The International Arbitration Review

Fourth Edition

Editor
James H Carter

Law Business Research

The International Arbitration Review

This article was first published in
The International Arbitration Review, 4th edition
(published in Juy 2013 – editor James H Carter).

For further information please email
Adam.Sargent@lbresearch.com

The International Arbitration Review

Fourth Edition

Editor
James H Carter

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

MARKETING MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing

PUBLISHING ASSISTANT
Lucy Brewer

PRODUCTION COORDINATOR
Lydia Gerges

HEAD OF EDITORIAL PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anna Andreoli

SENIOR SUBEDITOR
Caroline Rawson

EDITOR-IN-CHIEF
Callum Campbell

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-907606-70-0

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ABASCAL, SEGOVIA & ASOCIADOS

ADVOKATFIRMAN DELPHI

AMBOS NBGO

ANWALTSBÜRO WIEBECKE

BAKER & MCKENZIE

CÁRDENAS & CÁRDENAS ABOGADOS

CORRS CHAMBERS WESTGARTH

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

DEACONS

DE BERTI JACCHIA

DENTONS

DJ ARBITRAJE

DR COLIN ONG LEGAL SERVICES

GARRIGUES

HARASIĆ Y LÓPEZ

K&L GATES

KAMILAH & CHONG

KBH KAANUUN

KHAN & ASSOCIATES

KONRAD & PARTNERS

LETT LAW FIRM

LO BAPTISTA, SCHMIDT, VALOIS, MIRANDA, FERREIRA & AGEL (LOB-SVMFA)

MARKIDES, MARKIDES & CO LLC

MEHMET GÜN & PARTNERS

MOMO-O, MATSUO & NAMBA

MOTIEKA & AUDZEVIČIUS

MULLA & MULLA & CRAIGIE BLUNT & CAROE

PATTON BOGGS LLP

PAZ HOROWITZ ROBALINO GARCÉS

PROFESSOR HILMAR RAESCHKE-KESSLER

RAJAH & TANN LLP

SABEV & PARTNERS

SCHRECK LAW OFFICES

SHALAKANY LAW OFFICE

SIMMONS & SIMMONS LLP

SOFUNDE, OSAKWE, OGUNDIPE & BELGORE

SRS ADVOGADOS – SOCIEDADE REBELO DE SOUSA E ASSOCIADOS, RL

WASELIUS & WIST

WILMER CUTLER PICKERING HALE AND DORR LLP

CONTENTS

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 lawyer hours of reading 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 2013

Chapter 8

CANADA

Thomas P O'Leary, Michael D Schafler and Rachel A Howie[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. Similarly, the province of Ontario has legislation in the Arbitration Act[6] for domestic arbitrations and the International Commercial Arbitration Act[7] ('the Ontario ICAA') for international commercial arbitrations.[8] Within the province of Quebec, however, both domestic and international commercial arbitrations are governed by different sections

1 Thomas P O'Leary and Michael D Schafler are partners and Rachel A Howie is an associate at Dentons.

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.

6 1991, SO 1991, c 17.

7 RSO 1990, c I.9.

8 The situation is the same in the territories with, for example, the Yukon enacting the Arbitration Act, RSY 2002, c 8 along with the International Commercial Arbitration Act, RSY 2002, c 123.

of the Civil Code of Quebec[9] ('the Civil Code') and the Code of Civil Procedure[10] ('the Civil Procedure').[11] 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.

Federally, international commercial arbitration is governed by the Commercial Arbitration Act[12] ('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.[13] Thus any investor–state claims brought under Articles 1116 or 1117 of the North American Free Trade Agreement ('NAFTA')[14] against Canada are governed by the federal CAA.[15] 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').[16] 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').[17]

---

9 LRQ, c C-1991.

10 RSQ, c C-25.

11 Specifically, Section 940.6 of the Code of Civil Procedure, RSQ, c C-25 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 Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985;[…]'.

12 RSC 1985, c 17.

13 Commercial Arbitration Act, RSC 1985, c 17 [CAA] at Section 5.

14 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').

15 CAA, footnote 13 *supra* at Section 5(4)(a).

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

17 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 May 12, 1986 with a declaration, on May 20, 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

Provincial and territorial international commercial arbitration legislation also provides recourse to local courts in certain limited instances, such as on applications to consolidate arbitrations[18] or on applications to set aside arbitral awards.[19] 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'.[20] 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.[21]

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 use 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.

The balance of this chapter will discuss some of the differences in international commercial arbitration legislation across the country in the context of steps recently taken by the Uniform Law Conference of Canada ('ULCC') in attempting to synchronise provincial, territorial and federal legislation in this regard. Recent arbitration developments in local courts will also be reviewed, as will recent developments in

---

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>.

18 See the Alberta International Commercial Arbitration Act, RSA 2000, c I-5 [Alberta ICAA] at Section 8(1)(a) and the Ontario International Commercial Arbitration Act, RSO 1990, c I.9 [Ontario ICAA] at Section 7(1)(a).

