The International Arbitration Review

Sixth Edition

Editor
James H Carter

Law Business Research

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EDITOR'S 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 for 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 is consumed with debate over 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 2015

Chapter 10

CANADA

Thomas O'Leary, Martha Harrison and Holly Cunliffe[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] The result is that matters of international

1 Thomas O'Leary and Martha Harrison are partners and Holly Cunliffe is an associate at Dentons Canada LLP.

2 The 10 provinces are Alberta, British Columbia, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Quebec and Saskatchewan.

3 The three territories are the Northwest Territories, Nunavut and Yukon.

4 RSA 2000, c A-43.

5 RSA 2000, c I-5 [Alberta ICAA].

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, RSO 1990, c I.9 (the Ontario ICAA) for international commercial arbitrations.

7 CQLR, c C-1991.

8 CQLR, c C-25. Specifically, Section 940.6 states 'Where matters of extraprovincial or international trade are at issue in an arbitration, the interpretation of this Title, where applicable, shall take into consideration: (1) the Model Law on International Commercial

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.

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 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 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 (the Model Law).[13] 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 (the New York Convention).[14]

Provincial and territorial international commercial arbitration legislation also provides recourse to local courts in certain limited instances, such as on applications to

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Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985; […]'.

9 RSC 1985, c 17.

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

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) [NAFTA].

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 [Model Law].

14 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) (the New York Convention). 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, online: United Nations <http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en#EndDec>.

consolidate arbitrations[15] or on applications to set aside arbitral awards.[16] 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, where the Model Law mentions a 'court' or 'competent court'.[17] As a result, 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.[18]

Though 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 in Canada in recent years is the work of the Uniform Law Conference of Canada (ULCC)'s Working Group on Arbitration Legislation (the Working Group) to address differences in international commercial arbitration legislation between Canadian jurisdictions. The following paragraphs provide a brief overview of the Working Group's most recent work.[19]

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.[20] In 1986, the ULCC sought to harmonise

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

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

17 CAA at Section 6.

18 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) (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) (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.

19 For more detail, see the Fourth Edition of this review.

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

Canada's international arbitration legislation and developed a Uniform International Act as a template for Canadian jurisdictions to implement the Model Law.[21] While this template was adopted in most Canadian jurisdictions, the provinces of British Columbia and Quebec proceeded in a different fashion enacting their own, separate legislation based on the Model Law.[22] Several other jurisdictions also made their own alterations to the ULCC's proposed legislation, 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 led to some discrepancies in how the court addressed arbitration issues.

In response to the 2006 amendments to the Model Law (the 2006 Model Law),[23] the ULCC undertook a review of the existing legislation, with the goal of developing recommendations for uniform legislation in Canada. In March 2014, the Working Group delivered a proposed Uniform International Commercial Arbitration Act (Uniform ICAA) to the ULCC, which has now been approved by the ULCC.[24] The Uniform ICAA attaches the New York Convention as Schedule I,[25] and the 2006 Model Law as Schedule II,[26] 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.[27] The Uniform ICAA also addresses the inter-jurisdictional enforcement of arbitral awards, proposing

21 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', www.ulcc.ca/en/uniform-acts-en-gb-1/462-international-commercial-arbitration-act/292-international-commercial-arbitration-act-1987.

22 In British Columbia this was accomplished through the International Commercial Arbitration Act, RSBC 1996, c 233 [British Columbia ICAA]. Quebec, however, incorporated the Model Law through amending both the Civil Code of Quebec, LRQ, c C-1991 and the Code of Civil Procedure, RSQ, c C-25. See also the ULCC Working Group on Arbitration Legislation, 'Discussion Paper: Towards a New Uniform International Commercial Arbitration Act' (January 2013), online at *Global Arbitration Review*, www.globalarbitrationreview.com/cdn/files/gar/Articles/ULCC_Discussion_Paper_Towards_a_New_Uniform_International_Commercial_Arbitration.pdf.

23 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.

24 Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation (March 2014), www.ulcc.ca/images/stories/2013_pdfs_en/2013ulcc0040.pdf.

