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Chapter 53

North American Overview

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I. Introduction

A. Commercial Arbitration Climate

Both the US and Canada have arbitration-friendly legal regimes, as well as experienced arbitration counsel and arbitrators. In addition, both countries host a number of important arbitral institutions. The United States is home to the American Arbitration Association ("AAA") and its international arm, the International Centre for Dispute Resolution ("ICDR"); JAMS; the International Institute for Conflict Prevention & Resolution; the NY International Arbitration Center (which does not administer arbitrations, but does provide arbitration hearing facilities); and the International Chamber of Commerce ("ICC"). In Canada, arbitral institutions include the ADR Institute of Canada; the British Columbia International Commercial Arbitration Centre ("BCICAC"); the Canadian Commercial Arbitration Centre; the ICC; and Arbitration Place.

B. Investment Arbitration Climate

Both the US and Canada are signatories to a number of free trade agreements and bilateral investment treaties ("BITs").[1] Most importantly, the US and Canada, along with Mexico, are members of the North American Free Trade Agreement ("NAFTA"), which became effective on January 1, 1994. Chapter 11 of NAFTA provides for arbitration of investor-State disputes.[2] BITs – known as Foreign Investment Promotion and Protection Agreements ("FIPAs") in Canada – typically also provide for arbitration of disputes.[3]

II. Arbitration in the US and Canada

A. US Arbitration Framework

1. Basic Framework

The Federal Arbitration Act ("FAA") is the starting point for US arbitration law.[4] The FAA "declare[s] a national policy favoring arbitration".[5] The FAA applies to arbitrations related to interstate and foreign commerce and maritime transactions.[6] State arbitral law is pre-empted by the FAA, but continues to apply to areas on which the FAA is silent.

The FAA consists of three chapters. Chapter 1 contains general provisions.[7] Importantly, it recognises the validity of written arbitration agreements[8] and provides judicial procedures for confirming and challenging arbitration awards.[9] Chapter 2 implements the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), subject to two reservations: the New York Convention only applies to: (i) awards made in other signatory nations (a reciprocity requirement); and (ii) disputes that are deemed "commercial" under US law.[10] The New York Convention provides the basic framework for domestic enforcement of international arbitral awards. Chapter 3 implements the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").[11] The Panama Convention supersedes the New York Convention where a majority of the parties are citizens of eligible Panama Convention signatory countries.[12]

2. Requirements and Procedures

As stated, the FAA applies only to written arbitration agreements involving interstate, foreign, and maritime commerce. Such agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".[13] Courts must thus generally look to state contract law to determine whether an arbitration agreement has been validly formed. Note, however, that arbitration provisions are considered to be "severable" from the remainder of the contract such that, "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance".[14]

The FAA does not provide many default rules, thus leaving the procedures for conducting arbitrations largely to the discretion of the parties. The FAA does, however, set out a procedure for appointing an arbitrator in the absence of agreement by the parties.[15] It also gives arbitrators the power to summon witnesses and to enlist the aid of US courts in compelling their attendance.[16]

3. *Kompetenz-Kompetenz*

Kompetenz-kompetenz refers to a tribunal's authority to rule on questions related to the scope of its own jurisdiction (*i.e.*, questions of "arbitrability"). Under US law, questions about whether an arbitration agreement is valid and covers the dispute at issue are presumptively for the court to decide.[17] The exception is where the parties have agreed to grant the arbitrator the authority to decide such questions of arbitrability. This decision must, however, be established by "clea[r] and unmistakabl[e]" evidence; "silence or ambiguity" is not sufficient.[18] So-called "procedural" questions, on the other hand – *i.e.*, "whether prerequisites such as time limits, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met" – are presumptively for the arbitrator to decide.[19]

4. Enforcement and *Vacatur*

The grounds for vacating an arbitral award in the US are very narrow. The FAA provides that arbitral awards may only be vacated upon a showing that: (i) "the award was procured by corruption,

fraud, or undue means"; (ii) "there was evident partiality or corruption in the arbitrators"; (iii) "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or (iv) "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made".[20]

Before 2008, courts also recognised a judicially created *vacatur* ground where an arbitral award was issued in "manifest disregard of the law". In 2008, the Supreme Court issued its decision in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, holding that "§§ 10 and 11 respectively provide the FAA's exclusive grounds for expedited *vacatur* and modification".[21] Since *Hall Street*, the federal circuit courts have been split on whether "manifest disregard" survives. The Fifth, Eighth, and Eleventh Circuits have held that "manifest disregard" is no longer available as a ground for *vacatur*.[22] On the other hand, the Second, Fourth, Sixth, Seventh, and Ninth Circuits continue to apply the "manifest disregard" standard.[23] The First, Third, and Tenth Circuits have adopted a middle ground. They acknowledge uncertainty as to whether "manifest disregard" is a legitimate basis to vacate an arbitration award, and evade its application by never finding the stringent standard met thus rendering determination of its validity unnecessary.[24] The circuits that continue to apply "manifest disregard" require proof of a clearly established legal principle that the arbitrator wilfully ignored.[25]

