

# Investor-state arbitration, court intervention, and the ICSID Convention in Canada

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[The Convention on the Settlement of Investment Disputes between States and Nationals of Other States \(the “ICSID Convention”\)](#) is a multilateral treaty in the area of international investment. The ICSID Convention establishes a system whereby foreign investors can sue host states for wrongs committed in respect of their investments. The Convention limits the ability of host states to invoke immunity. Very importantly, by virtue of its distinctive self-enclosed procedural system, the Convention excludes the possibility of court intervention in the arbitral process and provides for the direct enforceability of a final arbitral award in favour of the foreign investor, without there being any need for the investor to engage domestic laws on the recognition of arbitral awards and without there being the possibility on the part of the host state to invoke grounds to annul or refuse to recognize the award before a domestic court.

Canada signed the ICSID Convention on December 15, 2006. It has not yet been ratified. This means that Canada is not yet a party to the Convention, and Canadian nationals cannot yet benefit from its regime. But what does the current status offer to parties who otherwise benefit from the Convention who choose a Canadian location as the venue of their ICSID arbitration? Can such parties expect to benefit from the ICSID Convention’s self-enclosed system? The answer is probably no. Given the fact that not all of the provinces have adopted legislation giving the ICSID Convention domestic effect, parties should be aware that the self-enclosed system under the ICSID Convention does not yet exist in Canada and that there is a possibility that Canadian courts will intervene in the arbitral proceedings or that grounds for annulment of an arbitral award will be entertained by those courts. The benefits of the ICSID arbitration process will likely not obtain in Canada until all of the provinces have passed legislation adopting the ICSID Convention.

## Legislative framework

Most matters of arbitral procedure are governed by provincial legislation.<sup>1</sup> However, arbitrations involving disputes where the federal government or federally owned corporations are parties, or where matters of admiralty or maritime law are engaged, are governed by a federal statute.<sup>2</sup>

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\* The views expressed in this article are those of the authors, and do not represent the views of Ogilvy Renault LLP.

1 Such provincial legislation is based on provincial constitutional jurisdiction over the administration of justice in the province (s. 92(14) of the *Constitution Act, 1867*) and arguably also based on provincial constitutional jurisdiction over property and civil rights (s. 92(13) of the *Constitution Act, 1867*).

Canada is one of the many jurisdictions that has adopted the [1985 UNCITRAL Model Law on International Commercial Arbitration](#) (“**Model Law**”). The Model Law is not a treaty, but rather a blueprint proposed by the United Nations Commission on International Trade Law in order to ensure a uniform legislative system across jurisdictions for the conduct of commercial arbitrations within those jurisdictions. The Model Law significantly limits the role of courts during the arbitral process. All or most of the provisions of the Model Law have been adopted by Parliament<sup>3</sup> and the provinces.<sup>4</sup>

As for the role of courts after the arbitral process, namely at the stage of enforcing arbitral awards, both the Model Law and the multilateral [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#) (the “**New York Convention**”) are relevant instruments of international law. The New York Convention has been ratified by Canada and adopted into domestic legislation by Parliament,<sup>5</sup> the provinces and the territories<sup>6</sup> in their respective jurisdictions. The Convention sets out specific grounds on which a court can annul or refuse to recognize a foreign arbitral award. These are mirrored in the Model Law. Any reasons invoked by the award debtor falling outside those grounds must be refused.

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<sup>2</sup> See [Commercial Arbitration Act, R.S.C. 1985, c. 17, s. 5](#). The federal government has constitutional jurisdiction over more subject-matters than simply proceedings involving the federal government, federally owned corporations, or admiralty/maritime disputes, and it could arguably expand the categories covered in the *Commercial Arbitration Act* to cover those other subject-matters, but it has largely left the matter of arbitral procedure to the provinces, as part of the latter’s constitutional jurisdiction over the administration of justice in the province and also, arguably, property and civil rights.

<sup>3</sup> As the schedule styled “Commercial Arbitration Code” found in the *Commercial Arbitration Act*, R.S.C. 1985, c. 17.

<sup>4</sup> Quebec: *Civil Code of Québec*, Book Five, Title Two, Chapter XVIII, and the *Code of Civil Procedure*, Book VII, Title I; Ontario: *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9, Manitoba: *The International Commercial Arbitration Act*, C.C.S.M. c. C151, Nova Scotia: *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234, Newfoundland and Labrador: *International Commercial Arbitration Act*, R.S.N.L. 1990, c. I-15, Alberta: *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, New Brunswick: *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2, Saskatchewan: *International Commercial Arbitration Act*, S.S. 1988-89, C. I-10.2, Prince Edward Island: *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5, British Columbia: *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233, Yukon Territory: *International Commercial Arbitration Act*, R.S.Y. 2002, c. 123, Northwest Territories: *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6 Nunavut: *International Commercial Arbitration Act*, R.S.N.W.T. (Nu.) 1988, ch. I-6.

<sup>5</sup> [United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16](#).

