Enforcing and Challenging Arbitration Awards in Canada:

How to Get Paid What You Won (or Avoid the Consequences of Defeat)

Presented By

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Agenda

1. Distinction Between Recognition and Enforcement
2. International Arbitral Awards - Recognizing and Enforcing Them (or Setting Them Aside)
3. Domestic Arbitral Awards - Recognizing and Enforcing Them (or Setting Aside *or* Appealing Them)
4. Recognizing and Enforcing Arbitral Interim Measures

Distinction Between Recognition and Enforcement

Recognition

- Judicial recognition of a valid and binding arbitral award.

Enforcement

- Giving the award the status of a court order, and access to the machinery available for the enforcement of court orders.

Distinction Between Recognition and Enforcement

Recognition and enforcement are usually sought and granted together, but not always.

Metso Minerals Canada Inc v ArcelorMittal exploitation minière Canada, 2020 QCCS 1103

- New York-seated ICC award recognized in Quebec despite the fact that it had already been paid.

lululemon athletica canada inc. v Industrial Color Productions Inc., 2021 BCSC 422

- Application to set international award aside was dismissed, but “execution” was stayed pending appeal.
- Chambers judge nevertheless granted an order recognizing the award, but not enforcing it.

Recognizing and Enforcing International Arbitral Awards

Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958 ("**New York Convention**")

- Adopted by 167 countries (March 2021)
- Provides machinery for recognition and enforcement of international arbitral awards

Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985 (the "**Model Law**")

- Implemented federally and in all Canadian Provinces
- Extends the recognition and enforcement machinery of the New York Convention

Recognizing and Enforcing International Arbitral Awards – The Application

On notice to the award debtor, a party applying to recognize or enforce an award must supply: (a) the duly authenticated original arbitral award or a duly certified copy of it; (b) the original arbitration agreement or a duly certified copy of it; and (c) a certified translation if the arbitral award or arbitration agreement is not made in English or French.

- *British Columbia International Commercial Arbitration Act*, s. 35
- *Alberta International Commercial Arbitration Act*, Schedule 1, Article IV
- *Saskatchewan International Commercial Arbitration Act*, Article 35
- *Manitoba International Commercial Arbitration Act*, Schedule A, Article IV
- *Ontario International Commercial Arbitration Act, 2017*, Schedule 1, Article IV

Recognizing and Enforcing International Arbitral Awards – How Long Do You Have?

Limitation Periods

- **British Columbia** – Within 10 years of the date on which the award becomes enforceable [*Limitation Act*, S.B.C. 2012, c. 13, s. 7(a)]

- **Alberta** – For non-reciprocating jurisdictions: application must be brought within 2 years of the date on which the "claim" was "discovered" [*Limitations Act*, R.S.A. 2000, c. L-12, s. 3(1), interpreted in *Yugraneft Corp. v. Rexx Management Corp*., 2010 SCC 19 at para. 47]; for reciprocating jurisdictions: application must be brought within 6 years of the date the award was made and became enforceable in the same manner as a judgment [*Reciprocal Enforcement of Judgments Act*, R.S.A. 2000, c. R-6, s. 2(1)]

Recognizing and Enforcing International Arbitral Awards – Limitation Periods (Cont'd)

- **Manitoba** – Application must be brought within 6 years after the award was made and became enforceable in the same manner as a judgment [*The Limitation of Actions Act*, C.C.S.M. c. L150, s. 2(1)(n); *Reciprocal Enforcement of Judgments Act*, C.C.S.M. C. J20, s. 3(1)]

- **Ontario** – Application must be brought within 10 years of the date the award was made or if proceedings at the place of arbitration to set aside the award were commenced, the date on which the proceedings concluded [Ontario *International Commercial Arbitration Act, 2017*, s. 10]

Recognizing and Enforcing International Arbitral Awards – Defences

Recognition or enforcement **may** (not must) only be refused on the limited grounds set out in the New York Convention and the Model Law:

- a party was under some incapacity;
- the arbitration agreement was invalid under its governing law;
- lack of procedural fairness;
- award deals with matters beyond the tribunal's jurisdiction;
- defects in the tribunal's appointment;

Recognizing and Enforcing International Arbitral Awards – Defences (Cont'd)

- the award is not binding, or has been set aside or suspended;
- the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made;
- the subject matter of the dispute is not arbitrable under the law of the enforcing province; or
- the recognition or enforcement of the arbitral award would be contrary to public policy.

Recognizing and Enforcing International Arbitral Awards – Defences

Note: British Columbia *ICAA* specifically provides that the existence of third party funding is not a ground for refusing recognition or enforcement under the "public policy ground": s. 36(3).

