oversight of international arbitration awards and the grounds on which an international award can be set aside by a domestic court. The court held that 'as a matter of principle, a reviewing court cannot set aside an international arbitral award simply because it believes that the arbitral tribunal wrongly decided a point of fact or law'[47] and that there should be a high degree of deference to awards of international arbitral tribunals.[48] Based on these principles and a review of the particular arguments made by the appellant with respect to jurisdiction, procedural fairness and public policy, the court declined to set aside the underlying award.

Finally, in 2017, the Supreme Court of Canada released a decision that effectively restricted the scope of appeals from decisions of commercial arbitrators. This decision was based on the court's conclusion in *Sattva Capital Corp v. Creston Moly Corp*[49] that contractual interpretation is a question of mixed fact and law (and not a pure question of law).[50] In *Teal Cedar Products Ltd v. British Columbia*,[51] the court confirmed that because British Columbia's Arbitration Act limits appeals to questions of law[52] in British Columbia, the court is deprived of appellate jurisdiction to review an arbitrator's award on contractual interpretation issues. The court held that the scope for extricable questions of law that confer appellate jurisdiction is narrow in order to remain consistent with the objective of finality in commercial arbitration and, more broadly, with deference to factual findings: 'Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law […]), and a party alleging that

43 RSBC 1996, c. 233, s. 8(1).
44 2017 BCSC 2171.
45 Ibid. at Paragraph 83.
46 2017 ONCA 939.
47 Ibid. at Paragraph 23.
48 Ibid. at Paragraph 24.
49 2014 SCC 53 [*Sattva*].
50 Ibid, at Paragraph 47.
51 2017 SCC 32 [*Teal Cedar*].
52 Arbitration Act, RSBC 1996, c. 55, s. 31 [British Columbia's Arbitration Act].

a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).'[53] The court also confirmed that, in the arbitral context, the standard of review applicable to questions of statutory interpretation 'is "almost always" reasonableness'.[54]

iii Investor–state disputes

Canada signed the ICSID Convention[55] on 15 December 2006. Nearly seven years later, on 1 November 2013, Canada ratified the ICSID Convention and became a contracting state.[56] Several provinces and territories have passed implementing legislation with respect to the ICSID Convention.[57]

Canada is also a party to the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (Mauritius Convention), which it ratified on 5 June 2015.[58]

Canada has continued to pursue international investment agreements in the form of Foreign Investment Promotion and Protection Agreements (FIPAs) and Free Trade Agreements (FTAs). Canada has over 30 FIPAs in force, and in the past year has brought into force agreements with Guinea and Burkina Faso, and has continued negotiations with a number of countries.[59]

After the United States decided to withdraw from the Trans-Pacific Partnership (TPP) free trade agreement, Canada participated in discussions with the other TPP member states with respect to a new free trade agreement, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[60] Negotiations on the CPTPP were concluded on 23 January 2018, with the result that the CPTPP incorporates, by reference, certain

53 *Teal Cedar* at Paragraph 45.

54 Ibid, at Paragraph 74.

55 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, (1965) 4 ILM 524: ICSID, icsid.worldbank.org/en/Documents/icsiddocs/ICSID%20Convention%20English.pdf.

56 ICSID, List of Contracting States and Other Signatories of the Convention (as of 3 May 2017): icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx.

57 In addition to the federal Settlement of International Investment Disputes Act, Ontario, British Columbia, Newfoundland and Labrador, Nunavut, the Northwest Territories, Saskatchewan and Alberta have all passed legislation to implement the ICSID Convention. See SO 1999, c 12, Sch D (Ontario); SBC 2006, c 16 (British Columbia); SN 2006, c S-13.3 (Newfoundland and Labrador); SNu 2006, c 13 (Nunavut); SNWT 2009, c 15 (Northwest Territories); SS 2006, c S-47.2 (Saskatchewan); SA 2013, c S-7.8 (Alberta, proclaimed into force on 17 February 2014).