25 Ibid., pp 35–40.

26 Ibid., pp 41–58.

27 Ibid., p 52.

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 and it has not yet been enacted by any Canadian jurisdiction, it is likely that it will be influential and persuasive in all Canadian jurisdictions.

ii Arbitration developments in local courts

Jurisprudential developments in local courts over the past few years, and in particular two relatively recent pronouncements from the Supreme Court of Canada,[28] have affirmed that international commercial arbitration is a recognised and respected process in Canada. These decisions have confirmed judicial respect for the competence–competence principle in international commercial arbitration and that arbitral jurisdiction will be approached with deference, subject only to narrow exceptions.[29]

The scope of jurisdictional deference in international commercial arbitration has been considered in several cases in the past few years, including *Assam Co India Ltd v. Canoro Resources Ltd*,[30] and *CE International Resources Holdings LLC v. Sit*,[31] both of which were discussed in last year's chapter. This differential approach has been followed in two recent cases from Canadian provincial appellate courts.

In *New York Stock Exchange LLC v. Orbixa Technologies Inc*[32] the Court of Appeal for Ontario adopted the reasoning of the Ontario Superior Court of Justice, granting recognition and enforcement of an arbitral award made in New York, in favour of the New York Stock Exchange (NYSE). The arbitral award denied Orbixa's claim for injunctive relief, and instead permitted the NYSE to terminate a service agreement between the parties. Thereafter, Orbixa applied to the US Securities and Exchange Commission (SEC) requesting a review of the NYSE's decision to terminate the agreement, and the arbitrator's award. The NYSE then applied for enforcement of the award in Ontario, pursuant to the Model Law and the Ontario ICAA.

Orbixa took the positon that the NYSE's application for recognition and enforcement was premature, as the award was not 'final and binding' when the NYSE commenced the application, as the three-month appeal period under the Model Law had not expired. The Court disagreed, holding that the date for determining whether the award was final and binding is the date that the matter comes before a court, and not the date that the application is filed. Consequently, the arbitral award was binding. Further, enforcement of the award in the face of the SEC proceedings was not contrary to public policy; although Orbixa initially requested that the SEC review the decision of

28 *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; *Seidel v. Telus Communications Inc*, 2011 SCC 15.

29 For a more in-depth discussion, see MD Schafler, TJ Coates and C Snider, 'Commercial Arbitration and the Canadian Justice System: Recent Decisions of the Supreme Court of Canada', *The Arbitration Review of the Americas 2012* at pp. 38–39.

30 2014 BCSC 370 [*Assam*].

31 2013 BCSC 1804 [*CEIR*].

32 2014 ONCA 219; 2013 ONSC 5521.

the arbitrator, it was unable to do so under the US Federal Arbitration Act, which Orbixa subsequently acknowledged. As such, Orbixa had received a full hearing and argument, and the regulatory SEC proceedings did not affect the final and binding nature of the arbitral award.

In *Sociedade-de-Fomento Industrial Private Ltd v. Pakistan Steel Mills Corporation (Private) Ltd* (*SFI v. PSM*),[33] the Court of Appeal for British Columbia held that SFI, an Indian mining and export company, was permitted to seek enforcement of its award in British Columbia, along with all the practical execution remedies available to domestic judgment debtors, irrespective of its connection to British Columbia or its attempts to enforce the award elsewhere.

In 2010, SFI obtained an arbitral award against PSM, a Pakistani state corporation, in the amount of C$8.67 million. PSM refused to pay and in an effort to enforce the award, SFI obtained an *ex parte Mareva* injunction at the Supreme Court of British Columbia. The *Mareva* injunction prevented a vessel (which was carrying a shipment of coal recently purchased by PSM) from leaving Vancouver, without first paying into court security of C$9.7 million. SFI then obtained a recognition and enforcement order from the Court, and brought an application to recover its costs incurred to enforce the award. However, PSM alleged that SFI had wrongly obtained the *Mareva* injunction, as it had not disclosed to the court that it could have enforced the award in Pakistan. The Court agreed, holding that there was material non-disclosure such that the injunction should be set aside, and SFI was liable in damages to PSM.

The Court of Appeal for British Columbia overturned this decision, relying on the New York Convention, which, as Canada is a contracting state, explicitly permits parties to an international arbitration to enforce the award in any other contracting state. The Court held that it was not entitled to consider whether the award should first be enforced in Pakistan and that a real and substantial connection to British Columbia is presumed to exist. The Court noted that it would be illogical to recognise a presumed jurisdictional connection for final judgment purposes but ignore it for interlocutory purposes.

