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J. G. Castel

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The Enforcement of Agreements to Arbitrate and Arbitral Awards in Canada

*J.G. Castel**

I. INTRODUCTION

Recently, there has been a remarkable change of attitude in Canada towards domestic and international commercial arbitration¹. Judicial hostility towards and interference with arbitration has been replaced by general acceptance and restrictive judicial intervention, creating a hospitable climate for the resolution of disputes by arbitration. At last, it has been recognized that arbitration is an important and useful tool in dispute resolution.

This paper contains an analysis of Canadian law as it applies to the validity and enforcement of an arbitration agreement, and to the enforcement of a domestic, interprovincial, foreign or international arbitral award made pursuant to a valid arbitration agreement. Validity and enforcement are two of the most important issues which must be examined when considering the settlement of a domestic or international commercial dispute by arbitration.

II. SOURCES OF CANADIAN LAW ON ARBITRATION

There are general arbitration statutes in the nine common law provinces² and in the two territories.³ While the legislative provisions are not uniform, they do include three elements essential to a system of arbitration. These essential elements are the validity of the submission (i.e. the written agreement to submit present or future differences to arbitration); the power of the court to assist in the implementation of the arbitration

* J.-G. Castel, O.C., Q.C., S.J.D., F.R.S.C., Professor of International Business Law, Osgoode Hall Law School, York University, Toronto.

¹ See e.g., COMMERCIAL DISPUTE RESOLUTION, ALTERNATIVES TO LITIGATION (P. Emond ed., 1989); J.G. CASTEL, A.L.C. DE MESTEL, W.C. GRAHAM, THE CANADIAN LAW AND PRACTICE OF INTERNATIONAL TRADE WITH PARTICULAR EMPHASIS ON EXPORT AND IMPORT OF GOODS AND SERVICES, chs. 16 & 18 (Emond Montgomery ed., 1991); R.H. McLAREN & E.E. PALMER, THE LAW & PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND (1982); A. WALTON & M. VITORIA, RUSSELL ON THE LAW OF ARBITRATION (20th ed. 1982).

² Alberta, R.S.A. ch. Ak-43 (1980); Manitoba, R.S.M. ch. A-120 (1987); New Brunswick, R.S.N.B. ch. A-10 (1973); Newfoundland, NFLD. R.S. ch. 8 (1985); Nova Scotia, R.S.N.S. ch. 19 (1989); Ontario, R.S.O. ch. 25 (1980); Prince Edward Island, R.S.P.E.I. ch. A-16 (1988); Saskatchewan, S.S. ch. A-24 (1978). In British Columbia the Arbitration Act has been replaced by the Commercial Arbitration Act, R.S.B.C. ch. 3 (1986).

³ R.O.N.W.T. ch. A-4 (1974); YUK. ORD. ch. 7 (1986).

agreement by staying judicial proceedings when there is a submission; and the enforcement of a domestic award by leave of the court or judge in the same manner as a judgment or order to the same effect. In addition, the legislation also provides for certain procedural essentials, such as the administration of oaths to parties, and the appointment of an arbitrator when the parties cannot agree.

The Uniform Reciprocal Enforcement of Judgments Act ("the Model Act"), which unifies the rules of practice relating to foreign money judgments and facilitates their enforcement through a registration procedure, has been adopted with some modifications in the nine common law provinces and two territories.⁴ Before a judgment creditor may invoke the provisions of the legislation, the Lieutenant Governor of the province must have declared, by order, the jurisdiction in which the foreign judgment or award was obtained to be a reciprocating jurisdiction.

Under the Model Act, a judgment which may be registered "includes an award in an arbitration proceeding if the award, under the law in force in the jurisdiction where it was made, has become enforceable in the same manner as a judgment given by a court in that jurisdiction. . . ."⁵ The number of reciprocating jurisdictions varies from province to province and is very limited with respect to foreign states. They are found in the regulations in force in each of the provinces and territories. Both the Arbitration (Foreign Awards) Act, which gives effect to the Geneva Protocol on Arbitration Clauses of 1923, and the Geneva Convention on the Execution of Foreign Awards of 1927, appear still to be in force in Newfoundland.⁶

Two separate federal statutes adopt the text of both the 1958 New York Convention⁷ and the 1985 UNCITRAL Model Law.⁸ These statutes are found in a schedule, preceded by a few general provisions dealing with, *inter alia*, interpretation, scope of application, courts and publication. Slight modifications of form have been made to the Model Law which is now called the Commercial Arbitration Code.⁹

Provincial legislation is more varied. Ontario has adopted only the Model Law, which also incorporates the essence of the New York Con-

⁴ 1962 Consolidation as amended in 1962 and 1976. The Reciprocal Enforcement of Judgments Act, R.S.A. ch. R-6 (1980); Court Order Enforcement Act, R.S.B.C. ch. 75, §§ 30-41 (1979); R.S.M. ch. J-20 (1987); R.S.N.B. ch. R-3 (1973); NFLD. R.S. ch. 327 (1970); R.S.N.B. ch. 388 (1989); R.S.O. ch. 432 (1980); R.S.P.E.I. ch. R-6 (1988); S.S. ch. R-3 (1978); The Judgements Extension Act, R.O.N.W.T. ch. R-1 (1974); S.Y.T. ch. 146 (1986).

⁵ Model Law section 1(a)(ii). See also art. I(d) of Convention between Canada and the United Kingdom Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters, S.C. ch. 32 (1984) [now R.S.C. ch. C-30 (1985)].

⁶ S. NFLD. ch. 2 (1931).

⁷ 1958 New York Convention, - U.S.T. -, 330 U.N.T.S. 38 (1959).

⁸ UNCITRAL Model Law, 24 I.L.M. 1302 (1985).

⁹ United Nations Foreign Arbitral Awards Convention Act, R.S.C. ch. 16 (2d Supp. 1985) [hereinafter U.N. Arb. Act]; Commercial Arbitration Act, R.S.C., ch.17 (2d Supp. 1985), amended by R.S.C. ch. 1 (4th Supp., 1985).

vention.¹⁰ British Columbia has two statutes; one implementing the New York Convention,¹¹ and another adopting the provisions of the Model Law serving the special needs of the province, although the departures from the original are not fundamental.¹² In Quebec, the Code of Civil Procedure refers to both the Model Law¹³ and the New York Convention¹⁴ as supplementary sources only, as most of the provisions of these documents are incorporated in the Code which applies to arbitration in general.¹⁵ Almost all the provinces and one territory incorporate both the New York Convention and the Model Law within one statute.¹⁶

The Model Law as adopted by federal and provincial legislation applies only to “commercial” arbitration. In British Columbia, the International Commercial Arbitration Act¹⁷ has adopted part of a definition found in a note accompanying Article I(1) of the Model Law which states:

The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

In Quebec, the expression, “matters of extra-provincial or international trade” is used when referring to commercial matters which are arbitrable under the Model Law.¹⁸ In the other common law provinces and territories the legislation follows the Model Law and does not define the term

¹⁰ International Commercial Arbitration Act, 1988, S.O. ch. 30 (1988) [hereinafter Ont. Comm. Arb. Act]. This Act repealed the Foreign Arbitral Awards Act, 1986, S.O. ch. 25.

