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2024

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Canada: rulings demonstrate judicial deference to arbitration

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Summary

In summary

Canada is an arbitration-friendly jurisdiction with a strong legislative framework that promotes the use of arbitration and minimises judicial intervention. This article provides an overview of international commercial arbitration in Canada and discusses developments in legislation across the country's provinces, the implementation of the Model Law into provincial international commercial arbitration statutes, the willingness of courts to recognise and uphold arbitration principles and recent notable developments in the case law.

Discussion points

- History of the implementation of the Model Law in Canada
- Background to the legislative framework for arbitration in Canada's provinces
- List of arbitration groups and institutions throughout Canada
- Recent Canadian case law

Referenced in this article

- UNCITRAL Model Law on International Commercial Arbitration
- *Peace River Hydro Partners v Petrowest Corp*
- *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*
- *Bakaris v Southern Sky*
- *79411 USA Inc v Mondofix Inc*
- *Stewart v Stewart*
- *Clayton et al v Attorney General of Canada*
- *Friction Co Ltd v Novalex Inc*
- *Octaform Inc v Leung*
- *The Russian Federation v Luxtona Limited*
- *Vento Motorcycles Inc v United Mexican States*

International commercial arbitration in Canada operates under a well-developed legal framework designed to promote the use of arbitration and minimise judicial intervention. Canadian courts have consistently upheld the integrity of the arbitral process; recent case law has further established Canada as a leader in the development of reliable jurisprudence relating to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and the United Nations Convention on the Recognition and Enforcement of Foreign

Arbitral Awards (the New York Convention) by giving broad deference to arbitral tribunals and supporting the rights of parties seeking to enforce international arbitral awards. Canadian courts have also been instrumental in supporting the arbitral process when necessary.

Legislative framework

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, however, Canada's provinces were not uniform in adopting the Model Law, and a number of provinces deviated from it in certain respects. The lack of complete uniformity among the provinces led to some discrepancies in how the courts addressed arbitration issues. Nevertheless, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process, and a high level of predictability for parties to international arbitrations in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada (ULCC) commenced a review of the existing model International Commercial Arbitration Act with a view to developing reform recommendations for a new model statute. Catalysed by the 2006 Model Law amendments, the review process also sought to reflect changes to international arbitration law and practice in the past three decades and to enhance the uniformity and predictability with which international commercial arbitral awards may be enforced in Canada. In 2014, the ULCC approved the working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada.

Among other things, the model statute adopts all of the 2006 Model Law amendments (except option II for article 7), including those that broaden the jurisdiction of courts and arbitral tribunals to order interim relief. The statute also establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The model statute will become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. In March 2017, Ontario was the first to adopt a new International Commercial Arbitration Act, adopting most of the ULCC's recommendations in the proposed Uniform Act. In May 2018, British Columbia also amended its International Commercial Arbitration Act, to incorporate the 2006 amendments to the UNCITRAL Model Law in a manner consistent with the ULCC model statute. In April 2019, the Alberta Law Reform Institute recommended that Alberta adopt the model statute but the province has not yet amended its International Commercial Arbitration Act. Prince Edward Island tabled similar amendments to its International Commercial Arbitration Act in February 2022, which have not yet progressed through the Legislative Assembly.

An arbitration-friendly jurisdiction

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. Canadian courts have consistently expressed their approval of these principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own

jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, one Canadian court stated that:

> *The purpose of the United Nations Conventions and legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.*

Courts across Canada have echoed these sentiments, consistently applying the competence–competence principle, showing broad deference to the decisions of arbitral tribunals and narrowly interpreting the grounds for setting aside arbitral awards. In addition, some provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law. Similarly, article V of the New York Convention, which sets out the limited grounds on which enforcement may be refused, is narrowly interpreted, and arbitral debtors have the burden of proving any allegation of injustice or impropriety that could render an award unenforceable.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, Arbitration Place, ICC Canada Arbitration Committee, the Vancouver International Commercial Arbitration Centre (VanIAC, formerly the British Columbia International Arbitration Centre, which is one of the oldest modern arbitral institutions in the world, having been created in 1986), the ADR Institute of Canada, the International Centre for Dispute Resolution Canada and the Canadian Commercial Arbitration Centre. These organisations provide parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators and meeting facilities. VanIAC recently released updated International Arbitration Rules, reflecting international best practices, effective 1 July 2022.

Recent Canadian case law

The commitment of Canadian courts to the tenets of the Model Law and the New York Convention has been confirmed by recent case law. Significant recognition and enforcement decisions clearly demonstrate the Canadian judiciary's respect for the integrity of the international arbitration process and the importance of deference to international arbitral tribunals. Some of these cases are summarised below.

Peace River Hydro Partners v Petrowest Corp

In ***Peace River Hydro Partners v Petrowest Corp***,[1] Canada's highest court, the Supreme Court of Canada (SCC) recently emphasised the doctrine of separability's purpose to affirm arbitration agreements and addressed the narrow fact-specific circumstances in which an arbitration agreement may be found inoperative in the context of federal bankruptcy legislation.

Peace River Hydro Partners (Peace River) was a partnership formed to build a hydroelectric dam in north-eastern British Columbia. Peace River subcontracted some of its construction work to Petrowest Corporation (Petrowest), an Alberta-based construction company in 2015. The parties entered into a number of contracts, each of which contained arbitration agreements, albeit with different wording.

Within two years, Petrowest encountered financial difficulties, which resulted in the Alberta Court of King's Bench appointing a receiver under Canada's Bankruptcy and Insolvency Act.-[2] Through that process, the receiver was authorised to, among other things, 'initiate the prosecution of "any and all proceedings" with respect to the debtors and their property'. In 2018, the receiver brought a civil claim against Peace River in the Supreme Court of British Columbia on behalf of Petrowest and its affiliates to collect funds allegedly owing to Petrowest under the parties' subcontracting agreements. Peace River applied for a stay of the receiver's claim under section 15 of British Columbia's former Arbitration Act.[3] The receiver opposed the application.

The chambers judge agreed with the receiver and dismissed the stay application. The Court of Appeal for British Columbia upheld the chambers judge's ruling on the basis that the receiver was not a party to the arbitration agreements between Peace River and Petrowest within the meaning of section 15(1) of the former Arbitration Act. The Court of Appeal held that the doctrine of separability permitted the receiver to disclaim the arbitration agreements and sue on the underlying contracts to recover payment for past performance.[4] Peace River sought and was granted leave to appeal from the Court of Appeal's decision to the SCC.

On the issue of separability, the SCC found that the Court of Appeal misapplied the doctrine. The SCC held that 'separability is intended to safeguard arbitration agreements, not imperil them . . . it is for a court . . . to determine whether an arbitration agreement is valid and enforceable according to the narrow statutory exceptions'.[5]

In a narrow majority (five justices to four), the SCC held that the receiver had established the arbitration agreements were inoperative under section 15(2) on the basis that the arbitration agreements would impair the Bankruptcy and Insolvency Act's objective of an 'orderly and efficient resolution of the receivership'.[6] Accordingly, the SCC concluded that a stay in favour of arbitration could not be granted and the appeal was dismissed. The Court stressed that this was a highly fact-specific result, and while it may apply to other areas of law where public policy objectives override parties' freedom of contract, 'courts should generally hold parties to their agreements to arbitrate, even if one of them has become insolvent.'[7]

Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited

Following the SCC's decision in ***Peace River Hydro Partners v Petrowest***, the Court of Appeal for Ontario was asked to determine if the test for granting a stay application under Ontario's International Commercial Arbitration Act was the same as for domestic arbitrations commenced under the Arbitration Act.[8]

In 2014, Husky Food Importers & Distributors Ltd (Husky Food) and JH Whittaker & Sons Limited (JH Whittaker) entered into a distribution agreement that was both oral and written. Between 2016 and 2020, the parties attempted to negotiate a formal, long-term distribution agreement. The agreement was never signed.[9] In the summer of 2020, Husky Food alleged that JH Whittaker wrongly diverted two shipments. Husky Food subsequently commenced an action in the Ontario Superior Court of Justice in June 2021. JH Whittaker applied to stay Husky Food's action in favour of arbitration pursuant to section 9 of Ontario's International Commercial Arbitration Act. Husky Food opposed the application on the basis that it had never agreed to arbitrate disputes that might arise under the parties' distribution agreement.