19 See the Alberta ICAA, footnote 18 *supra* at Schedule 'B', Article 34 and the Ontario ICAA, footnote 18 *supra* at Schedule 'B', Article 34.

20 CAA, footnote 13 *supra* at Section 6.

21 Prior to amendments which 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. S.D. Myers Inc.*, 2004 FC 38, to set aside the decisions in *S.D. Myers, Inc. v. The Government of Canada*, Final Award (30 December 2002), online: Investment Treaty Arbitration <www.italaw.com/sites/default/files/case-documents/ita0754.pdf>, *S.D. Myers, Inc. v. The Government of Canada*, Partial Award on the Merits (2000), 40 ILM 1408, and *S.D. Myers, Inc. v. The Government of Canada*, Second Partial Award (21 October 2001), online: Investment Treaty Arbitration <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.

investor–state arbitration involving Canada. It is notable that investor–state arbitration involving Canadian jurisdictions has been increasing of late, reflecting Canada's prominence in non-renewable and renewable resource and energy industries and the significant foreign investment in these sectors.

II THE YEAR IN REVIEW

i Developments affecting international arbitration

The most significant development affecting international arbitration in Canada in the last 12 months is the work of the ULCC's Working Group on Arbitration Legislation ('the Working Group') to address differences in international commercial arbitration legislation between Canadian jurisdictions. Since 1918 the ULCC has operated to harmonise provincial, territorial and federal laws across several disciplines.[22] The ULCC's first foray into international arbitration legislation was in 1986 when it 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 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 leading to differences in form and substance for international commercial arbitration across the country.

The legislation initially enacted in Canada in response to the original Model Law remains largely in force today. The following are a few examples of some of the legislative variations that currently exist between some Canadian jurisdictions.

The Ontario ICAA, at Section 5, stipulates that Article 11(1) of the Model Law shall read that a 'person of any nationality may be an arbitrator'. This is different from the Alberta ICAA and the ULCC template legislation, which does not contain any language to alter the original Article 11(1) of the Model Law. Article 11(1) of the Model Law

22 For more information about the ULCC, see Uniform Law Conference of Canada, Home, online: Uniform Law Conference of Canada <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 Uniform Law Conference of Canada, Uniform Acts, International Commercial Arbitration Act 1987, online: Uniform Law Conference of Canada <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 [BC 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 Uniform Law Conference of Canada Working Group on Arbitration Legislation, Discussion Paper: Towards a New Uniform International Commercial Arbitration Act (January 2013), online: Global Arbitration Review <www.globalarbitrationreview.com/cdn/files/gar/Articles/ULCC_Discussion_Paper_Towards_a_New_Uniform_International_Commercial_Arbitration.pdf> [ULCC Discussion Paper].

states that: 'No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.'

Unlike the federal CAA, several of the provinces[25] have enacted legislation that mirrors the ULCC template legislation in stipulating that 'unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the [Model Law], any hearing held prior to the replacement or removal shall' be repeated or shall start afresh.

All jurisdictions, except for British Columbia, Saskatchewan, the Yukon and the federal jurisdiction, have enacted a single statute that incorporates or is based on both the Model Law and the New York Convention. These four jurisdictions have separate legislation for international commercial arbitration and for the recognition and enforcement of foreign arbitral awards.[26]

In 2011, the ULCC decided to revisit international commercial arbitration in Canada. By that time Canadian jurisprudence on international commercial arbitration had developed to provide a significant body of authority that merited consideration. Moreover, the very foundation for international commercial legislation in Canada, the Model Law, was altered when the 2006 amendments to the Model Law were adopted ('the 2006 Model Law').[27] While some other countries have implemented these 2006 amendments in legislation, Canada has not.[28]

The Working Group released its initial Report in August, 2012,[29] and its detailed Discussion Paper, entitled 'Towards a New Uniform International Commercial Arbitration Act', in January 2013 ('the Discussion Paper').[30] The Discussion Paper contains several policy recommendations, comments on issues arising from the jurisdictional differences in international commercial arbitration, and a proposal for a new draft Uniform International Commercial Arbitration Act ('the Draft ICAA'). Each of these three items, and their effects, will be discussed in turn.

Policy recommendations

The five policy recommendations of the Working Group are to:

a continue to base the Uniform International Arbitration Act on the New York Convention and the Model Law;

---

25 See the Alberta ICAA, footnote 18 *supra* at Section 6, the Ontario ICAA, footnote 18 *supra* at Section 4 and the New Brunswick International Commercial Arbitration Act, SNB 1986, c I-12.2, at Section 6.

26 For example, Canada has enacted the CAA, footnote 13 *supra*, along with the United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp) and British Columbia has enacted the BC ICAA, footnote 24 *supra*, along with the Foreign Arbitral Awards Act, RSBC 1996, c 154.

27 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.

