INTERNATIONAL COMMERCIAL ARBITRATIONS BETWEEN CANADA AND INDIA

(This article is co-authored by International Commercial Arbitration lawyers of Singhania & Partners LLP, India and Lapointe Rosenstein Marchand Melançon., L.L.P, Canada)

The present article focuses on International Commercial Arbitrations between Indian and overseas parties, where the seat of arbitration is in Canada. It discusses the issues faced by foreign companies trying to obtain reliefs and remedies in India and Canada as well as the enforcement mechanisms for Canada-seated arbitrations involving parties in both countries. This summary of a selection of applicable legal principles should assist companies and other commercial parties in selecting the appropriate forum for dispute resolution in the context of their dealings with foreign parties.

The arbitration process is essentially guided by the terms of the contract between the parties[1]. Relevant arbitration law only applies to procedural issues not agreed upon or specifically addressed in the parties' arbitration agreement. By submitting their disputes to arbitral tribunals, parties ensure that their differences are settled outside the scope of the national court system in a relatively expeditious, cost-effective and private manner[2]. It is also owing to these factors that several countries including India have undergone a rapid evolution in the law of Arbitration to make it attractive to foreign investors.

Arbitrations can be both institutional as well as ad-hoc arbitrations. Various institutions such as the London Court of International Arbitration (LCIA), the International Chamber of Commerce (ICC), and the Singapore International Arbitration Centre (SIAC), also administer arbitrations, and carry their own rules of procedure for arbitration. However, this article deals with the basic law governing arbitrations in Canada as well as India in respect of Canada-seated arbitrations.

It is also important to note that the parties may select the substantive law that governs their contractual relationship; while the rules applicable to the parties' choice of law are beyond the scope of this article, parties must consider that where an arbitration is seated in a jurisdiction other than the jurisdiction of the selected governing law, the substantive rules applicable to the contract must be proven before the arbitral tribunal[3].

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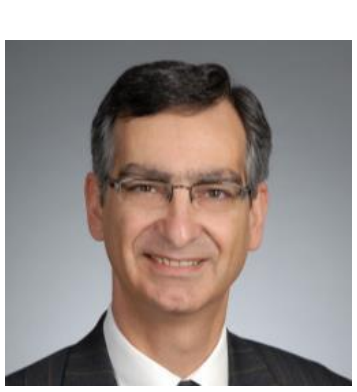

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[1] A sample arbitration clause has been provided for reference at the end of this article to assist the reader in their comprehension of various matters discussed in this publication.
[2] Jeffrey S. Leon, LSM & Gannon G. Beaulne, "Making Up Your Mind: Trial Litigation vs. Arbitration in the Commercial World" 34:1 Adv J 10.
[3] *M.S.C. v C.F.J.*, 2017 ONSC 2389 (CanLII), at para 25; *Civil Code of Québec*,

LEGAL SYSTEMS GOVERNING AN ARBITRATION

The seat of arbitration carries with it implications regarding the procedural law which is applicable to the arbitration proceedings. When considering whether to conduct arbitration in Canada or India, it is important to understand how both jurisdictions deal with different processes applicable to an arbitration agreement.

India

In the Indian legal system, where an arbitration contains a foreign element, there are three different systems of law which govern the arbitration[4]:-

1. The law governing the substantive law of the contract[5] which is the law governing substantive issues in dispute in the contract. Also referred to as "substantive law", "applicable law", or "proper law of the contract".

2. The law governing the existence and proceedings of the arbitral tribunal[6], which is the law governing the conduct of the arbitration proceedings. It is also referred to as the "curial law" or the "lexarbitri". This is the law which is determined by the seat of arbitration.

3. The law governing the recognition and enforcement of the award[7] is the law which governs the enforcement, as well as filing or setting aside of the award and is also the law which governs the arbitrability of the dispute.

Furthermore, in the absence of any other stipulation in the contract, proper law is the law applicable to the arbitral tribunal itself[8]. The place of the arbitration specified in a contract generally determines the seat of arbitration unless contrary intention is apparent from the contract. Also the *lexarbitri* and the law governing the recognition and enforcement of the award are one and the same in the absence of an intention/stipulation to the contrary[9].

The Indian law on arbitration, provided for in the Arbitration and Conciliation Act, 1996 (the "*Indian Act*"), is based on the 1985 UNCITRAL Model Law on International Commercial Arbitration and the UNCITRAL Arbitration Rules 1976 (the "*Model Law*"). In the *Indian Act*, an International Commercial Arbitration is defined as an arbitration arising from a legal relationship which must be considered commercial, where either of the parties is a foreign national or resident, or is a foreign body corporate or is a company, association or body of individuals whose central management or control is exercised in some other country, or a government of a foreign country[10].