The application judge held that JH Whittaker's submissions were sufficient to establish that 'looking at the language of the Alleged Distribution Agreement alone, the Arbitration Clause is not rendered inoperative by the other sections contained in it' and granted JH Whittaker's stay application.[10] Husky Food appealed from the application judge's decision to the Court of Appeal for Ontario. One of the grounds of appeal was that the application judge had applied the incorrect test for a stay application.

The Court of Appeal held that although the SCC's framework for stay applications was 'crafted in the context of domestic arbitration legislation' it applies equally in respect of international commercial arbitration agreements. The four technical perquisites are: (1) an arbitration agreement exists; (2) court proceedings have been commenced by a party to the arbitration agreement; (3) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and (4) the party applying for a stay in favour of arbitration does so before taking any 'step' in the court proceedings. The Court of Appeal held that the application judge applied the correct 'arguable case' standard to establish the technical perquisites for a mandatory stay and accordingly dismissed the Husky Food's appeal.[11]

Bakaris v Southern Sky

The Ontario Superior Court's decision in ***Bakaris v Southern Sky***[12] promotes respect for the principle of competence-competence even in the face of an agreement clause with conflicting provisions, one referring to arbitration under the London Court of International Arbitration (LCIA) Arbitration Rules and the other to litigation in Canada.

The parties entered into a memorandum of agreement (MOA) under which Nick Bakaris, an entrepreneur residing in Zimbabwe, agreed to obtain a licence on behalf of a Zimbabwean company to grow and sell medical cannabis in Zimbabwe. In exchange, Bakaris would receive, among other things, an interest in Southern Sky Holdings (formerly known as Southern Sun Pharma Inc) (Southern Sky), a British Columbia holding company whose subsidiaries produce, market and sell cannabis in Africa. Southern Sky subsequently terminated the MOA on the basis that Bakaris had not fulfilled its terms.[13]

Bakaris applied to the Ontario court to enforce his rights under the MOA pursuant to a provision in the MOA that referred to the 'non-exclusive jurisdiction' of Canadian courts to 'settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).' The MOA also contained a mandatory arbitration clause, however, which stated that disputes 'shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.' Pursuant to that clause, Southern Sky moved to

stay the litigation in favour of arbitration. The issue before the Court was whether Ontario's ICAA[14] applied and a stay should be granted in favour of arbitration.[15]

The application judge began her analysis by noting that the standard for demonstrating that a dispute is subject to arbitration under the Model Law is not onerous. Citing a British Columbia Court of Appeal case, the application judge held that a stay should be granted if it was 'arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement'.-[16] In reaching the conclusion that the test was met in this case, the application judge considered that the parties had turned their minds to the possibility of resolving disputes by way of arbitration, including by setting out in the MOA the number of arbitrators, the arbitral seat, the language of the arbitration and the arbitration rules that would apply. The parties also contemplated issues of confidentiality, interlocutory court orders and finality in the arbitration clause. Accordingly, the application judge 'decline[d] to reach any final determination as to the scope of the arbitration agreement' and stayed the litigation pending the determination of the LCIA on its jurisdiction to conduct the arbitration.[17]

79411 USA Inc v Mondofix Inc

In a decision that recognises the importance of maintaining confidentiality in the arbitration process, the Superior Court of Quebec held that the information in arbitration awards should be kept confidential in the course of recognition and enforcement applications unless the party seeking to disclose the award can demonstrate the utility or necessity of the disclosure.[18]

Fix Auto USA and Fusa Inc (Fix Auto) applied to recognise and enforce a domestic arbitration award resulting from an arbitration between Fix Auto and Mondofix Inc regarding a licence agreement between the parties. Although there was no disagreement that the conditions for the recognition and enforcement of the award under Quebec's Code of Civil Procedure (CCP)[19] were met, Mondofix objected to the award being made public. Mondofix asked the Court to put the award under seal and to withdraw from the court record the other exhibits filed in support of the application. The Court was only required to deal with the issue regarding the award as the parties consented to have the exhibits withdrawn from the court record in the course of the proceedings.[20]

The application judge began by noting that article 4 of the CCP, which provides that the arbitration process remains confidential subject to agreement by the parties or any 'special provisions' of the law, must necessarily extend to arbitration awards and not just the arbitration process.[21] While emphasising the importance of confidentiality in arbitration, the application judge recognised the need for exceptions to the rule that arbitration awards should remain confidential during the course of recognition and enforcement proceedings. The application judge held that applications to seal arbitration awards must be decided on a case-by-case basis and the 'solution . . . turns on the following question: Can justice "be done without the necessity of ordering the production of documents that are otherwise confidential"'.[22] The burden of showing that an exception must be made rests with the party seeking the benefit of the exception, in this case Fix Auto. Having found that Fix Auto had not demonstrated the utility or necessity of disclosing the award in this case, the application judge ruled that the award must remain confidential.[23]

Stewart v Stewart

A decision of the Supreme Court of British Columbia similarly recognised the importance of maintaining confidentiality in the arbitration process and upholding parties' reasonable expectations of privacy where applications related to an ongoing arbitration are made in court.[24]

The applications in this case were brought in the context of a longstanding dispute between siblings and various companies they controlled. As part of a settlement agreement in the litigation, the parties agreed that one of the defendant companies, Quadra Pacific Properties Corp (QPPC), was required to purchase the plaintiff's interest in it for fair market value. The settlement agreement provided that if the parties were unable to reach an agreement on fair market value, the purchase price for the shares was to be determined by arbitration. The parties failed to agree and proceeded to arbitration. At the time of the applications, the parties were awaiting the arbitrator's award.[25]

The plaintiff and the personal defendants brought competing applications, some of which related to information and documents disclosed in the arbitration. Among other orders sought by the personal defendants was a sealing order to protect certain financial documents and information disclosed in the arbitration.[26]

The application judge began his assessment of whether a sealing order would be necessary by referring to Rule 27 of the Domestic Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre (now VanIAC), which expressly protects the confidentiality of arbitrations. Rule 27 provides that '[u]nless: (a) otherwise agreed by the parties, (b) required by law, or (c) necessary to enforce or challenge an award, all hearings, meetings, evidence, documents (produced or exchanged), Awards and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.'[27] Similar provisions are contained in British Columbia's domestic Arbitration Act and its ICAA.[28]

The application judge then applied the two-part test developed by the Supreme Court of Canada for confidentiality orders (adapted from the Supreme Court of Canada's test for publication bans), which asks whether: the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects, including the public interest in open and accessible court proceedings.[29] In addition to finding that the disclosure of the information over which the defendants sought a sealing order could potentially harm the financial interests of the parties to the litigation, the application judge also held that 'the disclosure of this information would be likely to undermine the public policy in this jurisdiction of encouraging arbitrations by defeating the parties' reasonable expectations of privacy in an on-going arbitration.'[30] Accordingly, the sealing order was granted on the terms sought by the defendants.

Clayton et al v Attorney General of Canada

On a set aside application alleging three deficiencies in an arbitral award, the Ontario Superior Court of Justice reaffirmed the high threshold required to set aside an international tribunal's damages award and the limited role of courts in reviewing arbitral awards.[31]

The applicants, three individuals and Bilcon Delaware Inc, were the largest producers of aggregate in New Jersey and sought to develop a quarry in Nova Scotia. A federal-provincial joint review panel was constituted to conduct an environmental assessment and ultimately recommended that the quarry not be pursued for environmental reasons. In addition to marine wildlife and invasive species concerns, the panel emphasised that the quarry would not accord with 'community core values' in the area. The federal and provincial environment ministers denied approval for the quarry after receiving the joint review panel's report and recommendation.[32]

The applicants commenced an arbitration under Chapter 11 of the North American Free Trade Agreement. The arbitration was bifurcated. At the liability stage, the tribunal found that Canada breached its obligations to treat the applicants' investments as fairly and equitably as domestic investments. At the damages phase, the applicants asked for lost profits over the quarry's 50-year lifespan, estimated to be over US$440 million. The tribunal set damages at US$7 million, finding that the applicants failed to establish that but for the flawed environmental assessment, they would have obtained other necessary permissions for the quarry.[33]