58 The Mauritius Convention was signed on 17 March 2015, and was ratified on 5 June 2015. For more information, see UNCITRAL, UNCITRAL Texts & Status, United Nations Convention on Transparency in Treaty-based Investor–state Arbitration (New York, 2014): UNCITRAL, www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.

59 For a complete list of FIPAs and FTAs, see Global Affairs Canada, Foreign Investment Promotion and Protection (FIPAs): Global Affairs Canada, www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

60 Global Affairs Canada, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Frequently Asked Questions, http://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/faq.aspx?lang=eng.

provisions of the TPP.[61] Notably, the member states agreed to suspend the incorporation of provisions set out in an Annex to the CPTPP, which includes Chapter 9 of the TPP on investment and investor–state dispute settlement.[62]

The Comprehensive Economic and Trade Agreement (CETA)[63] between Canada and the European Union entered into provisional application on 21 September 2017[64] after the federal bill to implement CETA was granted Royal Assent on 16 May 2017.[65] Chapter 8 of CETA dealing with investment disputes will not be applied during provisional implementation, and will only take effect after CETA is ratified by all Member States. Investment disputes under CETA are to proceed before a three-member tribunal comprising one EU national, one Canadian national and one non-party third country, with the tribunal panel being randomly selected from a pool of 15 members appointed by the CETA Joint Committee[66] along with the creation of an appellate tribunal.[67]

Over the last year Canada, the United States and Mexico have also spent significant efforts renegotiating the NAFTA. To date, information gleaned from the negotiations has not contained much detail on what changes might be made to Chapter 11 and investor–state disputes settlement. Recently, the United States has proposed an 'opt-in' system for such disputes.[68] In January 2018, both Canada and Mexico proposed an 'investment court system' that would mirror what is set out in the CETA or a bilateral investor–state dispute process that would be solely between Canada and Mexico.[69] The negotiations on a new NAFTA, and any investor–state dispute settlement provisions therein, are still ongoing.

Current investor–state disputes

According to the federal government, Canada is currently a party to seven active international investment disputes: six under NAFTA and one under the Canada–Egypt FIPA.[70]

61 Global Affairs Canada, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Article 1, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng.

62 Government of Canada, Comprehensive and Progressive Agreement for Trans-Pacific Partnership, Annex, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cptpp-ptpgp/text-texte/cptpp-ptpgp.aspx?lang=eng.

63 Global Affairs Canada, Canada–European Union Comprehensive Economic and Trade Agreement: international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng.

64 Global Affairs Canada, CETA, Chronology of events and key milestones, http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/chronology-chronologie.aspx?lang=eng.

65 Parliament of Canada, Bill C-30, Royal Assent, http://www.parl.ca/DocumentViewer/en/42-1/bill/C-30/royal-assent.

66 See footnote 51 at Article 8.27. The 15 members shall comprise five EU nationals, five Canadian nationals and five non-party third-country nationals.

67 Ibid. at Article 8.28.

68 *The Canadian Press*, 'Canada, Mexico tell U.S.: Decide whether you want a NAFTA dispute settlement process.' http://www.cbc.ca/news/politics/nafta-montreal-talks-january-28-1.4507990.

69 Ibid.

70 Global Affairs Canada, Cases Filed Against the Government of Canada: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng, and Global Affairs