28 ULCC Discussion Paper, footnote 24 *supra* at p. 8, para 9.

29 Ibid. at pp. 8–9, paras 15–16.

30 ULCC Discussion Paper, footnote 24 *supra*.

b prepare a single statute that appends both the New York Convention and the Model Law;

c depart from the text of the Model Law only for 'good reason' (departures should be few if any, and only as necessary);

d continue to keep legislation for domestic arbitration separate from the legislation for international commercial arbitration; and

e promote uniformity among Canadian jurisdictions to avoid undue complexity.[31]

In large part, these policy recommendations have been followed in most Canadian jurisdictions and are reflected in the ULCC's existing template legislation. One specific issue affecting uniformity among jurisdictions and addressed by the Working Group is an independent review of international arbitration legislation undertaken by the province of Quebec. As previously noted, international commercial arbitration in Quebec currently operates under two statutes, the Civil Code and the Civil Procedure, with the practical result that some provisions from the Model Law are contained in the former and some in the latter statute. Any new uniform international commercial arbitration legislation in Quebec would need to take into account the fact that it would be split between two instruments. With this in mind, the Working Group concluded that in implementing these policy recommendations 'uniformity in substance is more important than any necessary differences in form'.[32]

Issues arising from jurisdictional differences

The Working Group discussed 23 issues that arise as a result of current jurisdictional differences across Canadian international commercial arbitration legislation, and the amendments in the 2006 Model Law.[33] While a complete discussion of all of these issues is beyond the scope of this Article, the following paragraphs highlight a few issues that are most likely to be of interest to practitioners and encountered on a regular basis.

The first issue raised by the Working Group was whether all of the 2006 Model Law amendments, including Articles 17B and 17C, should be implemented through the new Draft ICAA.[34] Articles 17B and 17C are new to the 2006 Model Law. These two Articles deal with applications for preliminary orders and conditions for granting preliminary orders along with a specific regime for such preliminary orders. Those against adopting these provisions felt the 2006 Model Law's provision for *ex parte* interim measures of protection (Article 17B) conflicted with the consensual nature of arbitration and may adversely affect the perception of arbitrator independence. Those in support of adopting Articles 17B and 17C were of the view that any risks in such *ex parte* orders are mitigated as the other party is eventually given an opportunity to be heard (Article 17C(2)), the applying party must provide security (17E), and such orders will likely not be routinely sought or granted.[35] Having a mechanism in place for a party to an international commercial arbitration to

31 Ibid. at pp. 11–13, paras 17–34.

32 Ibid. at p. 12, para 29.

33 Ibid. at pp. 15–43, paras 35–164.

34 Ibid. at pp. 15–16, paras 35–41.

35 Ibid. at pp. 15-16, paras 39–40.

obtain an *ex parte* interim measure of protection will mitigate the potential for serious irreparable harm and would be a novel advancement in arbitration in Canada.

Another practical consideration was the difference between provinces in limitation periods for the recognition and enforcement of awards.[36] The ULCC agreed with the Working Group's recommendation that 'measures to harmonise limitation periods applicable to the recognition and enforcement of foreign arbitral awards across Canada be considered'.[37] One suggestion in this respect is to work with the language of Article 34 of the 2006 Model Law and create a uniform three-year limitation for the recognition and enforcement of awards. Subsequent harmonisation would be required by each jurisdiction with its other limitations provisions, which could meet with opposition.[38] This issue is closely related to the fourth issue examined by the Working Group, which is limitation periods more generally for the commencement of international arbitration proceedings.[39] The Working Group does not recommend that the new Draft ICAA attempt to harmonise limitations periods for commencement. Rather, it has asked for comment on whether it would help to have a clarifying provision such as:

> *If the limitation period governing the commencement of arbitration proceedings is to be determined by the law of [enacting jurisdiction] then, unless the parties have otherwise agreed, the limitation period is the same as would be applicable to court proceedings and the commencement of the arbitration will have the same effect as the commencement of court proceedings.*[40]

The seventh issue raised by the Working Group is whether there should be legislation governing inter-jurisdictional enforcement of Canadian judgments that recognise and enforce international arbitration awards.[41] The question, ultimately, is whether multiple proceedings are required within and between Canadian jurisdictions to recognise and enforce an international arbitration award.[42] Despite concerns over usurping the right of provincial and territorial courts to carry out their own inquiry on whether to enforce an award, the Working Group is inviting comment on whether the following provision should be added to the new Draft ICAA:

---

36 ULCC Discussion Paper, footnote 24 *supra* at pp. 19-20, paras 56–59. This was the third issue addressed by the Working Group. For more detail see Michael D. Schafler, 'Comment: Enforcement of Foreign Arbitral Awards Subject to Local Limitation Periods – Supreme Court of Canada' (2010) 4 World Arbitration and Mediation Review 1.

37 Ibid. at p. 19, para 56.

38 This further harmonisation would be required as under Article 3 of the New York Convention, footnote 17 *supra*, '(t)here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.' As discussed at note 44, *infra*, and the accompanying text some Canadian limitation periods exceed three years.