Further, while the availability of enforcement proceedings in other jurisdictions may be a factor to be considered when granting a *Mareva* injunction, under the New York Convention, a party does not have an obligation to seek enforcement elsewhere as a precondition to granting the injunction. The correct approach is to consider whether it is just and convenient to grant the injunction, considering all the circumstances of the case.

These decisions all confirm that domestic courts in Canada will continue to respect the jurisdiction of international arbitral tribunals and will not, at the recognition and enforcement stage, venture into considering substantive issues that could and should have been raised before the tribunal. Where parties choose to resolve their disputes via private arbitration, Canadian courts will hold the parties to that decision and will not permit them to re-litigate their case in the courts if they are unhappy with how the arbitration unfolds. Moreover, the availability of injunctive relief in aid of proceedings to enforce an international arbitral award further enhances Canada's status as an arbitration-friendly jurisdiction.

33 2014 BCCA 205 [*SFI v. PSM*].

The Supreme Court of Canada has also recently rendered a decision relating to available grounds of review of domestic arbitral awards. The Supreme Court's decision in *Sattva Capital Corp v. Creston Moly Corp*[34] is expected to have a significant impact on courts' ability to review such awards, particularly with respect to the arbitrator's interpretation of a commercial contract. *Sattva* arose from a contractual dispute involving a finder's fee to be paid to the plaintiff, who was to receive US$1.5 million in Creston shares. However, the parties disagreed on the date to be used to price the shares and, therefore, how many shares the plaintiff was entitled to receive. At issue in the Supreme Court was whether the lower courts in British Columbia should have granted leave to appeal the arbitral award. Under the British Columbia Arbitration Act (BCAA),[35] leave to appeal from an arbitrator can only be granted on a point of law. Thus, the issue was raised whether the arbitrator's contractual interpretation was a question of law, or of mixed fact and law. The Supreme Court interpreted what constitutes a true question of law narrowly in that context. It held that contractual interpretation involves issues of mixed fact and law, as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.[36] As a result, the arbitrator's decision could not be appealed, as it did not raise a question of law.

The Supreme Court established three additional principles regarding the appeal of arbitral awards. First, in commercial arbitration, where appeals are restricted to questions of law, the standard of review is reasonableness, unless the question specifically calls for a standard of correctness, such as constitutional questions or questions of law that are of central importance to the legal system and are outside the scope of the arbitrator's expertise.[37] Second, after a question of law has been identified, the court must be satisfied that the determination of that point of law on appeal 'may prevent a miscarriage of justice' for it to grant leave to appeal pursuant to Section 31(2)(a) of the BCAA. This assessment depends on whether the proposed appeal has 'arguable merit', meaning that it cannot be dismissed on a preliminary examination.[38] Third, the BCAA confers discretion to deny leave, even where the leave requirements are technically met. The Supreme Court identified a number of discretionary factors that may be considered when determining a leave application, including the conduct of the parties, the existence of alternative remedies, undue delay, and the urgent need for a final answer.[39]

As a result of *Sattva*, parties seeking to appeal domestic arbitral awards must identify a clear question of law as well as establishing that the arbitrator's award was unreasonable. It would seem that a higher degree of finality has been imported into commercial arbitration by virtue of the principles set out in *Sattva*.

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34 2014 SCC 53 [*Sattva*].

35 RSBC 1996, c 55 [BCAA]. A similar requirement exists in other provincial acts (Alberta, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, and Saskatchewan).

36 *Sattva* (footnote 34, *supra*), paragraph 50.

37 Ibid., paragraphs 75 and 106.

38 Ibid., paragraph 74.

39 Ibid., paragraph 87.

International Centre for Dispute Resolution Canada (ICDR) Arbitration Rules

Canada has also recently expanded the options available to domestic parties who wish to arbitrate. In January 2015, the ICDR implemented the Canadian Dispute Resolution Rules and Procedures (the Canadian Rules),[40] which Canadian parties now have the option of using when submitting a domestic dispute to arbitration. The Canadian Rules are based almost entirely on the ICDR International Arbitration Rules, meaning they contain elements of international arbitral best practices. For example, and similar to the International Arbitration Rules, the Canadian Rules provide for an expedited process for claims of less than US$250,000, or the parties may agree to use the expedited process on matters of any claim size; mediation may be used at any time during the arbitration proceeding; and recognition that oral and documentary discovery developed for court proceedings is generally not appropriate for arbitration.