¹¹ Foreign Arbitral Awards Act, S.B.C. ch. 74 (1985).

¹² International Commercial Arbitration Act, S.B.C. ch. 14 (1986), *amended* by ch. 46, §§ 33 to 35 (1988) [hereinafter B.C. Int. Comm. Arb. Act]. In *Quintette Coal Ltd. v. Nippon Steel Corp.*, 1 W.W.R. 120, 29 B.C.L.R.2d 233 (1989), the Supreme Court of British Columbia held that §§ 16, 17 and 31(6) do not violate § 96 (appointment of judges) of the Constitution Act, 1867.

¹³ QUEBEC CODE OF CIVIL PROCEDURE, QUE. REV. STAT. ch. C-25, art. 940.6 (1977) [rep. and sub. ch. 73, § 2 (1986)][hereinafter QUE. CODE CIV. PRO.].

¹⁴ *Id.* art. 948. The substance of a provision of the New York Convention is also found in QUEBEC, CIVIL CODE OF LOWER CANADA, art. 1926.3 [ch. 73, § 1 (1986)].

¹⁵ See QUE. CODE CIV. PRO., *supra* note 13, arts. 940 to 951.2.

¹⁶ International Commercial Arbitration Act, Alta. Stat. ch. I-6.6 (1986); Man. Stat. ch. 32 (1986-87); N.B. Stat. ch. I-12.2 (1986). Nfld. Stat. ch. 45 (1986); N.W.T. Ord. ch. 6 (1986); N.S. REV. STAT. ch. 234 (1989); P.E.I. Stat. ch. I-5 (1988); SASK. STAT. ch. I-10.2 (1988); YUK. STAT. ch. 14 (1987). Saskatchewan and the Yukon Territory also have the Enforcement of Foreign Arbitral Awards Act, Sask. Stat. ch. E-9.11 (1986) and Foreign Arbitral Awards Act, YUK. ORD. ch. 70 (1986), respectively.

¹⁷ B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14, § 1(6).

¹⁸ QUE. CODE CIV. PRO., *supra* note 13.

“commercial.”¹⁹

The federal Commercial Arbitration Code applies to commercial arbitration in relation to matters where at least one of the parties to the arbitration is Her Majesty in right of Canada, a departmental corporation or a Crown corporation, or in relation to maritime or admiralty matters.²⁰ It also covers both international and domestic commercial arbitration²¹ but, with some exceptions, only if the arbitration is located in Canada.²² This is not the case in the other provinces and territories where the Model Law is restricted in its application to “international” arbitration, provided the place of arbitration is in the province²³ and also subject to the same exceptions.²⁴

In all the provinces and territories that have adopted the Model Law:²⁵

- (3) An arbitration is international if:
 - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states,
 - (b) one of the following places is situated outside the state in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement,
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed; the place with which the subject-matter of the dispute is most closely connected; or
 - (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of para. (3), of this article:
 - (a) if a party has more than one place of business, the place of

¹⁹ *E.g.* International Commercial Arbitration Act, Alta. Stat. ch. I-6.6, § 4(2) (1986), [hereinafter Alta. Comm. Arb. Act]

²⁰ Commercial Arbitration Act, R.S.C. ch. 17, § 5(2) (2d Supp. 1985) [amended ch. 1, §§ 8-10 (2d Supp. 1985)]; Federal Commercial Arbitration Code, Schedule, art. 1(1).

²¹ Commercial Arbitration Act, *supra* note 9, ch. 17, art. 1. The word “international” which appears in para. (1) of art. 1 of the Model Law, has been deleted from para. (1) of art. 1 of the Code. Also paras. (3) and (4) of art. 1 of the Model Law which contain a description of when arbitration is international have been deleted.

²² *Id.* art. 1(2).

²³ *E.g.*, Alta Comm. Arb. Act, *supra* note 19.

²⁴ Federal Commercial Arbitration Code, arts. 8 (Arbitration Agreement and Substantive Claim before Court); 9 (Arbitration Agreement and Interim Measures by Court); 35 (Recognition and Enforcement); and 36 (Grounds for Refusing Recognition or Enforcement). *See also* Alta. Comm. Arb. Act, *supra* note 19, Schedule 2, art. I (2) (1986); Federal Commercial Arbitration Code, art. I(2).

²⁵ Arts. I(3)(4) of UNCITRAL Model Law on Commercial Arbitration *reprinted in* the Can. Gaz., Part I, No. 40, Vol. 120. *See, e.g.*, B.C. STAT. ch. 14, § 1.(3)(4) (1986). *See* J. Blom, *Conflict of Laws Aspect of the International Commercial Arbitration*, in UNCITRAL ARBITRATION MODEL IN CANADA (R.K. Peterson & B.J. Thomson eds., 1987) (for a discussion of this provision).

business is that which has the closest relationship to the arbitration agreement;

- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

In some instances, it may be difficult to determine which place of business has the closest relationship to the arbitration agreement. In Ontario, despite Art.1(3)(c) of the Model Law, an arbitration conducted in Ontario between parties who all have their places of business in Ontario is not international when the parties have merely expressly agreed that the subject matter of the arbitration agreement relates to more than one country.²⁶ In British Columbia²⁷ and Ontario,²⁸ an arbitration which takes place there is not "international" when it has a relevant connection with two or more *provinces*. In the other provinces and territories, there is no such express limitation, and it is a matter of interpretation whether the word "state" in the Model Law means country, province or territory.

In interpreting the Model Law, recourse may be had to the Report of the United Nations Commission on International Trade Law on the work of its 18th session (June 3 to 21, 1985), and the analytical Commentary contained in the Report of the Secretary General to the 18th session of the United Nations Commission on International Trade Law.²⁹

Except for British Columbia and Quebec, all the statutes adopting the Model Law provide that it applies to international commercial arbitration agreements and awards whether made *before* or *after* the coming into force of the Act.³⁰ A similar provision exists in the legislation implementing the New York Convention³¹ with the exception of British Columbia, Quebec, Saskatchewan, and the Yukon.

With respect to international commercial arbitration, the 1958 New York Convention has become somewhat redundant since its provisions are now duplicated in a more elaborate form in the 1985 UNCITRAL Model Law. The Convention still applies to commercial arbitration agreements and awards that are foreign, but not international.

