JUDICIAL INTERVENTION IN INTERNATIONALCOMMERCIAL ARBITRATION IN BRITISH COLUMBIA

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Over the past two years, in an uncharacteristic display of uniformity, the provinces (together with Parliament) have all enacted legislation based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law).[1] At the same time, Canada has, as last, signed the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and that Convention has been implemented by federal and provincial legislation.[2] During this time a small but growing number of countries have joined Canada in implementing the Model Law or amending their existing laws in light of its provisions.[3]

A basis principle of the Model Law and the British Columbia International Commercial Arbitration Act (the Act) is limited court intervention.[4] This paper will explore the extent to which the British Columbia Act has been effective in achieving one of its primary stated objectives and the likelihood that courts in British Columbia, and elsewhere in Canada, will be willing to compromise their own role in order to enhance the effective resolution of international disputes.

The statement of the fundamental principle of limited court intervention is set out in section 5 of the Act which provides:

> "In matters governed by this Act,
>
> (a) no court shall intervene except where so provided in this Act ..."

The UNCITRAL background papers on the Model Law reveal that the intention of Article 5 was to achieve certainty as to the maximum extent of judicial intervention under the Model Law. There was a general concern that with judicial control and assistance would come the opportunity to the protraction of dispute resolution - contrary to the needs of the international business community.[5]

The limitations of section 5 are best comprehended by assessing what matters are not governed by the Act. The analytical commentary on the Model Law by the Secretary-General of UNCITRAL cites such matters as state immunity, the contractual relations between the parties and the arbitrators or arbitral institutions, fixing of fees and other costs, adaption of contracts, and the capacity of the parties to conclude their agreement to arbitrate, as not being dealt with by the Act.[6] In these areas, if the necessity of judicial assistance arises its scope is not compromised by the Act.

Woven into the principle of limited court intervention is another tenet of the Model Law - that of party autonomy.[7] Even where there is scope for judicial intervention it may be preempted by the parties having resolved the issue for themselves. The limitations the Act places on judicial intervention will only be effective if the courts also recognize the parallel need to preserve the party autonomy enshrined in the Act.

Before examining the ways in which the Act allows scope for judicial intervention some reference should be made to the situation prior to the passage of present law. Like the situation that prevailed in the United Kingdom, British Columbia allowed scope for appeals to the courts on questions of law and for misconduct by an arbitrator.[8] To an extent this situation still prevails for arbitrations that are not international commercial arbitrations.[9] For domestic commercial arbitrations

there is still considerable scope for judicial intervention and conflicting interpretations. While section 18 of the Act (which provides that the parties shall be treated with equality and each party given a full opportunity to present his case) may encompass some of the grounds for review that previously amounted to misconduct on the part of the arbitrator, it has been argued that it is likely to be more limited.[10] Many of the grounds which were formerly included under the heading of misconduct of the arbitrator are now grounds for setting aside an award under section 34 of the Act - such as an award not dealing with a dispute within the terms of the submission to arbitration. The Act (and the Model Law) have precluded judicial intervention for misconduct during international commercial arbitral proceedings but retained some types of misconduct as grounds for setting aside an award.

Under the British Columbia Act the issue of judicial intervention may rise at three distinct stages. The question of the role of the courts may arise before the arbitration proceedings commence, such as when one party argues that the dispute is not subject to the arbitration clause. Second, it may arise during the proceedings, such as when an arbitrator became incapable of performing his functions or withdraws. Finally, judicial intervention also arises after an award has been rendered in connection with its setting aside or enforcement.

For reasons of space, this discussion will largely concern itself with judicial intervention prior to and during arbitral proceedings.

1. JUDICIAL INTERVENTION PRIOR TO THE COMMENCEMENT OF THE ARBITRAL PROCEEDINGS

(a) Stay of Legal Proceedings; s.8

Section 8 of the Act provides a procedure whereby a party to an arbitration agreement may seek a court order staying legal proceedings brought by another party to the agreement respecting a matter agreed to be submitted to arbitration. The court is obliged to order a stay of proceedings unless it determines that the arbitration agreement is "null and void, inoperative or incapable of being performed". Subsection (3) of section 8 provides that an application under the section does not prevent the commencement or continuation of an arbitration. This last feature reflects a recurrent concern of UNCITRAL with the use of recourse to the courts for the purpose of delay. Section 8(1) would preclude a defendant from seeking a stay after filing a notice of defence but American courts have held that the onus on the party seeking a stay should be a heavy one so as to enhance arbitration as an alternative to litigation.[11] On the other hand, a challenge to jurisdiction is not a "step in the proceedings".[12] However, a demand for particulars of the statement of claim has been held to constitute a step in the proceedings.[13]

How courts in British Columbia interpret the words "void, inoperative or incapable of being performed" will determine, in large measure, the scope for judicial intervention under the Act. The expression "null and void" would seem to refer to the issue of whether an arbitration agreement exists at all or is void ab initio on such grounds as duress, fraud, mistake or misrepresentation.[14] The word "inoperative" has no established meaning at common law but probably includes a case where an agreement to arbitrate has expired or been ended by agreement between the parties.[15] "Incapable of being performed" has been interpreted as referring to questions of impracticability such as arise when an agreement is too vague or ambiguous to be susceptible to any reasonable interpretation.[16]