iii Investor–state disputes

Legislative developments

Canada signed the ICSID Convention[41] on 15 December 2006. Nearly seven years later, on 1 November 2013, Canada ratified it (and it came into force 1 December 2013) and became a contracting state.[42] Several provinces and territories have passed the necessary implementing legislation to assist in bringing the ICSID Convention into force in Canada.[43]

Following Canada's ratification, foreign investors of other contracting states may now submit claims for arbitration against Canada under the ICSID Convention,

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40 The Canadian Rules, effective January 2015, https://www.icdr.org/icdr/faces/i_search/i_rule/i_rule_detail?doc=ADRSTAGE2026272&_afrLoop=1905502694482550&_afrWindowMode=0&_afrWindowId=x1ax6wpdn_146#%40%3F_afrWindowId%3Dx1ax6wpdn_146%26_afrLoop%3D1905502694482550%26doc%3DADRSTAGE2026272%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dx1ax6wpdn_206.

41 The Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, (1965) 4 ILM 524, http://icsid.worldbank.org/ICSID/StaticFiles/basicdoc_en-archive/ICSID_English.pdf.

42 ICSID, List of Contracting States and Other Signatories of the Convention (as of 28 April 2014), https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main.

The federal Settlement of International Investment Disputes Act (SC 2008, c 8) was given royal assent on 13 March 2008 and came into force on 1 November 2013, the same day the ICSID Convention was ratified. See http://laws-lois.justice.gc.ca/eng/acts/S-8.5/page-1.html#docCont.

43 In addition to the federal 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).

provided that the parties have provided written consent to do so.[44] Similarly, Canadian investors may now submit claims against other contracting states.

The chief distinction between arbitrations conducted under the ICSID Convention and those conducted under other regimes, is that awards issued under the ICSID Convention cannot be appealed to Canadian courts;[45] rather, an award must be treated as final and binding[46] and must be immediately enforced as if the award were a final judgment of a Canadian court.[47] While the ICSID Convention includes a limited review process through which an award can be annulled, that review must be conducted by a new tribunal and annulment can only be made on very limited grounds.[48] The ICSID Convention procedure provides a greater degree of certainty than alternative regimes during the process of recognising and enforcing awards. Indeed, the possibility of a dispute arising at the recognition and enforcement stage would be of no concern in ICSID convention-based arbitrations.

There are other potential procedural advantages, including the fact that a contracting state cannot unilaterally withdraw its consent to arbitrate pursuant to the ICSID Convention,[49] and certain administrative provisions that guard against delay or frustration of arbitration proceedings.[50] Generally, however, the chief advantage of Canada's ratification of the ICSID Convention is that it provides both Canadian and foreign investors with access to an additional arbitral 'toolbox'.

Canada has also continued to pursue international investment agreements, referred to as foreign investment promotion and protection agreements (FIPAs). Canada currently has 28 FIPAs in place (in 2014, agreements with Kuwait, Benin and China

44 General consent is frequently given through bilateral investment treaties such as the foreign investment promotion and protection agreements (FIPAs) that Canada has entered into with various countries.

45 It should be noted that courts in those provinces and territories that have not currently enacted implementing legislation may not consider themselves bound by the provisions of the ICSID Convention, and may consequently scrutinise an ICSID award on the same basis as any other international arbitration award.

46 Article 53(1) of the ICSID Convention provides that awards 'shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.'

47 Article 54(1) of the ICSID Convention provides, in part, that contracting states 'shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court of that State'.

48 ICSID Convention at Article 52.

49 Ibid at Article 25(1).

50 For example, Article 38 of the ICSID Convention provides that ICSID will appoint an arbitrator if the parties fail to do so.

were brought into force), has signed a further six and has concluded negotiations on eight more (including India). Additionally, negotiations are ongoing for another 11 treaties.[51]

Canada has also recently signed the United Nations Convention on Transparency in Treaty-based Investor State Arbitration (the Mauritius Convention).[52] By adopting the Mauritius Convention, Canada ensures that the high-level transparency necessary for successful investor-state arbitration is enforced across all FIPAs and free trade agreements (FTAs). In particular, those FIPAs and FTAs that were concluded before 2006, which lack the high level transparency provisions in Canada's more modern agreements, will now reflect the transparency required in the 21st century.