39 ULCC Discussion Paper, footnote 24 *supra* at p. 20 paras 60–61.

40 Ibid. at p. 20, para 61.

41 Ibid. at p. 23, paras 77–82.

42 Ibid. at p. 23, para 78.

> *A judgment of a court of competent jurisdiction in Canada recognizing and enforcing an award under Articles II, IV, and V of the [New York Convention] or Articles 35 and 36 of the [2006 Model Law] shall be enforced in [enforcing jurisdiction] in the same manner as other judgments of that court.*[43]

If such a provision were enacted in provincial, territorial and federal international commercial arbitration legislation, it would confirm that an international arbitration award, once recognised and enforced in one Canadian jurisdiction, should be treated the same way as a court judgment from that jurisdiction, and not as a foreign arbitral award. Efficiency and effectiveness in enforcement would be improved. However, other issues are raised by this proposal. One is the possibility of 'forum-shopping' among holders of international arbitration awards. This could have significant practical impacts. For example, an award holder chooses to wait until four years after the award date and then takes steps to have the award recognised and enforced in British Columbia, which has a six-year limitation period. If the above provision were enacted across the country then such award could also be recognised in Alberta, even though under Alberta's two-year limitation provision[44] direct recognition and enforcement of the arbitral award in the province would not be possible. The Working Group explicitly recognised that this issue is necessarily connected to the earlier harmonisation of limitation periods for the recognition and enforcement of arbitral awards.[45]

Draft legislation

The ULCC's proposed Draft ICAA attaches the New York Convention as Schedule A and the 2006 Model Law as Schedule B.[46] The introductory text of the Draft ICAA fills in some of the gaps in the 2006 Model Law, such as which courts are 'competent courts', and delineates the different options where there are two versions for an Article within this text. The Draft ICAA retains, at Section 11, the proposed language noted earlier that '(u)nless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the Model Law, any hearing held before the replacement or removal shall be repeated.'[47] Section 16 of the Draft ICAA also incorporates language similar to Article 34 of the Model Law to direct a uniform 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.[48] Section 17 of the Draft ICAA addresses the inter-jurisdictional enforcement

43 Ibid. at p 23, para 81.

44 See the British Columbia Limitation Act, RSBC 1996, c 266, at Section 3 and the Alberta Limitations Act, RSA 2000, c L-12, at Section 3, along with the discussion in the ULCC Discussion Paper, footnote 24 *supra* at p 23, para 77.

45 ULCC Discussion Paper, footnote 24 *supra* at p 23, para 78.

46 Ibid. at pp 47-79.

47 Ibid. at p 50.

48 Ibid. at p 52.

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 an arbitral award.[49]

The new Draft ICAA is scheduled to be presented to the ULCC in August 2013.[50] There is no obligation on the provinces, territories and federal government to adopt the language in the Draft ICAA but, if approved by the ULCC, this new model template should be influential and persuasive to all Canadian jurisdictions.

ii Arbitration developments in local courts

Jurisprudential developments in local courts over the last few years, and in particular two relatively recent pronouncements from the Supreme Court of Canada,[51] 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.[52]

In this context, the enforcement of foreign arbitral awards has also been the subject of recent judicial consideration. In *Activ Financial Systems Inc v. Orbixa Management Services Inc* the Ontario Superior Court of Justice considered, *inter alia*, whether a foreign arbitral award, that had been converted to a foreign judgment in New York, must be enforced in Ontario as a foreign court judgment or as a foreign arbitral award under the Model Law and the Ontario ICAA.[53] Perell J looked at the substance of the question rather than its form in holding that the Ontario ICAA was the exclusive means for enforcing a foreign arbitral award, notwithstanding the fact that such award had been converted to a foreign judgment.[54] In other words, 'an application under the Model Law is not influenced by the fact that another jurisdiction may have covered the arbitral award with a court judgment; that circumstance is neutral to the enforcement under the Model Law'.[55]

If this determination is carried forward in future jurisprudence, some potentially harsh results could follow. One practical issue that may arise is whether a party looking to enforce a foreign arbitral award in Canada, outside of the limitation period for doing so under the relevant international commercial arbitration legislation, but within the limitation period for doing so under the other statutes or the common law of the province, could be precluded from proceeding under those other statutes to enforce the foreign judgment. This directly involves the seventh issue identified by the ULCC

49 Ibid.

50 Ibid. at p 9, para 16.

51 *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, and *Seidel v. TELUS Communications Inc.*, 2011 SCC 15.

52 For a more in-depth discussion, please see Michael D Schafler, Tamela J Coates and Chloe Snider, 'Commercial Arbitration and the Canadian Justice System: Recent Decisions of the Supreme Court of Canada', (2011) *The Arbitration Review of the Americas 2012* at 38-39.

53 *Activ Financial Systems Inc. v. Orbixa Management Services Inc.*, 2011 ONSC 7286, at paras 1–3.