The applicants applied to set aside the tribunal's damage award, alleging an excess of jurisdiction, a breach of natural justice and procedural fairness, and that the award conflicts with Canadian public policy. The Ontario Superior Court dismissed the application on all three grounds. On the question of excess jurisdiction, the application judge applied the principles from the Court of Appeal for Ontario's decision in ***United Mexican States v Cargill*** and held that the 'incorrect application of a correctly identified legal principle' is not a jurisdictional question.[34] The applicants' procedural fairness argument was based on the fact that they had been denied the opportunity to submit two additional expert reports one month before the damages hearing. The application judge found that this was a result of the applicants' strategic choices not to adduce the reports sooner and therefore did not amount to a breach of natural justice.[35] Finally, the application judge found that the applicants 'failed to establish any basis on which the arbitral award ought to be set aside as contrary to public policy.'[36]

Friction Co Ltd v Novalex Inc

On an appeal from an order for security for costs in connection with an application for recognition and enforcement of an arbitral award, the Ontario Superior Court held that a foreign enforcement applicant should not be ordered to post security for costs solely because the applicant is a non-resident of Ontario.[37]

The arbitration underlying the appeal was conducted in China pursuant to the parties' sales contract. An arbitral award issued by CIETAC required the respondent, Novalex Inc (Novalex) to pay the applicant, China Yantai Friction Co Ltd (Friction), US$1 million in respect of automobile brake pads that Novalex had received but not paid for. Novalex did not apply to set aside or otherwise appeal the award in either Ontario or China. Friction applied to have the award recognised and enforced in Ontario. Novalex sought an adjournment of the application to prepare its responding materials and also applied for an order for security for costs pursuant to Rule 56.01(1) of Ontario's Rules of Civil Procedure on the basis that Friction 'is ordinarily resident outside Ontario'. Friction cross-applied for an order that Novalex pay into court the full sum of the arbitral award as a condition for consenting to the requested adjournment.[38]

The preliminary applications regarding security for costs were heard together. The application judge: granted Novalex's application and ordered Friction to post C$76,376.71 as security for costs on the basis that Friction is ordinarily resident in China, not Ontario; dismissed Friction's application for an order requiring Novalex to post the amount of the arbitral award with the court; and adjourned the hearing of the recognition and enforcement application.[39]

Friction sought and was granted leave to appeal from the security for costs orders by the Divisional Court of the Ontario Superior Court.[40] In finding that Friction had met the leave to appeal test, the Divisional Court underscored the importance of the matter 'because it speaks to the response of Canadian courts to international comity and our relationships with other courts'.[41]

On the appeal, the Ontario Superior Court considered whether the application judge had erred by making an order for security for costs against Friction or refusing to order payment by Novalex of the arbitral award into court. On the second issue, the Court considered article 36(2) of the Model Law (and Ontario's ICAA), which provides that an enforcement applicant such as Friction can only seek an order for security in circumstances where the enforcement respondent has brought an application to set aside or suspend an arbitral award to 'a court of the country in which, or under the law of which, that award was made'. There was no dispute that Novalex had not brought an application of that nature in China. Accordingly, the Court held there was no basis for the application judge to require Novalex to post security into court.[42]

With respect to the order for security for costs made against Friction, the Court found that the application judge failed to conduct the proper analysis and set aside the order. In particular, the Court found that rather than taking the proper holistic approach that examines all of the circumstances of the case, including whether it is just to make a security for costs order, the application judge had focused narrowly on the fact that Friction was not ordinarily resident in Ontario. He then baldly concluded that Novalex might be unable to recover a costs award associated with Novalex's response to Friction's enforcement application. The Court pointed to a number of relevant factors that the application judge had failed to consider, including the merits of Friction's enforcement application; the fact that Novalex had participated in the arbitration; the unanimous arbitral award issued by the three members of the tribunal (one of whom had been selected by Novalex); and the fact that Novalex had not availed itself of its rights to set aside or appeal the award. The judge had also not considered whether Novalex could bring itself within the very narrow grounds for refusing recognition or enforcement of arbitration awards under article 36(1)(a) of the Model Law (and Ontario's ICAA).[43]

Given the parties' divided success on the appeal, the Court ordered the parties to bear their own costs.[44]

Octaform Inc v Leung

In a decision that displays the willingness of courts to assist (but not interfere with) the conduct of an arbitration, the Supreme Court of British Columbia issued subpoenas compelling two non-party witnesses to attend an ongoing arbitration.[45]

Octaform Inc (Octaform) brought a petition under section 27 of British Columbia's ICCA seeking the issuance of subpoenas compelling two non-party witnesses to attend the

hearing of an ongoing arbitration between Octaform and others in British Columbia. At the initial hearing of the petition, the petition judge held that the relief sought was premature, adjourned the petitions ***sine die*** and gave leave to Octaform to reschedule the hearing if either witness refused to appear at the hearing voluntarily after their appearance had been reasonably requested by Octaform.[46]

Following the issuance of his reasons, the petition judge was provided with additional information regarding the arbitration, including information that made it clear that the arbitrator had implemented a process for the taking of witness evidence that the petition judge had previously not been aware of. In his procedural orders, the arbitrator concluded, among other things, that it would be 'impractical in the circumstances to direct [the witnesses] to provide witness statements and that their evidence at the Arbitration should be entirely ***viva voce***.' He also granted leave and approval to Octaform to take the necessary steps to obtain the witnesses' evidence at the hearing.[47]

The petition judge clarified that his initial ruling:

> was not an attempt to impose a process by which evidence would be taken at the Arbitration. Rather, it was intended to ensure the process that had been directed by the Arbitrator . . . for the taking of evidence was followed. . . . It is not the role of this court to second guess the suitability of the processes adopted by the tribunal.'[48]

The petition judge then considered section 27 of the ICAA, which provides that an arbitral tribunal 'may request from the Supreme Court assistance in taking evidence, and the court may execute the request within its competence and according to its rules on taking evidence.' To satisfy himself that the requested assistance should be granted, the petition judge noted that he had to be satisfied that the request was reasonable and in accordance with the practices of the court. Despite the various objections made by the non-party witnesses, the petition judge held that the conclusions reached by the arbitrator that the witnesses should attend the arbitration were carefully reasoned and that 'this court is in no position to second guess them.'[49] Accordingly, the petition judge agreed to issue the two subpoenas, subject to the following additional terms: the witnesses be provided with any documents that the arbitrator deems appropriate prior to their attendance at the hearing; and Octaform provide undertakings not to use the evidence obtained pursuant to the subpoenas for any purpose other than the arbitration without the consent of the witnesses or the court and to reimburse the witnesses for their respective reasonable legal expenses associated with their preparation for and attendance as a witness at the arbitration.[50]

The Russian Federation v Luxtona Limited

On an application brought under article 16 of the Model Law challenging the tribunal's ruling that it has jurisdiction on a preliminary question, the Ontario Superior Court overturned the application judge's decision and held that the application before the court is a hearing ***de novo*** (not a review of the tribunal's decision) and parties are entitled to adduce evidence on the application as of right.[51] This view was subsequently upheld on appeal by the Court of Appeal for Ontario.[52]

The application arose from a dispute between Luxtona Limited, the former shareholder of an energy company called Yukos, and Russia, wherein Luxtona alleged that Russia had violated provisions of the Energy Charter Treaty (ECT) concerning the protection of investments, including Luxtona's investment in Yukos. The ECT had been ratified but never passed; however, the ECT contained a provision that Russia would undertake to provisionally apply the ECT to the extent that doing so was 'not inconsistent with' Russian law. Although Russia disputed that it had provisionally agreed to apply the ECT's arbitration clause and argued that the arbitration of this claim was inconsistent with Russian law, it participated in the appointment of an arbitral tribunal seated in Ontario while reserving all of its rights.[53]

The tribunal decided the interim issue of whether the provisional application of the ECT, in particular the arbitration provision, was 'not inconsistent with' Russian law and held that it had jurisdiction to hear Luxtona's claims. Russia subsequently brought an application to set aside the tribunal's interim award on the basis that the tribunal had wrongly decided two of Russia's objections to the tribunal's jurisdiction.[54]

Russia filed two new expert reports on Russian law in support of its application before the Ontario Superior Court that had not been before the tribunal. Luxtona objected to Russia filing new evidence. In somewhat unusual circumstances, the application regarding the admissibility of the new evidence was heard twice, by two different judges of the same court. The application judge initially assigned to the case held that Russia was permitted to file new evidence as of right. On account of changes to judicial assignments, a new judge was assigned to the case and was asked to decide a further evidentiary question resulting from the new evidence filed by Russia. In the course of hearing that issue, the newly assigned judge asked the parties to reargue the issue of admissibility. Upon finding that he had jurisdiction to change a previous interlocutory evidentiary ruling by a judge who was no longer hearing the application, the application judge went on to consider afresh whether Russia's new evidence should be admitted. The application judge found that Russia had not met the stringent test for fresh evidence and therefore found the evidence inadmissible.[55] Russia applied for and was granted leave to appeal the decision to the Divisional Court.[56]