The FAA also allows courts to modify or correct arbitral awards where there was a material miscalculation or mistake, the arbitrators have ruled on a matter not submitted to them, or there is a problem of form with the award not affecting the merits.[26]

B. Canadian Arbitration Framework

1. Basic Framework

Similar to the US, Canada has both federal and provincial legal systems. But, unlike in the US, provincial law, rather than federal law, provides the framework for most commercial arbitrations. As such, parties wishing to arbitrate international disputes in Canada must look to the law of the province in which they choose to arbitrate.

Fortunately, in the context of international arbitration, the differences between provinces rarely matter because the federal government and all Canadian provinces have adopted the UNCITRAL Model Law on International Commercial Arbitration with minor modifications.[27] They have done so either by appending the Model Law as a schedule to provincial legislation, reproducing it as a stand-alone statute, or in the case of Quebec (Canada's only Civil Code jurisdiction), adopting it in its Code.

Canada has also ratified the New York Convention and has implemented it at both the federal and provincial levels, typically with a restriction limiting its application to "commercial" disputes.[28] Unlike the US, Canada has not implemented any reciprocity restrictions.[29]

2. Requirements and Procedures

Procedural requirements in international arbitrations generally conform to the UNCITRAL Model Law's default rules. There are, however, some important exceptions. For example, the Supreme Court of Canada has held that arbitral awards made outside of Canada are subject to Canadian statutes of limitation when brought to Canadian courts for enforcement.[30]

In accordance with the Model Law, arbitration agreements in Canada must be either proven in writing or established by pleadings in which the existence of an agreement is alleged and not denied.[31]

Arbitrations are heard by panels of three, with one arbitrator appointed by each party and the third chosen by the first two arbitrators.[32] Courts may intervene to appoint arbitrators if parties do not follow their chosen procedures or if a vacancy is not filled.[33] Removal of an arbitrator is possible if a court finds that s/he is not impartial or is unqualified.[34] Parties may modify these and other rules by agreement.

Arbitrators generally have discretion to request the production of important documents. The IBA Rules on the Taking of Evidence in International Commercial Arbitration often serve as a guide.[35] Article 27 of the Model Law also provides for court assistance in collecting evidence.[36]

3. *Kompetenz-Kompetenz*

Canada recognises the *kompetenz-kompetenz* principle in all of its jurisdictions. Arbitrators may thus rule on their own jurisdiction. The Supreme Court of Canada has held that "in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator".[37] The only exception is where "the challenge to the arbitrator's jurisdiction is based solely on a question of law" and the court is "satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and . . . will not unduly impair the conduct of the arbitration proceeding".[38] Courts thus normally defer to arbitrators, for example, by granting stays of litigation while arbitral proceedings are pending.

There are, however, some limitations in Canada on the *kompetenz-kompetenz* principle. For example, the British Columbia Supreme Court has held that there must be "an evidentiary or statutory basis" for believing that the parties intended to give the arbitrator *kompetenz-kompetenz* authority.[39] A "statutory basis" exists where "the competence/competence principle forms part of the governing legal framework".[40]

4. Enforcement and *Vacatur*

In accordance with Model Law principles, Canadian courts exercise restraint in overturning international arbitral awards, whether made in Canada or abroad.[41] The Model Law sets out the grounds for refusing recognition or enforcement, which include a party's legal incapacity, defective notice, a tribunal acting outside its authority, improper composition of the arbitral tribunal, or denial of the opportunity to fully present a case.[42] The Model Law also allows for *vacatur* where "the recognition or enforcement of the award would be contrary to the public policy of this State".[43] However, courts in Canada construe the public policy ground narrowly. Trial courts in Ontario, for example, will only review foreign awards on public policy grounds where there is either corruption, or fundamental unfairness combined with procedural or substantive rules differing markedly from those in the forum in which enforcement is sought.[44] In *Quintette Coal Ltd. v. Nippon Steel Corp.*, the British Columbia Court of Appeal held that courts may not review international arbitral awards for errors of law.[45] *Quintette* has been followed in other jurisdictions in Canada.[46]

III. Recent Developments

A. United States

1. Class Arbitration Waivers and Federal Preemption: *DIRECTV, INC. v. Imburgia*

Until recently, class arbitration waivers were unenforceable in California as a matter of public policy, based on *Discover Bank v. Superior Court*.[47] In 2011, however, the US Supreme Court expressly held in *AT&T Mobility LLC v. Concepcion* that California's rule prohibiting the enforcement of class arbitration waivers in

consumer contracts "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and was thus pre-empted by the FAA.[48] Though this holding settled the question of validity of class-arbitration waivers in California going forward, the impact on cases involving claims prior to the *Concepcion* ruling was less certain.

