The Model Law Limits Challenges to Narrow Grounds

- UNCITRAL Model Law governs applications to set aside all international commercial arbitrations seated in Canada and any attempts to refuse enforcement of awards from tribunals seated outside of Canada.

- Article 34(2) – award may be set aside only if:
  a) applicant furnishes proof that:
     i. incapacity of a party or invalidity of arbitration agreement;
     ii. lack of notice to the party or denial of opportunity to present its case;
     iii. excess of jurisdiction;
     iv. arbitral procedure not in accordance with agreement.
  b) The court finds that:
     i. Subject-matter is not arbitrable;
     ii. Award is against public policy.

- There is no scope for any review on grounds of error of law or fact (Canada v. S.D. Myers, Inc. [2004] 3 F.C.R. 368 (T.D.)).

Failure to Object In the Arbitration May Be a Waiver of Rights

- Article 16(2) – a plea that tribunal lacks jurisdiction must be raised no later than the statement of defense or as soon as the matter alleged to exceed jurisdiction is raised.

- Strict requirement that may preclude later challenges to the award (see Canada v. S. D. Myers, supra.).

Powerful Presumption of Jurisdiction

- There is a “powerful presumption” that the tribunal acted within its powers (see Corporacion Transnacional de Inversiones S.A. de CV v. STET International Spa (1999), 45 O.R. 3d 183 aff’d (2000) 49 O.R. (3d) 414 (C.A.)).

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Due Process and Notice Issues

• Tribunals entitled to use special expertise and conduct their own investigation as long as parties are provided an opportunity to comment (Xerox Canada Ltd. v. MPI Technologies Inc., 2006 CanLII 41006)

• Inability to present a case must be “sufficiently serious to offend our most basic notions of justice and morality” (Corporacion Transnacional, supra.).

• Nonetheless, awards have been set aside and remanded to the tribunal where the respondents were not given notice of the capacity in which they were made parties to the arbitration (American Marketing Systems, Inc. v. Old TGHI, Inc., 2007 ONCA 226)

Limited Scope of Public Policy Grounds

• "Public policy" does not refer to the political position or an international position of Canada but refers to "fundamental notions and principles of justice." (Corporacion Transnacional, supra.).

• Obiter comments of some courts leave room for a “manifest disregard of law” argument, but no such argument has yet been successful (e.g. Canada v. S.D. Myers, supra. “Such a principle [of justice] includes that a tribunal not exceed its jurisdiction in the course of an inquiry, and that such a "jurisdictional error" can be a decision which is "patently unreasonable", such as a complete disregard of the law so that the decision constitutes an abuse of authority amounting to a flagrant injustice”).

NAFTA Investor-State Arbitrations: A Play in Three Acts

• Canada Is Not (Yet) A Party To The ICSID Convention: Canada only signed ICSID in December 2006 and ratification is still pending. Beware of including ICSID arbitration clauses in investor-state contracts with Canadian companies – they may be pathological (see Banro American Resources v. Congo, ICSID Case No. ARB/98/7)

• As Mexico is also not a party to ICSID, many NAFTA Chp.11 arbitrations have been seated in Canada. Three of these awards have been challenged in Canadian courts. No country has such experience in reviews of investor-state awards.
• Act One – *Mexico v. Metalclad*, 2001 BCSC 664: A notorious decision of the B.C. Supreme Court. On the one hand, the Court confirmed that Model Law applied to NAFTA arbitrations and did not allow merits based review. On the other hand, award was partially set aside on grounds of “excess of jurisdiction” due to judge’s apparent disagreement with Tribunal’s interpretation of NAFTA obligations.

• Behind The Scenes: Before the release of the B.C. Supreme Court decision, one NAFTA Tribunal chooses Washington DC over Toronto as the place of arbitration. Although all other considerations were evenly balanced, the Tribunal declared it was “troubled” by the submissions of the governments of Canada and Mexico that NAFTA Tribunals were not entitled to the same deference as commercial arbitral tribunals (see *United Parcel Service of America, Inc. v. Canada*, Decision of the Tribunal on Place of Arbitration, October 17, 2001).

• Act Two – *Canada v. S.D. Myers, supra*: The Federal Court of Canada dismisses an attempt to set aside a NAFTA award against the Canadian government. Affirms limited scope of review under Model Law and deference on jurisdictional issues. However, the Federal Court’s jurisdiction is limited to claims against the federal government or specialized areas of federal law (e.g. Intellectual Property).

• Act Three – *Mexico v. Feldman Karpa*: Ontario Court of Appeal dismisses an attempt to set aside a NAFTA award against Mexico. Confirms that NAFTA tribunals are entitled to a high degree of deference. “Notions of international comity and the reality of the global marketplace suggest that courts should use their authority to interfere with international commercial arbitration awards sparingly.”

• Conclusion – At least in Ontario, NAFTA awards are entitled to same level of extensive deference as commercial awards.