On appeal, the Divisional Court agreed that the newly assigned application judge was not bound by the evidentiary rulings of the prior application judge at any point before the application judge becomes ***functus officio***; however, it disagreed with the application judge's conclusion that Russia's application was a review of the tribunal's decision. Instead, the Court held that the language of the Model Law and the consensus in the international jurisprudence is that an application to challenge the jurisdiction of an arbitral tribunal under the Model Law is a hearing ***de novo*** such that parties are entitled to adduce evidence on the application (including expert evidence) as of right. The Court concluded that the Court of Appeal for Ontario's decision in ***Mexico v Cargill*** (relied on by the application judge in his decision) was distinguishable. In particular, the application in ***Cargill*** was brought under a different provision of the Model Law (article 34(2)) and, unlike Russia's application, was not brought on the basis that the tribunal lacked jurisdiction over the dispute.[57]

The Court found the approach of the UK Supreme Court in***Dallah v Pakistan*** to be consistent with the language of article 16(3) of the Model Law and section 11(1) of Ontario's ICCA, which require the court to 'decide the matter', not to 'review the tribunal's decision'. Although the UK is not a Model Law jurisdiction, the Court noted that ***Dallah*** has been followed in other Model Law jurisdictions and held that 'the strong consensus of the decisions from Model Law jurisdictions points to following the approach taken in ***Dallah***.' Although the Court recognised

that the ***Dallah*** decision was not binding in Ontario, it found that the 'uniformity' principle in article 2A of the Model Law renders international decisions 'strongly persuasive'.[58] The Court allowed Russia's appeal, with costs, and set aside the decision of the application judge.[59]

The Court of Appeal for Ontario affirmed the Divisional Court's decision and reasoning.[60]

Vento Motorcycles Inc v United Mexican States

The Ontario Superior Court recently held that the test for the admissibility of fresh evidence on an application to set aside an international arbitral award on procedural fairness grounds is akin to the test for the admission of fresh evidence on an application for judicial review.[61] The party seeking to admit fresh evidence on a set-aside application must show a 'certain degree of diligence' that the evidence could not have been put before the tribunal.

The applicant, Vento Motorcycles Inc (Vento), brought an application to set aside an arbitral award rendered in an arbitration administered by the International Centre for Settlement of Investment Disputes (ICSID) under the ICSID Rules.[62] Vento brought its application pursuant to articles 18 and 34 of the Model Law.[63] In particular, Vento argued that it was prevented from presenting its case and had been treated unequally with respect to certain evidence that was considered (and not considered) by the tribunal, and the arbitral procedure and the composition of the tribunal was not in accordance with the parties' agreement.[64] In support of the application, Vento filed a number of affidavits. The respondent, United Mexican States (Mexico), objected to the admissibility of three of the affidavits filed by Vento and sought orders prohibiting the filing of two of the affidavits in their entirety (or striking them from the application record) and striking certain paragraphs from a third affidavit.[65]

The parties disagreed on the applicable test for the admission of fresh evidence on a set-aside application. Mexico argued that the same test for the admission of fresh evidence on an application to set aside an international arbitral award with respect to jurisdictional issues (as in ***The Russian Federation v Luxtona Limited*** discussed above) should apply to set aside applications based on procedural fairness. Vento argued that the test that applies to judicial review applications was more appropriate.[66] The application judge found the differences between the two tests to be minor and that similar policy considerations (eg, order, finality and the integrity of the decision-making process) underlie both tests. Ultimately the application judge held that:

> Given the very limited grounds on which an international arbitral award can be set aside, I agree with Vento that an application to set aside such an award is much closer in nature to an application for judicial review than to an appeal. This is particularly the case when the application to set aside is based on procedural fairness, which is a common ground in applications for judicial review, but not in appeals. Further, . . . the exception applicable to the admissibility of fresh evidence relevant to procedural fairness on an application for judicial review is structured so as not to interfere with the role of the administrative decision-maker as the merits-decider. This is consistent with the high degree of defence owed to international arbitral tribunals and the very strict limits imposed on judicial intervention.[67]

The record on an application for judicial review (and in this case a set-aside application based on procedural fairness grounds) is generally limited to what was before the decision maker, subject to certain exceptions including where a party can demonstrate that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings. The application judge held that Vento had not met the test for fresh evidence with respect to the three affidavits (or portions thereof) that Mexico had challenged. Given its success on the application, Mexico was awarded its costs.[68]

Conclusion

Canada is consistently recognised as an arbitration-friendly jurisdiction, and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Second, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

* *The authors are grateful for the valuable assistance of Husayn Jamal (summer articled student, Borden Ladner Gervais LLP).*

Footnotes

[1] 2022 SCC 41.

[2] RSC 1985, c B-3.

[3] RSBC 1996, c 55. British Columbia's new domestic Arbitration Act came into force in 2020.

[4] *Petrowest Corporation v Peace River Hydro Partners*, 2020 BCCA 339 at paragraph 55.

[5] *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paragraphs 168, 194.

[6] *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paragraph 34.

[7] *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paragraph 10.

[8] 2023 ONCA 260.

[9] *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*, 2023 ONCA 260 at paragraph 10.

[10] *Husky Food Importers v JH Whittaker & Sons*, 2022 ONSC 1679 at paragraph 27.

[11] *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*, 2023 ONCA 260 at paragraphs 19–31.

[12] 2020 ONSC 7306.

[13] ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 2–3.

[14] SO 2017, c-2, Sched 5.

[15] ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 4–6, 16.

[16] ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraph 24, citing ***Gulf Resources Ltd v Arochem International Ltd***, 66 BCLR (2d) 113 (CA).

[17] ***Bakaris v Southern Sky***, 2020 ONSC 7306 at paragraphs 30 to 33.

[18] 2020 QCCS 1104.

[19] CQLR c CCQ-1991.

[20] ***79411 USA Inc v Mondofix Inc,*** 2020 QCCS 1104 at paragraphs 2, 25.

[21] ***79411 USA Inc v Mondofix Inc***, 2020 QCCS 1104 at paragraphs 6 to 9.

[22] ***79411 USA Inc v Mondofix Inc***, 2020 QCCS 1104 at paragraph 13.

[23] ***79411 USA Inc v Mondofix Inc***, 2020 QCCS 1104 at paragraph 24.

[24] 2021 BCSC 1212.

[25] ***Stewart v Stewart***, 2021 BCSC 1212 at paragraphs 1–4.

[26] ***Stewart v Stewart***, 2021 BCSC 1212 at paragraphs 5–7, 124–125.

[27] ***Stewart v Stewart***, 2021 BCSC 1212 at paragraph 123.

[28] Arbitration Act, SBC 2020, c 2, section 63; International Commercial Arbitration Act, RSBC 1996, c 233, section 36.01.

[29] ***Stewart v Stewart***, 2021 BCSC 1212 at paragraphs 126–127, citing ***Dagenais v Canadian Broadcasting Corp***, [1994] 3 SCR 835 at 878 and***Sierra Club of Canada v Canada (Minister of Finance***, 2002 SCC 41 at paragraph 48.

[30] ***Stewart v Stewart***, 2021 BCSC 1212 at paragraphs 128–129.

[31] 2022 ONSC 6583.

[32] ***Clayton et al v Attorney General of Canada***, 2022 ONSC 6583 at paragraphs 7–8.

[33] ***Clayton et al v Attorney General of Canada***, 2022 ONSC 6583 at paragraph 13.

[34] ***Clayton et al v Attorney General of Canada***, 2022 ONSC 6583 at paragraph 44.

[35] ***Clayton et al v Attorney General of Canada***, 2022 ONSC 6583 at paragraphs 66–75.

[36] ***Clayton et al v Attorney General of Canada***, 2022 ONSC 6583 at paragraphs 88–89.

[37] 2021 ONSC 7714.

[38] ***Friction Co Ltd v Novalex Inc***, 2021 ONSC 7714 at paragraphs 6–10.

[39] ***Friction Co Ltd v Novalex Inc***, 2021 ONSC 7714 at paragraphs 11–13.