It has been pointed out that the introduction of new terms such as those in section 8 will demand new approaches on the part of British Columbian courts to the issue of arbitrability and that, given the preamble of the Act they would faile to give effect to a clear legislative signal if they did not foster a bias in favour of arbitration rather than against it.[17] This has been the evolving position in the United States since the decision of the Supreme Court in Scherk v. Alberto-Culver Co where an arbitration agreement was upheld over attempts to bring suit in the United States regarding the application of the Securities Exchange Act of 1934 and the infamous Rule 10b-5 promulgated under that law.[18] Similarly, the Supreme Court of the United States in Mitsubishi Motors v. Soler Chrysler-Plymouth found that claims arising under federal anti-trust laws were susceptible to arbitration. In the opinion of the Court:

> As international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The controversies that international arbitral institutions are called upon to resolve have increased in diversity as well as complexity. Yet the potential of these tribunals for efficient disposition of legal disagreements arising from commercial relations has not yet been tested. If they are to take a central place in the international legal order, national courts will need to "shake off the old judicial hostility to arbitration ..." To this extent, at least, it will be necessary for national courts to subordinate domestic notions of arbitrability to the international policy favouring commercial arbitration.[19]

(b) Appointment of Arbitrators: S.11

Both the Model Law and the Act give a role to the courts in connection with the appointment of arbitrators. Section 11 of the Act provides for statutory appointment procedures when the parties faile to agree on a procedure for appointing the arbitral tribunal. If either procedure fails a party may request the Chief Justice of the Supreme Court of British Columbia or his designate to make an appointment or take a necessary measure. The decision of the Chief Justice is final and not subject to appeal and the Act sets out matters the Chief Justice must take into account in appointing an arbitrator.

The content of section 11 reflects a somewhat inevitable tension between two Model Law priorities. On the one hand there is concern with not allowing judicial intervention to override the private agreement the parties have reached. On the other hand, there is concern with realizing the parties' desire to arbitrate their differences without undue delay. Judicial intervention becomes essential, even when the parties have set up their own procedure to settle a disagreement as to who will arbitrate their substantive lis if the person or persons in control of that procedure fail or are unable to act as was envisaged.[20]

Judicial appointment of arbitrators has recently been the subject of a ruling of the former Chief Justice of British Columbia. The request arose out of an arbitration agreement contained in a long-term contract to sell coal between Quintette Coal Limited (Vendor) of British Columbia and a number of Japanese steel companies (Purchasers). Since the contract was signed, the world price of coal has declined significantly and the Purchases sought a variation of the price pursuant to the price review provisions contained in the contract. The Purchasers, as petitioner, applied to the Chief Justice under section 11 of the Act for an order appointing a third arbitrator to an arbitral tribunal set up under the arbitration

agreement between the parties. Under that agreement each side had appointed one arbitrator but these persons had been unable to agree on a third arbitrator.

In their petition, the Purchasers stated that since both sides' nominees were British Columbia residents, the third arbitrator "should be someone independent and impartial who will bring an international dimension to this international dispute" and that no further provincial representation was needed.[21] This argument drew support from the Act since two of the three factors the Chief Justice was required to have regard to in ordering the appointment of the third arbitrator were (1) matters likely to ensure that such person was independent and impartial and (2) the advisability of appointing a neutral arbitrator whose nationality was other than that of the parties.[22] Despite these considerations, the Chief Justice chose to appoint as third arbitrator the retiring Chief Justice of British Columbia, The Honourable Chief Justice N.T. Nemetz. In so ordering, the Chief Justice expressed the view that it would "be both inconvenient and unfair to the parties and to the arbitrator to expect anyone of international repute to spend the length of time this case will require away from his home and other interests" when someone of international reputation and experience was available locally.[23]

While the personal qualifications of the former Chief Justice of British Columbia are beyond criticism, the appointment of an all British Columbia tribunal is hardly likely to dispell allegations of parochialism. While an international commercial arbitration must inevitably have a specific situs, it is clearly the intention of parties, who have chosen to avoid any particular legal system, that their dispute appear to be resolved by persons independent of a particular nation. The credibility of Vancouver as an international commercial dispute resolution centre would have been enhanced by the choice of a non-Canadian

with the appropriate qualifications. These concerns would seem to have prompted a recent amendment to section 11 of the Act. Section 11(9) now provides as follows:

> (9) Unless the parties have previously agreed to the appointment of a sole or third arbitrator who is of the same nationality as any of the parties, Chief Justice shall not appoint a sole or third arbitrator who is of the same nationality as that of any of the parties.[24]

It could be said, however, that there might be situations where all the arbitrators should all be of the same nationality (even where the subject matter of the dispute was truly international) and that section 11(9) eliminates this option.