Current investor–state disputes

According to the government of Canada,[53] the country is currently a party to nine active international investment disputes. Of these, three awards have recently been issued (*Clayton/Bilcon v. Government of Canada*, *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada*, and *Detroit International Bridge Company v. Government of Canada* (*DIBC*)), although only the *Clayton/Bilcon* and *DIBC* awards are publicly available at this time. Below, we discuss these three disputes and briefly discuss a further dispute, *Eli Lilly and Company v. Government of Canada*, which has been active in the past year.

DIBC Arbitration

An award in favour of Canada, ending a five-year legal battle over Canada's plans to build a new bridge between Windsor and Detroit, was issued in April 2015.[54] The following discussion addresses the pertinent arguments giving rise to the award; a more detailed discussion of this dispute appears in last year's chapter.

The investor in DIBC is the owner of the Ambassador Bridge, an international toll bridge between Detroit, Michigan (US) and Windsor, Ontario (Canada). The investor alleged that, in response to its announced plans to build an addition to the Ambassador Bridge, the Canadian government frustrated the investor's efforts by announcing plans to construct a competing, Canadian-owned bridge.[55] This was allegedly contrary to

51 For a complete list of FIPAs, see Foreign Affairs and International Trade Canada (FAITC), Negotiations and Agreements, www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng.

52 The Convention was signed on 17 March 2015, but has yet to be ratified. For more information, see www.international.gc.ca/media/comm/news-communiques/2015/03/17a.aspx?lang=eng.

53 FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/gov.aspx?lang=eng.

54 *DIBC*, Award on Jurisdiction (2 April 2015), online at www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/detroit-16.pdf.

55 *DIBC*, Amended Notice of Arbitration (15 January 2013) (UNCITRAL), online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/detroit-04.pdf, paragraph 6.

Articles 1102 (national treatment), 1103 (most-favoured-nation treatment) and 1105 (minimum standard of treatment) of NAFTA.[56]

The parties were embroiled in a preliminary jurisdictional dispute regarding whether the Tribunal had jurisdiction over the matter. In particular, Canada alleged that the investor failed to waive its right to pursue domestic litigation with respect to the same 'measures' that were alleged to be in breach of NAFTA (as required by Articles 1121(1)(b) and 2(b)).

Article 1121 provides that an investor may submit a claim to arbitration only if it waives its right to initiate or continue any proceedings 'with respect to the measure of the disputing Party that is alleged to be a breach', except for proceedings for injunctive, declaratory or other extraordinary relief not involving the payment of damages 'before an administrative tribunal or court under the law of the disputing Party'. Before delivering its amended notice of arbitration, the investor had previously initiated four separate legal proceedings in both Canada and the United States, all of which related to the issues in the DIBC arbitration. Canada alleged that the investor's failure to terminate these proceedings was contrary to Article 1121.

Canada argued that the purpose of Article 1121 is to avoid duplicative proceedings and the possibility of conflicting outcomes and that, as such, it must be interpreted to avoid situations where the same 'measures' are the subject of both a Chapter 11 arbitration and domestic court proceedings.[57] With respect to the exception for injunctive and declaratory proceedings, Canada argued that several of the investor's ongoing domestic proceedings included claims for damages and thus do not fall within the exception,[58] and that even if damages were not claimed, the exception only applied to proceedings 'under the law of the disputing Party' (i.e., Canadian proceedings) and not the investor's lawsuit in the United States.[59] Both the United States and Mexico specifically agreed with Canada's narrow interpretation of the waiver exception in Article 1121.[60]

The Tribunal also agreed, holding that DIBC failed to waive its right to pursue domestic litigation under Article 1121. The Tribunal stated that, subject to limited prescribed exceptions, the purpose of Article 1121 is to allow the investor to quickly start an action in the host state to resolve its dispute, without prejudice to the possibility of subsequent resort to an investment arbitration tribunal should the investor still consider

56 Ibid., at paragraphs 7 and 135–137.

57 *DIBC*, Government of Canada Memorial on Jurisdiction and Admissibility (15 June 2013) (UNCITRAL), online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/detroit-03.aspx?lang=eng, at paragraphs 105–107.