[40] ***China Yantai Friction Co Ltd v Novalex Inc***, 2021 ONSC 3571.

[41] ***China Yantai Friction Co Ltd v Novalex Inc***, 2021 ONSC 3571 at paragraph 13.

[42] ***Friction Co Ltd v Novalex Inc***, 2021 ONSC 7714 at paragraphs 34–37.

[43] *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraphs 23–33.

[44] *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraph 40.

[45] 2021 BCSC 761.

[46] *Octaform v Leung*, 2021 BCSC 73.

[47] *Octaform v Leung*, 2021 BCSC 761 at paragraphs 5, 10, 14.

[48] *Octaform v Leung*, 2021 BCSC 761 at paragraphs 11 and 12.

[49] *Octaform v Leung*, 2021 BCSC 761 at paragraph 20.

[50] *Octaform v Leung*, 2021 BCSC 761 at paragraph 22.

[51] 2023 ONCA 393, affirming 2021 ONSC 4604, reversing 2019 ONSC 7558.

[52] *The Russian Federation v Luxtona Limited*, 2023 ONCA 393 at paragraph 40.

[53] *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 5.

[54] *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 6.

[55] *The Russian Federation v Luxtona Limited*, 2019 ONSC 7558 at paragraph 70.

[56] *The Russian Federation v Luxtona Limited*, 2020 ONSC 4668.

[57] *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraphs 23–25.

[58] *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraphs 30–37.

[59] *The Russian Federation v Luxtona Limited*, 2021 ONSC 4604 at paragraph 39.

[60] *The Russian Federation v Luxtona Limited*, 2023 ONCA 393 at paragraph 49.

[61] 2021 ONSC 7913.

[62] *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 1.

[63] *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 24–26. The Model Law is Schedule 2 to Ontario's ICAA, SO 2017, c 2, Schedule 5.

[64] *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 19.

[65] *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraph 2.

[66] *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 29–41.

[67] *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 43 and 44.

[68] *Vento Motorcycles Inc v United Mexican States*, 2021 ONSC 7913 at paragraphs 51, 67 and 68.

IN SUMMARY

Canada is an arbitration-friendly jurisdiction with a strong legislative framework that promotes the use of arbitration and minimises judicial intervention. This article provides an overview of international commercial arbitration in Canada and discusses developments in legislation across the country's provinces, the implementation of the Model Law

into provincial international commercial arbitration statutes, the willingness of courts to recognise and uphold arbitration principles and recent notable developments in the case law.

DISCUSSION POINTS

- History of the implementation of the Model Law in Canada
- Background to the legislative framework for arbitration in Canada's provinces
- List of arbitration groups and institutions throughout Canada
- Recent Canadian case law

REFERENCED IN THIS ARTICLE

- UNCITRAL Model Law on International Commercial Arbitration
- *Peace River Hydro Partners v Petrowest Corp*
- *Husky Food Importers & Distributors Ltd v JH Whittaker & Sons Limited*
- *Bakaris v Southern Sky*
- *79411 USA Inc v Mondofix Inc*
- *Stewart v Stewart*
- *Clayton et al v Attorney General of Canada*
- *Friction Co Ltd v Novalex Inc*
- *Octaform Inc v Leung*
- *The Russian Federation v Luxtona Limited*
- *Vento Motorcycles Inc v United Mexican States*

International commercial arbitration in Canada operates under a well-developed legal framework designed to promote the use of arbitration and minimise judicial intervention. Canadian courts have consistently upheld the integrity of the arbitral process; recent case law has further established Canada as a leader in the development of reliable jurisprudence relating to the UNCITRAL Model Law on International Commercial Arbitration (the Model Law) and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) by giving broad deference to arbitral tribunals and supporting the rights of parties seeking to enforce international arbitral awards. Canadian courts have also been instrumental in supporting the arbitral process when necessary.

LEGISLATIVE FRAMEWORK

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, however, Canada's provinces were not uniform in adopting the Model Law, and a number of provinces deviated from it in certain respects. The lack of complete uniformity among the provinces led to some discrepancies in how the courts addressed arbitration issues. Nevertheless, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process, and a high level of predictability for parties to

international arbitrations in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada (ULCC) commenced a review of the existing model International Commercial Arbitration Act with a view to developing reform recommendations for a new model statute. Catalysed by the 2006 Model Law amendments, the review process also sought to reflect changes to international arbitration law and practice in the past three decades and to enhance the uniformity and predictability with which international commercial arbitral awards may be enforced in Canada. In 2014, the ULCC approved the working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada.

Among other things, the model statute adopts all of the 2006 Model Law amendments (except option II for article 7), including those that broaden the jurisdiction of courts and arbitral tribunals to order interim relief. The statute also establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The model statute will become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. In March 2017, Ontario was the first to adopt a new International Commercial Arbitration Act, adopting most of the ULCC's recommendations in the proposed Uniform Act. In May 2018, British Columbia also amended its International Commercial Arbitration Act, to incorporate the 2006 amendments to the UNCITRAL Model Law in a manner consistent with the ULCC model statute. In April 2019, the Alberta Law Reform Institute recommended that Alberta adopt the model statute but the province has not yet amended its International Commercial Arbitration Act. Prince Edward Island tabled similar amendments to its International Commercial Arbitration Act in February 2022, which have not yet progressed through the Legislative Assembly.

AN ARBITRATION-FRIENDLY JURISDICTION

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. Canadian courts have consistently expressed their approval of these principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, one Canadian court stated that:

> *The purpose of the United Nations Conventions and legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.*

Courts across Canada have echoed these sentiments, consistently applying the competence–competence principle, showing broad deference to the decisions of arbitral tribunals and narrowly interpreting the grounds for setting aside arbitral awards. In addition, some provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law. Similarly, article V of the New York Convention, which sets out the limited grounds on which enforcement may be refused, is narrowly interpreted, and arbitral debtors have the burden of proving any allegation of injustice or impropriety that could render an award unenforceable.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, Arbitration Place, ICC Canada Arbitration Committee, the Vancouver International Commercial Arbitration Centre (VanIAC, formerly the British Columbia International Arbitration Centre, which is one of the oldest modern arbitral institutions in the world, having been created in 1986), the ADR Institute of Canada, the International Centre for Dispute Resolution Canada and the Canadian Commercial Arbitration Centre. These organisations provide parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators and meeting facilities. VanIAC recently released updated International Arbitration Rules, reflecting international best practices, effective 1 July 2022.

RECENT CANADIAN CASE LAW

The commitment of Canadian courts to the tenets of the Model Law and the New York Convention has been confirmed by recent case law. Significant recognition and enforcement decisions clearly demonstrate the Canadian judiciary's respect for the integrity of the international arbitration process and the importance of deference to international arbitral tribunals. Some of these cases are summarised below.

Peace River Hydro Partners V Petrowest Corp

In *Peace River Hydro Partners v Petrowest Corp*,[1] Canada's highest court, the Supreme Court of Canada (SCC) recently emphasised the doctrine of separability's purpose to affirm arbitration agreements and addressed the narrow fact-specific circumstances in which an arbitration agreement may be found inoperative in the context of federal bankruptcy legislation.

Peace River Hydro Partners (Peace River) was a partnership formed to build a hydroelectric dam in north-eastern British Columbia. Peace River subcontracted some of its construction work to Petrowest Corporation (Petrowest), an Alberta-based construction company in 2015. The parties entered into a number of contracts, each of which contained arbitration agreements, albeit with different wording.

Within two years, Petrowest encountered financial difficulties, which resulted in the Alberta Court of King's Bench appointing a receiver under Canada's Bankruptcy and Insolvency Act.-[2] Through that process, the receiver was authorised to, among other things, 'initiate the prosecution of "any and all proceedings" with respect to the debtors and their property'. In 2018, the receiver brought a civil claim against Peace River in the Supreme Court of British Columbia on behalf of Petrowest and its affiliates to collect funds allegedly owing to Petrowest under the parties' subcontracting agreements. Peace River applied for a stay of the receiver's claim under section 15 of British Columbia's former Arbitration Act.[3] The receiver opposed the application.

The chambers judge agreed with the receiver and dismissed the stay application. The Court of Appeal for British Columbia upheld the chambers judge's ruling on the basis that the receiver was not a party to the arbitration agreements between Peace River and Petrowest within the meaning of section 15(1) of the former Arbitration Act. The Court of Appeal held that the doctrine of separability permitted the receiver to disclaim the arbitration agreements and sue on the underlying contracts to recover payment for past performance.[4] Peace River sought and was granted leave to appeal from the Court of Appeal's decision to the SCC.