(c) Interim Measures of Protection: S.9

Both before and during the arbitration a court may grant interim measures of protection (s.9) unless otherwise agreed between the parties. This is a power concurrent to that possessed by the arbitral tribunal (ss.17 and 31(6)). There is no limit from whose countries' courts interim protection may be sought since the Act uses the word court in a general sense.[25]

The scope of such judicial relief is best gauged by comparing it to similar relief at the instance of the arbitral tribunal.[26] Interim relief offered by the tribunal cannot be enforced under the provisions of the Act as an arbitral award unless it comes within the definition of that term in section 2(1) of the Act.[27] The Act originally deemed the term "arbitral award" to "include an interim arbitral award".[28] The Act was recently amended to deem arbitral award to:

Include[s] (a) an interim arbitral award made for the preservation of property, and
(b) any award of interest or costs.
(emphasis added)

It is puzzling that the phraseology used in section 17 of the Act describing the scope of interim measures by the tribunal ("any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute") was not adapted into the wording of section 2(1). The new amendment creates an ambiguity which could be the basis of an argument that the enforcement of tribunal-ordered interim measures of protection is limited to those described in the section 2(1) definition of "arbitral award". That definition does, however, contain the word "includes" whose presence could be argued not to have diminished the scope for enforcement of tribunal interim awards. Moreover, the Act's policy of limited court intervention would hardly support any interpretation which made recourse to the court for interim relief more attractive than the seeking of such assistance from the tribunal.

In the Quintette Coal Limited arbitration, referred to earlier, the Purchasers next sought an order for an interim measure of protection, under section 17 of the Act, from the arbitral tribunal. The Purchasers sought an order that a portion of the moneys paid for coal shipments received during the arbitration to be paid into trust. The Seller argued that the tribunal lacked jurisdiction to make an order. The tribunal ruled that the parties had evinced an intention to be bound by the Act and that the tribunal itself was bound by the statute. In upholding its jurisdiction to rule on interim measures of protection the tribunal found that:

> This statute, in its preamble, speaks of reflecting a consensus of view on the conduct of, and the degree

> and nature of judicial intervention in, international commercial arbitrations. A review of the Act indicates the consensus is that in international commercial arbitrations disputes should be resolved, subject of course, to jurisdiction, whenever possible by arbitration tribunals rather than by the Courts.
>
> The tribunal takes a purposive view of the statute. As the statute aims at resolving disputes within the framework of the arbitration, the tribunal will hear the application for an interim measure of protection ...[29]

The tribunal thus concluded that, in its view, the parties had not shown an intention to exclude the granting of interim relief by the tribunal established by their agreement. A subsequent challenge to the ruling of the tribunal was dismissed by the Supreme Court of British Columbia[30] - both the tribunal and the court showing a willingness to uphold the scope of the tribunals' power to provide ancillary relief.

Should a party seek interim relief from a court it remains unclear how such requests will be responded by Canadian judges. Article 9 of the Model Law was broadly phrased to make it clear that it did not seek to regulate which measures of protection were available to a party but merely expressed the principle that a request to a court for any interim measure is not incompatible with the fact that the parties had agreed to settle their dispute by arbitration.[31] Th Analytical Commentary of the UNCITRAL Secretary General on the Model Law expresses the view that the scope of interim relief pursuant to Article 9 is wider than that retainable from the tribunal in that it would extend to orders affecting third parties as well as orders sought from foreign courts.[32] This contrast between judicial and tribunal interim relief may be undermined by section 31(6) which provides that the

tribunal may, at any time during the arbitral proceedings, make an interim award on any matter on which it may issue a final award. Section 31(6) is not contained in the Model Law but resembles Article 32.1 of the UNCITRAL Arbitration Rules. When read with section 17 of the Act section 31(6) reveals that the scope for tribunal interim relief is very wide as well.

Given the fact that the Act establishes a principle for its own construction, that reference be made to and due weight given UNCITRAL documents and working group papers regarding the preparation of the Model Law, it is likely that the above analysis would be given special weight in fashioning interim relief.[33] On the other hand, court-ordered interim relief is perhaps less likely than tribunal orders under section 17, to be based on principles of granting relief developed in international law. It could be argued that to the extent that customary international law is part of Canadian law it should apply, especially where the statute under which such relief is granted reveals a transnational bias. In any case, it would appear that the principles for granting interim relief under public international law and Anglo-Canadian common law are remarkably similar - apparently because of the incorporation into the former of municipal legal principles by the World Court.[34] The International Court of Justice now appears to regard interim measures as available even where damages would be an adequate remedy as long as "irreparable prejudice" would be sustained by the applicant if such relief were to be refused.[35] Similarly, Anglo-Canadian courts will grant injunctive relieve even when future losses can be calculated.[36] It seems that Canadian law has now reached the stage where damages will be seen as adequate only where a plaintiff may not be significantly prejudiced by a denial of interim protection.[37]

2. JUDICIAL INTERVENTION DURING THE ARBITRAL PROCEEDINGS

In addition to ancillary relief, there are at least five express instances where the Act allows scope for court intervention during the course of arbitral proceedings to which the Act applies. These instances are:

(a) Resolving challenges to arbitrators: s.13;

(b) Termination of the Mandate of an Arbitrator: s.14;

(c) Rulings by the Arbitral Tribunal on its jurisdiction: s.16/

(d) Court assistance in taking evidence: s.27(1).

(e) Judicial Consolidation: s.27(2) and (3).