One such case, *Imburgia v. DIRECTV, Inc.*,[49] arose out of a form service agreement that DIRECTV entered into with two respondent California residents. The agreement included an arbitration clause that contained a waiver of the parties' right to class arbitration, which also provided that if "the law of your state would find this agreement to dispense with class arbitration procedures unenforceable, then this entire [arbitration clause] is unenforceable".[50] At the time the action was filed, DIRECTV did not move to compel arbitration because its arbitration agreement was invalid under *Discover Bank*.[51] A few days after class certification was granted; however, the Supreme Court's decision in *Concepcion* came down. DIRECTV moved to compel arbitration. Despite *Concepcion*, the California court denied DIRECTV's motion. The California Court of Appeal affirmed, ruling that the parties had chosen to apply California state arbitration law to their arbitration agreement (and not the FAA), even though California state law would otherwise have been pre-empted.[52] Because the class waiver was not enforceable under California state law, the entire arbitration agreement was unenforceable, and the parties would have to resolve their claims in court.[53]

The US Supreme Court granted certiorari to consider "[w]hether the California Court of Appeal erred by holding, in direct conflict with the Ninth Circuit, that a reference to state law in an arbitration agreement governed by the Federal Arbitration Act requires the application of state law pre-empted by the Federal Arbitration Act".[54] In a December 2015 decision, the Supreme Court disagreed with the California courts, ruling that the service agreement's reference to "the law of your state" unambiguously means "valid state law".[55] As California's pre-*Concepcion* policy that class-arbitration waivers were unenforceable was found not to be a *valid* policy, "valid state law" would mean permitting class arbitration waivers. Although the Court acknowledged that parties to a contract "are free to choose the law governing an arbitration provision, including California law as it would have been if not pre-empted", there was nothing in the service agreement that suggested it should be governed by a now-invalid law.[56] The Court further found that the California court had not put the DIRECTV arbitration clause on equal footing with other contracts and did not give due regard to the federal policy favouring arbitration. As a result, the Supreme Court ordered the California court to enforce the arbitration agreement.[57]

Imburgia demonstrates that the US Supreme Court's trend of protecting arbitration by cracking down on attempts to circumvent the FAA shows no signs of stopping soon. A minority of Supreme Court justices, however, have indicated that they would not go so far to protect arbitration. In a heated dissenting opinion in *Imburgia*, Justice Ginsburg, joined by Justice Sotomayor, noted that the increase in pro-arbitration rulings "have predictably resulted in the deprivation of consumers' rights to seek redress for losses, and, turning the coin, they have insulated powerful economic interests from liability for violations of consumer protection laws".[58] In particular, Judge Ginsburg pointed to articles and studies that demonstrate that individual arbitration clauses are being imposed on consumers, who lack the bargaining power to change the terms, in "a soaring number of consumer and employment contracts" across many sectors. Such clauses all but assure that consumers will forego their claims rather than initiating arbitration to pursue small-dollar amounts, as depriving consumers of the ability to bring class actions eliminates perhaps the only means citizens have to fight illegal or deceitful business practices.[59]

2. Cases Affirming the Finality of Arbitration Awards

As noted in Part II.A.4 above, grounds for vacating an arbitral award in the US are very narrow. As a general matter, once a final award is issued, the dispute is treated as finally determined. This year, a number of federal circuit courts have considered whether the modification or *vacatur* of an arbitration award is appropriate in some seemingly unique situations, and continue to come out in favour of enforcing the final arbitral award.

National Football League Management Council v. National Football League Players Association involves an arbitration arising from the involvement of Tom Brady, quarterback of the New England Patriots football team, in a scheme to deflate footballs used during a playoff game to a pressure below the permissible range, an event widely reported in the US media as "Deflategate".[60] After the National Football League (NFL) ordered Brady suspended for four games, Brady requested arbitration. The NFL Commissioner served as the sole arbitrator and entered an award confirming the suspension. When the parties sought judicial review, the US District Court vacated the award because, among other reasons, it took issue with the Commissioner's role in determining the discipline and then presiding over the arbitration challenging that discipline. On appeal, the US Court of Appeals for the Second Circuit reversed.