On the issue of separability, the SCC found that the Court of Appeal misapplied the doctrine. The SCC held that 'separability is intended to safeguard arbitration agreements, not imperil them . . . it is for a court . . . to determine whether an arbitration agreement is valid and enforceable according to the narrow statutory exceptions'.[5]

In a narrow majority (five justices to four), the SCC held that the receiver had established the arbitration agreements were inoperative under section 15(2) on the basis that the arbitration agreements would impair the Bankruptcy and Insolvency Act's objective of an 'orderly and efficient resolution of the receivership'.[6] Accordingly, the SCC concluded that a stay in favour of arbitration could not be granted and the appeal was dismissed. The Court stressed that this was a highly fact-specific result, and while it may apply to other areas of law where public policy objectives override parties' freedom of contract, 'courts should generally hold parties to their agreements to arbitrate, even if one of them has become insolvent.'[7]

Husky Food Importers & Distributors Ltd V JH Whittaker & Sons Limited

Following the SCC's decision in *Peace River Hydro Partners v Petrowest*, the Court of Appeal for Ontario was asked to determine if the test for granting a stay application under Ontario's International Commercial Arbitration Act was the same as for domestic arbitrations commenced under the Arbitration Act.[8]

In 2014, Husky Food Importers & Distributors Ltd (Husky Food) and JH Whittaker & Sons Limited (JH Whittaker) entered into a distribution agreement that was both oral and written. Between 2016 and 2020, the parties attempted to negotiate a formal, long-term distribution agreement. The agreement was never signed.[9] In the summer of 2020, Husky Food alleged that JH Whittaker wrongly diverted two shipments. Husky Food subsequently commenced an action in the Ontario Superior Court of Justice in June 2021. JH Whittaker applied to stay Husky Food's action in favour of arbitration pursuant to section 9 of Ontario's International Commercial Arbitration Act. Husky Food opposed the application on the basis that it had never agreed to arbitrate disputes that might arise under the parties' distribution agreement.

The application judge held that JH Whittaker's submissions were sufficient to establish that 'looking at the language of the Alleged Distribution Agreement alone, the Arbitration Clause is not rendered inoperative by the other sections contained in it' and granted JH Whittaker's stay application.[10] Husky Food appealed from the application judge's decision to the Court of Appeal for Ontario. One of the grounds of appeal was that the application judge had applied the incorrect test for a stay application.

The Court of Appeal held that although the SCC's framework for stay applications was 'crafted in the context of domestic arbitration legislation' it applies equally in respect of international commercial arbitration agreements. The four technical perquisites are: (1) an arbitration agreement exists; (2) court proceedings have been commenced by a party to the arbitration agreement; (3) the court proceedings are in respect of a matter that the parties

agreed to submit to arbitration; and (4) the party applying for a stay in favour of arbitration does so before taking any 'step' in the court proceedings. The Court of Appeal held that the application judge applied the correct 'arguable case' standard to establish the technical perquisites for a mandatory stay and accordingly dismissed the Husky Food's appeal.[11]

Bakaris V Southern Sky

The Ontario Superior Court's decision in ***Bakaris v Southern Sky***[12] promotes respect for the principle of competence-competence even in the face of an agreement clause with conflicting provisions, one referring to arbitration under the London Court of International Arbitration (LCIA) Arbitration Rules and the other to litigation in Canada.

The parties entered into a memorandum of agreement (MOA) under which Nick Bakaris, an entrepreneur residing in Zimbabwe, agreed to obtain a licence on behalf of a Zimbabwean company to grow and sell medical cannabis in Zimbabwe. In exchange, Bakaris would receive, among other things, an interest in Southern Sky Holdings (formerly known as Southern Sun Pharma Inc) (Southern Sky), a British Columbia holding company whose subsidiaries produce, market and sell cannabis in Africa. Southern Sky subsequently terminated the MOA on the basis that Bakaris had not fulfilled its terms.[13]

Bakaris applied to the Ontario court to enforce his rights under the MOA pursuant to a provision in the MOA that referred to the 'non-exclusive jurisdiction' of Canadian courts to 'settle any dispute or claim arising out of or in connection with this Agreement or its subject matter or formation (including non-contractual disputes or claims).' The MOA also contained a mandatory arbitration clause, however, which stated that disputes 'shall be referred to and finally resolved by arbitration under the LCIA Arbitration Rules, which Rules are deemed to be incorporated by reference into this clause.' Pursuant to that clause, Southern Sky moved to stay the litigation in favour of arbitration. The issue before the Court was whether Ontario's ICAA[14] applied and a stay should be granted in favour of arbitration.[15]

The application judge began her analysis by noting that the standard for demonstrating that a dispute is subject to arbitration under the Model Law is not onerous. Citing a British Columbia Court of Appeal case, the application judge held that a stay should be granted if it was 'arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement'.-[16] In reaching the conclusion that the test was met in this case, the application judge considered that the parties had turned their minds to the possibility of resolving disputes by way of arbitration, including by setting out in the MOA the number of arbitrators, the arbitral seat, the language of the arbitration and the arbitration rules that would apply. The parties also contemplated issues of confidentiality, interlocutory court orders and finality in the arbitration clause. Accordingly, the application judge 'decline[d] to reach any final determination as to the scope of the arbitration agreement' and stayed the litigation pending the determination of the LCIA on its jurisdiction to conduct the arbitration.[17]

79411 USA Inc V Mondofix Inc

In a decision that recognises the importance of maintaining confidentiality in the arbitration process, the Superior Court of Quebec held that the information in arbitration awards should be kept confidential in the course of recognition and enforcement applications unless the party seeking to disclose the award can demonstrate the utility or necessity of the disclosure.[18]

Fix Auto USA and Fusa Inc (Fix Auto) applied to recognise and enforce a domestic arbitration award resulting from an arbitration between Fix Auto and Mondofix Inc regarding a licence agreement between the parties. Although there was no disagreement that the conditions for the recognition and enforcement of the award under Quebec's Code of Civil Procedure (CCP)[19] were met, Mondofix objected to the award being made public. Mondofix asked the Court to put the award under seal and to withdraw from the court record the other exhibits filed in support of the application. The Court was only required to deal with the issue regarding the award as the parties consented to have the exhibits withdrawn from the court record in the course of the proceedings.[20]

The application judge began by noting that article 4 of the CCP, which provides that the arbitration process remains confidential subject to agreement by the parties or any 'special provisions' of the law, must necessarily extend to arbitration awards and not just the arbitration process.[21] While emphasising the importance of confidentiality in arbitration, the application judge recognised the need for exceptions to the rule that arbitration awards should remain confidential during the course of recognition and enforcement proceedings. The application judge held that applications to seal arbitration awards must be decided on a case-by-case basis and the 'solution . . . turns on the following question: Can justice "be done without the necessity of ordering the production of documents that are otherwise confidential"'.[22] The burden of showing that an exception must be made rests with the party seeking the benefit of the exception, in this case Fix Auto. Having found that Fix Auto had not demonstrated the utility or necessity of disclosing the award in this case, the application judge ruled that the award must remain confidential.[23]

Stewart V Stewart

A decision of the Supreme Court of British Columbia similarly recognised the importance of maintaining confidentiality in the arbitration process and upholding parties' reasonable expectations of privacy where applications related to an ongoing arbitration are made in court.[24]

The applications in this case were brought in the context of a longstanding dispute between siblings and various companies they controlled. As part of a settlement agreement in the litigation, the parties agreed that one of the defendant companies, Quadra Pacific Properties Corp (QPPC), was required to purchase the plaintiff's interest in it for fair market value. The settlement agreement provided that if the parties were unable to reach an agreement on fair market value, the purchase price for the shares was to be determined by arbitration. The parties failed to agree and proceeded to arbitration. At the time of the applications, the parties were awaiting the arbitrator's award.[25]

The plaintiff and the personal defendants brought competing applications, some of which related to information and documents disclosed in the arbitration. Among other orders sought by the personal defendants was a sealing order to protect certain financial documents and information disclosed in the arbitration.[26]

The application judge began his assessment of whether a sealing order would be necessary by referring to Rule 27 of the Domestic Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre (now VanIAC), which expressly protects the confidentiality of arbitrations. Rule 27 provides that '[u]nless: (a) otherwise agreed by the parties, (b) required by law, or (c) necessary to enforce or challenge an award, all hearings, meetings, evidence, documents (produced or exchanged), Awards and

communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.'[27] Similar provisions are contained in British Columbia's domestic Arbitration Act and its ICAA.[28]

The application judge then applied the two-part test developed by the Supreme Court of Canada for confidentiality orders (adapted from the Supreme Court of Canada's test for publication bans), which asks whether: the order is necessary to prevent a serious risk to an important interest, including a commercial interest; and the salutary effects of the order outweigh its deleterious effects, including the public interest in open and accessible court proceedings.[29] In addition to finding that the disclosure of the information over which the defendants sought a sealing order could potentially harm the financial interests of the parties to the litigation, the application judge also held that 'the disclosure of this information would be likely to undermine the public policy in this jurisdiction of encouraging arbitrations by defeating the parties' reasonable expectations of privacy in an on-going arbitration.'[30] Accordingly, the sealing order was granted on the terms sought by the defendants.