(a) Resolving Challenges To Arbitrators: s.13

Like section 11(5), which prevents disagreement over composition of the tribunal from unduly delaying the arbitral proceedings, section 13 also enables access to the Supreme Court in the event that a challenge to an arbitrator is rejected by the arbitral tribunal. Like judicial resolution of disagreements over tribunal composition, determinations under section 13 are not subject to appeal.[38]

There is support for the view that court proceedings, though rarely successful in practice, is often taken advantage of for delaying purposes.[39] At least three features of judicial access under section 13 tend to minimize this risk. First. the challenging party has only 30 days, after notice of rejection of the challenge, to request the Supreme Court to decide on the challenge.[40] Second, as mentioned the decision of the court is final

and not subject to further appeal.[41] Third, while the request for judicial review is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration and even make an award. The Act includes a further provision, not contained in the Model Law, which further reduces the risk of dilatory tactics. Section 13(5) provides that where the Court is asked to rule on the challenge to an arbitrator, it may refuse to exercise its jurisdiction to do so if it is satisfied that the petitioner had already had an opportunity to have the challenge ruled upon, by other than the arbitral tribunal, under the procedure agreed upon by the parties.[42]

(b) Termination of the Mandate of an Arbitrator: s.14

The act allows the Supreme Court of the province to rule on the termination of the mandate of an arbitrator on the basis that:

(a) He becomes de jure or de facto unable to perform his functions or for the reasons fails to act without undue delay, and

(b) He withdraws from office or the parties agree to the termination of his mandate.

This jurisdiction only arises if the parties cannot agree upon a termination on the above grounds.[43] Unlike section 13, the parties cannot agree on termination by an alternate procedure. The decision of the court is final and unreviewable.[44]

In his analytical commentary on the Model Law, the UNCITRAL Secretary General suggests that, in considering an arbitrators' failure to act, the following may be relevant:

(i) what action was required or expected of him in light of the arbitration agreement;

(ii) has the delay been so inordinate as to be unacceptable in the circumstances, including technical difficulties and the complexity of the case, and

(iii) has his conduct fallen below the standard of what may reasonably have been expected from a person with his qualifications and experience.[45]

(c) Rulings by the Arbitral Tribunal on its own jurisdiction: s.16

Section 16 of the Act confers on the arbitral tribunal the power to rule on its own jurisdiction, including rulings on the existence and validity of the arbitration agreement. If the tribunal rules as a preliminary question that it has jurisdiction, then any party may request the Supreme Court to decide the matter.[46]

The earlier version of Article 16 in the Model Law allowed positive rulings by the tribunal on its own jurisdiction to be contested only in court action to set aside the award.[47] The view which prevailed allows for judicial review of any rulings by the tribunal on its jurisdiction as a preliminary question. The major concern, as with other questions of judicial access, was with the potential for delay to the arbitral proceedings. As with judicial review of challenges to arbitrators under section 13, court decisions on preliminary jurisdictional rulings by the tribunal are subject to three factors ameliorating the risk such redreww might pose to the expedition of the proceedings. First, the request to the Supreme Court must be made within 30 days of the

tribunal's ruling on its own jurisdicion.[48] Second, the decision of the Supreme Court is final and not subject to appeal.[49] Third, the arbitral proceedings may continue and an award delivered while the request to the Court is pending.[50] The possibility of delay arose in the Quinette Coal Ltd. arbitration when the seller argued that the tribunal lacked jurisdiction to make an interim order under sections 17 and 31(6) of the Act. After deciding that it had such jurisdiction, the tribunal ruled that it would continue the proceedings while the seller applied to the Court under s.16(6).

Another limitation on the role of the courts arises if the facts upon which a party challenges the jurisdiction of the tribunal are inseparable from the merits of the case. In such instances, the tribunal may continue with the proceedings and make a final award dealing with both issues simultaneously. Without a preliminary ruling on jurisdiction, a party is deprived of recourse to the courts during the proceedings under section 16 of the Act. It will only be after the award has been delivered that it can be sought to be set aside on the ground that it contains rulings on matters beyond the scope of the submission to arbitration.[51] The Act leaves it to the tribunal, in such cases, to decide whether it should rule on jurisdiction as a preliminary issue or in the final award on the merits.[52]

Any concern that jurisdictional rulings by the courts are too narrowly defined under the Act is also allayed by the existence of another method of obtaining judicial rulings relating to jurisdiction.[53] Proceedings can be commenced, outside of the Act, based on the arbitrator having no jurisdiction because there is no agreement between the parties to arbitrate their differences. If these proceedings succeed, the court will assume jurisdiction over the dispute.[54] The notes accompanying Article 16 specifically recognise that the

Model law does not preclude access to a court on the issue of whether a valid arbitration agreement exists.[55]

(d) Court Assistance in Taking Evidence: s.27(1)