54 Ibid. at para 45.

55 Ibid.

Working Group, and whether foreign or international arbitral awards enforced in one Canadian jurisdiction ought to be deemed to be judgments for purposes of registration and enforcement in other Canadian jurisdictions.

iii Investor–state disputes

Canada signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States[56] ('the ICSID Convention') on 15 December 2006. Despite signing, Canada has not yet ratified the ICSID Convention.[57] Only a few provinces and territories have passed the necessary implementing legislation to assist in bringing the ICSID Convention into force in Canada.[58] While investors bringing disputes against Canada cannot yet take advantage of the ICSID Convention, they can nonetheless agree to arbitrate under the ICSID Additional Facility Rules.[59]

Canada has continued to pursue international investment agreements, referred to as foreign investment promotion and protection agreements ('FIPAs') by the government. The most notable of these recent FIPAs is that between Canada and China, which was signed in September 2012.[60] While Canada has only 24 FIPAs currently in place, it has

56 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, (1965) 4 ILM 524.

57 International Centre for Settlement of Investment Disputes, List of Contracting States and Other Signatories of the Convention (as of April 10, 2013), online: <https://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ContractingStates&ReqFrom=Main>. Federal legislation entitled An Act to implement the convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) was given royal assent on 13 March 2008, however the legislation is not yet in force. See Canada Bill C-9, An Act to implement the convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), 2nd Sess, 29th Parl, 2008 (assented to 13 March 2008).

58 In 1999, Ontario enacted the Settlement of International Investment Disputes Act, 1999, SO 1999, c 12, Sch D, and in 2006, British Columbia, Newfoundland and Labrador, Nunavut and Saskatchewan adopted legislation that would implement the ICSID Convention. Uniform Law Conference of Canada, 2007 Charlottetown PE Annual Meeting, online: Uniform Law Conference of Canada <www.ulcc.ca/en/2007-charlottetown-pe/216-civil-Section-documents/600-activities-and-priorities-dept-justice-private-international-law-2007?start=4>.

59 NAFTA, footnote 14 *supra* at Article 1120(1)(b) states a disputing investor may submit the claim to arbitration under 'the Additional Facility Rules of ICSID, provided that either the disputing Party or the Party of the investor, but not both, is a party to the ICSID Convention'. Further, under Article 1120(c) a disputing investor may submit its claim under the UNCITRAL Arbitration Rules.

60 Foreign Affairs and International Trade Canada, Canada-China Foreign Investment Promotion and Protection Agreement (FIPA) Negotiations, online: Foreign Affairs and International Trade <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china-chine.aspx?lang=eng>. At the time of writing, Canada has yet to ratify this FIPA.

concluded negotiations on a further 10 (including the Canada–China FIPA) since 2008 and is in negotiations on another 13 treaties.[61]

According to the government of Canada, the country is currently a party to nine active international investment disputes. Two of the nine disputes active over the past year are effectively at an end. The arbitral tribunal in *Mobil Investments Inc and Murphy Oil Corporation v. Government of Canada* ('*Mobil*'), discussed in more detail below, recently issued a 'Decision on Principles of Liability and Quantum',[62] and the parties in a second dispute, *St. Marys VCNA, LLC v. Government of Canada*, recently entered into a consent order to end the dispute.[63] Of the seven remaining active disputes, four were initiated during the past year: *Mercer International Inc. v. Government of Canada* ('*Mercer*'), *Windstream Energy LLC v. Government of Canada* ('*Windstream*'), *Eli Lilly and Company v. Government of Canada* ('*Eli Lily*') and *Lone Pine Resources Inc v. Government of Canada* ('*Lone Pine*'). All of these cases are brought under NAFTA and, with the exception of *Eli Lily*, all involve the energy and resource industries.

The *Mobil* case is worthy of particular attention for its detailed consideration of NAFTA Article 1108. The tribunal was asked to determine, *inter alia*, whether Canada had imposed impermissible performance requirements within the meaning of Article 1106(1)(c) of NAFTA on the foreign investor, subject to the exceptions to such performance requirements within Article 1108.[64] The claimants in *Mobil* were American investors in two offshore oil production projects in the province of Newfoundland and Labrador. 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.[65] 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 had been required previously.

---

61 For a complete list of FIPAs, see Foreign Affairs and International Trade Canada, Negotiations and Agreements, online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>.

62 *Mobil Investments Canada Inc. & Murphy Oil Corporation v. Canada,* Decision on Liability and on Principles of Quantum (Public Version) (22 May 2012), ICSID Case No ARB(AF)/07/4, online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mobil-15.pdf> (*Mobil*).

63 Foreign Affairs and International Trade Canada, News Release 'Foreign Affairs and International Trade Canada Issues Statement on St Marys VCNA , LLC, Settlement' (8 March 2013) online: Foreign Affairs and International Trade Canada <www.italaw.com/sites/default/files/case-documents/DFAIT.pdf>. This press release noted the claimant 'has agreed to irrevocably and permanently withdraw its NAFTA claim against Canada. In doing so, St Marys VCNA, LLC, acknowledges that it lacks and has always lacked standing to bring this claim under NAFTA Chapter 11.'