Global Telecom Holdings SAE has initiated an arbitration before ICSID under the Canada–Egypt foreign investment promotion and protection agreement,[71] one of the earlier FIPAs that Canada negotiated.[72] On 28 May 2016, the claimant filed a request for arbitration with respect to its investment in the Canadian telecommunications market and mobile services, which it provided in Canada under the name 'Wind Mobile'. The claimant alleges that from 2008 to 2014, 'Canada failed to create a fair, competitive and favourable regulatory environment for new investors in this sector'.[73] Canada's actions are alleged to have denied the claimant fair and equitable treatment and full protection and security, and to have breached the FIPA obligations by according preferential treatment to similarly situated national investors and investors from other states. Global Telecom Holdings SAE is claiming damages in the amount of at least C$1.32 billion.[74] This dispute is the first known non-NAFTA investment treaty claim against the country.[75] According to the timetable in procedural order No. 1 the parties are in the midst of document production and have addressed jurisdiction and bifurcation, however, the memorials on the same are not yet public.[76] If this matter proceeds, the tribunal's determination on the FIPA language concerning frequently contested issues such as fair and equitable treatment will provide insight into how Canadian FIPAs with similar provisions may be interpreted.

In the previous edition, we discussed a recent claim against Canada under NAFTA, *Resolute Forest Products Inc v. Government of Canada (Resolute)*,[77] where the claimant is seeking damages of at least US$70 million as a result of measures adopted by the governments of Nova Scotia and Canada that allegedly discriminated against Resolute Forest Products Inc in favour of a local entity, ultimately depriving the claimant of its investment. In its notice of arbitration and statement of claim, the claimant alleged breaches of NAFTA Article 1110 on expropriation and compensation, Article 1105 on the minimum standard of treatment

Canada, Dispute Settlement, Foreign Investment Promotion and Protections Agreements (FIPAs): Global Affairs Canada, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/index.aspx?lang=eng.

71 Global Affairs Canada, Agreement Between the Government of Canada and the Government of the Arab Republic of Egypt for the Promotion and Protection of Investments: treaty-accord.gc.ca/text-texte.aspx?id=101524&lang=eng.

72 Global Affairs Canada, Trade, Trade and Investment Agreements: www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

73 Global Affairs Canada, Dispute Settlement, *Global Telecom Holdings SAE v. Government of Canada*: www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gth_sae.aspx?lang=eng.

74 Ibid.

75 Douglas Thomson, 'Canada hit with first BIT claim', *Global Arbitration Review* (8 June 2016): globalarbitrationreview.com/article/1036392/canada-hit-with-first-bit-claim.

76 *Global Telecom Holdings SAW v. Government of Canada*, Procedural Order No. 1 (13 June 2017), ICSID Case No. ARB/16/16, http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5566/DC10755_En.pdf, and *Global Telecom Holdings SAW v. Government of Canada*, ICSID Case No. ARB/16/16, Case Details, Materials, https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/16/16

77 Government of Canada, Cases Filed Against the Government of Canada, *Resolute Forest Products Inc v. Government of Canada*: Global Affairs Canada,www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/resolute.aspx?lang=eng.

and Article 1102 on national treatment.[78] In brief, the notice of arbitration and statement of claim allege that after an unrelated pulp and paper mill in Nova Scotia found itself facing creditor protection in 2011, the provincial government undertook several measures to preserve such mill, including allegedly providing preferential electricity rates and funding assistance, and protecting the mill's assets from division and sale.[79] The claimant alleges that these government actions had consequences for its investment in three other pulp and paper mills in the neighbouring province of Quebec. As a result of the government's actions, the claimant alleges that it had to close one mill, suffering a total deprivation of its investment, and that its two other mills continue to suffer harm from the measures.[80]

On 30 January 2018, the Tribunal issued its decision on jurisdiction and admissibility, addressing several early challenges brought by Canada.[81] An initial objection was raised by Canada that certain claims were time-barred because the claimant 'knew or could not have been unaware of the enactment of' the measures alleged to constitute the NAFTA breaches by more than three years prior to when the dispute was submitted to arbitration.[82] On this, the Tribunal noted that there was 'a distinction between a continuing breach of an obligation', on the one hand, and 'a perfected breach which continues to have injurious effects' on the other.[83] After thoroughly canvassing the specific evidence before it, the Tribunal held that the claimant 'did not and could not have reasonably known' that it had incurred loss or damage from the alleged breach by three years prior to submitting the dispute to arbitration.[84]