²⁶ Ont. Comm. Arb. Act, *supra* note 10, ch. 30 § 2(3).

²⁷ B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14, § 1(5). Interprovincial commercial arbitration is governed by the B.C. Stat., ch. 3, § 1(5) (1986); *see* §§ 7 to 17 which refer to the rules of the British Columbia International Commercial Arbitration Centre.

²⁸ Ont. Comm. Arb. Act, *supra* note 10, ch. 30 § 1(7). The arbitration is subject to the Ontario Arbitrations Act, ONT. REV. STAT. ch. 25 (1980).

²⁹ *See, e.g.*, Commercial Arbitration Act, *supra* note 9, ch. 17 § 4(2); QUE. CODE. CIV. PRO., *supra* note 13. These documents have been reprinted in the Can. Gaz., Part I, Vol. 120, No. 40 (Supp. 1986).

³⁰ *E.g.*, the International Commercial Arbitration Act, Sask. Stat. ch. I-10.2, § 3(2) (1988); Ont. Comm. Arb. Act, *supra* note 10, ch. 30 § 2(2) (1988).

³¹ *E.g.*, U.N. Arb. Act, *supra* note 9, ch. 16 § 4(2).

III. THE ARBITRATION AGREEMENT

Capacity of the Parties

The capacity of the parties to agree to arbitration is governed by the proper law of the agreement or the personal law of either party.³²

Validity

i. At Common Law

An arbitration agreement may take the form of a separate agreement submitting a particular dispute to arbitration,³³ or a clause can be included in a contract whereby the parties agree in advance to submit any disputes relating to that contract to arbitration. When a question concerning the agreement arises before a Canadian court or arbitral tribunal, the validity, effect and interpretation of such an agreement or clause are governed by its proper law.³⁴ Most often this proper law is the proper law of the contract which it relates to or in which it is contained.³⁵ However, it could be different.³⁶ The proper law is determined in accordance with the conflict of laws rules applicable to contracts in general³⁷ which may have been expressly chosen by the parties, or in the absence of an express choice, those that are in force at the place of arbitration or as determined by the arbitral tribunal.

The proper law will determine, *inter alia*, whether the arbitration agreement or clause is valid and binding on the parties even if it is alleged that the contract which it relates to is void, voidable, illegal or has become frustrated.³⁸ It also determines the agreement or clause's effect, interpretation and construction, including the question of whether it covers the matters in dispute.³⁹

ii. The Model Law as Adopted in Canada

According to Article 7 of the Model Law:⁴⁰

³² B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14, §§ 34(2)(a)(i) and 36(1)(a)(i) (1986). Model Law, arts. 34(2)(a)(i) and 36(1)(a)(i). The Model Law and the B.C. Int. Comm. Arb. Act do not contain the words "the law applicable to them."

³³ *Bremer Vulkan Schiffbau und Maschinenfabrik v. South India Shipping Corp.*, 2 W.L.R. 141 (1981), [1981] A.C. 909 (H.L.).

³⁴ *Hamlyn & Co. v. Talisker Distillery*, [1894] A.C. 202.

³⁵ *Cia Maritima Zorzoza S.A. v. Sesostris S.A.E. (The Marques de Bolarque)*, 1 Lloyd's Rep. 652 (1984).

³⁶ *Black Clawson Int'l Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.*, 2 Lloyd's Rep. 446 (1981).

³⁷ In *Dallal v. Bank Mellat*, [1986] Q.B. 441, 1 All E.R. 239 (1986), the court rejected the argument that public international law could be the proper law of an arbitration agreement.

³⁸ *Dalmia Dairy Indus. Ltd. v. National Bank of Pakistan*, 2 Lloyd's Rep. 223 (1978).

³⁹ *Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei G.m.b.H.*, 1 W.L.R. 713 (H.L. 1977).

⁴⁰ See also B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14 § 7; QUEBEC, *Civil Code of Lower Canada*, arts. 1926.1 and 1926.3 [ch. 73, § 1 (1986)].

- (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defences in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

This article widens and clarifies the definition found in Article II of the 1958 Convention on which it is based.

The arbitration clause is deemed to be separate from and independent of the contract in which it is contained. Thus, the fact that the contract is invalid does not deprive the arbitral tribunal of jurisdiction to decide the issue of invalidity of the clause and its potential consequences. Therefore, the tribunal can also decide whether the dispute falls within the scope of the arbitration clause.⁴¹ However, if one party denies the existence of both the contract and the arbitration clause, the arbitration cannot proceed until this question has been settled by the appropriate court.

The law applicable to the merits of the dispute⁴² does not necessarily govern the validity and interpretation of the arbitration agreement. Of course, the parties may specifically stipulate the law governing the arbitration agreement. Since the award may be set aside if the arbitration agreement is invalid under the law the parties have chosen or, failing any indication of that law, the law of the place of arbitration,⁴³ it could be argued that the law of the place of arbitration governs the arbitration agreement in the absence of an express choice.

The question whether some types of dispute can be decided by arbitration must be determined by the law applicable to the validity of the arbitration agreement. This is supported by Article II.1 of the New York

⁴¹ B.C. Stat. ch. 14, § 16(1) (1986) states:

- (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and
- (b) a decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

This provision is based on art. 16 of the Model law. In Quebec, Civil Code of Lower Canada, art. 1926.5 [ch. 73, § 1(1986)].

⁴² See B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14 § 28; Model Law, art. 28.

⁴³ B.C. Int. Comm. Arb. Act, *supra* note 12, §§ 34(2)(a)(ii), 36(1)(a)(ii).

Convention. If there is any doubt as to the arbitrability of the types of dispute that could arise with respect to a particular negotiation of a contract, it is advisable to examine all the potentially applicable national laws.

In the case of international commercial arbitration, the question likely to arise is whether the parties could submit disputes to arbitration that involve, for instance, the law of competition, bankruptcy, patents, trademarks, or securities. If the arbitral tribunal rejects a claim of non-arbitrability the aggrieved party may still resist the enforcement of the award, in which case the relevant court applies its own law to determine whether the award relates to an arbitrable dispute.

Even if the subject-matter of the dispute is arbitrable, there remains the question whether the claim or claims come within the scope of the arbitration agreement. Generally, this issue is determined by the arbitral tribunal which interprets the arbitration agreement.

