

# THE IMPLEMENTATION AND APPLICATION OF THE *NEW YORK ARBITRATION CONVENTION* IN CANADA

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*On the eve of expected revisions to Canadian arbitration laws, it may be useful to comparative law scholars and Canadian jurists to take stock of how Canadian legislatures and courts have implemented the New York Convention. While the convention's obligations regarding recognition of arbitration agreements and referral of disputes to arbitration, as well as recognition and enforcement of foreign awards, are straightforward in principle, this article emphasizes the key ways in which courts have ensured the success of the convention's regime in practice. As Canadian jurisdictions embark on their revisions, it is hoped that the pro-enforcement and international spirit that their courts have fostered with respect to the New York Convention will live on.*

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*À la veille de probables modifications des lois canadiennes sur l'arbitrage, il semble utile, tant pour les comparatistes que pour les juristes canadiens, de faire le point sur la manière dont les assemblées législatives et les tribunaux canadiens ont mis en œuvre la Convention de New York. Étant donné que les obligations découlant de la convention – qui ont trait à la reconnaissance des conventions d'arbitrage, le renvoi des différends à l'arbitrage ainsi qu'à la reconnaissance et l'exécution des sentences étrangères – sont relativement bien définies dans l'abstrait, le présent article met l'accent sur les principaux moyens par lesquels les tribunaux ont assuré le succès de la convention en pratique. Alors que les ressorts canadiens s'appêtent à procéder à des modifications, il est à souhaiter que la tendance favorable à l'arbitrage et l'approche cosmopolite que les tribunaux ont privilégiées en appliquant la Convention de New York se perpétueront.*

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## 1. Introduction

This article presents the findings of a report delivered at the 2014 Congress of the International Academy of Comparative Law in Vienna on the implementation and application of the *Convention on the Recognition and*

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*Enforcement of Foreign Arbitral Awards*<sup>1</sup> by Canadian legislatures and courts. On the eve of an expected new wave of modernization of Canadian arbitration laws,<sup>2</sup> it may be useful to comparative law scholars and Canadian jurists to take stock of how the *New York Convention* has been implemented and applied throughout the country.

Canada adopted the *New York Convention* in the 1980s as part of a massive and co-ordinated federal-provincial effort to modernize arbitration law throughout Canada,<sup>3</sup> an important part of which consisted in the implementation of the United Nations Commission on International Trade Law (UNCITRAL) *Model Law on International Commercial Arbitration*.<sup>4</sup> This effort was unanimously hailed as a success and has surely contributed to the significant growth of international arbitration in Canada over the past thirty years.

In essence, the *New York Convention* requires that courts of contracting states recognize arbitration agreements in writing, refer disputes falling within the ambit of such agreements to arbitration, and recognize and enforce foreign awards except in narrow and exhaustively enumerated circumstances. At the level of principle, these international-law obligations are straightforward and have led to an impressive convergence in the understandings that make up the backbone of the legal framework governing international arbitration today.<sup>5</sup> When its implementation is looked at in detail, however, the *New York Convention* does raise a number of issues that national courts have not always addressed consistently. It will be useful in this context to consider whether Canadian courts have been faithful to the pro-enforcement and international spirit of the convention and, more specifically, whether they have correctly understood and applied the grounds upon which recognition or enforcement of an award may be denied.

We begin by addressing certain general features of the *New York Convention*, namely the means of its implementation in Canadian legal

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<sup>1</sup> 10 June 1958, Can TS 1986 No 43 [*New York Convention*].

<sup>2</sup> See e.g. Uniform Law Commission of Canada – Civil Law Section, *International Commercial Arbitration – Report of the Working Group* (2012), online: Uniform Law Commission of Canada <<http://www.ulcc.ca/en/civil-section/905-civil-section-current-topics/international-commercial-arbitration/1249-international-commercial-arbitration-2012>>.

<sup>3</sup> See e.g. Edward C Chiasson and Marc Lalonde, “Recent Canadian Legislation on Arbitration” (1986) 2 *Arb Int'l* 370; John EC Brierley, “Canadian Acceptance of International Commercial Arbitration” (1988) 40 *Me L Rev* 287.

<sup>4</sup> UN Doc A/40/17 (1985), Ann I (21 June 1985) [*Model Law*].

<sup>5</sup> On which, see generally Gary Born, *International Commercial Arbitration*, 2d ed (The Hague: Kluwer, 2014).

orders, its scope of application, the reservations to which it is subject, and its relationship to the *UNCITRAL Model Law* (Part 2). We then discuss the courts' enforcement of agreements to arbitrate (Part 3) and the recognition and enforcement of awards that are within the convention's purview (Part 4).

## 2. *The New York Convention: General Features*

### A) *Implementing Legislation*

Canada adheres to a dualist approach to the domestic effect of conventional international law.<sup>6</sup> Legislative jurisdiction over international commercial arbitration is shared between the federal and provincial legislatures, and statutes implementing the *New York Convention* have been adopted in all Canadian jurisdictions. All but two – Ontario and Quebec – have adopted short implementing statutes to which the full text of the convention is attached.<sup>7</sup>

Ontario had initially adopted a similar statute.<sup>8</sup> It was repealed, however, because it was considered superfluous after the adoption of the *International Commercial Arbitration Act*,<sup>9</sup> a statute implementing the *UNCITRAL Model Law*.<sup>10</sup> While the absence of a statute explicitly implementing the *New York Convention* in Ontario has been the source of some confusion in the past,<sup>11</sup> a consensus has since emerged to the effect

<sup>6</sup> See generally Armand de Mestral and Evan Fox-Decent, "Rethinking the Relationship between International and Domestic Law" (2008) 53 McGill LJ 574.

<sup>7</sup> Federal: *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2d Supp). Alberta: *International Commercial Arbitration Act*, RSA 2000, c I-5. British Columbia: *Foreign Arbitral Awards Act*, RSBC 1996, c 154. Manitoba: *International Commercial Arbitration Act*, SM 1986-87, c 32, CCSM, c C-151. New Brunswick: *International Commercial Arbitration Act*, RSNB 2011, c 176. Newfoundland and Labrador: *International Commercial Arbitration Act*, RSNL 1990, c I-15. Nova Scotia: *International Commercial Arbitration Act*, RSNS 1989, c 234. Northwest Territories: *International Commercial Arbitration Act*, RSNWT 1988, c I-6. Nunavut: *International Commercial Arbitration Act*, RSNWT 1988, c I-6, as duplicated for Nunavut by s 29 of the *Nunavut Act*, SC 1993, c 28. Prince Edward Island: *International Commercial Arbitration Act*, RSPEI 1988, c I-5. Saskatchewan: *Enforcement of Foreign Arbitral Awards Act*, RSS 1996, c E-9.12. Yukon: *Foreign Arbitral Awards Act*, RSY 2002, c 93.

<sup>8</sup> *Foreign Arbitral Awards Act of Ontario*, RSO 1986, c 25.

<sup>9</sup> RSO 1990, c I-9.

<sup>10</sup> *Supra* note 4.