The Second Circuit's decision was based on the well-established principle that "a federal court's review of labor arbitration awards is narrowly circumscribed and highly deferential".[61] It viewed its role as limited to determining whether the arbitration proceedings and award met the minimum legal standards established by the Labor Management Relations Act, which require merely that the arbitrator acted "within the bounds of his bargained-for authority".[62] In the collective bargaining agreement ("CBA") between the players' union and the NFL, "not just a contract, but a generalized code to govern a myriad of cases", the parties agreed that the NFL Commissioner had broad authority to investigate possible rule violations, impose appropriate sanctions, and preside at arbitrations challenging his discipline.[63] The Second Circuit held Brady and the union to the "regime" that they bargained for, declining to accept the lower court's determination that the way in which the arbitral proceedings were conducted deprived Brady of fundamental fairness. To the contrary, held the Court, the CBA was entered knowing that it provided for a disciplinary regime that gave the Commissioner a stake both in the underlying discipline and any arbitration brought to question the propriety of such discipline—thus the Commissioner, as arbitrator, acted within his authority in confirming his initial disciplinary decision.[64] Accordingly, the Second Circuit ordered that the arbitration award be reinstated.

In *Robinson v. Littlefield*, the U.S. Court of Appeals for the Third Circuit began its decision with a telling quote from a Seventh Circuit case: "Arbitration can be an effective way to resolve a dispute in less time, at less expense, and with less rancor than litigating in the courts. Arbitration loses some of its luster, though, when one party refuses to abide by the outcome and courts are called in after all for enforcement".[65] *Robinson* involved a dispute over the purchase of a recreational vehicle, in which the arbitrator ruled for the buyers and awarded them compensatory damages, fees and expenses. The seller made a motion to the arbitrator to modify or correct the award, to which the arbitrator never responded. After the buyers obtained an entry of judgment in court, the seller filed a motion to strike, claiming that the judgment was not final due to the pending motion before the arbitrator. The district court asked the arbitrator to advise whether the case remained active. In response, the arbitrator wrote that he was not going to amend the arbitration award, and that the award "is reaffirmed and remains in full force and effect".[66] Whereas the district court concluded from this that the initial arbitration award was not final until this notice of disposition, and thus struck the entry of

judgment obtained by the buyers, the Third Circuit disagreed. The Circuit concluded that the arbitrator's initial award was indisputably final, regardless of the seller's ignored motion, as the award fully and unambiguously resolved everything that was at issue in the arbitration.[67]

In a twist on *Robinson*'s fact pattern, the U.S. Court of Appeals for the Eleventh Circuit addressed the finality of an arbitral award when *the arbitrator himself* issued a substituted award. *IBEW, Local Union 824 v. Verizon Florida* involved a dispute over a provision of a CBA that addressed "bumping rights" of communications technician employees in the event of a layoff.[68] The arbitrator issued an award in which he interpreted a clause of the CBA and applied it to particular employees. The union subsequently requested a "clarification" of the award, maintaining that additional employees also should have benefitted. The company opposed the request, and further asked for a "reconsideration of the entire award" on the basis that the arbitrator's decision went beyond the issues properly before him. The arbitrator agreed with the company and issued a substituted award, stating that he was persuaded that his earlier award partially relied on a contract provision not submitted for consideration. The substituted award denied the union's grievance as to all of the affected employees. The union brought an action in federal court to confirm the original award and vacate the substituted award.

In reviewing the district court's order granting the union its requested relief, the Eleventh Circuit stressed that an arbitrator's decision is entitled to "considerable deference" in light of the strong policy favouring finality for arbitration awards.[69] The Court held that the arbitrator's decision must be affirmed if he was "even arguably" acting within the scope of his power, which it found that he was.[70] Looking next at the question of whether the arbitrator's issuance of the substituted award was proper – "did he exceed his authority by finding that he had exceeded his authority?" – the Court observed that while contracting parties can ask an arbitrator to clarify or reconsider his decision if they mutually agree, mutual consent was not present here.[71] The union's narrow inquiry was about the arbitrator's application of his analysis to the factual record, whereas the company's request was an attack on the merits of the award.[72] And there was no rule that "empowered" him to do what he did. As the arbitrator's initial award was final, he had no power to later decide he was wrong and modify.[73]

These cases support that arbitral parties enjoy a degree of certainty and finality at the close of arbitration proceedings, so long as a final award is issued disposing of all matters. Perhaps equally important, such cases serve as a reminder to the trial courts that if they fail to be sufficiently deferential to arbitral awards, they can expect their decisions to be reversed. The US Circuit Courts are enforcing the clear legislative intent that final arbitration awards be, indeed, final.