Enforcement

i. General Rules

An arbitration agreement or clause is enforced by a court granting a stay of judicial proceedings on an application by the defendant. The court has the discretion to either grant or refuse a stay. In general, Canadian courts have been inclined to grant an order staying proceedings in actions commenced in disregard of an arbitration agreement, especially when the agreement is contained in an international contract. The ground for staying such proceedings is that parties to such contracts should be confident that if they deliberately and advisedly stipulate for arbitration by a tribunal of their choice, this stipulation will be respected. The stay can only be sought by the defendant, who, before taking any step in the legal proceedings, demonstrates a willingness and readiness to do all things necessary to follow the proper conduct of the arbitration.⁴⁴ The stay may be granted pursuant to a provision of an Arbitration Act⁴⁵

⁴⁴ *E.g.* Arbitration Act, B.C. REV. STAT. ch. 18, § 6 (1979), now Commercial Arbitration Act, B.C. Stat., ch. 3, § 15(3)(k) (1986); *Dillingham Can. International Ltd. v. Mana Construction*, 69 B.C.L.R. 133 (C.A. 1985).

⁴⁵ The Arbitration Acts in force in the various common law provinces and territories give the court a discretionary power to stay proceedings brought within the jurisdiction in breach of a written agreement to submit present or future disputes to an arbitration to be held in that jurisdiction. *See e.g.*, Ontario Arbitrations Act, *supra* note 28, ch. 25 §§ 1(d), 7 and *Planned Sales Ltd. v. Einson-Freeman Int'l (Americas) Ltd.*, 4 D.L.R. 649 (1955), [1955] O.W.N. 443 (H.C.); *M.A. Kennedy Ltd. v. Fiat of Turin (Italy)*, 24 O.W.N. 537 (H.C. 1923). For a waiver of the arbitration clause see *Newfoundland (A.G.) v. Churchill Falls (Labrador) Corp. Ltd.*, 56 Nfld. & P.E.I.R. 91 (Nfld. C.A. 1985), *aff'd*, 1 S.C.R. 1085 (1988); *Sinclair Can. Oil Co. v. Great Northern Oil Co.*, 66 D.L.R.2d 258 (Sask. C.A. 1967); *Altwasser v. Home Ins. Co. of New York*, 2 W.W.R. 46 (Sask. C.A. 1933); *Canadian Home Assurance Co. v. Cooper*, 29 D.L.R.4th 419 (1986), 18 C.C.L.I. 279, 73 N.S.R.2d 230 (N.S.C.A.). The onus is on the party resisting the stay to give sufficient reasons why it should not be granted. *Crowder v. Webcor Electronics (Can.) Inc.*, 17 C.P.C.2d 282 (Ont. D.C. 1987) (a case where the stay should have been granted). *But see* *Karlsen Shipping Co. v. Sefel J. & Associates*

or a Commercial Arbitration Act⁴⁶ allowing it, or independently from this legislation in the inherent jurisdiction of the court.⁴⁷ The factors that will be taken into account by the court in deciding whether to grant the stay are numerous and varied. Obviously the claim in the legal proceedings must fall within the scope of the arbitration agreement. In the case of a *Scott v. Avery* clause the court's decision to grant the stay is not discretionary because arbitration is a condition precedent to legal liability under the contract.⁴⁸

ii. 1958 New York Convention

A stay of court proceedings in breach of an arbitration agreement is mandatory where the agreement falls within the scope of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Article II.1 stipulates that each contracting state shall recognize arbitration agreements which meet certain requirements.⁴⁹ Before a stay can be granted, four conditions must be met. First, the arbitration agreement must be in writing.⁵⁰ This includes an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.⁵¹ Second, the arbitration agree-

Ltd., 3 W.W.R. 122 (Alta. S.C.T.D. 1977). The Arbitration Acts do not seem to contemplate arbitrations to be held outside the jurisdiction which therefore would remain subject to the general rules applicable to forum selection agreements. *But see* Crowder v. Webcor Electronics (Canada) Inc., 17 C.P.C.2d. In Dilligham Can. Int'l Ltd. v. Mana Constr. 69 B.C.L.R. 133 (C.A. 1985) the Court of Appeal, *obiter*, expressed the opinion that § 6 of the British Columbia Arbitrations Act, B.C. REV. STAT. ch. 18 (1979) which deals with stays of proceedings only applies to arbitrations to which the Act, as a whole, extends either because British Columbia law is the proper law of the contract or the curial law. The Arbitration Act has now been replaced by the B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 3. The Act does not apply to international commercial arbitration.

⁴⁶ See, e.g., Comm. Arb. Act, *supra* note 27, ch. 14, § 15(3) which lists the matters to be considered by the court with respect to a stay of proceedings.

⁴⁷ Exercised in Dilligham Can Int'l Ltd. v. Mana Constr., 69 B.C.L.R. 133 (C.A. 1985) relying on Rogers v. Bank of Montreal, 49 B.C.L.R. 85 (1984), 2 W.W.R. 597 (1984), 41 C.P.C. 60, 4 D.L.R.4th 507 (C.A.). See also Offen v. McCain Produce Co., 46 N.B.R.2d 108 (1983), 121 A.P.R. 108 (Q.B.), *aff'd*, 49 N.B.R.2d 338, 129 A.P.R. 388 (C.A.). For cases decided by the Federal Court by virtue of the Federal Court Act, R.S.C., ch. F-7, § 50 (1985); Le Syndicat de Normandin Lumber Ltd. v. The "Angelic Power" et al., [1971] F.C. 263 (T.D.); Distillers Co. et al. v. M.V. "Agelos Raphael" et al., 1 Lloyd's Rep. 105 (F.C.T.D. 1978); Leeson Corp. v. United Throwsters Ltd., 35 C.P.R.2d 138 (F.C.T.D. 1977); Ship M/V "Seapearl" et al. v. Seven Seas Dry Cargo Shipping Corp., 2 F.C. 161 (1983), 43 N.R. 517, 139 D.L.R.3d 669 (C.A.); United Nations v. Atlantic Seaways Corp., 2 F.C. 345 (T.D. 1980); Navionics Inc. v. Flota Maritima Mexicana S.A., 26 F.T.R. 148 (T.D. 1989).

⁴⁸ *Scott v. Avery*, 25 L.J.C. 308 (1856). The contract is drafted in such a way that the only obligation is to pay a sum awarded by the arbitral tribunal. Thus, no complete cause of action or liability exists for enforcement by the courts until an award is made by the arbitral tribunal. However, under the B.C. Comm. Arb. Act, *supra* note 27, § 19 a *Scott v. Avery* clause is only deemed to be a simple commercial arbitration agreement.

⁴⁹ The legislation implementing the Convention specifies to which arbitration agreements it applies (e.g. domestic, foreign, international).

⁵⁰ U.N. Arb. Act, *supra* note 9, ch. 16, Schedule, art II.1.