<sup>11</sup> See e.g. *Kanto Yakini Kogyo Kabushiki-Kaisha v Can-Eng Manufacturing Ltd* (1992), 4 BLR (2d) 108, 7 OR (3d) 770 (Ct J (Gen Div)) (where the Court refused to consider the *New York Convention* on the ground that proof had not been made that it was in force in Ontario).

that the convention is properly implemented through the *International Commercial Arbitration Act*.<sup>12</sup>

In Quebec, the *New York Convention* has been implemented through provisions of the *Code of Civil Procedure*.<sup>13</sup> The Code also instructs courts to take the convention into consideration when they interpret those provisions.<sup>14</sup> Additionally, in 2005, the Supreme Court of Canada held that courts have a duty to interpret those provisions consistently with the international obligations imposed on Canada by the convention.<sup>15</sup>

In all Canadian jurisdictions except Ontario and Quebec, legislatures have adopted statutes implementing both the *New York Convention* and the *UNCITRAL Model Law*. While the statutes implementing the convention all provide that they are to prevail over any other act in case of a conflict, article VII – which states that the convention “shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law ... of the country where such award is sought to be relied upon” – would surely dispose of any argument asserting that a conflict with the *New York Convention* could prevent parties from seeking the recognition and enforcement of foreign awards on the basis of the statutes implementing the *Model Law*. In Ontario, where the *New York Convention* has not been implemented in a separate statute, foreign awards are recognized and enforced pursuant to the provisions of the *Model Law*-based statute regulating international commercial arbitration. According to the Ontario Superior Court of Justice, this regime is exclusive, in that a party may not seek the recognition and enforcement of a foreign award on the basis of common law rules regarding the domestic effect of foreign judgments.<sup>16</sup> In Quebec,

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<sup>12</sup> See e.g. Kenneth McEwan and Ludmila Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Toronto: Canada Law Book, 2007) ch1 at 7.

<sup>13</sup> RSQ, c C-25. See Bill 28, *An Act to establish the New Code of Civil Procedure*, 1st Sess, 40th Leg, Quebec, s 1. These changes are expected to come into force in January 2016; see « Adoption du projet de loi no 14 : La ministre Stéphanie Vallée se réjouit de cette première étape vers la modernisation de la justice civile », online: Portail Québec <<http://www.fil-information.gouv.qc.ca/Pages/Article.aspx?aiguillage=ajd&type=1&idArticle=2210241462>>.

<sup>14</sup> Article 948, paragraph 2: “The interpretation of this Title shall take into account, where applicable, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as adopted by the United Nations Conference on International Commercial Arbitration at New York on 10 June 1958.”

<sup>15</sup> See *GreCon Dimter inc v JR Normand inc*, 2005 SCC 46, 2 SCR 401 [*GreCon*].

<sup>16</sup> *ACTIV Financial Systems, Inc v Orbixa Management Services Inc*, 2011 ONSC 7286, 345 DLR (4th) 353.

the provisions of the *Code of Civil Procedure*<sup>17</sup> that implement the *New York Convention* do not clearly specify whether the recognition and enforcement procedure they set out is exclusive.

### B) *Scope of Application*

It is useful, first, to recall that the scope of the regime put in place by the *New York Convention* is broader than the so-called Geneva regime that preceded it. The Geneva regime, to which Canada was never a party, was based on the *Geneva Protocol on Arbitration Clauses* of 1923<sup>18</sup> and the *Geneva Convention on the Execution of Foreign Awards* of 1927.<sup>19</sup> The first of these two instruments provided for the recognition and enforcement of arbitration agreements, while the second addressed the recognition and enforcement of awards made pursuant to arbitration agreements falling under the first. Whereas the Geneva regime applied only where the parties were “subject respectively to the jurisdiction of different contracting states,”<sup>20</sup> the *New York Convention* applies irrespective of the parties’ nationality.

While the *New York Convention* is not clear as to the kinds of arbitration agreements that courts are required to recognize and enforce under article II,<sup>21</sup> in practice, issues regarding its scope of application usually arise when a party seeks recognition and enforcement of an award. As its title indicates, the *New York Convention* applies to “foreign arbitral awards.”<sup>22</sup> There are thus three concepts that are key to a proper understanding of the convention’s scope: “foreign,” “arbitral,” and “award.”

#### 1) “Foreign”

Article I of the *New York Convention* defines foreign arbitral awards as awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought, or awards not considered domestic by the forum state.<sup>23</sup> The implementing statutes do

<sup>17</sup> *Supra* note 13.

<sup>18</sup> 24 September 1923, 27 LNTS 158 [*Geneva Protocol*].

<sup>19</sup> 26 September 1927, 92 LNTS 302.

<sup>20</sup> *Geneva Protocol*, *supra* note 18, art 1.

<sup>21</sup> See Dorothee Schramm, Elliott Geisinger and Philippe Pinsolle, “Article II” in Herbert Kronke *et al*, eds, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (The Hague: Kluwer, 2010) 37 at 41 ff.

<sup>22</sup> Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (The Hague: Kluwer Law and Taxation Publishers, 1981) at 11.

<sup>23</sup> Note that the scope of application is not defined explicitly in respect of the recognition of arbitration agreements. The “foreign” requirement is understood to apply

not speak to the conditions under which an award made in Canada will be considered a non-domestic award for the purposes of the convention. However, all provinces – except Quebec – and all federal territories draw a distinction between domestic and international arbitration, the latter being governed by statutes that adhere closely to the UNCITRAL *Model Law*. In Quebec, the provisions of the *Code of Civil Procedure*<sup>24</sup> derived from the *Model Law* apply to both domestic and international arbitration, and the provisions of the code that implement the *New York Convention* are found in a section that applies only to arbitration awards “made outside Québec.”<sup>25</sup>

## 2) “Arbitral”

In Canada, the implementing statutes do not provide any indication of the legislatures’ understandings of the types of processes that can be characterized as arbitral for the purposes of the *New York Convention*. Other arbitration statutes tend not to define “arbitration” in detail. One recurring problem, which has arisen mostly in relation to domestic disputes, concerns the distinction between arbitration and expert determination. The leading case is a 1988 decision of the Supreme Court of Canada holding that arbitration involves a third party resolving an existing dispute pursuant to a process intended by the disputing parties to be adjudicative in nature.<sup>26</sup> Courts have also had to determine whether private adjudicative processes based on a statute rather than an agreement of the parties are arbitral in nature. The cases currently stand for the proposition that such processes will be characterized as arbitral if they are non-mandatory, that is, if the statute allows the parties to opt out and submit their dispute to a court.<sup>27</sup>

## 3) “Award”

The Canadian implementing statutes do not provide any indication of the legislatures’ understanding regarding the types of decisions that amount to awards for the purposes of the *New York Convention*. That said, the notion of an award tends to be conceived broadly in other contexts. For example, all Canadian jurisdictions except Quebec have adopted similar statutes

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by analogy. See Reinmar Wolff, “Article II” in Reinmar Wolff, ed, *New York Convention: Commentary* (Oxford: Hart, 2012) 100; Jean-Francois Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (London, UK: Sweet and Maxwell, 2007) at para 489.

<sup>24</sup> *Supra* note 13.

<sup>25</sup> Article 948.

<sup>26</sup> *Sport Maska Inc v Zitrer*, [1988] 1 SCR 564, 38 BLR 221.