Setting Aside International Arbitral Awards

Award may only be set aside if the applicant establishes one of the similar grounds on which recognition and enforcement may be refused:

- a party was under some incapacity;
- the arbitration agreement was invalid under its governing law;
- lack of procedural fairness;
- award deals with matters beyond the tribunal's jurisdiction;
- defects in the tribunal's appointment;
- the subject matter of the dispute is not arbitrable under the law of the enforcing province; or
- the recognition or enforcement of the arbitral award would be contrary to public policy.

Recognizing and Enforcing International Arbitral Awards – Stays and Security

Recognition or enforcement may be stayed, and security may be required of the respondent, if set-aside proceedings are ongoing at the seat of arbitration.

In some jurisdictions, and although law is developing, international awards may be enforced even if they have been set-aside at the seat of arbitration.

Recognizing and Enforcing Domestic Arbitral Awards – The Application

On notice to the award debtor, a party applying to enforce a domestic award must supply the original arbitral award or a certified copy of it:

- *British Columbia Arbitration Act*, s. 61
- *Alberta Arbitration Act*, s. 49
- *Saskatchewan Arbitration Act, 1992*, s. 50
- *Manitoba Arbitration Act*, s. 49
- *Ontario Arbitration Act, 1991*, s. 50

Recognizing and Enforcing Domestic Arbitral Awards – The Application (Cont'd)

In British Columbia, the applicant must also provide evidence as to whether:

- the time limit for commencing an application to set aside or appeal the award at the place of arbitration has elapsed;
- there is a pending application to set aside or appeal the award;
- a stay of enforcement of the award has been issued;
- the award has been set aside, or
- the award has been remitted to the arbitral tribunal [s. 61(3)].

Recognizing and Enforcing Domestic Arbitral Awards

An application to enforce an arbitral award is not a hearing of the merits of the substantive dispute. Provided the award is clear and unambiguous, it is generally enforceable as a court order: *Macdonald Realty Ltd. v. Metro Edge Holdings Ltd*., 2020 BCCA 272.

Recognizing and Enforcing Domestic Arbitral Awards – How Long Do You Have?

Limitation Periods

- **British Columbia** – Application must be brought within 10 years of the date on which the award becomes enforceable [*Limitation Act*, S.B.C. 2012, c. 13, s. 7(a)]
- **Alberta** – Application must be made within the later of two years after the date on which the applicant receives the award, or after all appeal periods have expired [AA, s. 51(3)]
- **Saskatchewan** – Application must be made within the later of two years after the date on which the applicant receives the award, or after all appeal periods have expired [AA, s. 52(3)]
- **Manitoba** - Application must be made within the later of two years after the date on which the applicant receives the award, or after all appeal periods have expired [AA, s. 51(3)]
- **Ontario** – Application must be made within 10 years of the date the award was made, or if proceedings at the place of arbitration to set aside the award were commenced, within 10 years of the date on which the proceedings concluded [AA, s. 52(3)]

Recognizing and Enforcing Domestic Arbitral Awards –Defences

Court must recognize and enforce the award unless:

- the award has been set aside by a court of competent jurisdiction;
- the subject matter of the dispute is not capable of resolution by arbitration under the law of the enforcing jurisdiction;
- the court does not have the jurisdiction to grant the relief sought;
- the time limit for commencing an application to set aside or appeal the award under the laws of the place of arbitration has not yet elapsed;
- there is a pending application to set aside or appeal the award, or a stay of enforcement of the award has been issued, at the place of arbitration; or
- the award has been remitted to the arbitral tribunal.

Recognizing and Enforcing Domestic Arbitral Awards –Defences

A decision to recognize and enforce an arbitral award has the same effect as a court judgment granting the remedy described in the award.

- *British Columbia Arbitration Act*, s. 61(6)
- *Alberta Arbitration Act*, s. 49(8)
- *Saskatchewan Arbitration Act, 1992*, s. 50(8)
- *Manitoba Arbitration Act*, s. 49(8)
- *Ontario Arbitration Act, 1991*, s. 50(8)

Setting Aside or Appealing Domestic Arbitral Awards

***I am not going to mention Vavilov or the standard of review*.**

Setting Aside or Appealing Domestic Arbitral Awards

The new BC approach:

Within 30 days, a party may apply to the Supreme Court to set aside an arbitral award on listed grounds (generally tracking the Model Law):

- a party was under some incapacity;
- the arbitration agreement is void, inoperative or incapable of being performed;
- lack of procedural fairness;
- award deals with matters beyond the tribunal's jurisdiction;
- defects in the tribunal's appointment or there are justifiable doubts as to the arbitrator's independence or impartiality;
- the subject matter of the dispute is not arbitrable under the law of British Columbia; or
- fraud

[*Arbitration Act,* s. 58]

Setting Aside or Appealing Domestic Arbitral Awards

The new BC approach:

Within 30 days, a party may seek leave to appeal to the Court of Appeal on any question of law arising out of the award if the justice finds that:

- the importance of the award to the parties justifies an appeal, and the appeal may prevent a miscarriage of justice;
- the point of law is of important to a particular group; or
- the point of law is of general or public importance.