With respect to Canada's objection on whether the government measures at issue 'related to' the claimant or its investment under NAFTA Article 1101(2) (such measures took place in a different province than the province of the investment), the Tribunal determined that 'a "legally significant connection" must exist between the measure and the claimant or its investment'.[85] This requires 'a relationship of apparent proximity between the challenged measure and the claimant or its investment'.[86] Noting that the matter was still in the preliminary stages and that too much parsing of the facts could risk intrusion into matters of substance, the Tribunal found that based on certain relevant questions the measures at issue were sufficiently proximate to 'relate to' the claimant or its investment.[87] The Tribunal similarly rejected Canada's contention that national treatment was limited to

78 *Government Resolute Forest Products Inc v. Government of Canada*, Notice of Arbitration and Statement of Claim (30 December 2015), PCA Case No. 2016-13: www.pcacases.com/web/sendAttach/2045.

79 Ibid. at Paragraphs 3-6.

80 Ibid. at Paragraph 7.

81 *Resolute Forest Products Inc. v. Government of Canada*, Decision on Jurisdiction and Admissibility (30 January 2018), PCA Case No. 2016-13: PCA,

82 Ibid. at Paragraph 89.

83 Ibid. at Paragraph 157.

84 Ibid. at Paragraph 178.

85 Ibid. at Paragraph 242.

86 Ibid.

87 Ibid. at Paragraphs 247-248.

treatment within a specific province[88] and held that the expropriation claim should proceed to the merits.[89] However, the Tribunal did find that it had no jurisdiction over the claims concerning various taxation measures pursuant to Article 2103.[90]

As reported in last year's edition, in June 2015 the Attorney General of Canada filed a notice of application with the Federal Court to set aside the tribunal's award on jurisdiction and liability in *Clayton/Bilcon v. Government of Canada*[91] alleging that it contravened Articles 34(2)(a)(iii) and 34(2)(b)(ii) of the federal CAA[92] which, respectively, relate to awards addressing disputes outside of the submission to arbitration and awards in conflict with public policy.[93] Canada alleges, *inter alia*, that the tribunal erroneously found the conduct of the environmental assessment (and resulting recommendations) were attributable to Canada, and that it was beyond the terms of submission for the award to determine that the actions of the panel conducting the environmental assessment violated domestic Canadian law.[94] Canada subsequently attempted to stay the damages phase of the arbitration pending the determination of its application with the Federal Court. This relief was denied by the tribunal in August 2015.[95] In December 2015, the investors filed a motion with the Federal Court requesting that the set-aside proceedings be stayed pending the outcome of the damages phase. This motion was denied both in the first instance[96] and on appeal,[97] which decision was recently further denied by a panel at the Federal Court of Appeal.[98] The Federal Court of Appeal thus confirmed that, with a limited exception in Article 32, the CAA 'does not distinguish between final awards and other awards.'[99] The arguments of the investors – that damages were 'inextricably linked' to the finding on liability such that the damages phase might provide clarity to the reasons on liability, that the Court failed to provide sufficient deference to arbitration procedure in denying the stay, and that the Prothonotary applied the wrong test in whether to stay proceedings – all failed.[100]

The hearing on damages was held from 19–27 February 2018 in Toronto, Canada.[101] The memorials from the parties with respect to damages raise interesting issues of valuation, with the investor arguing for loss of profits on a discounted cash flow (DCF) basis[102] and

88 Ibid. at Paragraphs 290-291.

89 Ibid. at Paragraph 314.

90 Ibid. at Paragraph 320. One aspect of the claim relating to interim measures to keep a mill in operation were also deemed inadmissible.

91 *Clayton/Bilcon*, Award on Jurisdiction and Liability (17 March 2015), PCA Case No. 2009-04: FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-12.pdf.