<sup>27</sup> See e.g. *Desputeaux v Éditions Chouette (1987) Inc*, 2003 SCC 17, 1 SCR 178 [*Desputeaux*]; *Conseil d’arbitrage des comptes des avocats du Barreau du Québec c Marquis*, 2011 QCCA 133 (available on CanLII).

giving effect to the UNCITRAL *Model Law*, and they all conceive of the notion of “award” at least as broadly as does the *Model Law*.<sup>28</sup> Ontario and British Columbia have both added language to their statutes specifying that arbitral decisions granting interim measures of protection constitute awards, and British Columbia’s statute also provides that decisions awarding interest or costs constitute awards.<sup>29</sup> Furthermore, the notion of an award tends to be conceived broadly in domestic matters. For example, under the Uniform Conference of Canada’s *Uniform Arbitration Act*,<sup>30</sup> which has had a notable influence on the law of domestic arbitration, arbitral decisions recording settlements,<sup>31</sup> granting interim measures,<sup>32</sup> resolving only part of the merits,<sup>33</sup> or granting costs<sup>34</sup> all constitute awards. However, a fairly consistent line of cases stands for the proposition that mere procedural orders do not constitute awards.<sup>35</sup>

Neither the implementing statutes nor the cases specifically address the applicability of the *New York Convention* to arbitral decisions granting interim measures of protection. As mentioned earlier, however, British Columbia’s and Ontario’s *Model Law*-based international arbitration statutes both provide that such decisions do qualify as awards.

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<sup>28</sup> On the notion of an award under the *Model Law*, see United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration*, art 34 at paras 13 ff, online: UNCITRAL <[http://www.uncitral.org/uncitral/en/case\\_law/digests/mal2012.html](http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html)>.

<sup>29</sup> British Columbia: “‘arbitral award’ means any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes (a) an interim arbitral award, including an interim award made for the preservation of property, and (b) any award of interest or costs” (*International Commercial Arbitration Act*, RSBC 1996, c 233, s 2(1)); Ontario: “An order of the arbitral tribunal under article 17 of the Model Law for an interim measure of protection and the provision of security in connection with it is subject to the provisions of the Model Law as if it were an award” (*International Commercial Arbitration Act*, RSO 1990, c I-9, s 9).

<sup>30</sup> Online: Uniform Law Conference of Canada <<http://www.ulcc.ca/en/uniform-acts-new-order/older-uniform-acts/697-arbitration-act/1615-uniform-arbitration-act-1990>> [*Uniform Arbitration Act*].

<sup>31</sup> *Uniform Arbitration Act*, *ibid*, s 36: “If the parties settle the dispute during arbitration, the arbitral tribunal shall terminate the arbitration and, if a party so requests, may record the settlement in the form of an award.”

<sup>32</sup> *Ibid*, s 41: “The arbitral tribunal may make one or more interim awards.”

<sup>33</sup> *Ibid*, s 42: “The arbitral tribunal may make more than one final award, disposing of one or more matters referred to arbitration in each award.”

<sup>34</sup> *Ibid*, s 54(4): “If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs.”

<sup>35</sup> See e.g. *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642, 97 OR (3d) 161; *Gazette c Blondin*, [2003] RJQ 2090 (Qc CA).

### C) *Reservations*

Under article I(3) of the *New York Convention*, contracting states have the possibility of limiting the scope of the convention to commercial relationships. Accordingly, when it acceded to the convention, Canada declared that it would only apply the convention to disputes arising out of legal relationships, whether contractual or not, that are considered to be commercial under the laws of Canada. An exception was made in the case of Quebec, where the *New York Convention* applies to commercial and non-commercial matters alike.<sup>36</sup> The scope of the implementing statutes adopted outside Quebec is explicitly limited to “differences arising out of commercial legal relationships, whether contractual or not.”

Unlike many other contracting states, however, Canada did not make the so-called reciprocity reservation available under article I(3) of the *New York Convention* and pursuant to which contracting states may limit the application of the convention to awards made in the territory of another contracting state.<sup>37</sup>

### D) *UNCITRAL Model Law and Circulation of Judicial Decisions*

Since the *UNCITRAL Model Law* can be and has been used as implementing legislation for the *New York Convention*, there is obviously a certain overlap between the two instruments. Judicial decisions made under one of the instruments are therefore highly relevant to consideration of the same issues under the other instrument. In presenting the Canadian interpretation of the *New York Convention*, regard is therefore had not only to decisions made under the convention, but also to decisions applying the relevant provisions of the *Model Law*. Also, although a certain number of jurisdictions are covered by this study, it is useful to note that judicial decisions may have persuasive authority across jurisdictional boundaries, even where Quebec – with its mixed legal system and codal implementation of the *Model Law* principles – is concerned.

### 3. *Recognition and Enforcement of Agreements to Arbitrate*

Article II of the *New York Convention* is the provision that requires courts to recognize the validity of arbitration agreements in writing that concern “a subject matter capable of settlement by arbitration,” and – at the request

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<sup>36</sup> See *Status of Multilateral Treaties Deposited with the Secretary-General, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3*, online: United Nations Treaty Series <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXII-1&chapter=22&lang=en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en)>.

<sup>37</sup> *Ibid.*



of one of the parties – to refer court actions falling within the scope of such agreements to arbitration unless the agreement is found to be “null and void, inoperative or incapable of being performed.” Canadian courts have had the opportunity to address a number of issues raised by this provision that have proved controversial in other contracting states.

A) “*Agreement in Writing*”

A liberal interpretation has been given to the writing requirement in Canadian legislation, which tends to track relevant provisions of the *UNCITRAL Model Law*.<sup>38</sup> The parties’ consent, for example, does not have to be expressed in writing: tacit consent to an arbitration agreement set out in writing suffices.<sup>39</sup> Although the arbitration agreement must be in writing, courts do not interpret this as amounting to a requirement that the agreement be signed by the parties.<sup>40</sup> In one case illustrating the breadth of the concept of “in writing,” a court held that a cheque referring to an invoice amounted to a written record of the cheque issuer’s consent to an arbitration clause inserted in a written contractual offer to which the issuer had heretofore not replied in writing.<sup>41</sup>

B) “*Subject Matter Capable of Settlement by Arbitration*”

The validity of an arbitration clause may be affected by the arbitrability of its subject matter. This issue is dealt with in Part 4(E)(1) of this article, which covers arbitrability as a ground for refusal of enforcement pursuant to article V(2) of the *New York Convention*. As explained in more detail in that part, in matters governed by statute, the Supreme Court of Canada has established a presumption according to which matters falling within the scope of a statute are arbitrable unless the statute provides otherwise.<sup>42</sup>

<sup>38</sup> Born, *supra* note 5 at 694 ff.

<sup>39</sup> *Schiff Food Products Inc v Naber Seed & Grain Co Ltd* (1996), [1997] 1 WWR 124, 149 Sask R 54, 28 BLR (2d) 221 (QB) [*Schiff*]. See also *Achilles (USA) c Plastics Dura Plastics (1977) ltée/Ltd*, 2006 QCCA 1523 (available on CanLII) [*Achilles*] (but note that the writing requirement found in article 2640 of the *Civil Code of Québec* is arguably less stringent than that in the *Code of Civil Procedure*).

<sup>40</sup> *Schiff*, *ibid*.

<sup>41</sup> *Ferguson Bros of St Thomas v Manyan Inc* (1999), 98 OTC 265, 38 CPC (4th) 91 (Sup Ct).

