THE ENFORCEMENT OF ARBITRATION AWARDS IN CANADA

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The arbitration process is commonly used to resolve legal disputes that arise in the shipping industry. Many of the standard form charterparties that have been in use for decades include a clause requiring disputes to be resolved by arbitration. The recognition or enforcement of Arbitration Awards is, as a consequence, an important part of the international legal system, providing the final legal mechanism for the conclusion of disputes governed by an arbitration clause. Without a legal framework for recognizing or enforcing such awards, the arbitration process would be of little value to anyone.

The recognition or enforcement of arbitration awards can arise in either a domestic or international legal context. So, for example, if an arbitration award is made following an arbitration in Vancouver under the Rules of the Vancouver Maritime Arbitrators Association issues regarding the recognition or enforcement of that award may arise in British Columbia if the parties are all located in British Columbia, or elsewhere depending on the location of the parties involved. Similarly, if an arbitration award is made following an arbitration in London or New York, issues regarding the recognition or enforcement of that award may arise in British Columbia or Canada if the losing party has assets in either British Columbia or Canada or is taking some legal step contrary to the award in British Columbia or Canada. Hence the need for an easy and quick mechanism to enforce or have awards recognized.

The recognition or enforcement of Arbitration Awards in Canada is governed by a number of different pieces of legislation, depending on the subject matter of the dispute and the award. In British Columbia, for example, there are at least three separate Acts dealing with the arbitration process being the *Commercial Arbitration Act,* the *Foreign Arbitral Awards Act,* and the *International Commercial Arbitration Act.* Federally there are a number of relevant pieces of legislation, including the *Commercial Arbitration Act,*

and with respect to arbitration awards issued in the United Kingdom, the *Canada-United Kingdom Civil and Commercial Judgments Convention Act.*

Under the *Constitution Act* of Canada the Federal Government has exclusive legislative authority to make laws with respect to navigation and shipping. As a consequence the applicable legislation governing maritime arbitrations is either the Federal *Commercial Arbitration Act* or, in the case of awards being made or enforced in either Canada or the United Kingdom, the *Canada-United Kingdom Civil and Commercial Judgments Convention Act,* The Federal *Commercial Arbitration Act* is the most widely used piece of legislation for the enforcement of foreign maritime arbitration awards. That legislation annexes in its entirety the model law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on June 21, 1985, commonly referred to as the "Model Law".

As a consequence, if a foreign arbitration award is made governing issues in respect of navigation or shipping, such as a charter party dispute, a dispute under a contract of afreightment, a salvage agreement or any other such award, the enforcement of that award in Canada is determined by reference to the *Commercial Arbitration Act* and the Model Law as annexed thereto. Of particular significance Articles 35 and 36 of the Model Law provide, in part, as follows:

> *"Article 35*
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> *Recognition and Enforcement*
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> (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.
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> *Article 36*
> *Grounds for Refusing Recognition or Enforcement*
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> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; Or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within, the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of Canada; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of Canada.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

An application for recognition or enforcement may be made in either the Federal Court of Canada or any Superior, County or District Court, which in British Columbia means that steps can be taken to enforce a foreign maritime arbitration award in either the Supreme Court of British Columbia or the Federal Court of Canada. The selection of which Court to choose may vary depending on the location of assets of the debtor. If, for example, the

debtor has assets situated at different locations in Canada then the Federal Court of Canada would be the most logical choice since the Federal Court has registry offices in each of the Provinces and no special steps are required to enforce Federal Court orders in the different Provinces, unlike orders from the Provincial Superior Courts.

Under the *Federal Court Rules* there is a fairly simple process for the enforcement or recognition of a foreign arbitration award. That process requires a number of steps be taken, and in particular requires an exemplified or certified copy of the award to be provided along with a copy of the arbitration agreement. As well, a confirmation of the following by Affidavit evidence is necessary:

(a) that the award has not been satisfied:
(b) whether the debtor appeared in the original proceeding:
(c) an address for service in Canada for the creditor:
(d) the name and address of the debtor:
(e) whether interest has accrued and information regarding the rates:
(f) appropriate exchange rate information:
(g) confirmation that the applicant knows of no impediment to recognition or enforcement:
(h) confirmation that the award is final.

As is clear from Article 36 above, challenges can be made to the recognition or enforcement of an award. Not surprisingly a challenge to the recognition or enforcement of award can be a complicated and expensive legal process with the burden being largely on the debtor to satisfy the court that recognition or enforcement should be refused. The case law on the subject of challenging the recognition or enforcement of an award is quite extensive. It will be observed, however, that the grounds to challenge an award do not generally relate to the merits of the award, but rather focus on whether the arbitration process was properly invoked and whether the arbitration process was properly completed. The only form of challenge in respect of the merits or substance of the decision is if the award is made in relation to a dispute that cannot legally be dealt with

through arbitration in Canada, or where the enforcement of the award would be contrary to the public policy of Canada. An example of the latter would be an award for interest at criminal rates.

Needless to say Canada's implementation of the Model Law is a step in the right direction to creating a legal framework for the ready enforcement and recognition of foreign arbitration awards in Canada. This step goes a long way to promoting reciprocity which ensures that Canadian arbitration awards are more easily enforced or recognized around the world. This is also of critical importance in the drive to promote Vancouver as a place to have such disputes resolved,