An International Commercial Arbitration may either be seated in India, or be seated in a foreign country, such as Canada. Where an International Commercial Arbitration is seated in Canada, Part I

CQLR c CCQ-1991, art. 2809 (CcQ)

[4] Harmony Innovation Shipping Ltd. v. Gupta Coal India Ltd. &Anr. (2015) 9 SCC 172

[5] Reliance Industries Ltd. v. Union of India (2014) 7 SCC 603.

[6] Reliance Industries Ltd. v. Union of India (2014) 7 SCC 603.and Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (1998) 1 SCC 305

[7] Sumitomo Heavy Industries Ltd. v. ONGC Ltd. (1998) 1 SCC 305

[8] Yograj Infrastructure Ltd. v. Ssangyong Engineering & Construction Co. Ltd. (2012) 12 SCC 359

[9] Bharat Aluminium Co. v. Kaiser Aluminium Technical Services Inc (2012) 9 SCC 552; Enercon (India) Ltd. and Ors.v. EnerconGmbh and Anr. (2014) 5 SCC 1

[10] Section 2(1)(f) of the Indian Act.

of the *Indian Act*, which is the curial law in India, is excluded for such arbitrations, barring certain exceptions discussed further below.

Canada

Parties wishing to institute arbitral proceedings in Canada must take into consideration the particularity of the Canadian legal framework[11]. The Canadian constitution provides for the division of legislative powers between the federal and provincial governments[12]. Traditionally, matters relating to commercial arbitration have fallen within the purview of the provincial and territorial legislatures[13]. Canada adopted the *Model Law* in 1985[14] and accordingly, all Canadian provinces and territories, including Quebec[15] (Canada's only civil law jurisdiction), have enacted international commercial arbitration legislation premised on the *Model Law*[16]. As a result, the rules applicable to Canada-seated arbitration are generally consistent with those applicable in India.

In essence, the parties' choice of law will be respected, the parties will be required to make proof of their claims and defenses through accepted means of introducing evidence and testimony[17], and the enforcement of the arbitral award will depend on the criteria applicable in the jurisdiction where enforcement is sought.

INTERIM RELIEF FROM COURT

The mode of obtaining Interim Reliefs would vary depending on the seat of arbitration, as already explained above. The need to obtain interim relief will depend on whether a party may suffer damages or irreparable harm if any issues in dispute remain unaddressed while the arbitration proceedings run their course. For example, a party may insist that its contractual counterpart continue respecting the terms of a contract throughout the arbitration, whether by continuing to supply products, ceasing to engage in competitive activities, refraining from conduct that may constitute intellectual property infringement, etc. As such, it is important to consider whether the seat of the arbitration may affect outcomes in respect of interim relief.

India

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[11] Claude R. Thomson & Annie M. K. Finn, "International Commercial Arbitration : A Canadian Perspective", 18 :2 Arbitration International 205 at 205-206.
[12] *Constitution Act*, 1867 (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, s 91-92.
[13] Thomson & Finn, *supra* note 10, at 206.
[14] Adopted by the United Nations Commission on International Trade Law on June 21, 1985; Halsbury's Laws of Canada, "International Commercial Arbitration", (Markham, Ont: Lexis Nexis Canada, 2014) at para HDR-73 "The United Nations Model Law and Convention".
[15] *Code of Civil Procedure*, CQLR c C-25.01, art 649 (CCP) ; *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 SCR 801, 2007 SCC 34, at paras 38-48.
[16] (AB) *International Commercial Arbitration Act*, RSA 2000, c. I-5; (BC) *International Commercial Arbitration Act*, RSBC 1996, c. 233; (BC) *Foreign Arbitral Awards Act*, RSBC 1996, c. 154; (MB) *International Commercial Arbitration Act*, CCSM c. C151; (NB) *International Commercial Arbitration Act*, RSNB 2011, c. 176; (NL) *International Commercial Arbitration Act*, RSNL 1990, c. I-15; (NS) *International Commercial Arbitration Act*, RSNS 1989, c. 234; (ON) *International Commercial Arbitration Act*, RSO 1990, c. I.9; (PE) *International Commercial Arbitration Act*, RSPEI 1988, c. I-5; (SK) *International Commercial Arbitration Act*, SS 1988-89, c. I-10.2; (SK) *Enforcement of Foreign Arbitral Awards Act*, 1996, SS 1996, c. E-9.12; (NT) *International Commercial Arbitration Act*, RSNWT 1988, c. I-6; (YT) *International Commercial Arbitration Act*, RSY 2002, c. 123; (YT) *Foreign Arbitral Awards Act*, RSY 2002, c. 93.
[17] United Nations Commission of International Trade Law *(UNCITRAL) Model Law on International Commercial Arbitration*, 1985 (*Model Law*), art. 19.