⁵¹ *Id.*, art. II.2.

ment must apply to a “defined legal relationship,” whether contractual or not, which is considered to be commercial under the law of the recognizing state.⁵² The proper law of the agreement, or the *lex fori*, will determine the exact meaning of these words. Third, the arbitration agreement must be one concerning a subject-matter capable of settlement by arbitration.⁵³ Finally, a court shall not make an order staying proceedings if it finds that the arbitration agreement is null and void, inoperative, or incapable of being performed.⁵⁴ When the validity of the arbitration agreement is challenged in the context of the enforcement of a foreign arbitral award, the validity of the agreement is determined by the law chosen by the parties or, in the absence of choice, by the law of the country where the award was made.⁵⁵

iii. Model Law as Adopted in Canada

In British Columbia, it is provided that where a party to an arbitration agreement commences legal proceedings against another party to the agreement, on a matter which was agreed to be submitted to arbitration, either party, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, may apply to that court to stay the proceedings. On such an application, the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.⁵⁶ While this matter is before the court, the arbitration may be commenced or continued and an award made. This provision is not restricted to agreements providing for arbitration in the province.

⁵² *Id.*, ch. 16, § 4(1); Foreign Arbitral Awards Act, *supra* note 11, ch. 74, § 3. Article I.3 allows a signatory State to restrict the application of the Convention to legal relationships that are considered commercial under its law.

⁵³ U.N. Arb. Act, *supra*, note 9, ch. 16, art. II.

⁵⁴ *Id.* art. II.3; International Arbitration Act, P.E.I. REV. STAT. ch. I-5, § 10 (1988); QUE. CODE CIV. PRO. *supra* note 13, art. 940.1. In *The Rena K*, 1 Q.B. 377 (1979), 1 All E.R. 397 (1979), it meant whether an arbitration agreement is capable of being performed up to the stage when it results in an award. See also *Paczy v. Haendler & Natermann G.m.b.H.*, 1 Lloyd's Rep. 302 (C.A. 1981) where impecuniosity was rejected.

⁵⁵ U.N. Arb. Act, *supra* note 9, ch. 16, art. V.1(a).

⁵⁶ B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14 § 8; *ODC Exhibit Systems Ltd. v. Lee*, 41 B.L.R. 286 (B.C.S.C. 1988) (stay refused as claim not arising from conciliation agreement); Model Law, art. 8. See also *Stancroft Trust Ltd. v. Can-Asia Capitol*, 39 C.P.C.2d 253 (B.C.C.A. 1990). In other provinces see e.g. N.B. Stat. ch. I-12.2, § 10 (1986). QUE. CODE CIV. PRO., *supra* note 13, art. 940.1; Ont. Stat. ch. 30, § 8 (1988), applied in *Boart Sweden AB v. Nya Stromnes AB*, 41 B.L.R. 295 (Ont. H.C. 1988) (proceedings stayed with respect to matters subject to the arbitration agreement). See also *Navionics Inc. v. Flota Maritima Mexicama S.A.*, 26 F.T.R. 148 (T.D. 1989), where a stay was granted both by virtue of the Federal Court Act, R.S.C. ch. 10, § 50(1)(b)(2d Supp. 1970) [now R.S.C. ch. F-7, § 50 (1985)] and § 8(1) of the Commercial Arbitration Code. In *Ocean Star Container Line A.G. v. Iberfreight (F.C.A. 1989)* the court stated that the existence of an arbitration agreement does not require the court automatically to dismiss a motion for service *ex juris* or to decline jurisdiction.

To conclude, in non-domestic arbitrations the discretion of the court is severely curtailed.

IV. ENFORCEMENT OF AWARDS

For a Canadian business enterprise, it is very important to determine, before agreeing to an arbitration agreement or clause, whether an arbitral award made in Canada or abroad is susceptible to enforcement in Canada or in the country where the other party resides or maintains its assets, should the other party refuse to comply voluntarily with its terms.

Domestic Awards

A domestic award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.⁵⁷ The court only requires proof that the award was made and that it appears satisfactory on its face. The summary application to enforce the award may be blocked by a motion to prevent enforcement brought by an applicant who has a defense that should be heard on trial of the issue. The moving party must then attempt to have the court set aside the award.⁵⁸

Foreign Award

i. At Common Law

A foreign award that has been made enforceable by a foreign judgment can be enforced in Canada as a foreign judgment outside the provisions of the Reciprocal Enforcement of Judgments Act. In *Stolp & Co. v. W.B. Browne & Co.*,⁵⁹ the Ontario Supreme Court held that when an arbitration award is presented to a foreign court of competent jurisdiction, in the manner prescribed by the foreign rules of procedure, and thereupon becomes effective as a judgment, it may be sued upon as a foreign judgment in Ontario.

The court was of the view that a foreign award does not fall within the definition of a foreign judgment until it has been made an order of a foreign court. It is then merged into that order which in effect is the judgment of the foreign court in the matter.

This view is not tenable today as a foreign arbitration award will be enforced whether or not the law of the arbitration proceedings requires a judgment or order of a court to make it enforceable. The enforcement of

⁵⁷ E.g. B.C. Comm. Arb. Act, *supra* note 27, ch. 3, § 29. A distinction must be made between an action to enforce an award and an action to impeach it. See R.H. MCLAREN & E.E. PALMER, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION* chs. 8 and 9 (1982) (for a discussion of the law as it applies to domestic awards).

⁵⁸ See, e.g., B.C. Comm. Arb. Act, *supra* note 27, ch. 3, §§ 30-31.

⁵⁹ *Stolp & Co. v. W.B. Browne & Co.*, 66 O.L.R. 73 (1930), 4 D.L.R. 703 (H.C. 1930).

foreign awards is a matter of procedure governed by the *lex fori*. Thus, the same local procedure should apply to all awards whether they are local or foreign.

Furthermore, if the award is made enforceable by a foreign judgment, it would seem that the cause of action does not merge into the foreign judgment. The judgment creditor can still sue on the original cause of action. He may either seek to enforce either the award or the judgment.

In addition to the grounds on which a foreign judgment can be impeached at common law, the agreement to arbitrate must be valid under its proper law⁶⁰ and the award must be valid and final according to the law governing the arbitration proceedings.⁶¹ These rules should also apply to a foreign award that has not been reduced to judgment. There is no reason why foreign arbitration awards should not be treated in the same way as foreign judgments. In all cases, the arbitrators must have acted within the terms of the authority which was given to them by the agreement to arbitrate.⁶²

The summary procedure contained in the various provincial Arbitration Acts for enforcing *domestic* awards should be available to enforce a valid *foreign* award.⁶³

ii. By Virtue of Special Provincial Legislation

As previously mentioned, in the common law provinces and territories the Foreign Judgments Reciprocal Enforcement legislation defines judgments to include certain arbitral awards.⁶⁴ Where the legislation applies, it excludes resort to enforcement at common law. The requirements for enforcement and the defenses thereto are the same as for foreign judgments.⁶⁵ If the arbitration agreement is valid by its proper law, it meets the jurisdiction requirement.

iii. Limited Jurisdiction of the Federal Court

In the maritime field, a new approach to recognition and enforce-

⁶⁰ *Norske Atlas Ins. Co. v. London General Ins. Co. Ltd.*, 28 L.I.L. Rep. 104 (1927) and *Bankers & Shippers Ins. Co. of New York v. Liverpool Marine & General Ins. Co.*, 24 L.I.L. Rep. 85 (H.L. 1926); *Dalmia Dairy Indus. Ltd. v. National Bank of Pakistan*, 2 Lloyd's Rep. 223 (1978). In *Dallal v. Bank Mellat*, 1 All E.R. 239 (1986), [1986] Q.B. 441 the court was of the opinion that the competence of the foreign arbitral tribunal can be derived from international law and that international comity requires that the courts of England recognize the validity of decisions of a foreign tribunal whose competence was so derived. 1 All E.R. at 255.