B. Canada

1. Canada-European Union Trade Agreement

In August 2014, negotiations concluded on the Canada-European Union Comprehensive Economic and Trade Agreement ("CETA").[74] The completed text of the agreement was released in September 2014, although it will not be binding until the ratification process is completed.[75] A major hurdle was passed in February 2016, with the completion of the legal review of CETA. In a joint statement following the legal review, officials of Canada and the European Commission indicated that they will focus on swift ratification of CETA once the translation and review of the text in French and the 21 other EU treaty languages is finalised.[76] They expect that CETA will go into force in 2017.[77]

CETA is Canada's most ambitious trade initiative to date. CETA will largely eliminate tariffs for trade between the EU and Canada.[78] Other key provisions include: limitation of non-tariff restrictions on the import or export of goods; elimination or reduction of barriers to exports of services (including citizenship or residency requirements, barriers to temporary entry, and ownership and investment restrictions); expansion of access to the government procurement market; and establishment of a unified system of intellectual property rights and rules for their enforcement.[79]

Notably, CETA contains provisions for the promotion and protection of investment, including investor-state dispute settlement ("ISDS") provisions. These ISDS provisions establish a detailed procedure for the arbitration of disputes, including rules for the composition of the arbitration panel, the selection of arbitrators, the conduct of hearings, the transparency or confidentiality of the proceedings, *amicus curiae* submissions, and the timing and form of the arbitrators' final report.[80] They also include a binding code of conduct for arbitrators.[81] Per recent modifications as a result of the legal review, Canada and the EU also added provisions to move to a permanent, transparent, and institutionalised dispute settlement tribunal and to agree to an appeal system.[82]

2. The Mauritius Convention

In March 2015, Canada signed the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the "Mauritius Convention on Transparency").[83] By adopting the Mauritius Convention on Transparency, Canada joined with other nations, including Finland, France, Germany, Mauritius, the United Kingdom, and the United States, to ensure that the high level of transparency required in investor-state arbitrations is enforced across all FIPAs and free trade agreements. In particular, such agreements that concluded prior to 2006 lacked the transparency provisions that Canada's more recent agreements contain. Adoption of the Mauritius Convention on Transparency serves to update the outdated agreements. The transparency provisions in CETA, however, already exceed those found in the Mauritius Convention.[84]

3. Consequences of Trying to Evade Mandatory Arbitration: *Edmonton (City) v. Lafarge Canada Inc.*

In multiple proceedings in *Edmonton (City) v. Lafarge Canada Inc.*, the Alberta Court of Appeal and Court of Queen's Bench addressed the consequences of initiating litigation in violation of a mandatory arbitration provision.[85] The case concerns a contract between the City of Edmonton and Lafarge Canada Inc. for supply of storm sewer pipe, which provided for mandatory arbitration of contract disputes. In connection with a dispute over delay costs, Lafarge filed a Statement of Claim commencing a court action against the City. The action was filed within the limitation period. The City asserted as a jurisdictional defence in its Statement of Defence that the parties had agreed to submit any disputes arising under the contract to arbitration. Lafarge did not take further formal litigation steps until months later, after the expiration of the limitation period. The City responded that the contract was subject to mandatory arbitration proceedings and that Lafarge failed to commence such proceedings within the limitation period.

The City applied to the Court of Queen's Bench to strike or stay the action commenced by Lafarge, and to obtain a declaration that the arbitration was statutorily barred from commencing. The Court of Queen's Bench's determination that the Statement of Claim served as a notice of, or a commencement document for, arbitration and thus arbitration was not barred was reversed on appeal. The Alberta Court of Appeal emphasised that "arbitration and litigation are conceptually distinct processes" and noted the "significant policy issues at stake", and thus determined that it could not characterise the Statement of Claim, "the opposite of notice to commence

arbitration", as sufficient to either commence arbitration or serve as notice of an intention to arbitrate.[86]

The Court of Queen's Bench subsequently examined whether it could exercise its discretionary authority afforded by the relevant arbitration statute to allow the court action to proceed notwithstanding an agreement to arbitrate, due to special circumstances such as claimed undue delay in requesting the stay. The Court found that given there was no dispute that the contract provided for mandatory arbitration and that the limitation period for arbitration had ended with neither party commencing arbitration proceedings, it no longer had any supervisory authority over the dispute.[87] Thus, "the issue of undue delay is irrelevant - even if it means that the party having commenced a court action is denied an avenue for recourse".[88] Acknowledging this position may seem "rigid", the Court pointed to the important policy consideration of enforcing contracts between parties who have agreed to arbitrate.[89]

This case underscores the Canadian courts' strict enforcement of the legislative intent that arbitration should trump court proceedings where there exists a valid and binding agreement to arbitrate. Indeed, the *Lafarge* decisions serve as a clear warning to those subject to mandatory arbitration provisions – attempts to circumvent arbitration are inherently risky propositions, and likely to leave one without an avenue to pursue claims.