<sup>6</sup> Quebec: *Code of Civil Procedure*, Book VII, Title II; Ontario, *supra* note 4, Manitoba, *supra* note 4, Nova Scotia, *supra* note 4, Newfoundland and Labrador, *supra* note 4, Alberta, *supra* note 4, New Brunswick, *supra* note 4, Saskatchewan: *Enforcement of Foreign Arbitral Awards Act*, 1996, S.S. 1996, c. E-9.12, Prince Edward Island, *supra* note 4, British Columbia: *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154, Yukon Territory: *Foreign Arbitral Awards Act*, R.S.Y. 2002, c. 93, Northwest Territories, *supra* note 4, Nunavut, *supra* note 4.

## Status of the ICSID Convention in Canada

The ICSID Convention limits the role of courts in arbitrations to which it applies even further than the Model Law and the New York Convention. Canada signed the ICSID Convention on December 15, 2006. Canada will ratify the Convention once the provinces have passed implementing legislation. Because Canada has yet to ratify the ICSID Convention, it is not a party to the Convention.

The federal government has passed legislation implementing the ICSID Convention but it is not yet in force.<sup>7</sup> To the extent that the ICSID Convention touches on certain matters that are generally of provincial jurisdiction, for example arbitral procedure as a matter of the administration of justice in the province, provincial legislation to implement the Convention would be required. It is only after all the provinces have adopted legislation implementing the Convention, or have agreed to do so, that Canada can ratify the Convention. The federal government cannot override the constitutional division of legislative powers through the signature of international agreements.<sup>8</sup>

Private-law treaties developed after the ICSID Convention often include what is known as a “federal state clause” enabling a federal state like Canada to become a party to a convention with less than all of its provinces acceding to the instrument. In such situations, a state can limit the application of a convention to the provinces that have adopted it.

Because the ICSID Convention has no federal state clause, Canada must implement the Convention in all of the provinces and territories before it can become a party. At the time of writing, only some provinces and territories had passed implementing legislation.<sup>9</sup> Moreover, the coming into force of this implementing legislation in each province that has passed it is contingent on all of the provinces passing implementing legislation and Canada ratifying the Convention. The timing of implementing legislation in the remaining provinces and territories is unclear.

Until the Convention is ratified, Canada’s signature of the ICSID Convention will not have an impact on a Canadian court’s interpretation of its jurisdiction under applicable arbitration

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<sup>7</sup> [Settlement of International Investment Disputes Act, S.C. 2008, c. 8.](#)

<sup>8</sup> The Supreme Court of Canada reaffirmed this principle in [Thomson v. Thomson, \[1994\] 3 S.C.R. 551](#) at para. 113. See also P. W. Hogg, *Constitutional Law of Canada*, 5<sup>th</sup> ed. supp. (Scarborough, Ont.: Thomson Carswell, 2007) at 11-15 and G. van Ert, *Using International Law in Canadian Courts*, 2<sup>nd</sup> ed. (Toronto: Irwin Law, 2008) at 270.

<sup>9</sup> British Columbia: *Settlement of International Disputes Act*, S.B.C. 2006, C. 16; Newfoundland and Labrador: *Settlement of International Disputes Act*, S.N.L. 2006, c. S-13.3; Saskatchewan: *Settlement of International Disputes Act*, S.S. 2006, c. S-47.2; Ontario: *Settlement of International Disputes Act*, S.O. 1999, c. 12 schedule D ; Northwest Territories: *Settlement of International Disputes Act*, S.N.W.T. 2009, c.15. See also R. East, “Canada Signs International Convention on the Arbitration of Investment Disputes” (2007) 7:1 *Canadian International Lawyer* at 37-38.

legislation to intervene in ICSID arbitral proceedings or to entertain a challenge of an ICSID award.

The interpretation rule according to which Canadian courts must avoid interpreting domestic law inconsistently with Canada's international legal obligations<sup>10</sup> would not apply to the present case. When a treaty is to be concluded by formal ratification, as in the present case,<sup>11</sup> the signature of a state is not sufficient to express the state's consent to be bound.<sup>12</sup>

Accordingly, an interpretation of the relevant legislation which is contrary to the ICSID Convention, for example allowing judicial intervention in an ICSID arbitration located in Canada, would not be inconsistent with Canada's treaty obligations. The signature of the ICSID Convention by the federal government has no direct consequence for the interpretation of arbitration legislation by Canadian courts.

### **Intervening in arbitral proceedings or challenging a domestic ICSID Award in Canadian courts**

Canadian courts would most likely find that they have jurisdiction to intervene in ICSID arbitral proceedings or entertain a challenge to any award issued by an ICSID Tribunal conducting proceedings in Canada (within the limits imposed by relevant arbitration legislation). It is only if federal or provincial legislation implementing the ICSID Convention is in force that it can be said that there is no risk of court intervention in an arbitral process where the parties have agreed to the application of the ICSID Convention and the ICSID Arbitration Rules.

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<sup>10</sup> A rule often referred to as "the presumption of conformity". See the Supreme Court of Canada's judgment in *R. v. Hape*, 2007 SCC 26 at para. 53.

<sup>11</sup> Article 68 of the ICSID Convention and *Memorandum on Signature and Ratification, Acceptance or Approval of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*.

<sup>12</sup> I. Brownlie, *Principles of Public International Law*, 7<sup>th</sup> ed. (Oxford: Oxford University Press, 2008) at 610. This is subject to the exception of provisional application, but the ICSID Convention does not have a provisional application regime.