The parties may contract out of any right of appeal in their arbitration agreement

[*Arbitration Act*, s. 59]

Setting Aside or Appealing Domestic Arbitral Awards

Other Provinces have different routes to the trial court, *e.g.*, Alberta:

Within 30 days, a party may apply to the Court of Queen's Bench to set aside an arbitral award on listed grounds (generally tracking the Model Law)

- a party was under some incapacity;
- the arbitration agreement is void, inoperative or incapable of being performed;
- lack of procedural fairness;
- award deals with matters beyond the tribunal's jurisdiction;
- defects in the tribunal's appointment or there is a reasonable apprehension of bias; or
- fraud

[*Arbitration Act*, s. 45].

Setting Aside or Appealing Domestic Arbitral Awards

Other Provinces have different routes to the trial court, e.g., Alberta:

- Within 30 days, a party may *appeal* to the Court of Queen's Bench if the arbitration agreement permits an appeal on a a question of law, a question of fact or a question of mixed law and fact [s. 44(1)]
- Within 30 days, a party may seek leave to appeal to the Court of Queen's Bench on a question of law if the Court concludes that:
  - *the importance to the parties of the matters at stake in the arbitration justifies an appeal, and*
  - *the determination of the question of law at issue will significantly affect the rights of the parties* [s. 44.2]

Uniquely in Alberta, a party may not appeal on a question of law that the parties expressly referred to the arbitral tribunal for decision [s. 44(3)]

New Tools: Interim Measures and Preliminary Orders

Often, emergency measures such as injunctions and preservation orders are sought.

Traditionally, one would seek these orders from the Court, and arbitration legislation specifically provides that doing so is not inconsistent with the arbitration agreement.

New Tools: Interim Measures and Preliminary Orders (Cont'd)

Some statutes provide the tribunal with the power to make some orders, and some are enforceable by the Court:

- e.g., detention, preservation or inspection of property and documents
  - *British Columbia Arbitration Act, s. 32(2)(viii)*
  - *Alberta Arbitration Act, s. 18*
  - *Saskatchewan Arbitration Act, 1992, s. 19*
  - *Manitoba Arbitration Act, s. 18*
  - *Ontario Arbitration Act, 1991, s. 18*

Applicable rules may also provide similar powers.

New Tools: Interim Measures and Preliminary Orders

Most recent updates to the Model Law allow the tribunal to issue interim measures and preliminary orders of their own.

These updates have been made to:

- *British Columbia Arbitration Act*, ss. 36-44
- *British Columbia International Commercial Arbitration Act*, ss. 17-17.09

Interim Measures

Any temporary measure in which the tribunal:

- orders the preservation of the status quo;
- orders a party to do something (or not refrain from doing something) is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- freezes assets;
- preserves evidence; or
- requires security for costs.

Interim Measures (Cont’d)

Applicant must demonstrate:

- irreparable harm is likely to result absent the interim measure;
- harm if the measure is not granted outweighs the harm that is likely to result to the respondent if the measure is granted; and
- there is a reasonable possibility that the requesting party will succeed on the merits of the claim.

Interim Measures May be Enforced by the Court

Interim measure must be recognized as binding and, unless otherwise provided by the tribunal, enforced on application to the Court.

Recognition and enforcement may only be refused on limited grounds.

Grounds generally parallel the grounds upon which recognition and enforcement of an arbitral award may be refused, with some additional grounds:

- where the required security has not been posted;
- where the interim measure has been suspended or terminated by the tribunal; and
- where the interim measure is incompatible with the Court's own powers (although reformulation is possible).

Preliminary Order

"Without notice" order directing the opposing party not to frustrate the purpose of the interim measure requested.

Exceptional orders require exceptional terms

- applicant must make full and frank disclosure of all circumstances;
- applicant must provide security unless the tribunal considers it unnecessary or inappropriate to do so;
- Tribunal must give notice to the responding party "immediately" after issuing the order;
- responding party must be given opportunity present its case "at the earliest practicable time"; and
- tribunal may then confirm or vary the interim measure.

Preliminary Order

A preliminary order:

- expires 20 days after the date on which it was made;
- is binding on the parties but is not subject to enforcement by a court; and
- is not an arbitral award.

Thank You

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