<sup>42</sup> See e.g. *Dell Computer Corporation v Union des consommateurs*, 2007 SCC 34, 284 DLR (4th) 577 [*Dell*]; *Rogers Wireless Inc v Muroff*, 2007 SCC 35, 2 SCR 921 [*Muroff*]; *Seidel v TELUS Communications Inc*, 2011 SCC 15, 1 SCR 531 [*Seidel*].

C) “Null and Void, Inoperative or Incapable of Being Performed”

A number of key propositions applicable in an international commercial context are firmly established in the Canadian cases. First, Canadian courts can dismiss applications seeking the referral of an action to arbitration if the arbitration agreement invoked by the applicant is either invalid – whether as a matter of contract law<sup>43</sup> or because the dispute is non-arbitrable<sup>44</sup> – not yet in effect,<sup>45</sup> no longer in effect,<sup>46</sup> or inapplicable to the dispute at hand.<sup>47</sup> Second, courts have no discretion to refuse to enforce a valid and applicable arbitration agreement on mere grounds of convenience – such as the fact that arbitration would be less time- or cost-effective, or would prevent all aspects of a multiparty dispute from being decided in a single forum.<sup>48</sup> Third, an arbitration agreement will not be considered inoperative on the sole basis that the party seeking the referral of the action to arbitration has yet to take steps to set the arbitration proceedings in motion.<sup>49</sup> Fourth, the fact that the words “void, inoperative or incapable of being performed” were left out the Quebec *Code of Civil Procedure*<sup>50</sup> provision that implements article II(3) of the *New York Convention* is of no substantive consequence.<sup>51</sup>

D) *Separability of the Arbitration Clause and Applicable Law*

The principle of the separability of the arbitration clause is recognized in Canadian arbitration law.<sup>52</sup> Canadian courts have confirmed on a number

<sup>43</sup> See e.g. *H & H Marine Engine Service Ltd v Volvo Penta of the Americas Inc*, 2009 BCSC 1389, BCJ No 2010 (QL) [*H & H Marine*]; *Achilles*, *supra* note 39; *Kaverit Steel and Crane Ltd v Kone Corp*, 1992 ABCA 7, 87 DLR (4th) 129 [*Kaverit*].

<sup>44</sup> See e.g. *Dell*, *supra* note 42; *Canada (AG) v Reliance Insurance Company* (2007), 87 OR (3d) 42 (Sup Ct) [*Reliance Insurance*].

<sup>45</sup> See e.g. *Cecrop Co v Kinetic Sciences Inc*, 2001 BCSC 532, 16 BLR (3d) 15 [*Cecrop*].

<sup>46</sup> See e.g. *Bombardier Transportation v SMC Pneumatics (UK) Ltd*, 2009 QCCA 861, JQ No 4218 (QL) [*Bombardier*]; *Instrumenttitehdas Kytola Oy v Esko Industries Ltd*, 2004 BCCA 25, BCJ No 136 (QL) [*Instrumenttitehdas Kytola*].

<sup>47</sup> See e.g. *Patel v Kanbay International Inc*, 2008 ONCA 867, 93 OR (3d) 588 [*Patel*]; *Ocean Fisheries Ltd v Pacific Coast Fishermen’s Mutual Marine Insurance Co*, [1998] 1 FC 586 (FCA).

<sup>48</sup> See e.g. *GreCon*, *supra* note 15; *Kaverit*, *supra* note 43; *Gulf Canada Resources Ltd v Arochem International Ltd* (1992), 43 CPR (3d) 390 (BCCA).

<sup>49</sup> See *Burlington Northern Railroad Co v Canadian National Railway Co*, [1997] 1 SCR 5, 34 BLR (2d) 291.

<sup>50</sup> *Supra* note 13.

<sup>51</sup> See *Dell*, *supra* note 42; see also *MacKinnon v National Money Mart Company*, 2009 BCCA 103, 304 DLR (4th) 331.

<sup>52</sup> Article 2642 of the *Civil Code of Quebec*, RSQ, c 991, and article 16(1) of the *Model Law*.

of occasions that the invalidity of a contract will not *ipso facto* invalidate an arbitration clause found in that contract.<sup>53</sup>

Another generally accepted consequence of the principle of separability is that the law governing the agreement to arbitrate will not necessarily be the same as the law governing the contract in which the arbitration agreement has been inserted.<sup>54</sup> Article II of the *New York Convention* does not expressly address the question of the law under which the validity and scope of arbitration agreements ought to be assessed, and Canadian cases offer little guidance on this issue. Among Canadian jurisdictions, only Quebec has adopted legislative provisions setting out choice-of-law rules applicable at the referral stage.<sup>55</sup>

As international arbitration agreements almost never explicitly “indicate” their own governing law, the law chosen by the parties to govern the underlying contract may be taken to be “the law to which the parties have subjected” the arbitration clause.<sup>56</sup> As a default rule, the *New York Convention*’s provisions on the recognition and enforcement of awards state that the arbitration agreement is governed by the law of the place of arbitration. This solution should arguably be extended by analogy when the enforcement of an arbitration agreement is sought under article II(3).<sup>57</sup>

### *E) Types of Objections That Will Be Entertained*

As a general rule – and consistently with the *New York Convention*’s provisions – Canadian courts will only consider objections relating to whether an arbitration agreement is “null, void, inoperative or incapable of being performed.” As mentioned earlier, this language captures objections asserting that the agreement is either invalid – whether as a matter of contract law or because the dispute is non-arbitrable – not yet in effect, no

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<sup>53</sup> *DG Jewelry Inc v Cyberdium Canada Ltd*, [2002] OTC 251, 21 CPC (5th) 174 (Sup Ct) [*DG Jewelry*]; *Siderurgica Mendes Junior SA v Ice Pearl (The)*, [1996] 6 WWR 411, 18 BCLR (3d) 182 (SC) [*Siderurgica*]; *Harper v Kvaerner Fjellstrand Shipping AS*, [1991] BCJ No 2654 (QL) (SC) [*Harper*]; *OEMSDf Inc v Europe Israel Ltd* (1999), 42 CPC (4th) 229 (Ont Sup Ct) [*OEMSDf*].

<sup>54</sup> See McEwan and Herbst, *supra* note 12, ch 8 at 2.

<sup>55</sup> *Civil Code of Quebec*, *supra* note 52, art 3121 (“[f]ailing any designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the country where arbitration takes place”).

<sup>56</sup> *Achilles*, *supra* note 39. Note that, in this case, while the law of the underlying agreement (State of Washington) was found to apply to the arbitration agreement, this law was taken to be “similar” to Quebec law because no proof of the relevant foreign law had been adduced.