Under section 27(1) the court may only provide assistance in taking evidence if requested to do so by the arbitral tribunal or by a party with the approval of the arbitral tribunal. The UNCITRAL Working Group believed it should be left to each state to decide whether to place the ultimate authority over court intervention in the court itself. Consistent with the principle of limited court intervention, British Columbia believed it necessary to preclude court intervention where the tribunal did not request it. On the other hand, it is accepted that a court can play a vital role in aiding an arbitral tribunal in taking evidence. The tribunal has no power over persons who are not parties to the arbitrator agreement. Perhaps the main weakness in the theory of court intervention in section 27 is the likely reluctance of the arbitral tribunal to decline a party's request for judicial assistance.[56]

It remains unclear how the phrase "taking evidence" in section 27(1) will be interpreted. From the UNCITRAL Working Papers it is clear that the phrase applies to oral testimony from a person required to be examined as a witness as well as documents to be produced or property to be inspected.[57] Such powers would include the obtaining of evidence with the assistance of a foreign court. The local court might execute the request by taking evidence itself, communicating the result to the tribunal, or it might order that the evidence be provided directly to the arbitral tribunal.

It is also not clear whether the phrase "taking evidence" gives the Supreme Court the power to order an

examination for discovery. American courts allow the use of examination for discovery in commercial arbitrations only in exceptional circumstances. In Recognition Equipment, Inc. v NCR Corporation[58] an issue was whether, assuming the court were to stay proceedings, the court should allow discovery under the Federal Rules of Civil Procedure, pending arbitration. After a careful review of apparently conflicting case law, the court found no "exceptional circumstances" that would justify the cost of pre-arbitration discovery, particularly when there existed the possibility of "dual discovery" by arbitral, as well as, judicial order. An interpretation of section 27(1) that excludes the use of examination for discovery is consistent with the object of arbitration as avoiding litigation procedures that can be seen as oppressive and counter-productive.[59]

(e) Judicial Consolidation: s. 27(2) and (3)

The Supreme Court of British Columbia has powers under section 27(2) of the Act in connection with the consolidation of two or more arbitrations when the parties have already agreed that their arbitrations will be consolidated. Since the jurisdiction of the court is predicated on consensus, the section should not be a vehicle for delay. Judicial consolidation as a dilatory tactic has been well established by American experience.[60]

Consolidation of arbitral proceedings seeks to save the delay and expense of separate proceedings and avoid the possibility of conflicting awards. Experience suggests, however, that consolidations are often more complicated and costly than unconsolidated proceedings where parties are not forced to assume the additional burdens of hearing claims, giving evidence and discussing issues with all other parties.

It is important to realize that the scope of the courts power under section 27(2) is limited to ordering the terms on which arbitrators are to be consolidated, appointing an arbitral tribunal in accordance with section 11(8) where the parties cannot agree on its composition and making any other order it considers necessary. The court does not, it seems, have the power to order consolidation because it copnsiders it "just and necessary" if the parties have not agreed to consolidation amongst themselves. At the same time, the court might well be reluctant to allow consolidation of all aspects of a dispute when the delay and expense of doing so would only be justified for certain parts of the parties' disagreement.

Section 27(2) and (3) are not contained in the Model Law but were based on section 6B of the Arbitration Ordinance of Hong Kong. In its recent Report on the Adoption of the UNCITRAL Model Law of Arbitration, the Law Reford Commission of Hong Kong recommended against a compulsory consolidation procedure on the ground that inter alia, it is more difficult in an international context to devise a workable procedure for consolidation, than in a domestic context where the parties are usually all subject to the jurisdiction of the local courts. The Hong Kong Report is critical of the British Columbia Act for including a provision which operates only by consent and therefore seems to not justify court intervention. While the judicial intervention provided for in section 27(2) may expedite the process of consolidation by specifying the terms on which it is to occur, it is arguable that this has been achieved at the high cost of risking the level of judicial intervention in consolidation which has occurred in the United States.[61]

3. JUDICIAL INTERVENTION SUBSEQUENT TO THE ARBITRAL AWARD

(a) Application for setting aside an arbitral award: s. 34

Section 34 is the exclusive basis for recourse against an international commercial arbitration award under the law of British Columbia. The grounds the section sets out for setting award aside are the same as those contained in Article 34 of the Model Law and Article V of the New York Convention (for refusal of recognition and enforcement).

There is general consensus amongst experts that the grounds set out in section 34 - which are the exclusive basis for recourse against awards uder B.C. law - place strict limits on the scope for judicial intervention in international arbitrations. For instance, an award can no longer be annulled on the ground of mistake or fraud or because fresh evidence has been discovered since the conclusion of the arbitral proceedings. Despiute such limitations, section 34, as worded, is not only consistent with the presumption in favour of strict limits on judicial intervention but also with a policy of ensuring, whenever possible not only the uniformity of domestic legislation but consistency between the provisions of the new York Convention and the Model Law.

While judicial interpretation of section 34 is still awaited it is unlikely that the provision will be seen as not excluding appeal on points of law altogether - consistent with notions of certainty and finality of the arbitration. Section 34 does seek to ensure certain minimum standards of procedural fairness have been met but it sets these grounds out, rather than leaving them to the courts to devise. Some of the grounds set out come close to the common law concept of "misconduct" by the arbitral tribunal and it is to be hoped that they will not be interpreted solely in the light of that former basis for review. On the other hand, the public policy ground for setting aside an award (section 34(2)(b)(ii)) may include not only substantive standards but procedural ones as well - closer to the civil law concept of "ordre publique".