Clayton Et Al V Attorney General Of Canada

On a set aside application alleging three deficiencies in an arbitral award, the Ontario Superior Court of Justice reaffirmed the high threshold required to set aside an international tribunal's damages award and the limited role of courts in reviewing arbitral awards.[31]

The applicants, three individuals and Bilcon Delaware Inc, were the largest producers of aggregate in New Jersey and sought to develop a quarry in Nova Scotia. A federal-provincial joint review panel was constituted to conduct an environmental assessment and ultimately recommended that the quarry not be pursued for environmental reasons. In addition to marine wildlife and invasive species concerns, the panel emphasised that the quarry would not accord with 'community core values' in the area. The federal and provincial environment ministers denied approval for the quarry after receiving the joint review panel's report and recommendation.[32]

The applicants commenced an arbitration under Chapter 11 of the North American Free Trade Agreement. The arbitration was bifurcated. At the liability stage, the tribunal found that Canada breached its obligations to treat the applicants' investments as fairly and equitably as domestic investments. At the damages phase, the applicants asked for lost profits over the quarry's 50-year lifespan, estimated to be over US$440 million. The tribunal set damages at US$7 million, finding that the applicants failed to establish that but for the flawed environmental assessment, they would have obtained other necessary permissions for the quarry.[33]

The applicants applied to set aside the tribunal's damage award, alleging an excess of jurisdiction, a breach of natural justice and procedural fairness, and that the award conflicts with Canadian public policy. The Ontario Superior Court dismissed the application on all three grounds. On the question of excess jurisdiction, the application judge applied the principles from the Court of Appeal for Ontario's decision in ***United Mexican States v Cargill*** and held that the 'incorrect application of a correctly identified legal principle' is not a jurisdictional question.[34] The applicants' procedural fairness argument was based on the fact that they had been denied the opportunity to submit two additional expert reports one month before the damages hearing. The application judge found that this was a result of the applicants' strategic choices not to adduce the reports sooner and therefore did not amount to a breach

of natural justice.[35] Finally, the application judge found that the applicants 'failed to establish any basis on which the arbitral award ought to be set aside as contrary to public policy.'[36]

Friction Co Ltd V Novalex Inc

On an appeal from an order for security for costs in connection with an application for recognition and enforcement of an arbitral award, the Ontario Superior Court held that a foreign enforcement applicant should not be ordered to post security for costs solely because the applicant is a non-resident of Ontario.[37]

The arbitration underlying the appeal was conducted in China pursuant to the parties' sales contract. An arbitral award issued by CIETAC required the respondent, Novalex Inc (Novalex) to pay the applicant, China Yantai Friction Co Ltd (Friction), US$1 million in respect of automobile brake pads that Novalex had received but not paid for. Novalex did not apply to set aside or otherwise appeal the award in either Ontario or China. Friction applied to have the award recognised and enforced in Ontario. Novalex sought an adjournment of the application to prepare its responding materials and also applied for an order for security for costs pursuant to Rule 56.01(1) of Ontario's Rules of Civil Procedure on the basis that Friction 'is ordinarily resident outside Ontario'. Friction cross-applied for an order that Novalex pay into court the full sum of the arbitral award as a condition for consenting to the requested adjournment.[38]

The preliminary applications regarding security for costs were heard together. The application judge: granted Novalex's application and ordered Friction to post C$76,376.71 as security for costs on the basis that Friction is ordinarily resident in China, not Ontario; dismissed Friction's application for an order requiring Novalex to post the amount of the arbitral award with the court; and adjourned the hearing of the recognition and enforcement application.[39]

Friction sought and was granted leave to appeal from the security for costs orders by the Divisional Court of the Ontario Superior Court.[40] In finding that Friction had met the leave to appeal test, the Divisional Court underscored the importance of the matter 'because it speaks to the response of Canadian courts to international comity and our relationships with other courts'.[41]

On the appeal, the Ontario Superior Court considered whether the application judge had erred by making an order for security for costs against Friction or refusing to order payment by Novalex of the arbitral award into court. On the second issue, the Court considered article 36(2) of the Model Law (and Ontario's ICAA), which provides that an enforcement applicant such as Friction can only seek an order for security in circumstances where the enforcement respondent has brought an application to set aside or suspend an arbitral award to 'a court of the country in which, or under the law of which, that award was made'. There was no dispute that Novalex had not brought an application of that nature in China. Accordingly, the Court held there was no basis for the application judge to require Novalex to post security into court.[42]

With respect to the order for security for costs made against Friction, the Court found that the application judge failed to conduct the proper analysis and set aside the order. In particular, the Court found that rather than taking the proper holistic approach that examines all of the circumstances of the case, including whether it is just to make a security for costs order, the application judge had focused narrowly on the fact that Friction was not ordinarily resident in Ontario. He then baldly concluded that Novalex might be unable to recover a costs award

associated with Novalex's response to Friction's enforcement application. The Court pointed to a number of relevant factors that the application judge had failed to consider, including the merits of Friction's enforcement application; the fact that Novalex had participated in the arbitration; the unanimous arbitral award issued by the three members of the tribunal (one of whom had been selected by Novalex); and the fact that Novalex had not availed itself of its rights to set aside or appeal the award. The judge had also not considered whether Novalex could bring itself within the very narrow grounds for refusing recognition or enforcement of arbitration awards under article 36(1)(a) of the Model Law (and Ontario's ICAA).[43]

Given the parties' divided success on the appeal, the Court ordered the parties to bear their own costs.[44]

Octaform Inc V Leung

In a decision that displays the willingness of courts to assist (but not interfere with) the conduct of an arbitration, the Supreme Court of British Columbia issued subpoenas compelling two non-party witnesses to attend an ongoing arbitration.[45]

Octaform Inc (Octaform) brought a petition under section 27 of British Columbia's ICCA seeking the issuance of subpoenas compelling two non-party witnesses to attend the hearing of an ongoing arbitration between Octaform and others in British Columbia. At the initial hearing of the petition, the petition judge held that the relief sought was premature, adjourned the petitions ***sine die*** and gave leave to Octaform to reschedule the hearing if either witness refused to appear at the hearing voluntarily after their appearance had been reasonably requested by Octaform.[46]

Following the issuance of his reasons, the petition judge was provided with additional information regarding the arbitration, including information that made it clear that the arbitrator had implemented a process for the taking of witness evidence that the petition judge had previously not been aware of. In his procedural orders, the arbitrator concluded, among other things, that it would be 'impractical in the circumstances to direct [the witnesses] to provide witness statements and that their evidence at the Arbitration should be entirely ***viva voce***.' He also granted leave and approval to Octaform to take the necessary steps to obtain the witnesses' evidence at the hearing.[47]

The petition judge clarified that his initial ruling:

> was not an attempt to impose a process by which evidence would be taken at the Arbitration. Rather, it was intended to ensure the process that had been directed by the Arbitrator . . . for the taking of evidence was followed. . . . It is not the role of this court to second guess the suitability of the processes adopted by the tribunal.'[48]