<sup>57</sup> See article V(1)(a) of the *New York Convention* and commentary below.

longer in effect, or inapplicable to the dispute at hand, and it excludes any consideration of convenience or time- and cost-effectiveness. A limited number of cases stand for the proposition that a referral application may also be dismissed on the ground that there exists no dispute between the parties.<sup>58</sup> However, the fact that the party seeking referral of the action to arbitration has failed to commence arbitration within the deadline set out in the arbitration agreement has been held not to constitute a ground upon which a referral application may be dismissed.<sup>59</sup>

#### *F) Extent to Which Objections Will Be Considered*

In a 2007 decision seeking to strike a balance between cases holding that courts seized of referral applications should only review the effectiveness of the arbitration agreement on a prima facie standard, and cases in which courts adopted a plenary standard, the Supreme Court of Canada held (i) that where the objection to the referral to arbitration only raises questions of law, those questions ought to be resolved fully, and in a final manner, by the court; (ii) that where the objection raises disputed questions of fact, the court should let the arbitral tribunal make the first ruling on the objection unless a prima facie review of the arbitration agreement clearly shows that it is either inapplicable or “null and void, inoperative or incapable of being performed”; (iii) and that this latter approach is also applicable where the objection raises mixed questions of fact and law, unless the questions of fact require only superficial consideration of the documents submitted by the parties.<sup>60</sup>

### *4. Recognition and Enforcement of Arbitral Awards*

#### *A) General Scheme and Residual Discretion*

The *New York Convention* greatly improved upon the Geneva regime by shifting the burden of proof at the recognition and enforcement stage. Save in respect of public policy and arbitrability, which can be raised *ex officio* by courts under article V(2), the burden is now on the party resisting

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<sup>58</sup> See e.g. *Methanex New Zealand Ltd v Fontaine Navigation SA, Tokyo Marine Co Ltd*, [1998] 2 FC 583, 142 FTR 81; *Mitsui v Oldendorff*, 2003 BCSC 1478, 38 BLR (3d) 234.

<sup>59</sup> See *BC Navigation SC (Trustee of) v Canpotex Shipping Services Ltd* (1987), 16 FTR 79 (FCTD).

<sup>60</sup> *Dell*, *supra* note 42. While the case originated in Quebec, the approach adopted by the Supreme Court has been followed in common law jurisdictions: see e.g. *Seidel*, *supra* note 42; *Ontario v Imperial Tobacco Canada Limited*, 2011 ONCA 525, 338 DLR (4th) 282; *Dancap Productions Inc v Key Brand Entertainment Inc*, 2009 ONCA 135, 55 BLR (4th) 1; *Patel*, *supra* note 47; *EDF (Services) Limited v Appleton & Associates*, 2007 CanLII 36078 (Ont Sup Ct).

recognition or enforcement to demonstrate that there is a valid ground for dismissing the application. Article V(1) now provides: “Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that ...” The provision then enumerates, in an exhaustive manner, the admissible grounds on which recognition or enforcement may be denied.

Recent Quebec cases clearly stand for the proposition that courts retain a residual discretion to recognize and enforce an award notwithstanding the existence of a ground that would allow them to dismiss the application.<sup>61</sup> A number of cases from other provinces also stand for this proposition.<sup>62</sup> Courts have notably recognized the possibility of enforcing a foreign arbitral award that may either be under attack before the courts of the place of arbitration<sup>63</sup> or tainted by a procedural defect that does not seriously affect the integrity of the process as a whole.<sup>64</sup>

### B) *Waiver*

In Quebec, the *Code of Civil Procedure*<sup>65</sup> provides that no arbitration agreement may derogate from the provisions governing the setting aside of awards, but there is no equivalent provision in respect of the grounds for refusing enforcement of an award made outside Quebec. In other Canadian jurisdictions, the decided cases tentatively indicate that parties may contractually waive, in advance, either the right to request that a court set aside an arbitral award<sup>66</sup> or the right to resist enforcement of a foreign award under the provisions implementing the *New York Convention*.<sup>67</sup> This should not, however, prevent a court from raising a question of arbitrability or public policy *ex officio*, as contemplated by article V(2) of the *New York Convention*.

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<sup>61</sup> See e.g. *Louis Dreyfus & Cie v Holding Tusculum, bv*, 2008 QCCS 5903 (available on WL Can) [*Tusculum*]; *Rhéaume v Société d'investissements l'Excellence inc*, 2010 QCCA 2269, [2011] RJQ 1 [*Rhéaume*].

<sup>62</sup> See e.g. *Europcar Italia SpA v Alba Tours International Inc* (1997), 23 OTC 376 (available on WL Can) (Ct J (Gen Div)) [*Europcar*]; *Javor v Francoeur*, 2003 BCSC 350, 13 BCLR (4th) 195; *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608 (Ct J (Gen Div)) [*Schreter*].

<sup>63</sup> See *Schreter*, *ibid*.

<sup>64</sup> See *Rhéaume*, *supra* note 61.

<sup>65</sup> *Supra* note 13, arts 940, 947-947.7.

<sup>66</sup> See *Noble China Inc v Cheong* (1998), 42 OR (3d) 69 (Ct J (Gen Div)).

<sup>67</sup> See *Food Services of America Inc v PanPacific Specialties Ltd* (1997), 32 BCLR (3d) 225 (SC) [*Food Services of America*].

It was found in one case that a party's failure to challenge the validity of the award at the place of arbitration did not amount to a waiver of its right to invoke a violation of the applicable rules of procedure in recognition and enforcement proceedings subsequently undertaken in Quebec.<sup>68</sup>

*C) Statute of Limitations or Prescription Period Applicable to Actions to Enforce a Foreign Arbitral Award*

The Supreme Court of Canada has confirmed that the *New York Convention* allows contracting states to impose local time limits on the recognition and enforcement of arbitral awards.<sup>69</sup> The relevant time limit is the one applicable in the province or territory within which recognition and enforcement are sought.<sup>70</sup> At the federal level, the limitation period for the recognition and enforcement of foreign arbitral awards is of six years.<sup>71</sup>

*D) Grounds Which Must Be Proved by the Party Resisting the Application*

*1) Article V(1)(a)*<sup>72</sup>

*Parties were under some incapacity.* To succeed on this ground, the resisting party must prove the incapacity to the court's satisfaction, which may require expert evidence of an applicable foreign law.<sup>73</sup> The incapacity ground has been invoked in very few Canadian cases. It has been read as possibly covering a medical inability to act in the arbitral proceedings, but

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<sup>68</sup> *Smart Systems Technologies Inc v Domotique Secant inc*, 2008 QCCA 444, JQ No 1782 [*Smart Systems*].

<sup>69</sup> See *Yugraneft Corp v Rexx Management Corp*, 2010 SCC 19, 1 SCR 649 [*Yugraneft*].

<sup>70</sup> The time limit is not explicit in every province. For Alberta, see *Limitations Act*, RSA 2000, c L-12, s 3. See also *Yugraneft*, *ibid*. For British Columbia, see *Limitation Act*, RSBC 1996, c 266, ss 3(3)(f), 3(3)(c); *Foreign Arbitral Awards Act*, *supra* note 7, s 7.

<sup>71</sup> See *Federal Courts Act*, RSC 1985, c F-7, s 39(2). See also *Compania Maritima Villa Nova SA v Northern Sales Co*, [1992] 1 FC 550 (FCA), leave to appeal to SCC refused [1992] SCCA No 37. Neither the legislation nor the decided cases discuss the point at which the six-year period should be taken to begin.

<sup>72</sup> "The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made."

<sup>73</sup> See McEwan and Herbst, *supra* note 12, ch 12 at 27.

only on the basis of a high evidentiary threshold.<sup>74</sup> The possibility that this ground may cover issues of undue pressure or threats at the contracting stage and at the time of the proceedings has also been raised.<sup>75</sup>

*Arbitration agreement not valid.* Some of the propositions outlined earlier concerning objections to referral applications on the basis that the arbitration agreement is “null, void, inoperative or incapable of being performed” are also relevant at the enforcement stage. An award can certainly be refused enforcement where the agreement to arbitrate is invalid as a matter of contract law<sup>76</sup> or because the matter is not arbitrable.<sup>77</sup> It is unclear whether this ground should be available where the agreement was not yet in effect,<sup>78</sup> or was no longer in effect,<sup>79</sup> at the relevant time.