4. The Binding Effect of Past Arbitrations Going Forward: *Enmax Energy Corp. v. TransAlta Generation Partnership*

The Alberta Court of Appeal recently explored the role that the long-standing legal principles of *res judicata* and issue estoppel may play in arbitrations. *Res judicata* and issue estoppel (a type of *res judicata*) traditionally prevent parties from relitigating issues previously decided in a court action between the same parties. Overturning an Alberta Court of Queen's Bench ruling, the Court of Appeal made clear that arbitral decisions can have comparable binding effect.[90]

Enmax Corporation and TransAlta Generation Partnership were parties to a "power purchase arrangement" (the "PPA") that provided that disputes were to be submitted to "final, binding and non-appealable" arbitration.[91] In 2010, a dispute between Enmax and TransAlta led to an arbitration and resulting award (the "Prior Arbitration"). A few years later, a new dispute arose and with it a new arbitration. In connection with that arbitration, TransAlta argued that a discrete finding made by the panel in the Prior Arbitration estopped Enmax from taking certain positions in the current arbitration. Because the PPA provided that either party could refer a "question of law" to a court of competent jurisdiction, notwithstanding that it could be part of an arbitral dispute, the Alberta courts had an opportunity to weigh in and settle this outstanding question.[92]

Although the chambers judge determined that prior arbitration positions and decisions are not binding on future arbitrations, the Alberta Court of Appeal reversed, holding that, as a matter of law, *res judicata* and issue estoppel *can* apply to arbitral decisions. The Court's decision relied heavily on the final and binding nature of arbitration between the parties, pursuant to both the PPA and Alberta's Arbitration Act.[93] The Court also found support in a survey of case law from other provinces, including Manitoba, Ontario, and British Columbia, and in the Supreme Court of Canada's 2001 observation in *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, that issues such as issue estoppel, though initially developed in the context of prior court proceedings, have been extended to decisions classified as "quasi-judicial" in nature (*i.e.*, decisions by administrative officers and tribunals).[94] Rejecting the respondent's arguments as to why *res judicata* and issue estoppel are inappropriate for arbitrations, including that the concepts are too complex, the Court emphasised that arbitrators are presumed to have the competence to resolve the issues that will arise.[95] Thus, while the Court determined it "clear" that both parties are estopped from relitigating issues that were decided in the Prior Arbitration, it left to the arbitrators the determination of where the issues of the prior and current arbitrations overlapped and the resulting scope of estoppel. The Court also clarified that other arbitral decisions on the same or similar topics are appropriately viewed as persuasive authority from which the present arbitrators might derive assistance.[96]

Enmax Energy is significant for emphasising the extent to which arbitrations are binding on the parties, particularly where the parties have an ongoing contractual relationship or repeated commercial dealings. Under this Court's rationale, opting to resolve commercial disputes in arbitration will not deprive parties of the efficiency and certainty of *res judicata* and issue estoppel that has long been the standard in comparable court actions.

5. Former Soviet Republic Succeeds to the USSR's FIPA Obligations: *Arbitration Between World Wide Minerals Ltd. and the Republic of Kazakhstan*

An October 2015 decision by an arbitral tribunal established under the rules of the United Nations Commission on International Trade Law could lead to a wave of arbitrations against the Republic of Kazakhstan by Canadian investors. The tribunal found that World Wide Minerals Ltd. ("WWM"), a Canadian mining company, could pursue its claims against Kazakhstan relating to multimillion-dollar investments that WWM made in the former Soviet State in 1996–1997.[97] This decision is notable in that Kazakhstan never negotiated a BIT with Canada. Rather, the tribunal has permitted the claims to proceed against Kazakhstan as a legal successor to the 1989 BIT between Canada and the USSR. Displaying its own interest in this type of claim going forward, the government of Canada intervened in the matter with an amicus submission that argued that Kazakhstan succeeded to the Canada/USSR FIPA.[98]

The tribunal's decision seemingly marks the first time that any state other than Russia has been held to be a legal successor to the international investment treaty obligations of the USSR.[99] This could prove meaningful not only for other Canadian investors with potential claims against Kazakhstan – or perhaps other former Soviet Republics – but also for potential claimants from several other nations that also had signed treaties with the USSR.

IV. Conclusion

The United States and Canada are each home to mature and arbitration-friendly legal regimes. Although the laws regarding arbitration continue to evolve, the US and Canada remain important sites of international arbitration.