This was the view adopted in the Analytical Commentary on the Model Law and the Australian report on the Model Law has recommended, in its recommendations for legislation implementing the Model Law in Australia, that it be explicitly set out in the definition of "public policy".[62]

(b) RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS; SS 35 AND 36

While closely-related in several respects to judicial recourse against the award, recognition and enforcement requires judicial intervention since the tribunal lacks the powers available to the courts (such as the contempt power). Because new grounds (from those for setting aside an award) are not introduced for enforcing an award, a party should not be prejudiced by not having actively sought to have an award set aside.

Section 36 lists the only grounds on which the Supreme Court of British Columbia may refuse to regonise and enforce an award. These, as mentioned, are the same grounds as are set out in the New York Convention and in section 34 for setting aside an award. This part of the Act needs to be read along with the Foreign Arbitral Awards Act, which implements the New York Convention into the Law of British Columbia and differs from the enforcement provisions of the Act in that it also deals with the recognition of arbitration agreements and foreign awards whose subject-matter is domestic, as distinct from international in scope.

4. THE BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION ACT AND S.96 OF THE CONSTITUTION ACT 1982; THE ARBITRATOR AS "UNWELCOME GUEST"[63]

In Quintette Coal Limited v Nippon Steel Corporation et al the petitioner contested the validity of sections

16, 17 and 31(6) of the Act under section 96 of the Constitution Act 1982.[64] As one of the authors of the report to the Attorney-General of British Columbia on which the Act was based, the writer was aware of earlier concern about this issue. It was surprising, however, that the question arose so early on in the history of the new legislation.

In Quinette, the contract between the Vendor and the Purchasers provided for arbitration of all disputes between the parties. The law governing the Interpretation of the parties contract was stated to be the law of British Columbia. The tribunal having determined that it would hear the Purchaser's application for an interim measure of protection, the Vendor applied for a review of that ruling under section 16(6) of the Act and for declarations in respect of the constitutional issues.

Section 96 reserves to the Governor-General the power to "appoint the judges of the Superior, District, and County Courts in each province" and has been construed as preventing provincial leglslatures from creating tribunals and tribunal personages with the powers of section 96 judges. In Reference Re Residential Tenancies Act[65] Dickson, J. (as he then was) stated the scope of section 96 as:

> ... limiting provincial competence to make appointments to a tribunal s.96 judicial powers and therefore as implicitly limiting provincial competence to endow a provincial tribunal with such powers.[66]

Mr Justice Gow determined that nothing turned on whether it was argued that the tribunal created by the provincial law was a section 96 Court, or whether the tribunal was conceded to be valid but the legislation conferring certain powers on it was not. In his view, the tribunal

established pursuant to the parties' agreement was not a creature of the Act. Though the Act provided a procedural structure for international commercial arbitral tribunals established in British Columbia this did not convert them into statutory tribunals'

> The essence of the violation of section 96 is the existence of a provincial body having the powers of a court of justice, its members, therefore, being in substance section 96 judges. The premise is that without the legislation neither the tribunal nor its members would have those powers. But section 96 has never been construed (and cannot be) as forbidding two or more citizens from appointing another as their "private judge" to resolve their dispute and conferring upon him as applicable only to them the decision making powers of a section 96 judge.[96]

Specifically, the Court found that far from suggestions, through the inclusion of injunctive and interim award powers in section 17 and 31)6_ respectively, that tribunals subject to the Act were section 96 courts, these powers led to the inference that such tribunals were conventional private arbitral bodies. Mr Justice Gow concluded that even if the tribunal were a provincial statutory body and its members provincially appointed, the exercise of the powers in sections 16(1), 17 and 31(6) would not violate section 96.

The judicial review of the tribunal's rulings on its own jurisdiction provided for under section 16(7) of the Act was also argued to be in violation of section 96. The Court rejected this argument as well, saying: "A review by the Supreme Court is provided; that is armour enough to deflect any attack by section 96 even upon a "statutory tribunal". (at p.33).

While the correctness of the decision in Quinette

awaits comment from constitutional scholars, there is no doubt that it sends out a very welcome signal both inside and outside Canada. Mr Justice Gow, is clearly cognizant of the change in outlook towards the private resolution of international commercial disputes in recent years and in this respect he is clearly not alone among his judicial bretheren in the province. In Century 22 Vernon Lowe Realty Ltd v Roval Le Page Real Estate Services Ltd Madam Justice Proudfoot states:

> "Finally, the most compelling reason why the court should not intervene is simply the (sic) legislation sets up a mechanism to expediently and inexpensively resolve these types of dispute which occur from time to time. This process should be allowed to continue. If the courts are to become involved by way of granting leave each time an Award is made and a party is not happy, the objectives and intentions of the legislation will never be fulfilled. Everyone talks today of mechanisms for "alternative dispute resolution", here is just such a mechanism; that scheme should be allowed to flourish.[68]

Her Honour's remarks were made in the context of an application for leave to appeal on a question of law pursuant to British Columbia's domestic arbitration statute, the Commercial Arbitration Act, but they are equally pursuasive in the context of private international disputes. Such reluctance to intervene in arbitrations of domestic commercial disputes is evidenced by other recent decisions in British Columbia; Southmark Vancouver Corporation v Wosk's Ltd (1987) 21 B.C.L.R. (2d) 348 (B.C.S.C.); Domtar Inc. v Belkin Inc. [1988] B.C.D. Civ.240-03 (B.C.S.C.) and Crown Forest Ind. Ltd v Commonwealth Construction Co. (B.C.S.C.) Vancouver Registry A.861085.