64 *Mobil*, footnote 62 *supra* at para 172.

65 Ibid. at paras 34–93.

The tribunal found as a fact that the 2004 Guidelines would require local expenditure[66] and were 'designed to ensure that expenditures for R&D and E&T services occur in the Province' implying a legal requirement for the purposes of Article 1106.[67] Further, 'in the view of the Tribunal […] such spending on R&D and E&T in the Province is a central feature of the 2004 Guidelines, and not an ancillary objective or consequence'.[68] The tribunal held the R&D and E&T requirements set out in the 2004 Guidelines were prohibited by Article 1106, as their implementation 'imposed legal requirements on the claimants to undertake R&D and E&T expenditures in the province'.[69]

The tribunal then carried out an extensive analysis of Article 1108(1) of NAFTA, which expressly carves out exceptions to, *inter alia*, the prohibition against performance requirements in Article 1106 based on certain measures delineated in schedules to various annexes to NAFTA. The tribunal's analysis was to determine whether the 2004 Guidelines fell within the exceptions covered by Article 1108 such that they were, in effect, saved despite breaching Article 1106.[70] After assessing Article 1108(1), a majority of the tribunal concluded the types of 'measures' that fall under the provision 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] In doing so, the majority was careful to note they 'were not asked to address the implications [of the 2004 Guidelines] for other investors in these [offshore] projects, [or] for other investment projects […] which could have a different set of applicable measures'.[73]

Mesa Power Group LLC v. Government of Canada ('*Mesa*'), an ongoing investor–state dispute initiated in October 2011 involving the government of Ontario's Feed-in-Tariff Program ('FIT Program') merits mention for two recent tribunal decisions

66 Ibid. at para 237.

67 Ibid. at para 242.

68 Ibid. at para 242.

69 Ibid. at para 246.

70 Ibid. at paras 247–413.

71 Ibid. at para 343.

72 Ibid. at para 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 Investments Canada Inc. & Murphy Oil Corporation v. Canada*, Partial Dissenting Opinion (17 May 2012), ICSID Case No ARB(AF)/07/4, online: Foreign Affairs and International Trade Canada <http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mobil-16.pdf>.

73 Mobil, footnote 62 *supra* at 412.

on bifurcation.[74] In brief, in this dispute the claimant alleges Canada, through various sub-national entities within the province of Ontario, 'imposed sudden and discriminatory changes to the established scheme for renewable energy' under the FIT Program that breached several of Canada's obligations under the NAFTA.[75] In an early objection as to jurisdiction, Canada alleged the claimant failed to respect the minimum six-month time period set out in Article 1120(1) of the NAFTA.[76] Article 1120(1) states, in relevant part, '[e]xcept as provided in Annex 1120.1, and provided that six months have elapsed since the events giving rise to a claim, a disputing investor may submit the claim to arbitration'.

Some of the investor's claims did meet this six-month requirement. However, the claimant served its notice of intent to submit a claim to arbitration on 6 July 2011, two days after certain events relating to the FIT Program. The claimant's notice of arbitration, dated 4 October 2011, also includes mention of various alleged actions in August 2011 as part of the claim.[77] As Canada's consent to arbitrate is conditional upon the 'procedures set out in' the NAFTA,[78] Canada argued the tribunal did not have jurisdiction to hear any claims that failed to meet this six-month time period.[79] Canada requested the tribunal bifurcate the proceedings to hear its objection to jurisdiction based on Article 1120(1) as a preliminary matter.[80]

The ultimate issue is whether Article 1120(1) requires all events leading to a claim to occur at least six months before a claimant initiates arbitration, or whether this provision only requires six months to pass from the time of one of the first events giving rise to

74 *Mesa Power Group LLC v. Government of Canada*, Procedural Order No. 2 (18 January 2013) (UNCITRAL), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-po-03.pdf> [Mesa Procedural Order No. 2] and *Mesa Power Group LLC v. Government of Canada*, Procedural Order No. 3 (28 March 2013) (UNCITRAL), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-po-04.pdf> [Mesa Procedural Order No. 3].

75 *Mesa Power Group LLC v. Government of Canada*, Notice of Arbitration (4 October 2011) (UNCITRAL), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-02.pdf> at para 6.

76 *Mesa Power Group LLC v. Government of Canada*, Government of Canada Objection to Jurisdiction (3 December 2012) (UNCITRAL), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-04.pdf> at para 2 [Mesa Government of Canada Objection].