Endnotes

1. *See* Office of the US Trade Representative, *Free Trade Agreements*, at http://www.ustr.gov/trade-agreements/free-trade-agreements (listing free trade agreements to which the US is a party); Foreign Affairs, Trade & Development Canada, *Canada's Free Trade Agreements*, at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fta-ale.aspx?lang=eng (listing free trade agreements to which Canada is a party).
2. *See* Final Text of NAFTA, Ch. 11 § B, available at https://www.nafta-sec-alena.org/Default.aspx?tabid=97&language=en-US.

3. *See* Office of Trade Agreements Negotiation and Compliance, *Bilateral Investment Treaties*, at http://tcc.export.gov/Trade_Agreements/Bilateral_Investment_Treaties/index.asp (listing BITs to which the US is a party); *Foreign Affairs, Trade & Development Canada, Foreign Investment Promotion and Protection (FIPAs)*, at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/index.aspx?lang=eng (listing BITs to which Canada is a party).
4. 9 U.S.C. § 1 *et seq.*
5. *Nitro-Lift Techs., L.L.C. v. Howard*, 133 S. Ct. 500, 503 (2012) (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).
6. *See* 9 U.S.C. § 1.
7. 9 U.S.C. § 1 *et seq.*
8. 9 U.S.C. § 2.
9. 9 U.S.C. §§ 9, 10.
10. 9 U.S.C. § 201 *et seq.*; see also UNCITRAL, *Status: Convention on the Recognition & Enforcement of Foreign Arbitral Awards*, at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
11. 9 U.S.C. § 301 *et seq.*
12. 9 U.S.C. § 305.
13. 9 U.S.C. § 2.
14. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445-46 (2006).
15. 9 U.S.C. § 5.
16. 9 U.S.C. § 7.
17. *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).
18. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).
19. *Howsam*, 537 U.S. at 85 (emphasis omitted).
20. 9 U.S.C. § 10.
21. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008).
22. *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. CitiFinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010); *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009).
23. *Renard v. Ameriprise Fin. Servs., Inc.*, 778 F.3d 563, 567–69 (7th Cir. 2015); *Wachovia Secs., LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2012); *Biller v. Toyota Motor Corp.*, 668 F.3d 655, 665 (9th Cir. 2012); *Jock v. Sterling Jewelers Inc.*, 646 F.3d 113, 121–22 (2d Cir. 2011); *Coffee Beanery, Ltd. v. WW, L.L.C.*, 300 F. App'x 415, 418–19 (6th Cir. 2008).
24. *Raymond James Fin. Servs., Inc. v. Fenyk*, 780 F.3d 59, 63–65 (1st Cir. 2015); *Bellantuono v. ICAP Secs. USA, LLC*, 557 F. App'x 168, 173–74 (3d Cir. 2014); *Schafer v. Multiband Corp.*, 551 F. App'x 814, 818–19 (6th Cir. 2014).
25. *See Renard*, 778 F.3d at 567-68; *Wachovia Secs.*, 671 F.3d at 483; *Biller*, 668 F.3d at 665; *Jock*, 646 F.3d at 121 n.1; *Coffee Beanery*, 300 F. App'x at 418; *see also Raymond James Fin. Servs.*, 780 F.3d at 64; *Bellantuono*, 557 F. App'x at 174; *Schafer*, 551 F. App'x at 819–20.
26. 9 U.S.C. § 11.
27. UNCITRAL, *Status: UNCITRAL Model Law on International Commercial Arbitration*, at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.
28. UNCITRAL, *Status: Convention on the Recognition & Enforcement of Foreign Arbitral Awards*, at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.
29. *Id.*
30. *Yugraneft Corp. v. Rexx Mgmt. Corp.*, 2010 SCC 19, paras. 14–34 (Can.).
31. UNCITRAL Model Law on Int'l Commercial Arbitration art. 7(2), (5) (2006) ("UNCITRAL Model Law"), available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.
32. *Id.* arts. 10, 11.
33. *Id.* art. 11(3), (4).
34. *Id.* arts. 12, 13.
35. *See IBA Rules on the Taking of Evidence in International Arbitration*, available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materialsaspx#takingevidence.
36. UNCITRAL Model Law art. 27.
37. *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, para. 84 (Can.); *see also* UNCITRAL Model Law art. 16.
38. *Dell Computer Corp.*, 2007 SCC 34, paras. 84, 86.
39. *H&H Marine Engine Serv. Ltd. v. Volvo Penta of the Am. Inc.*, 2009 BCSC 1389, para. 55 (Can. B.C.).
40. *Id.* para. 54.
41. *See* UNCITRAL Model Law art. 36.
42. *Id.*
43. *Id.* art. 36(1)(b)(ii).
44. *Schreter v. Gasmac Inc.*, (1992) 7 O.R. (3d) 608, para. 50 (Can. Ont. Ct. J. (Gen. Div.)); *see also Corporacion Transnacional de Inversiones, S.A. de C.V. v. STET Int'l, S.p.A.*, (1999) 45 O.R. (3d) 183, paras. 28–30 (Can. Ont. Sup. Ct. J.).
45. *Quintette Coal Ltd. v. Nippon Steel Corp.*, (1990) 50 B.C.L.R (2d) 207 (Can. B.C.C.A.).
46. *E.g.*, *Corporacion Transnacional de Inversiones*, 45 O.R. (3d) 183, para. 27; *Dunhill Personnel Sys. Inc. v. Dunhill Temps Edmonton Ltd.*, (1993) 13 Alta. L.R. (3d) 241, para. 5 (Can. Alta. Q.B.).
47. *Discover Bank v. Superior Court*, 36 Cal. 4th 148 (Cal. 2005).
48. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011).
49. *Imburgia v. DIRECTV, Inc.*, 225 Cal. App. 4th 338 (Ct. App. 2014).
50. 225 Cal. App. 4th at 342.
51. *Imburgia v. DIRECTV, Inc.*, 2012 WL 7657788 (Cal. Super. Feb. 26, 2012).
52. 225 Cal. App. 4th at 342-45.
53. *Id.* at 347.
54. *DIRECTV, Inc. v. Imburgia*, No. 14-462, 2015 WL 1280237 (granting petition for writ of certiorari).
55. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015).
56. 136 S. Ct. at 464–65.
57. *Id.* at 471.
58. *Id.* at 477.
59. *Id.*
60. *National Football League Management Council v. National Football League Players Ass'n*, __ F.3d __, 2016 WL 1619883 (2d Cir. April 25, 2016).
61. *Id.* at 2016 WL 1619883, *1.
62. *Id.*
63. *Id.* at *5–6.
64. *Id.* at *17.