*Choice of law.* As discussed earlier, it is generally recognized that the law governing the agreement to arbitrate will not necessarily be the same as the law governing the contract in which the arbitration clause has been inserted.<sup>80</sup> It is also recognized that the invalidity of a contract will not *ipso facto* invalidate an arbitration clause found in that contract.<sup>81</sup> As was also discussed earlier, failing a (very unlikely) specific choice of law, the law chosen to govern the underlying contract may be taken to be “the law to which the parties have subjected” their arbitration clause.<sup>82</sup> There is otherwise little guidance in the Canadian cases, but the default position under article V(1)(a) is that the validity of the arbitration agreement is governed by the law of the place of arbitration.

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<sup>74</sup> See *Subway Franchise Systems of Canada Ltd v Laich*, 2011 SKQB 249, 380 Sask R 54 [*Subway*].

<sup>75</sup> See *Grow Biz International, Inc v DLT Holdings Inc*, 2001 PESCTD 27, 199 Nfld & PEIR 135 [*Grow Biz*]; *Znamensky Selekcionno-Gibridny Center LLC v Donaldson International Livestock Ltd*, 2010 ONCA 303, 90 CPC (6th) 163.

<sup>76</sup> See e.g. *H & H Marine*, *supra* note 43; *Achilles*, *supra* note 39; *Kaverit*, *supra* note 43.

<sup>77</sup> See e.g. *Dell*, *supra* note 42; *Reliance Insurance*, *supra* note 44.

<sup>78</sup> See e.g. *Cecrop*, *supra* note 45.

<sup>79</sup> See e.g. *Bombardier*, *supra* note 46; *Instrumenttitehdas Kytola*, *supra* note 46.

<sup>80</sup> See McEwan and Herbst, *supra* note 12, ch 8 at 2.

<sup>81</sup> *DG Jewelry*, *supra* note 53; *Siderurgica*, *supra* note 53; *Harper*, *supra* note 53; *OEMSDF*, *supra* note 53.

<sup>82</sup> *Achilles*, *supra* note 39.

## 2) Article V(1)(b)<sup>83</sup>

*Applicable standard.* The current trend in the case law indicates that procedural irregularities that do not amount to a violation of procedural public policy within the meaning of article V(2)(b) will not lead to the setting aside or denial of recognition and enforcement of an award.<sup>84</sup> This may be understood as an exercise of the courts' residual discretion, mentioned earlier, or as an interpretation of the applicable standard of article V(1)(b). On either view, the questionable consequence of this position has been the judicial deletion of article V(1)(b) as a distinct ground for refusing enforcement.<sup>85</sup>

As in other common law jurisdictions,<sup>86</sup> Canadian courts often assimilate the relevant standard to the procedural standard of administrative law, namely the rule of natural justice known as *audi alteram partem*.<sup>87</sup> The decided cases suggest that, within the arbitral context, the requirement for proper notice and a fair hearing is equivalent to the ordinary standards of natural justice<sup>88</sup> and procedural fairness.<sup>89</sup> In Canada, there is no constitutional protection of due process in civil and commercial matters to which this standard can be compared.

*Notice.* Recognition and enforcement of a foreign arbitral award may be refused where a party has not been informed of a claim against it,<sup>90</sup> or has not received proper notice of either the arbitration<sup>91</sup> or the appointment of an arbitrator. However, a mere failure to comply with contractual notice

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<sup>83</sup> “The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”

<sup>84</sup> See e.g. *Corporacion Transnacional de Inversiones, SA de CV v STET International, SPA* (1999), 45 OR (3d) 183 (Sup Ct) [*Corporacion Transnacional de Inversiones*]; *Bayview Irrigation District No 11 v United Mexican States* (2008), 2008 CanLII 22120 (Ont Sup Ct) [*Bayview*]; *Tusculum*, *supra* note 61.

<sup>85</sup> See Fabien Gélinas, “Le contrôle de la sentence pour défaut de conformité de la procédure aux règles applicables : quelques questions” in Sylvette Guillemard, ed, *Mélanges en l'honneur du professeur Alain Prujiner* (Cowansville, Qc: Éditions Yvon Blais, 2011) 143.

<sup>86</sup> For Singapore, see e.g. *Soh Beng Tee & Co Pte Ltd v Fairmount Development Pte Ltd*, [2007] SGCA 28.

<sup>87</sup> See e.g. *Corporacion Transnacional de Inversiones*, *supra* note 84.

<sup>88</sup> See *Lussier v Lussier*, 2013 BCSC 280, BCJ No 314 (QL).

<sup>89</sup> See *Arbutus Software Inc v ACL Services Ltd*, 2012 BCSC 1834, BCJ No 2553 (QL).

<sup>90</sup> See *Rusk Renovations Inc v Dunsworth*, 2013 NSSC 179, 331 NSR (2d) 187.

<sup>91</sup> See *American Marketing Systems Inc v Old THGI Inc*, 2007 ONCA 226 (available on CanLII).



requirements will not be sufficient for recognition and enforcement to be denied on that ground.<sup>92</sup>

*Ability to present one's case.* The concept of an inability to present one's case has been interpreted narrowly. Again, it has been held that, to bring oneself within this ground, one must show that the procedural violation complained of is tantamount to a violation of public policy as contemplated under article V(2)(b).<sup>93</sup>

The nature of the violation required in order to qualify under this ground has been articulated in different ways by courts. One court decided that a clear violation of the principles of fundamental justice or a violation equating to such mishandling of the arbitration as was likely to amount to some substantial miscarriage of justice was necessary.<sup>94</sup> Another held that the conduct of the arbitral tribunal "must be sufficiently serious to offend our most basic notions of morality and justice ... [and] cannot be condoned under the law of the enforcing state."<sup>95</sup> Where a party refuses to participate in the arbitration, it is taken to have deliberately forfeited the opportunity to be heard.<sup>96</sup>

Other cases in which the required procedural standard was met include one where a party failed to substantiate its assertion that it had been unable to present its case because it could not afford to attend the hearing,<sup>97</sup> and one in which an applicant was given ample opportunity to argue its position and decided not to file supplementary evidence<sup>98</sup> or retrospectively believed it had not filed sufficient expert evidence.<sup>99</sup> Furthermore, the fact that an arbitrator uses the specialized knowledge for which he was chosen does not necessarily constitute a procedural defect.<sup>100</sup> It has also been held that an arbitral tribunal has full control over legal issues and may therefore decide the case on the basis of legal arguments other than those put forward by the parties, provided that the tribunal's reasoning is supported by the evidence on record.<sup>101</sup>

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<sup>92</sup> See McEwan and Herbst, *supra* note 12, ch 12 at 28.

<sup>93</sup> See *Corporacion Transnacional de Inversiones*, *supra* note 84.

<sup>94</sup> *Bayview*, *supra* note 84.

<sup>95</sup> *Corporacion Transnacional de Inversiones*, *supra* note 84.