92 CAA, footnote 10.

93 *Attorney General of Canada v. Clayton/Bilcon*, Notice of Application (16 June 2015), Toronto T-1000-15 (FC), Paragraph 15.

94 Ibid., Paragraph 15.

95 *Clayton/Bilcon*, Procedural Order No. 19 (10 August 2015), PCA Case No. 2009-04: PCA, www.pcacases.com/web/sendAttach/1405.

96 *Attorney General of Canada v. Clayton/Bilcon*, 2016 FC 1035 (Prothonotary).

97 *Attorney General of Canada v. Clayton/Bilcon*, 2017 FC 214.

98 *Attorney General of Canada v. Clayton/Bilcon*, 2018 FCA 1.

99 Ibid. at Paragraph 9.

100 Ibid. at Paragraph 12.

101 *Bilcon of Delaware et al v. Government of Canada*, Press Release (6 February 2017), PCA Case No. 2009-14: PCA.

102 *Bilcon of Delaware et al v. Government of Canada*, Investors' Damages Memorial (10 March 2017), PCA Case No. 2009-04: PCA.

Canada arguing that, *inter alia*, the actual amount invested should be used.[103] Canada also raises arguments under NAFTA itself and standing for damages by disputing that damages are owed to the claimant because the claims are ultimately being pursued by shareholders of the investor under Article 1116, which Article Canada alleges only permits claims by an investor on its own behalf (where 'the investor has incurred loss or damage'), whereas it is Article 1117 that Canada asserts permits an investor to bring a claim where 'the enterprise has incurred loss or damage'.[104]

In other recent developments, on 1 June 2017, Tennant Energy, LLC initiated arbitration under NAFTA alleging that it was treated unfairly under the Feed-In Tariff programme in the province of Ontario with respect to its proposed wind farm project.[105] The claimant is seeking damages of '[a]t least $116 million CDN' for the alleged breaches of NAFTA Article 1105.[106] At this time, neither the notice of intent nor the notice of arbitration are publicly available.

On 6 March 2018, the tribunal in *Mercer International, Inc v. Canada* rendered its award. The claim, brought by an investor over measures that involved the purchase and sale of electricity in the province of British Columbia, alleged that the manner in which such measures were implemented by the province, a provincial regulatory body and a provincial Crown corporation deprived the investor of its economic benefit from investing in a biomass-based generation facility.[107] We previously discussed this claim in the fourth edition of *The International Arbitration Review* and the award is not yet publicly available.

III OUTLOOK AND CONCLUSIONS

Canada has a well-supported reputation as an arbitration-friendly jurisdiction, and has developed significant jurisprudential authority on the importance of arbitration in the settlement of disputes. However, the existence of various provincial and federal arbitration statues, and the differences among and between them, has the potential to complicate arbitration and related proceedings in some circumstances. Ontario's recent adoption of the 2006 Model Law and the work towards uniformity in arbitration laws discussed in previous editions may signal that other jurisdictions will also modernise their international arbitration legislation. These efforts, combined with the ratification of the ICSID Convention and the resulting certainty and finality that is presented by this avenue of dispute resolution, suggest that international arbitration in Canada is likely to continue to gain prevalence.

103 *Bilcon of Delaware et al v. Government of Canada*, Government of Canada Counter-Memorial on Damages (9 July 2017), PCA Case No. 2009-04: PCA.

104 Ibid. at Paragraph 8 et seq. and *Bilcon of Delaware et al v. Government of Canada*, Government of Canada Rejoinder Memorial on Damages (6 November 2017), PCA Case No. 2009-04: PCA.

105 Global Affairs Canada, Cases Filed Against the Government of Canada: http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/tennant.aspx?lang=eng.

106 Ibid.

107 *Mercer International Inc. v. Government of Canada*, Request for Arbitration (30 April 2012), ICSID Case No. ARB(AF)/12/3: ICSID.

Appendix 1

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