58 Ibid., at paragraphs 146, 155 and 163–165.

59 Ibid., at paragraphs 147–148.

60 *DIBC*, United States 1128 Submission (14 February 2014) (UNCITRAL), online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/detroit-12.pdf, paragraph 7; Mexico 1128 Submission (14 February 2014), online at, FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/detroit-11.pdf, at paragraphs 15–18.

that the treaty standards have not been met and decide to abandon the action in the host state's courts. The Tribunal's determination of this issue provides both investors and NAFTA parties with a greater level of certainty with respect to the waiver precondition to bringing a claim under NAFTA, and sets a favourable precedent for all three states.

Clayton/Bilcon v. government of Canada

In March 2015, the tribunal's award on jurisdiction and liability[61] in *Clayton/Bilcon* was released. It has potentially significant ramifications for both the regulatory process that may be taken by Canada when faced with an environmental investment opportunity, and the forum of dispute that a claimant may choose when a regulatory decision is arguably in breach of domestic law.

The US investors were hoping to develop a quarry in Nova Scotia (the project). The project underwent a lengthy environmental assessment,[62] undertaken by a joint review panel (JRP) appointed by both the provincial and federal governments. This process has become common where a proposed development engages aspects of both Federal and Provincial jurisdictions. The JRP rejected the project, concluding that it was incompatible with 'community core values' and that there were no mitigation measures that could be taken that might make the project acceptable. In line with the recommendations of the JRP, both governments rejected the project.

The investors claimed that the JRP's focus on 'community core values' was novel, and that they did not receive notice that this would be a significant element in the environmental assessment. Further, they argued that in failing to identify any mitigation measures, the JRP had not conducted an assessment that was comparable to similar cases. As such, the investors alleged that their legitimate expectations, created by the regulatory framework and specific expressions of encouragement by governments, were frustrated unfairly and in breach of the safeguard that Chapter 11 of NAFTA provides for investors and investments concerning non-discrimination and fair treatment. Consequently, the investors claimed they had received treatment less favourable than that accorded to similar Canadian-owned investments.

The majority of the Tribunal agreed, finding that Canada had breached both Article 1105 (minimum international standard)[63] and Article 1102 (national treatment standard).[64] Regarding the minimum international standard, the Tribunal found that the conduct of the JRP was arbitrary and had effectively created a new standard of assessment in adopting the concept of community core values, without legal authority or notice to the investors. As such, the investors' application was assessed in a manner that fundamentally departed from the methodology required by Canadian and Nova Scotia laws. The arbitrary departure from domestic law constituted egregious state conduct that

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

62 Ibid., paragraphs 23–24.

63 IIbid., paragraphs 588–604.

64 Ibid., paragraphs 685–731.

established a breach of Article 1105. With regard to the national treatment standard, the Tribunal found that the JRP's failure to identify mitigation measures, which had been part of the environmental assessment in comparable cases, was sufficient to conclude that the investors received less favourable treatment than did investors in comparable cases. This matter will go back to the Tribunal for an assessment of damages.

A strong dissenting opinion[65] argued that the concept of community core values was not, in fact, novel or unknown to environmental assessments. To the contrary, community core values was simply a term given to an important component of what the JRP had to consider in accordance with its terms of reference. Further, when the JRP decided not to recommend mitigation measures, it was because it believed that the overall effect of the project could not be mitigated. As such, the dissent suggested that the JRP's position was principled (and not arbitrary), even if it turned out that it could not be supported under Canadian law. While under judicial review the JRP may have been found not to be in conformity with Canadian law, a potential violation of Canadian law ought not to be sufficient to establish a violation of Article 1105. Thus, the dissent considered that the majority had improperly turned a possible breach of domestic law into an international wrong.

This decision has important ramifications for the application of environmental laws by NAFTA parties. Arguably, a claimant can now bypass the domestic remedy to challenge a regulatory decision provided for in Canadian law (judicial review), and instead proceed with a NAFTA claim. In this regard, there is now potential for an investor to claim damages for a breach of Canadian law, where Canadian law does not provide a damages claim for such a breach. The dissent suggested that this will lead to a chill on the operation of environmental review panels, which will now be concerned not to give too much weight to socio-economic considerations or other considerations of the human environment, in case the result is a claim for damages under Article 1105.

Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada

In February 2015, the *Mobil* case came to an end almost eight years after the dispute arose. The claimants in *Mobil* were American investors in two offshore oil production projects. The regulatory scheme for offshore oil production at the time of investment subjected the investors to certain performance requirements, including research and development (R&D), and education and training (E&T) expenditure requirements.[66] Several years after the claimants' initial investment, the regulatory agency overseeing these R&D and E&T requirements adopted new guidelines (the 2004 Guidelines) compelling the claimants to spend considerably more on R&D and E&T than required previously. The Tribunal was asked to consider whether Canada had imposed on the

65 *Clayton/Bilcon*, Dissenting Opinion of Professor Donald McRae, online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/clayton-13.pdf.

66 *Mobil*, Decision on Liability and on Principles of Quantum (Public Version) (22 May 2012), ICSID Case No ARB(AF)/07/4, at paragraphs 34–93, online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mobil-15.pdf.

investor impermissible performance requirements within the meaning of Article 1106(1)(c), subject to the exceptions to such performance requirements within Article 1108.[67]

Although the award is not yet publically available, the Tribunal granted approximately C$17.3 million in damages to the investors (C$13.9 million to ExxonMobil, and C$3.4 million to Murphy Oil), and the Tribunal's award was in line with its earlier decision on liability and principles of quantum.[68]

In that liability decision, the Tribunal found as a fact that the 2004 Guidelines would require local expenditures, implying a legal requirement for the purposes of Article 1106.[69] Further, the expenditures were a central feature of the 2004 Guidelines, and not an ancillary objective or consequence.[70] Regarding the exceptions in Article 1108, the majority concluded that the types of 'measures' which fall under Article 1108 can include the expressly reserved measures listed by each state party in its Schedule to Annex 1 of NAFTA along with 'any subordinate measures that have been adopted and maintained under the authority of and consistent with, that measure'.[71] Thus, a newer measure implemented by a government authority subsequent to the creation of the Schedule to Annex 1, might be covered by Article 1108(1). The majority concluded, however, that on the claimants' specific facts, the 2004 Guidelines were inconsistent with the exceptions enumerated in Article 1108(1) and therefore remained an impermissible performance requirement.[72]

Eli Lilly and Company v. Government of Canada (Eli Lilly)

Eli Lilly presents an interesting issue regarding the interaction between a state's obligations pursuant to international treaties and developments in its domestic law. The investor is the owner of two pharmaceutical patents that were granted by Canada in the 1990s. Several years later, in the mid-2000s, Canada's domestic courts created a new 'promise utility doctrine' to assess whether an invention is 'useful' or 'capable of industrial application' such that it is properly the subject of patent protection. Consequently, in a series of decisions beginning in 2010, the Canadian courts ruled that the investor's patents were invalid for lack of utility.[73] The investor alleges that the development in Canada's domestic patent law, specifically the 'promise utility doctrine', constitutes a violation of the minimum standard of treatment mandated by Article 1105 of NAFTA, and has resulted in the unlawful expropriation of its investments contrary to Article

67 Ibid., paragraph 172.

68 Footnote 65, *supra*.

69 Ibid., paragraphs 237 and 242.

70 Ibid., paragraph 242.

71 Ibid., paragraph 343.

72 Ibid., paragraph 413. A partial dissenting opinion by Professor Philippe Sands, QC, found that the 2004 Guidelines were covered by Canada's Article 1108(1) reservation to Article 1106. See *Mobil,* Partial Dissenting Opinion (17 May 2012), ICSID Case No ARB(AF)/07/4, online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mobil-16.pdf.

73 Leave to appeal to the Supreme Court of Canada denied, 2013 CanLII 26762.

1110.[74] With regard to the minimum standard of treatment, the investor alleges that the 'promise utility doctrine' violates the principle of fair and equitable treatment, and that the court decisions invalidating the patents were 'improper and discreditable'.[75] With regard to Article 1110, the investor alleges that the effect of the common law has revoked the patents *ab initio*, thereby depriving the investor of its exclusive patent rights.