⁶¹ Finality means conclusiveness. *Dalmia Dairy Indus. Ltd. v. National Bank of Pakistan*, 2 Lloyd's Rep. 223 (1978); *Union Nationale des Coopératives Agricoles des Céréales v. Robert Catterall & Co. Ltd.*, 2 Q.B. 44 (1959), 1 All E.R. 721 (C.A. 1959).

⁶² *Offen v. McCain Produce Co. Ltd.*, 46 N.B.R.2d 108 (1983), 121 A.P.R. 108 (Q.B.), *aff'd*, 49 N.B.R.2d 388, 129 A.P.R. 388 (C.A.).

⁶³ *E.g.*, B.C. Comm. Arb. Act, *supra* note 27, ch. 3, § 29.

⁶⁴ *Supra*, note 4.

⁶⁵ See J.-G. CASTEL, *CANADIAN CONFLICT OF LAWS* para. 175 (2d ed. 1986).

ment of foreign awards was taken by the Trial Division of the Federal Court. In *Eurobulk Ltd. v. Wood Preservation Industries*⁶⁶ the court expressed the view that since it has jurisdiction with respect to “any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise,” it can give executory force to an arbitration award rendered abroad where the subject-matter of the award falls under navigation and shipping.⁶⁷ The court pointed out that the plaintiff did not seek to enforce a foreign judgment, in which case the provincial courts would have been competent, but an award. Historically, the Admiralty Courts of England could enforce decrees of foreign Admiralty Courts. In 1861, the Admiralty Courts Act, 1861⁶⁸ clearly stated, in section 23, that Admiralty jurisdiction extended to arbitrations and the enforcement of awards “in all causes and matters pending in the said court” which is inferentially incorporated in section 2 of the Federal Court Act.⁶⁹ In this case, the claim arose out of a charter-party agreed to by the two parties to the arbitration. Both parties also agreed to be bound by the award. Because an award is in substance an action to enforce an agreement (the agreement being implied in the submission to arbitration) that the parties will pay the sum or thing which is awarded by the arbitrator, the award is intimately connected with the claim. The claim being within the jurisdiction of the Federal Court, such court also has jurisdiction over the enforcement of the award.

In *Re John Helmsing Schiffahrtsgesellschaft M.b.H. v. Marechart Ltd.*,⁷⁰ the Federal Court reiterated the view that it has jurisdiction to enforce certain foreign arbitration awards and that, in such cases, to proceed by means of an originating notice of motion is appropriate notwithstanding the absence of a specific provision to that effect in the Federal Court Rules. Thus, to enforce an arbitration award it is not necessary to proceed by way of an action. Now that the federal Parliament has adopted the Commercial Arbitration Code and the United Nations Foreign Arbitral Awards Convention Act, it is unlikely that this jurisprudence will continue.⁷¹

⁶⁶ *Eurdouk Ltd. v. Wood Preservation Indus.*, 2 F.C. 245 (1980), 106 D.L.R.3d 571 (T.D.).

⁶⁷ Federal Court Act, R.S.C. ch. F-7, § 22(2)(i) (1985).

⁶⁸ Admiralty Courts Act, 1861, 24 & 25 Vict. ch. 10 (1861).

⁶⁹ *Tropwood A.G. v. Sivaco Wire & Nail Co.*, 2 S.C.R. 157 (1979), 99 D.L.R.3d 235, (which explains the scope of *Que. North Shore Paper Co. v. C.P. Ltd.*, 2 S.C.R. 1054 (1977), 71 D.L.R.3d 111).

⁷⁰ *John Helmsing Schiffahrtsgesellschaft M.b.H. v. Marechart Ltd.*, 1 F.C. 186 (1982), 121 D.L.R.3d 486 (T.D.).

⁷¹ See Commercial Arbitration Act, *supra* note 9, ch. 17, § 5(2); U.N. Arb. Act, *supra* note 9, ch. 16, § 6; *Eurobulk Ltd. v. Wood Preservation Indus.*, 2 F.C. 245 (1980), 106 D.L.R.3d 571 (T.D.) was cited with approval in *Compania Maritima Villa Nova S.A. v. Northern Sales Co. Ltd.*, 29 F.T.R. 136 (F.C.T.D. 1989) although the judge relied on the U.N. Convention. In *Navigation Sonamar Inc. v. Algoma Steamships Ltd.*, [1987] R.J.Q. 1346 (S.C. Que.), the court scrutinized an arbitration award dealing with a charter party in light of art. 34 of the Model Law.

1958 New York Convention

As already noted, the federal Parliament and the legislatures⁷² of the provinces and territories have implemented the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁷³

i. Arbitral Awards to Which the Legislation Applies

The purpose of the 1958 Convention is to facilitate the recognition and enforcement of foreign arbitration awards respecting differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the law of the recognizing and enforcing state.⁷⁴

The legislation implementing the Convention applies to "foreign" domestic as well as "international" commercial arbitral awards whether the arbitration was *ad hoc* or institutional and whether or not it was ratified by a competent authority. This seems to include commercial awards made in another province.⁷⁵ Since reciprocity is not required by the legislation, the "foreign" award need not have been made in a state that is a party to the 1958 Convention.

ii. Recognition of Awards

A foreign award is binding, for all purposes, on the parties to the arbitration agreement in pursuance of which it was made, subject to the defenses which are available to the enforcement of an award.⁷⁶

iii. Enforcement

Arbitral awards are enforced in accordance with the rules of procedure in force in the place where they are relied upon or sought to be enforced.⁷⁷ The party applying for recognition or enforcement shall, at the time of the application, supply to the court the duly authenticated original award or a duly certified copy thereof and the original arbitra-

⁷² E.g., the U.N. Arb. Act, *supra* note 9, ch. 16; Foreign Arbitral Awards Act, *supra* note 11, ch. 74; QUE. CODE CIV. PRO. *supra* note 13, arts. 948-951.1.