5. CONCLUSION

British Columbia's enactment of the UNCITRAL Model Law has been praised for not containing extensive variations which might have interfered unduly with the policy priorities of the uniform code on international commercial arbitration that it closely reflects. This means that judicial intervention in international commercial arbitrations taking place in the province should be strictly limited. White it is too early to make firm conclusions about the effect the new legislation is likely to have on private international commercial dispute resolution in Britich Columbia, there have already been some troubling developments.

British Columbian judges have shown an encouraging level of support of arbitration over adjudication for private commercial disputes but there has been no unqualified statement that this preference is elevated when the subject-matter of the dispute is international, rather than domestic, in character. The preamble to the British Columbia statute makes clear the level of legislative support in the province for arbitration of international commercial disputes. Further, the British Columbia law which regulates the arbitration of domestic commercial disputes, the Commercial Arbitration Act, clearly tolerates a higher level of judicial interference than does the International Commercial Arbitration Act. It will be crucial to the success of the B.C. Act that it is recognised as upholding a stronger bias against judicial intervention.

Another concern arises from the risk posed to the original Act through the process of legislative amendment. While no legislation can be immune from change, there is an enhanced risk of injury to delicately balanced policy priorities when those are contained in what is really an international uniform law. The

amendment already referred to, the definition of "arbitral award" in the Act, is an example of the danger local amendments pose to the central principles of the Model Law contained in the Act - including limited court intervention.

In the writer's view it is important that scepticism regarding judicial intervention in international commercial arbitral proceedings be maintained. It is well documented that such intervention poses risks in the form of increased costs and delay. Recent experience in British Columbia also suggests that it may undermine the level of confidentiality expected through a choice of a private means of dispute resolution. The most serious risk posed by judicial intervention, however, may be the likelihood that courts are less able to make findings that give effect to the parties' original expectations.

NOTES

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1 The last two Canadian jurisdictions to enact the Model Law were Saskatchewan and Ontario with their International Commercial Arbitration Acts, S.S. 1988 c. 1-10.2 and S.O. 1988, c. 30, respectively.

2 See Paterson & Thompson (eds), UNCITRAL Arbitration Model in Canada (Carswell, 1987), 165-166.

3 Among these are Cyprus and Nigeria (and Bulgaria). Australia, Hong Kong and New Zealand have examined implementation by amendment to existing legislation.

4 S.B.C. 1986, c. 14.

5 Report of UNCITRAL on the Work of its Eighteenth Session, 40 U.N. Gaor Supp. (NO. 17) U.N. Doc. A/40/17 (1985).

6 Report of the Secretary-General, U.N. Doc A/CN.9/263 (1985).

7 See Herrmann, "The British Columbia Enactment of the UNCITRAL Model Law", in Paterson & Thompson, supra, n.2, 65, at 67.

8 See Alvarez, "Judicial Intervention & Review Under the International Commercial Arbitration Act", in Paterson & Thompson, supra n.2, 137.

9 These are governed by the new Commercial Arbitration Act, S.B.C. 1986, c.3.

10 See Kerr, "Arbitration & the Courts: The UNCITRAL Model Law" (1985) 34 Int. and Comp. L.Q. 16.

11 GATES ENERGY PRODUCTS INC. v. YUASA BATTERY CO. LTD (1986) XI Year. of Comm. Arb. 566.

12 HOWAY AND REID v. DOMINION PERMANENT LOAN CO. 6 B.C.R. 551.

13 FOFONOFF v. C. & C. IASC SERVICE LTD (1978) 5 C.P.C. 131.

14 Mustill & Boyd, Commercial Arbitration (1982) at 414 and see TYWOOD INDUSTRIES LTD v. ST ANNE-NACKOWIC PULP & PAPER CO. (1980) 25 O.R. (2d) 89.

15 See JAMES SCOTT & SONS LTD v. DEL SEL (1923) 14 Lloyds' Rep. 65 (H.L.).

16 Infra, n. 17, at p90.

17 Graham, "International Commercial Arbitration: The Developing Canadian Profile", in Paterson & Thompson, supra, n. 2, 77, at 90-91.

18 417 U.S. 506; 41 L. Ed. 2d 270; 94 S. Ct 2449 (1974).

19 473 U.S. 614; 87 L. Ed. 2d 444; 105 S. Ct 334 (1985), L. Ed. at 462-463. The trend of Supreme Court decisions preferring arbitration over regulatory codes was further exemplified in SHEARSON-AMERICAN EXPRESS INC. v. McMAHON 55 L.W. 4757 (1987) (Securities Exchange Act and Racketeer Influenced and Corrupt Organisations Act).