65. *Robinson v. Littlefield*, 626 Fed. Appx. 370, 371 (3d Cir. 2015).
66. 626 Fed. Appx. at 373.
67. *Id.* at 373–74.
68. *IBEW, Local Union 824 v. Verizon Florida*, 803 F.3d 1241 (11th Cir. 2015).
69. 803 F.3d at 1246 (citations omitted).
70. *Id.* at 1247.
71. *Id.* at 1249.
72. *Id.*
73. *Id.* at 1250–51.
74. Foreign Affairs, Trade & Development Canada, *Canada-European Union: Comprehensive Economic & Trade Agreement – Chronology of Events & Key Milestones*, at http://international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/understanding-comprendre/chronology-chronologie.aspx?lang=eng.
75. *Id.*
76. European Commission, *Joint statement: Canada-EU Comprehensive Economic and Trade Agreement (CETA)*, at http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm.
77. *Id.*
78. Consolidated CETA Text, available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/toc-tdm.aspx?lang=eng; *see also* Foreign Affairs, Trade & Development Canada, *Canada-European Union: Comprehensive Economic & Trade Agreement*, at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/index.aspx?lang=eng.
79. *Id.*
80. Consolidated CETA Text, § 33 (Dispute Settlement), available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/33.aspx?lang=eng.
81. *Id.* § 33, Annex II (Code of Conduct for Members of Arbitration Panels and Mediators).
82. *Joint statement: Canada-EU Comprehensive Economic and Trade Agreement (CETA)*, http://europa.eu/rapid/press-release_STATEMENT-16-446_en.htm.
83. Foreign Affairs, Trade & Development Canada, *Canada Signs United Nations Convention on Transparency in Investor-State Arbitration*, at http://news.gc.ca/web/article-en.do?nid=951639.
84. *Id.*
85. *Edmonton (City) v. Lafarge Canada Inc.*, 2015 ABQB 56 (Can. A.B.Q.B.); *Lafarge Canada Inc. v. Edmonton (City)*, 2013 ABCA 376 (Can. A.B.C.A.).
86. *Lafarge Canada Inc. v. Edmonton (City)*, 2013 ABCA 376 (Can. A.B.C.A.), paras. 30–32.
87. *Edmonton (City) v. Lafarge Canada Inc.*, 2015 ABQB 56 (Can. A.B.Q.B.), para. 36.
88. *Id.* para. 32.
89. *Id.* para. 33.
90. *Enmax Energy Corporation v. TransAlta Generation Partnership*, 2015 ABCA 383.
91. *Id.* para. 22.
92. *Id.*
93. *Id.* para. 31.
94. *Id.* paras. 41–61.
95. *Id.* para. 51.
96. *Id.* paras. 52–54.
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