Under Article 17, Canada is obliged to provide certain intellectual property protections to nationals of the other NAFTA parties. Specifically, under Article 1709, Canada may only revoke a patent on grounds that would have justified a refusal to grant the patent in the first instance.[76] The investor alleges that at the time NAFTA entered into force, the Canadian Patent Office's position regarding utility was that as long as an invention had some industrial purpose and was not inoperable, it would satisfy the utility requirement.[77] In contrast, the new common law 'promise utility doctrine' involves the court scrutinising the patent application for a 'promised utility'. If a promise is found, the patentee must prove that it had 'demonstrated' or 'soundly predicted' this promised utility as at the date of its patent application.[78] The inventor alleges that this new doctrine, which could not have been anticipated when its patents were granted by Canada,[79] imposes a significantly higher burden on patentees than the standard of utility mandated by NAFTA, and is inconsistent with Canada's obligation to make patents available to inventions that are capable of industrial application.[80]

In its statement of defence,[81] Canada argues that the investor is seeking to misapply NAFTA Chapter 11, and have the Tribunal transform itself into a supranational court of appeal from domestic court decisions.[82] Canada argues that the investor is seeking to elevate its view of how Canadian law 'ought' to be, into an expectation resulting in a breach of international law.[83] When determining whether there has been a breach of the minimum standard of treatment, Canada suggests that the Tribunal must determine whether the court decisions violated fundamental principles of due process, rising to a level of a denial of justice.[84] In any event, a determination that there has been a breach of Chapter 17 (or of any other NAFTA provision) does not establish that there has

74 *Eli Lilly*, Notice of Arbitration (12 September 2013), (UNCITRAL), online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/eli-03.pdf.

75 Ibid., paragraph 81.

76 NAFTA Article 1709(8).

77 *Eli Lilly* Notice of Arbitration (footnote 73, *supra*), paragraphs 28–29.

78 Ibid., paragraphs 34–39.

79 Ibid., paragraph 34.

80 Ibid., paragraphs 68 and 71.

81 *Eli Lilly*, UNCT/14/2, Statement of Defence (30 June 2014), online at FAITC, www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/eli-statement-declaration.aspx?lang=eng.

82 Ibid., paragraph 1.

83 Ibid., paragraph 6.

84 Ibid., paragraph 7.

been a breach of the minimum standard of treatment.[85] With regard to Article 1110 (Expropriation), Canada suggests that the court decisions invalidating an initial patent grant do not amount to a taking of 'property'; rather, they amount to determinations of whether or not such property rights exist at all.[86] Further, the Tribunal's jurisdiction only relates to alleged breaches of Chapter 11, and does not have the jurisdiction to rule on alleged violations of Chapter 17.[87]

The ultimate determination in *Eli Lilly*, the hearing of which is scheduled to begin at the end of May 2016, will help to further define the minimum standard of treatment required under Article 1105 of NAFTA and the limits for expropriation under Article 1110. It should also provide important guidance regarding how developments in domestic law will affect NAFTA parties' treaty obligations, and what level of protection investors can expect in the future.

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. Unfortunately, specific differences among Canadian jurisdictions retain the potential to complicate arbitration and related proceedings in some circumstances. To the extent such differences are of concern to inter-jurisdictional or foreign entities looking to arbitrate in Canada, the work of the ULCC in this regard is promising. The Uniform ICAA will, if adopted by Canadian governments, form a strong basis for more unified international commercial arbitration legislation throughout Canada. These efforts, combined with the recent 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 grow more prevalent.

85 Ibid., paragraph 105.

86 Ibid., paragraphs 9 and 108.

87 Ibid., paragraph 84.

Appendix 1

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Tom is a partner in the Calgary office of Dentons Canada LLP, is a member of the firm's energy litigation practice group and co-lead of the firm's national ADR practice group. Tom's diverse advocacy practice includes energy litigation, regulatory hearings and a broad spectrum of commercial disputes. Tom has represented clients at all levels of court in Alberta, at the Federal Court of Canada and numerous administrative tribunals. He has also acted as counsel in over 100 mediations and numerous arbitrations. Tom has authored papers and articles on a variety of ADR topics and other subjects including the regulations and risks associated with hydraulic fracturing, *force majeure*, and coal-bed methane development. He is active in community affairs and is currently a member of the board of directors of the Calgary Stampede.

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Martha Harrison is a partner in our international trade and regulatory group. As part of her trade practice, she has developed considerable expertise representing clients in investor-state disputes under NAFTA and various bilateral investment treaties. She has participated as lead counsel in international arbitrations held under UNCITRAL and ICSID rules, and provides advisory advice on related risk assessment on international transactions. Martha is a roster arbitrator for the International Centre for Dispute Resolution, and sits on the executive of the Toronto Commercial Arbitration Society. She is recognised as an expert in trade law in a number of peer-review journals.

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