⁷³ For an analysis of the Convention see G. Gaja, *The New York Convention in INTERNATIONAL COMMERCIAL ARBITRATION* (K.R. Simmonds ed., 1978); W.C. Graham, *The New York Convention of 1958: A Canadian Perspective*, in *INTERNATIONAL COMMERCIAL ARBITRATION 185* (N. Antaki & A. Prujiner, eds 1985); W.C. Graham, *International Commercial Arbitration: The Developing Canadian Profile in UNCITRAL ARBITRATION MODEL IN CANADA 77* (R.K. Paterson & B.J. Thomson, eds. 1987).

⁷⁴ E.g., U.N. Arb. Act, *supra* note 9, ch. 16 § 4(1); B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 74, § 3. The 1985 Convention allows the signatories to enter a reservation to restrict it to differences arising out of relationships that are "commercial" in nature: U.N. Arb. Act, *supra* note 9, ch. 16, Schedule, art. I.3. This is what Canada has done.

⁷⁵ QUE CODE CIV. PRO., *supra* note 13. This is not the case in Ontario, *supra* note 28, art. 948 or British Columbia, *supra* note 27.

⁷⁶ U.N. Arb. Act, *supra*, note 9, ch. 16, arts. III and V.

⁷⁷ *Id.* at art. III. See also *Compania Maritima Villa Nova S.A. v. Northern Sales Co. Ltd.*, 29 F.T.R. 136 (F.C.T.D. 1990) (statute of limitations of forum).

tion agreement under which the award purports to have been made.⁷⁸ If the award or agreement is written in a language other than English or French, there shall be produced a certified translation of these documents in the English or French language.⁷⁹

Canadian legislation adopts the local rules applicable for the enforcement of domestic awards, which is by leave of the court in the same manner as a judgment or order of the Supreme Court to the same effect. The normal court procedures for enforcing it (e.g., execution on goods) are available provided that prior leave of the court has been obtained.⁸⁰ This procedure should be used in nearly all cases. Leave should be given to enforce the award as a judgment unless there is real ground for doubting the validity of the award.⁸¹

iv. Defenses to Recognition and Enforcement

Articles V and VI of the Convention contain a list of grounds which may be invoked to resist the recognition and enforcement of a foreign award. They are:

- (1) The incapacity on the part of either party to agree to arbitration. In the absence of an express choice of law rule in the Convention and implementing legislation, Canadian courts will apply the proper law of the agreement or the personal law of either party.
- (2) The invalidity of the arbitration agreement under the law expressed in the agreement to be applied or, where no law is so expressed, under the law of the state in which the award was made.
- (3) 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 or her case in the arbitration proceedings. This refers to lack of natural justice.⁸²
- (4) That the award deals with a difference not contemplated by, or not falling within the terms of the arbitration agreement or contains decisions on matters beyond the scope of the arbitration agreement.⁸³
- (5) That the composition of the arbitral tribunal 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

⁷⁸ U.N. Arb. Act, *supra* note 9, ch. 16, art. IV.1.

⁷⁹ *Id.* art. IV.2.

⁸⁰ Application for leave to enforce the award and for the costs of the judgment against the defendant in terms of the award.

⁸¹ *Middlemiss & Gould v. Hartlepool Corp.*, 1 W.L.R. 1643 (1972) (especially Lord Denning M.R. at 1647).

⁸² U.N. Arb. Act, *supra* note 9, ch. 16, art. V.1(b). Refusal to hear oral evidence does not constitute a denial of natural justice. *See also* *Parsons & Whitmore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969 (1974).

⁸³ *Kianta Osakeyhtio v. Britain & Overseas Trading Co. Ltd.*, 1 Lloyd's List L. Rep. 247 (C.A. 1954); *Compania Maritima Villa Nova S.A. v. Northern Sales Co.*, 29 F.T.R. 136 (T.D. 1989).

- state where the arbitration took place.⁸⁴
- (6) That the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the state in which or under the law of which the award was made.⁸⁵
 - (7) That the subject matter of the dispute between the parties to the award is not capable of settlement by arbitration under the laws in force in the province or territory where the court is sitting.
 - (8) That the award is contrary to the public policy of the province or territory where it is sought to be recognized and enforced.⁸⁶ This defense which is to be narrowly construed in the light of the overriding purpose of the 1958 Convention will be successfully invoked only when recognition or enforcement violates the forum's most basic notions of morality and justice.⁸⁷

Model Law as Adopted in Canada

In Canada, on the provincial level, an "international" commercial arbitral award, irrespective of the state in which it was made, (thus excluding reciprocity), shall be recognized as binding and, on application in writing to a competent court, be enforced provided certain requirements have been met.⁸⁸ For instance, an international commercial arbitral award made in the United States will be recognized and enforced in Ontario or in British Columbia. Except in these two provinces, the legislation also covers an "international" commercial arbitral award made in another province.⁸⁹

The Model Law does not cover foreign "domestic" commercial arbitral awards which are within the scope of the 1958 Convention, nor does it apply to "non-commercial" foreign arbitral awards. They must be enforced at common law or pursuant to special provincial legislation.⁹⁰

The federal Commercial Arbitration Code⁹¹ applies to both domes-

⁸⁴ *Compania Maritima Villa Nova S.A. v. Northern Sales Co. Ltd.*, 29 F.T.R. 136 (F.C.T.D. 1990).

⁸⁵ *E.g.*, *Union Nationale des Coopératives Agricoles des Céréales v. Robert Catterall & Co. Ltd.*, 2 Q.B. 44 (1959), 1 All E.R. 721 (C.A. 1959) and *Dalmia Dairy Indus. Ltd. v. National Bank of Pakistan*, 2 Lloyd's Rep. 223 (1978). These cases did not involve the New York Convention.

⁸⁶ *See, e.g.*, *Masinimport v. Scottish Mechanical Light Indus. Ltd.* 1976 S.L.T. 245; *Dalmia Dairy Indus. Ltd. v. National Bank of Pakistan*, 2 Lloyd's Rep. 223 (1978) (not decided under the Convention).

⁸⁷ *See, e.g.*, *Parsons & Whitmore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969 (1974); *La Société Nationale pour la Recherche v. Shaheen Natural Resources Co. Inc.*, 585 F. Supp. 57 (1983), *aff'd*, 733 F.2d 260 (1984); *Waterside Ocean Navigation Co. Inc. v. International Navigation Ltd.*, 737 F.2d 150 (1984).

⁸⁸ Model Law, arts. 35 and 36; B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14 § 1(2), 35, 36. The legislation of each province or territory designates a competent court, *e.g.*, the Supreme Court of British Columbia.

⁸⁹ B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14, § 1(5); Ont. Comm. Arb. Act, *supra* note 10, ch. 30 § 1(7).