The petition judge then considered section 27 of the ICAA, which provides that an arbitral tribunal 'may request from the Supreme Court assistance in taking evidence, and the court may execute the request within its competence and according to its rules on taking evidence.' To satisfy himself that the requested assistance should be granted, the petition judge noted that he had to be satisfied that the request was reasonable and in accordance with the practices of the court. Despite the various objections made by the non-party witnesses, the petition judge held that the conclusions reached by the arbitrator that the witnesses should attend the arbitration were carefully reasoned and that 'this court is in no position to second guess them.'[49] Accordingly, the petition judge agreed to issue the two subpoenas,

subject to the following additional terms: the witnesses be provided with any documents that the arbitrator deems appropriate prior to their attendance at the hearing; and Octaform provide undertakings not to use the evidence obtained pursuant to the subpoenas for any purpose other than the arbitration without the consent of the witnesses or the court and to reimburse the witnesses for their respective reasonable legal expenses associated with their preparation for and attendance as a witness at the arbitration.[50]

The Russian Federation V Luxtona Limited

On an application brought under article 16 of the Model Law challenging the tribunal's ruling that it has jurisdiction on a preliminary question, the Ontario Superior Court overturned the application judge's decision and held that the application before the court is a hearing ***de novo*** (not a review of the tribunal's decision) and parties are entitled to adduce evidence on the application as of right.[51] This view was subsequently upheld on appeal by the Court of Appeal for Ontario.[52]

The application arose from a dispute between Luxtona Limited, the former shareholder of an energy company called Yukos, and Russia, wherein Luxtona alleged that Russia had violated provisions of the Energy Charter Treaty (ECT) concerning the protection of investments, including Luxtona's investment in Yukos. The ECT had been ratified but never passed; however, the ECT contained a provision that Russia would undertake to provisionally apply the ECT to the extent that doing so was 'not inconsistent with' Russian law. Although Russia disputed that it had provisionally agreed to apply the ECT's arbitration clause and argued that the arbitration of this claim was inconsistent with Russian law, it participated in the appointment of an arbitral tribunal seated in Ontario while reserving all of its rights.[53]

The tribunal decided the interim issue of whether the provisional application of the ECT, in particular the arbitration provision, was 'not inconsistent with' Russian law and held that it had jurisdiction to hear Luxtona's claims. Russia subsequently brought an application to set aside the tribunal's interim award on the basis that the tribunal had wrongly decided two of Russia's objections to the tribunal's jurisdiction.[54]

Russia filed two new expert reports on Russian law in support of its application before the Ontario Superior Court that had not been before the tribunal. Luxtona objected to Russia filing new evidence. In somewhat unusual circumstances, the application regarding the admissibility of the new evidence was heard twice, by two different judges of the same court. The application judge initially assigned to the case held that Russia was permitted to file new evidence as of right. On account of changes to judicial assignments, a new judge was assigned to the case and was asked to decide a further evidentiary question resulting from the new evidence filed by Russia. In the course of hearing that issue, the newly assigned judge asked the parties to reargue the issue of admissibility. Upon finding that he had jurisdiction to change a previous interlocutory evidentiary ruling by a judge who was no longer hearing the application, the application judge went on to consider afresh whether Russia's new evidence should be admitted. The application judge found that Russia had not met the stringent test for fresh evidence and therefore found the evidence inadmissible.[55] Russia applied for and was granted leave to appeal the decision to the Divisional Court.[56]

On appeal, the Divisional Court agreed that the newly assigned application judge was not bound by the evidentiary rulings of the prior application judge at any point before the application judge becomes ***functus officio***; however, it disagreed with the application judge's conclusion that Russia's application was a review of the tribunal's decision. Instead, the Court

held that the language of the Model Law and the consensus in the international jurisprudence is that an application to challenge the jurisdiction of an arbitral tribunal under the Model Law is a hearing ***de novo*** such that parties are entitled to adduce evidence on the application (including expert evidence) as of right. The Court concluded that the Court of Appeal for Ontario's decision in ***Mexico v Cargill*** (relied on by the application judge in his decision) was distinguishable. In particular, the application in ***Cargill*** was brought under a different provision of the Model Law (article 34(2)) and, unlike Russia's application, was not brought on the basis that the tribunal lacked jurisdiction over the dispute.[57]

The Court found the approach of the UK Supreme Court in***Dallah v Pakistan*** to be consistent with the language of article 16(3) of the Model Law and section 11(1) of Ontario's ICCA, which require the court to 'decide the matter', not to 'review the tribunal's decision'. Although the UK is not a Model Law jurisdiction, the Court noted that ***Dallah*** has been followed in other Model Law jurisdictions and held that 'the strong consensus of the decisions from Model Law jurisdictions points to following the approach taken in ***Dallah***.' Although the Court recognised that the ***Dallah*** decision was not binding in Ontario, it found that the 'uniformity' principle in article 2A of the Model Law renders international decisions 'strongly persuasive'.[58] The Court allowed Russia's appeal, with costs, and set aside the decision of the application judge.[59]

The Court of Appeal for Ontario affirmed the Divisional Court's decision and reasoning.[60]

Vento Motorcycles Inc V United Mexican States

The Ontario Superior Court recently held that the test for the admissibility of fresh evidence on an application to set aside an international arbitral award on procedural fairness grounds is akin to the test for the admission of fresh evidence on an application for judicial review.[61] The party seeking to admit fresh evidence on a set-aside application must show a 'certain degree of diligence' that the evidence could not have been put before the tribunal.

The applicant, Vento Motorcycles Inc (Vento), brought an application to set aside an arbitral award rendered in an arbitration administered by the International Centre for Settlement of Investment Disputes (ICSID) under the ICSID Rules.[62] Vento brought its application pursuant to articles 18 and 34 of the Model Law.[63] In particular, Vento argued that it was prevented from presenting its case and had been treated unequally with respect to certain evidence that was considered (and not considered) by the tribunal, and the arbitral procedure and the composition of the tribunal was not in accordance with the parties' agreement.[64] In support of the application, Vento filed a number of affidavits. The respondent, United Mexican States (Mexico), objected to the admissibility of three of the affidavits filed by Vento and sought orders prohibiting the filing of two of the affidavits in their entirety (or striking them from the application record) and striking certain paragraphs from a third affidavit.[65]

The parties disagreed on the applicable test for the admission of fresh evidence on a set-aside application. Mexico argued that the same test for the admission of fresh evidence on an application to set aside an international arbitral award with respect to jurisdictional issues (as in ***The Russian Federation v Luxtona Limited*** discussed above) should apply to set aside applications based on procedural fairness. Vento argued that the test that applies to judicial review applications was more appropriate.[66] The application judge found the differences between the two tests to be minor and that similar policy considerations (eg, order, finality and the integrity of the decision-making process) underlie both tests. Ultimately the application judge held that:

> Given the very limited grounds on which an international arbitral award can be set aside, I agree with Vento that an application to set aside such an award is much closer in nature to an application for judicial review than to an appeal. This is particularly the case when the application to set aside is based on procedural fairness, which is a common ground in applications for judicial review, but not in appeals. Further, . . . the exception applicable to the admissibility of fresh evidence relevant to procedural fairness on an application for judicial review is structured so as not to interfere with the role of the administrative decision-maker as the merits-decider. This is consistent with the high degree of defence owed to international arbitral tribunals and the very strict limits imposed on judicial intervention.[67]

The record on an application for judicial review (and in this case a set-aside application based on procedural fairness grounds) is generally limited to what was before the decision maker, subject to certain exceptions including where a party can demonstrate that the new evidence could not have been put forward by the exercise of reasonable diligence at the original proceedings. The application judge held that Vento had not met the test for fresh evidence with respect to the three affidavits (or portions thereof) that Mexico had challenged. Given its success on the application, Mexico was awarded its costs.[68]

CONCLUSION

Canada is consistently recognised as an arbitration-friendly jurisdiction, and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Second, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

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Endnotes

1 2022 SCC 41. ^ Back to section

2 RSC 1985, c B-3. ^ Back to section

3 RSBC 1996, c 55. British Columbia's new domestic Arbitration Act came into force in 2020. ^ Back to section

4 *Petrowest Corporation v Peace River Hydro Partners*, 2020 BCCA 339 at paragraph 55. ^ Back to section

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6 *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at paragraph 34. Back to section

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28 Arbitration Act, SBC 2020, c 2, section 63; International Commercial Arbitration Act, RSBC 1996, c 233, section 36.01. Back to section

29 *Stewart v Stewart*, 2021 BCSC 1212 at paragraphs 126–127, citing *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 878 and*Sierra Club of Canada v Canada (Minister of Finance*, 2002 SCC 41 at paragraph 48. Back to section

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38 *Friction Co Ltd v Novalex Inc*, 2021 ONSC 7714 at paragraphs 6–10. Back to section

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