77 Ibid. at para 15.

78 NAFTA, footnote 14 *supra* at Article 1122(1) reads: 'Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.'

79 Mesa Government of Canada Objection, footnote 76 *supra* at paras 33-38.

80 *Mesa Power Group LLC v. Government of Canada*, Government of Canada Request for Bifurcation (3 December 2012) (UNCITRAL), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-05.pdf> at para 12.

a claim before a claimant initiates arbitration. The claimants contend that all relevant events, including those within the six-month time period, were part of a 'composite act' that first arose in January 2011. As such, the six-month requirement was met and it would be improper to 'reset the clock' every time a new breach occurs in such a scenario.[81] Moreover, the claimant argues that Article 1120(1) of NAFTA does not expressly require that either six months must elapse since the 'last event' giving rise to a claim or that six months must elapse since 'each and every event' giving rise to 'all claims'.[82]

The tribunal, in procedural order No. 2, granted Canada's request to bifurcate the jurisdictional objection.[83] In doing so the tribunal expressly reserved its own power 'to re-join the said objection to the merits of the case' if it considers that circumstances warrant.[84] Subsequent to issuing procedural order No. 2, on 19 February 2013, the tribunal received the claimant's answer to Canada's preliminary objections on jurisdiction.[85] In this answer, the claimant stressed that while there were later events, falling within the six-month time period, such events were directly connected with events that occurred prior to this six-month time period.[86] Thus the bifurcated proceeding required significant introduction of facts and evidence and, the claimant argued, would be unnecessarily duplicative.[87]

In light of this, the tribunal discontinued its decision on bifurcation in procedural order No. 3, dated 28 March 2013.[88] While a bifurcated hearing on jurisdiction could be more efficient, the tribunal held it would 'likely need to establish certain facts and the connections between these facts' which 'will best be conducted together with the merits phase, when the Tribunal will have the benefit of the entire record, including documents obtained through document production orders and witness evidence'.[89] If, after proceeding with the entire hearing on the merits, Canada is ultimately successful on the jurisdictional issue the tribunal noted it 'may take steps to accommodate the Respondent's costs'.[90] The ultimate decision on the merits will be interesting for the tribunal's interpretation of the requirements under NAFTA Article 1120(1).

The three new energy-related disputes all present interesting issues. *Mercer* involves a pulp mill and biomass-based electricity generation facility in British Columbia. It is brought by an investor over various measures involving the purchase and sale of electricity

81 *Mesa Power Group LLC v. Government of Canada*, Investor's Response on Bifurcation (24 December 2012) (UNCITRAL), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mesa-06.pdf> at para 36(b).

82 Ibid. at para 3.

83 Mesa Procedural Order No 2, footnote 74 *supra* at para 17-22.

84 Ibid. at para 22.

85 Mesa Procedural Order No 3, footnote 74 *supra* at para 6.

86 Ibid. at para 72.

87 Ibid. at para 70.

88 Ibid. at paras 77 and 81(vii).

89 Ibid. at para 73.

90 Ibid. at para 75.

in the province.[91] In this case the investor alleges that the manner in which such measures have been implemented by the province, the province's regulatory body and a Provincial Crown Corporation deprive the investor of a majority of the economic benefit of its investment in the biomass-based generation facility.[92] These actions are alleged to constitute a breach of Articles 1102 (national treatment), 1103 (most-favoured-nation treatment including fair and equitable treatment) and 1105 (the minimum standard of treatment) of the NAFTA.[93]

The second new dispute, *Windstream*, involves Ontario's FIT Program, which was created in the 2009 to offer a fixed premium price for energy derived from renewable resources, including on and offshore wind energy.[94] Under the FIT Program there were standard bidding rules, pricing and contracts ('FIT contracts') for renewable energy applicants.[95] In brief, the investor alleges that the government of Ontario committed to a streamlined regulatory approval process for the investor's offshore wind energy facility if the investor obtained a FIT contract. After the investor did so, the streamlined approval process did not come to fruition as the government subsequently introduced a moratorium on offshore wind energy facilities and other measures that allegedly frustrated the investor's ability to develop its project and benefit from the FIT contract.[96] Accordingly, the investor is alleging a breach of Canada's obligations under NAFTA Article 1102(2) prohibiting discrimination, Article 1105 on the minimum standard of treatment including fair and equitable treatment, and Article 1110 prohibiting nationalisation or expropriation without compensation.[97]

The third energy dispute, *Lone Pine* involves a claim by an investor that held several permits and approvals from the government of Quebec to recover shale gas from beneath the St. Lawrence River.[98] Obtaining the permits required significant investment. The investor alleges Canada breached its obligations under Articles 1105 and 1110 of the

91 *Mercer International Inv. v. Government of Canada*, Request for Arbitration (30 April 2012), ICSID Case No ARB(AF)/12/3, online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/mercer-02.pdf> at para 6.

92 Ibid. at paras 24–25.

93 Ibid. at paras 8-9 and 21.

94 *Windstream Energy LLC v. Government of Canada*, Notice of Arbitration (28 January 2013) (UNCITRAL), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/windstream-02.pdf> at para 8 [Windstream Notice of Arbitration]. The specific Ontario legislation in issue is the Green Energy Act, 2009, SO 2009, c 12, Sch A.