<sup>96</sup> See *Corporacion Transnacional de Inversiones, SA de CV v STET International, SPA* (2000), 49 OR (3d) 414 (CA).

<sup>97</sup> *Grow Biz*, *supra* note 75.

<sup>98</sup> *Xerox Canada Ltd v MPI Technologies Inc*, 2006 CanLII 41006 (Ont Sup Ct).

<sup>99</sup> *Bayview*, *supra* note 84.

<sup>100</sup> See *Morneau v Balian*, 2007 QCCA 315, QJ No 1589 (QL).

<sup>101</sup> See *Superior Energy Management, a Division of Superior Plus Inc v Manson Insulation Inc*, 2011 QCCS 5100, QJ No 13569.

On the other hand, cases where the applicable procedural standard was not met include one in which the arbitral tribunal decided an issue that had not been submitted to its determination and did not give the parties the opportunity to address it.<sup>102</sup> Similarly, a party was found to have been unable to present its case where it was deprived of the opportunity to fully participate in the evidentiary process;<sup>103</sup> in another case, the court decided that there was a denial of natural justice where the parties did not have the opportunity to make representations as to costs.<sup>104</sup>

### 3) Article V(1)(c)<sup>105</sup>

*Presumption and deference.* There is a “powerful presumption” at the post-award stage that arbitral tribunals have acted within their powers.<sup>106</sup> Canadian courts have consistently stated that they should accord arbitral tribunals a high degree of deference and that arbitral awards should be interfered with only rarely or in extraordinary cases.<sup>107</sup>

*Award goes beyond the scope of the submission to arbitration.* An award may be refused enforcement if it deals with a difference not contemplated by, or not falling within, the terms of the submission to arbitration, or if it contains decisions on matters beyond the scope of the submission to arbitration.<sup>108</sup> When raised before the enforcement court, this issue is often one that has already been considered and decided by the arbitrators. The standard of review applicable to the tribunal’s jurisdictional determinations is correctness; that is, the tribunal must have been correct in determining that it had jurisdiction. Canadian courts will consider the arbitral decision with deference, however, and will presume that the arbitrators have reached the correct decision unless the party challenging jurisdiction clearly shows otherwise. Once the court has found that the

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<sup>102</sup> *Tusculum*, *supra* note 61.

<sup>103</sup> *Petro-Canada v Alberta Gas Ethylene Co* (1991), 121 AR 199 (QB).

<sup>104</sup> *Ridley Terminals Inc v Minette Bay Ship Docking Ltd* (1990), 45 BCLR (2d) 367 (CA).

<sup>105</sup> “The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.”

<sup>106</sup> See e.g. *Quintette Coal Ltd v Nippon Steel Corp* (1990), 50 BCLR (2d) 207 (CA) [*Quintette*]; *Bayview*, *supra* note 84.

<sup>107</sup> See e.g. *United Mexican States v Cargill, Inc*, 2011 ONCA 622, 107 OR (3d) 528 [*Cargill*]; *Quintette*, *ibid*; *Canada (AG) v SD Myers, Inc*, 2004 FC 368, 3 FCR 368.

<sup>108</sup> See e.g. *Tusculum*, *supra* note 61; *Cargill*, *ibid*.

tribunal made no error in its assumption of jurisdiction, it should not go on to review the merits.<sup>109</sup>

In determining whether an arbitral award goes beyond the terms of the agreement or submission, the court hearing the application to set aside must consider the degree to which the decision rendered by the arbitrators is linked to the issues submitted to them.<sup>110</sup> As the Supreme Court has put it, the arbitrators' mandate must not be interpreted restrictively; it includes everything that is closely connected to the agreement and to the question they have to decide.<sup>111</sup>

*Remedy specifically excluded by the main contract.* It was held in one case that an arbitral tribunal had exceeded its jurisdiction by awarding costs, despite the fact that the arbitral agreement provided that each party was to bear its own costs. The Court hence refused to enforce the costs portion of the arbitral award.<sup>112</sup>

#### 4) Article V(1)(d)<sup>113</sup>

*Composition of the arbitral authority or arbitral procedure not in accordance with the agreement of the parties or the law where arbitration took place.* A failure to constitute the tribunal or otherwise conduct the arbitral proceedings in accordance with the applicable procedure will not automatically lead to the award being refused recognition and enforcement.<sup>114</sup> This may be explained in terms of the courts' residual discretion to recognize and enforce an award in spite of the establishment of a ground for refusal. Or it may be explained as a narrow reading of the ground in article V(1)(d).

It has been held that, in order for a violation of the applicable procedure to justify a refusal of recognition or enforcement, the violation

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<sup>109</sup> See e.g. *Cargill, ibid*; *Telestat Canada v Juch-Tech Inc*, 2012 ONSC 2785, 3 BLR (5th) 282 [*Telestat*]; *Nearctic Nickel Mines Inc v Canadian Royalties Inc*, 2012 QCCA 385, QJ No 1639 (QL).

<sup>110</sup> See *Laurentienne-vie, Cie d'assurance inc c Empire, Cie d'assurance-vie*, [2000] RJQ 1708, [2000] RRA 637 (CA).

<sup>111</sup> *Desputeaux, supra* note 27 at para 35, citing Sabine Thuilleaux, *L'arbitrage commercial au Québec : droit interne, droit international privé* (Cowansville, Qc : Éditions Yvon Blais, 1991) at 115.

<sup>112</sup> *Telestat, supra* note 109.

<sup>113</sup> "The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place."

<sup>114</sup> See e.g. *Rhéaume, supra* note 61; *Tusculum, supra* note 61; *Schreter, supra* note 62; *Food Services of America, supra* note 67.

must affect the integrity of the process as a whole,<sup>115</sup> or constitute a flagrant breach of procedural fairness.<sup>116</sup> However, as with the grounds under article V(1)(b), requiring a “flagrant breach of procedural fairness” may well be tantamount to subsuming this ground within the ground of article V(2)(b) by which an award is contrary to public policy, and for that reason, probably goes too far. Requiring something more than a minor or formal breach of the applicable procedure, however, is clearly appropriate.<sup>117</sup>

*Application of a body of law, other than the law selected by the parties, to the merits.* The claim that an arbitrator has failed to apply the rules of law selected by the parties is usually a thinly veiled attempt to have a court conduct a merits review and refuse enforcement on that basis. In one case, a court did take issue with an arbitral tribunal’s application of the governing law and concluded that the arbitrators had acted as *amiable compositeurs* without the authority to do so, thereby acting in violation of the applicable procedure.<sup>118</sup>

#### 5) Article V(1)(e)<sup>119</sup>

*Award has not yet become binding on the parties.* A court may refuse to recognize and enforce an award that has not yet become binding in the country where it was made,<sup>120</sup> but it has discretion to recognize and enforce such an award.<sup>121</sup> To be enforceable, a foreign arbitral award does not need to be recognized by the courts of the place where it was made,<sup>122</sup> as such a requirement would impose the regime of double *exaequatur* that the *New York Convention* was intended to eliminate.<sup>123</sup>

<sup>115</sup> See *Rhéaume*, *ibid.*

<sup>116</sup> See *Tusculum*, *supra* note 61.

<sup>117</sup> See Gélinas, *supra* note 85.

<sup>118</sup> *Tusculum*, *supra* note 61 at para 107.