20 See NATIONAL ENTERPRISES LTD v. RACAL COMMUNICATIONS LTD [1975] Ch. 397 where the Court held it had no jurisdiction, under the U.K. Arbitration Act, to appoint an arbitrator where a third party agreed upon by the parties to make such an appointment had failed to act, but cf. Re P.Z. Resort Systems Inc. et al (1987) 39 D.L.R. (4th) 626 (B.C.C.A.) where the court refused to appoint a new arbitrator when the agreement to arbitrate was held to be a specific agreement to refer a dispute to a named individual

and was no longer capable of enforcement since the award of the sole arbitration had been set aside (Commercial Arbitration Act, S.B.C., 1986, c. 3, s. 17).

21 Re an Arbitration between NIPPON STEEL CORPORATION et al V. QUINTETTE COAL LTD, Petition to the Surpeme Court of British Columbia, No. 880290, Vancouver Registry, p12.

22 Act, supra, n. 4, s. 11(8) (as originally enacted).

23 Re an Arbitration between NIPPON STEEL CORPORATION et al V. QUINTETTE COAL LTD, Reasons for the Judgment of the Chief Justice (23 March 1988), p3.

24 See Miscellaneous Statutes Amendments Act (No. 2) S.B.C. 1988, c. 46, s. 35.

25 Act, s. 2(1).

26 Act, s. 17.

27 See s. 2(1) definition of "arbitral award", as amended by Miscellaneous Statutes Amendment Act (No. 2) S.B.C. 1988, c. 46, s. 34.

28 Act, s. 2(1), as originally enacted.

29 QUINTETTE COAL LIMITED v. NIPPON STEEL CORPORATION, et al (Supreme Court of B.C., Vancouver, 6 July 1988, No. A881722), pp15-16.

30 Id.

31 U.N. Doc A/CN.9/SR.312.

32 U.N. Doc A/CN.9/SR.264.

33 Act, s. 6.

34 See Elkind, Interim Protection: A Functional Approach (1981).

35 See Goldworthy, "Interim Measures of Protection in the International Court of Justice" (1974) 68 Am. J. Int. Law 258.

36 E.g., TURF CARE PRODUCTS v. CRAWFORDS (1978) 95 D.L.R. (3d) 378 and HOSKIN v. PRICE WATERHOUSE LTD, (1982) 35 O.R. (2d) 350 (H.C.J.).

37 See EVANS MARSHALL & CO. v. BERTOLA S.A. [1973] 1 W.L.R. 349.

38 Act, s. 13(6).

39 Redfern & Hunter, Law & Practice of International Commercial Arbitration (1986), 175.

40 Act, s. 13(4). This is consistent with the common law: JOHNSON v. KORN 117 S.W. 2d 514 (1938). See also Domke on Arbitration (1968), pp332-333.

41 Act, s. 13(6).

42 Act, s. 13(5).

43 Act, s. 14(2).

44 Act, s. 14(3).

45 U.N. Doc.A/CN.9/S.R. 264.

46 Act. s. 16(6).

47 Act. s. 34 and U.N. Doc. A/40/17, at 157.

48 Act. s. 16(6).

49 Act. s. 16(7).

50 Act. s. 16(8).

51 U.N. Doc. A/CN.9/SR.315.

52 Act. s. 34(2)(iv).

53 Redfern and Hunder, supra, n. 39 at pp.215-216.

54 Graham, supra, n. 17, at 87-89

55 (1985) 24 Int. Leg. Mat. 1302, 1339, note 163.

56 Melis and Hanak, "Arbitration and the Courts" in Sanders, UNCITRAL's Project for a Model Law on International Commercial Arbitration (1984), 83,95.

57 U.N. Doc. A/CN.9/233, paras. 31 ff.

58 532 F. Supp. 271 (1981) (U.S.D.Ct. N.D. Texas).

59 See Kerr, supra, n. 10.

60 See Hascher, "Consolidation of Arbitration by American Courts: Fostering or Hampering International Commercial Arbitration" 1 J. Int. Arb. 127 (1984) and Branson and Wallace, "Court Ordered Consolidated Arbitrators in the United States: Recent Authority Assures the Parties a Choice" 5 J. Int. Arb. 91 (1988).

61 See Re Burmah Oil Tankers Ltd, 454 U.S. 966, CF, Weyerhaeuser Co. v. Western Seas Shipping, 743 F. 2d 635 (9th Circ. 1984).

62 See Standing Committee of Attorneys-General Working Group on the UNCITRAL Model Law on Internationl Commercial Arbitration, Report, 1986.

63 This is an elliptical reference to Mr. Justice Gow's reference in Quintette (infra. n. 64) to the Canadian "house of disputes resolution" now being inhabited by the arbitrator.

64 Quintette Coal Limited v. Nippon Steel Corporation, et al. Unreported decision of Gow, J., Supreme Court of B.C., Vancouver Registry No. A881722 (July 6, 1988)

65 (1981) 123 D.L.R. (3d) 554 (S.C.C.).

66 Id., at p. 566.

67 Supra, n. 64, at p. 23.

68 Unreported, S.C. of B.C. Vancouver Registry, No. C. 86 5798 (Oct. 20, 1987).