95 Windstream Notice of Arbitration, footnote 94 *supra* at para 8.

96 Ibid. at paras 39–47.

97 Ibid.

98 *Lone Pine Resources Inc. v. The Government of Canada*, Notice of Intent to Submit a Claim to Arbitration (Non-Confidential) (8 November 2012), online: Foreign Affairs and International Trade Canada <www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/lone-01.pdf> at paras 2–3.

NAFTA when Quebec first suspended its permits relating to oil and gas resources below the St. Lawrence River and subsequently implemented legislation purporting to revoke these permits without compensation.[99]

The ultimate determinations in these ongoing cases will add to the body of law already created under NAFTA. Specifically, they should help to further define 'fair and equitable treatment' and the minimum standard of treatment under Article 1105, delineate the limits for expropriation and regulatory expropriation under Article 1110, and determine the complex relationship between provincial energy regulation and Canada's obligations to investors. Given forecasts for increasing energy resource development in Canada in the decades ahead, and ever-increasing foreign investment in Canada's energy sector, these issues should continue to be of importance for years to come.

III OUTLOOK AND CONCLUSIONS

Canada has a 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 have 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 recommendations in the Discussion Paper, in particular to adopt all of the 2006 Model Law Amendments and depart from the text of the Model Law only for 'good reason', demonstrate a Canadian commitment to uniformity and predictability in international commercial arbitration. The Draft ICAA will, if accepted by the ULCC, form a strong basis for more unified international commercial arbitration legislation throughout Canada.

There has also been a renewed interest in Canadian ratification of the ICSID Convention.[100] This interest, combined with Canada's continued pursuit of FIPAs and general openness to foreign investment, particularly in energy and resource industries, suggests that international arbitration in Canada is likely to become more prevalent.

Canada will continue to maintain its position as a nation that respects arbitration. In particular, the ongoing work toward harmonising laws on international commercial arbitration across provincial, territorial and federal jurisdictions in order to bring such laws in line with current international regimes, such as the 2006 Model Law, indicates that Canada will continue on its established course.

---

99 Ibid. at paras 38–48.

100 See Julius Melnitzer, 'New Brunswick Premier Alward confirms federal pressure to ratify ICSID,' Financial Post (2 October 2012) online: <http://business.financialpost.com/2012/10/02/new-brunswick-premier-alward-confirms-federal-pressure-to-ratify-icsid/> and Julius Melnitzer, 'Canada close to ratifying international investment dispute treaty: Yves Fortier,' Financial Post (7 August 2012) online: <http://business.financialpost.com/2012/08/07/canada-close-to-ratifying-international-investment-dispute-treaty-yves-fortier/>.

Appendix 1

ABOUT THE AUTHORS

THOMAS P O'LEARY

Dentons

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 in arbitration and 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 the community and is currently a member of the board of directors of the Calgary Stampede.

MICHAEL D SCHAFLER

Dentons

Mike is the co-lead of Dentons Canada LLP's national ADR practice group and the department manager of the Dentons Toronto litigation practice group. Mike focuses on the resolution of complex commercial disputes in the financial and resource industries. Mike has appeared at all levels of Ontario courts and the Supreme Court of Canada. He has acted as arbitration counsel on many *ad hoc* and institutional arbitrations, both domestic and international. Mike has taught and written extensively about ADR. He is an executive member of the National ADR Section of the Canadian Bar Association, as well as a member of the Toronto Commercial Arbitration Society. Mike was ranked in 2012 and again in 2013 by *Chambers Global* as a leading lawyer in the areas of dispute resolution – arbitration and dispute resolution – Ontario. He was also recognised in 2012 by Lexpert as a leader in securities litigation.

RACHEL A HOWIE

Dentons

Rachel joined Dentons Canada LLP as an articling student in 2008. She is currently an associate in the firm's energy litigation practice group and is also a member of firm's national ADR practice group. Rachel obtained her LLB from the University of Ottawa and her LLM specialising in natural resources, energy and environmental law from the University of Calgary where her research focused on fair and equitable treatment in international investment agreements and Alberta's regulation of oil sands royalties. She has a growing practice in energy and environmental arbitration and litigation and experience in a variety of corporate and commercial matters. Rachel is a member of the Law Society of Alberta, the Law Society of Upper Canada, the Young Canadian Arbitration Practitioners and is a member of the 2012/2013 steering group for the American Bar Association's Section of International Law, International Investment and Development Committee.

DENTONS

15th Floor, Bankers Court
850 – 2nd Street SW
Calgary, Alberta
T2P 0R8
Canada
Tel: +1 403 268 7000
Fax: +1 403 268 3100

77 King Street West
Suite 400
Toronto-Dominion Centre
Toronto, Ontario
M5K 0A1
Canada
Tel: +1 416 863 4511
Fax: +1 416 863 4592
thomas.oleary@dentons.com
michael.schafler@dentons.com
rachel.howie@dentons.com

www.dentons.com