⁹⁰ *But see* Ontario, *infra* note 92.

⁹¹ Commercial Arbitration Act, *supra* note 9, ch.17 § 5(2); Federal Code, Schedule, art. 1(1).

tic and foreign commercial arbitral awards whether or not international.

It should be noted that the Ontario statute stipulates that for the purpose of the recognition and enforcement of an international commercial arbitral award pursuant to the Model Law, an arbitral award includes a commercial arbitral award made outside Canada, even if the arbitration which it relates to is not international as defined in the Model Law.⁹² No such provision exists in the relevant law of the other Canadian jurisdictions because the Model Law is restricted to “international” commercial arbitral awards. Since the Ontario Foreign Arbitral Awards Act of 1986,⁹³ implementing the 1958 Convention, was repealed in 1988, provision had to be made for the recognition and enforcement of foreign commercial arbitral awards that are not “international.” Thus, in Ontario, the Model Law applies to both.

In Canada, the party relying on an international commercial arbitral award or applying for its enforcement must supply the duly authenticated original award or a duly certified copy thereof.⁹⁴ If the award or agreement is not in the English or French language, this party must supply a duly certified translation of it into one of these official languages.

According to Article 36 of the Model Law:

- (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
 - (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
 - (i) a party to the arbitration agreement referred to in Article 7 was 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; or
 - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - (iii) the award deals with a dispute 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

⁹² Ont. Comm. Arb. Act, *supra* note 10, ch. 30, § 10. See also *The Setting Aside and Enforcement of Arbitral Awards under the UNCITRAL Model Law* in *ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION* 177 (P. Sarcevic ed. 1989).

⁹³ Ontario Foreign Arbitral Act, Ont. Stat. ch. 25 (1986).

⁹⁴ Model Law, art. 35(2); QUE. CODE CIV. PRO., *supra* note 13, art. 949.1. In Quebec, the application for recognition and execution is made by way of motion for homologation to the court which would have been competent in Quebec to decide the matter in dispute submitted to the arbitration. See also QUE. CODE CIV. PRO., *supra* note 13, art. 946; B.C. Int. Comm. Arb. Act, *supra* note 12, ch. 14, § 35(2), which adds the words “unless the court orders otherwise.”

- those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal 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; or
 - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of [Canada], or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of [Canada],
- (2) If an application for setting aside or suspension of an award has been made to a court referred to in para. (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

The burden of proof is upon the person who is opposed to the recognition and enforcement of the arbitral award. These grounds are the same as those that may be invoked to set aside an award.⁹⁵ They are also found in the 1958 Convention.⁹⁶ However, the grounds relating to arbitrability and public policy in the case of recognition and enforcement may lead to different results, since the State of setting aside may not be the same as the State of enforcement.

The major advantage of the legislation now in place in Canada is that awards are recognized and enforced almost automatically without the necessity of bringing an action in the local courts to confirm the awards and without a review of the merits of the dispute.

Once an international commercial arbitral award is recognized by the court, it is enforceable in the same manner as a judgment or order of that court, and it binds the persons between whom it was made and may be relied upon by any of them in any legal proceedings.⁹⁷

⁹⁵ Model Law, art. 34, and *Re Nippon Steel Corp. and Quintette Coal Ltd.*, 47 B.C.L.R.2d 201 (1990), 48 B.L.R. 32 (S.C.).

⁹⁶ In Quebec, see *QUE. CODE CIV. PRO.*, *supra* note 13, arts. 949, 950, 951.

⁹⁷ *E.g.*, *Ont. Comm. Arb. Act*, *supra* note 10, ch. 30, § 11. The legislation also applies to an arbitration to which the Crown is a party: § 12. In Quebec, an arbitration award once homologated is executory as a judgment of the court: *QUE CODE CIV. PRO.*, *supra* note 13, art. 951.2.

V. THE CANADA-U.S. FREE TRADE AGREEMENT

Chapter 18 of the Agreement,⁹⁸ which deals with Institutional Provisions, states that any dispute regarding the interpretation or application of the Agreement that does not involve matters covered by Chapter 17 (financial services) and Chapter 19 (antidumping and countervailing duty cases⁹⁹) may be referred to binding arbitration if it has not been resolved within a period of thirty days after referral to the Canada-United States Trade Commission.¹⁰⁰ A dispute regarding actions taken pursuant to Chapter 11 (emergency action), must be referred to binding arbitration.¹⁰¹ In both instances, the members of the Commission must agree upon the terms of the arbitration agreement. As an informal agreement between states, its validity and interpretation should be governed by public international law.

Should the Ontario government pass legislation creating an agency monopoly over automobile insurance, without providing for the payment of compensation to United States insurance companies now doing business in Ontario, the United States, pursuant to paragraph 4 of Article 1608, could use the procedures provided in Chapter 18. If binding arbitration is the method chosen by the parties for the settlement of the dispute, it is suggested that the arbitral tribunal would be able to award monetary compensation since Article 1605 requires that, in the case of a measure tantamount to an expropriation of an investment in its territory, the expropriating party must pay promptly adequate and effective compensation at fair market value. The amount of the award would be distributed by the United States government to the companies that lost their business in Ontario.

With respect to the enforcement of the award, the Agreement states that:

If a Party fails to implement in a timely fashion, the findings of a binding arbitration panel and the Parties are unable to agree on appropriate compensation or remedial action, then the other Party shall have the right to suspend the application of equivalent benefits of this Agreement to the non-complying Party.¹⁰²

Traditional public international law methods of enforcement have been rejected by the parties.

Disputes arising under both the Canada-United States Free Trade Agreement and the General Agreement on Tariffs and Trade ("GATT") and agreements negotiated thereunder, may be settled in either forum,

⁹⁸ The Canada-U.S. Free Trade Agreement (Ottawa, Department of External Affairs), copy 10-12-87.

⁹⁹ *Id.* at art. 1801.

¹⁰⁰ *Id.* at arts. 1805 and 1806.

¹⁰¹ *See also, id.* at art. 705.4 (compulsory binding arbitration on the determination of levels of government support for wheat, oats and barley).

¹⁰² *Id.* at art. 1806.3.

according to the rules of that forum, at the discretion of the complaining Party.¹⁰³ This means that resort to non-compulsory binding arbitration may be possible since GATT now provides for this method of settlement of disputes.¹⁰⁴ The award would be enforced in accordance with GATT procedures.

¹⁰³ *Id.* at art. 1801.2.

¹⁰⁴ See *Mid-Term Review Agreements*, NUR 027, April 26, 1989, at 24-31, and J.-G. Castel, *The Uruguay Round and the Improvements to the GATT Dispute Settlement Rules and Procedures*, 38 INT'L & COMP. L.Q. 834 (1989).