<sup>119</sup> “The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.”

<sup>120</sup> See *Murmansk Trawl Fleet v Bimman Realty Inc*, [1994] OJ No 3018 (QL) (Ct J (Gen Div)) [*Murmansk*].

<sup>121</sup> See *Schreter*, *supra* note 62.

<sup>122</sup> See *Murmansk*, *supra* note 120.

<sup>123</sup> This refers to the requirement in the *Geneva Convention on the Execution of Foreign Awards* of 1927 that the party seeking enforcement of an award demonstrate that the award had become final at the seat. Often, the only way to do this was to seek and obtain leave of enforcement (or *exaequatur*) at the seat, thus leading to a *de facto* double *exaequatur* requirement; see Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (Antwerp: Kluwer Law, 1981) at 7.

*Award has been set aside in the country where it was made.* Canadian courts have discretion to recognize and enforce an arbitral award even where it has been set aside,<sup>124</sup> suspended,<sup>125</sup> or where a motion to set it aside is pending at the place of arbitration.<sup>126</sup> While Canadian cases suggest criteria for when an application for an order enforcing an award should be adjourned pending a motion to set it aside at the place of arbitration, there is no guidance as to the circumstances under which the discretion to enforce an award annulled at the place of arbitration will be used.

### *E) Grounds Which May Be Raised by Courts Ex Officio*

#### *1) Article V(2)(a)<sup>127</sup>*

*Subject matter not capable of settlement by arbitration in Canada.* This provision refers to the scope of legally arbitrable matters. Arbitrability is closely related to public policy. However, the fact that a matter is governed by mandatory or public policy rules does not in and of itself make that matter incapable of settlement by arbitration.<sup>128</sup> Thus, for example, disputes relating to the Quebec *Securities Act*,<sup>129</sup> to oppression claims under the *Canada Business Corporations Act*,<sup>130</sup> to copyright ownership,<sup>131</sup> and to competition law<sup>132</sup> have been held to be arbitrable. Matters relating to criminal law and child custody, however, are generally inarbitrable. Consumer protection laws in some provinces impose limits on the effect of arbitration clauses inserted in consumer contracts.<sup>133</sup>

*Presumption of arbitrability.* In matters governed by statute, the Supreme Court of Canada has established a presumption according to which the matters covered by a statute are arbitrable unless the statute provides otherwise. Although the presumption has been formulated in different ways in successive decisions of the Supreme Court,<sup>134</sup> the current

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<sup>124</sup> See *Schreter*, *supra* note 62.

<sup>125</sup> See *Europcar*, *supra* note 62.

<sup>126</sup> See e.g. *Wires Jolley LLP v Wong*, 2010 BCSC 391, 95 CPC (6th) 212; *Powerex Corp v Alcan Inc*, 2004 BCSC 876, BCJ No 1349 (QL).

<sup>127</sup> “The subject matter of the difference is not capable of settlement by arbitration under the law of that country.”

<sup>128</sup> See *Desputeaux*, *supra* note 27.

<sup>129</sup> See *Carboni v Financière Banque Nationale*, 2004 CarswellQue 1770 (WL Can) (CS).

<sup>130</sup> See *Acier Leroux inc v Tremblay*, [2004] RJQ 839 (Qc CA).

<sup>131</sup> See *Desputeaux*, *supra* note 27.

<sup>132</sup> See *Murphy v Amway Canada Corporation*, 2013 FCA 38, 356 DLR (4th) 738.

<sup>133</sup> For example, article 11.1 of Quebec’s *Consumer Protection Act*, RSQ, c P-40.1; section 7(2) of Ontario’s *Consumer Protection Act*, 2002, SO 2002, c 30.

<sup>134</sup> See e.g. *Dell*, *supra* note 42; *Muroff*, *supra* note 42.

position is that an express mention of arbitration is not required for arbitration to be excluded. Therefore, courts will refuse to give effect to arbitration agreements on this ground where a statute is interpreted as excluding or prohibiting arbitration.<sup>135</sup>

## 2) Article V(2)(b)<sup>136</sup>

*Recognition or enforcement of the award would be contrary public policy.* This ground has consistently been interpreted narrowly.<sup>137</sup> The standard for establishing a breach of public policy in this context has been expressed in various ways. It has been held, for example, that an award can be set aside or refused enforcement only if it offends local principles of justice and fairness in a fundamental way;<sup>138</sup> if it fundamentally offends the most basic and explicit principles of justice and fairness;<sup>139</sup> or if it is contrary to the essential morality<sup>140</sup> of the relevant jurisdiction.<sup>141</sup> To our knowledge, public policy has never led to the setting aside of an international award in Canada and has been invoked successfully only twice in enforcement proceedings. One case involved an issue of double recovery<sup>142</sup> and the other, a failure by an arbitrator to provide reasons for his award.<sup>143</sup>

*International public policy versus domestic public policy.* This distinction has currency in the Quebec legal system and has been recognized in the context of the enforcement of foreign awards: only violations of international public policy will justify a refusal of enforcement.<sup>144</sup> Although this distinction is not explicitly recognized by courts in other jurisdictions, the result may well be similar.

## 5. Conclusion

This article takes stock of the implementation and application of the *New York Convention* in Canada nearly thirty years after its adoption. Although the obligations imposed by the convention are, in principle, straightforward, our review provides a glimpse of how complex the issues that they raise

<sup>135</sup> See *Seidel*, *supra* note 42.

<sup>136</sup> “The recognition or enforcement of the award would be contrary to the public policy of that country.”

<sup>137</sup> See e.g. *Corporacion Transnacional de Inversiones*, *supra* note 84.

<sup>138</sup> See *Schreter*, *supra* note 62.

<sup>139</sup> See *Corporacion Transnacional de Inversiones*, *supra* note 84.

<sup>140</sup> See *Boardwalk Regency Corp v Maalouf* (1992), 6 OR (3d) 737 (CA).

<sup>141</sup> See *Tusculum*, *supra* note 61.

<sup>142</sup> See *Subway*, *supra* note 74.

<sup>143</sup> See *Smart Systems*, *supra* note 68.

<sup>144</sup> *Ibid.*

can be in practice and how important the courts' contribution is to the success of the *New York Convention* regime in a particular country.

Based on our review, we conclude that Canadian courts have clearly embraced the pro-enforcement and international spirit of the *New York Convention*. We find that they have done so in four distinct and notable ways. First, they have ensured that the obligation imposed by the convention to refer the parties to arbitration in the presence of a valid arbitration agreement will serve its purpose effectively by interpreting its exceptions strictly. Second, they have kept the grounds for refusal of enforcement, particularly in respect of public policy and arbitrability, within tightly monitored boundaries. Third, they have assumed a residual discretion to recognize and enforce awards even in the presence of an established ground for refusal. Fourth, they have consistently reaffirmed the importance of approaching the convention as an international instrument and have accordingly been extremely receptive to using international and foreign sources.<sup>145</sup>

The fact that all Canadian jurisdictions are *Model Law* jurisdictions has clearly fostered this international spirit in the interpretation and application of the *New York Convention*. It is hoped that this spirit will live on as Canadian jurisdictions embark on a revision of their arbitration laws in the years to come.

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<sup>145</sup> See notably *GreCon*, *supra* note 15; *Yugraneft*, *supra* note 69.