In India, Section 9 of the *Indian Act* governs the power of the courts to grant interim relief. It is based on Article 9 of the *Model Law*[18]. Under Section 9 of the *Indian Act*, a party is permitted to apply to Court for certain interim measures, before, during or after making of the award by the Tribunal. Although Section 9 is a part of Part I of the *Indian Act*, owing to a recent amendment[19], the position has been substantially changed. Before the amendment of 2015, the law with respect to seeking interim relief from court was governed by a judgment[20] ("*BALCO*") of the Supreme Court of India. The *BALCO* judgment clearly laid down that Part I of the Arbitration and Conciliation Act (of which Section 9 is a part) would be inapplicable to any foreign seated arbitration. However, the 2015 amendment essentially nullifies the law laid down in *BALCO* to a limited extent and holds that even in an International Commercial Arbitration having a foreign seat; a party can approach Indian courts under Section 9 and obtain appropriate relief.

Therefore a Section 9 remedy would be available for a Canada-seated arbitration, only if the arbitration has been commenced after the coming into effect of the amending act[21]. The nature of reliefs sought under Section 9 are generally for protection, preservation or interim custody of goods, assets, properties, securing the amounts in dispute and appointment of interim receivers.

This provision gives a huge relief to parties in cases where assets of parties to a Canada-seated arbitration are located in India and there is a fear of disposal or where conduct reproached of a party occurs in India or causes harm in India. Similarly, the Appeal against an Order passed in a Petition filed under Section 9 would also lie to Indian courts only as per the amendment[22].

Canada

In Canada, provincial legislation derived from the *Model Law* provides that national courts and arbitral tribunals have concurrent jurisdiction in granting interim relief[23]. Canadian courts have continuously held that the option to seek interim relief from national courts should be available to parties, even though they have agreed to submit the resolution of their disputes to arbitration[24]. Resorting to the Canadian court system for interim relief is not equivalent to a waiver of the right to arbitrate[25]. As such, parties are free to request interim relief from courts without first having to obtain the consent of an arbitral tribunal[26]. It is also possible to apply to the courts for interim relief where arbitration has not yet commenced, although this process may be affected by the parties' choice of governing law and venue for dispute resolution. In any event, the flexibility provided by this concurrent jurisdiction may prove to be of interest to parties in selecting their arbitration seat.

Pursuant to a three-part test developed by the Supreme Court of Canada, prior to granting interim relief to arbitrating parties, Courts of the Canadian common law provinces (i.e. provinces other than Quebec) must first establish whether:

(i) the applicant raises a serious question to be decided;

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[18] *Model Law*, art. 9.
[19] Arbitration and Conciliation (Amendment) Act, 2015
[20] Bharat Aluminum and Co. vs. Kaiser Aluminium and Co. (2012) 9 SCC 552.
[21] Serial no. 26 of Arbitration and Conciliation (Amendment) Act, 2015
[22] Section 2(2) of the Act makes the appeal provision of Section 37 also applicable to International Commercial Arbitrations, even if the place of arbitration is outside India.
[23] *Model Law,* art. 7; 19 ; Hon. J. Edgar Sexton & Adam Lazier, "Caught Between Arbitrators and the Courts: Interim Measures in Canadian International Legislation" 11 Constrlr-Art 175; art. 623 CCP; Diane Sabourin, "L'ARBITRAGE CONVENTIONNEL ET LE NOUVEAU CODE DE PROCÉDURE CIVILE" in Louise Lalonde et Stéphane Bernatchez, dir*, Le nouveau Code de procédure civile du Québec : « Approche différente » et « accès à la justice civile »?,* Sherbrooke, Éditions Revue de Droit de l'Université, 2014, p.470-476.
[24] Marvin J. Huberman, *A practitioner's guide to commercial arbitration,* Toronto : Irwin Law, 2017, at 331.
[25] *Ibid.*
[26] *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd*., 1994 CanLII 845 (BC SC).

(ii) the applicant would suffer irreparable harm without an interlocutory injunction; and
(iii) the balance of convenience favors granting the relief sought[27].

A similar test also applies for granting interlocutory injunctions in the province of Quebec[28].

Parties may look to courts instead of arbitral tribunals for obtaining interim relief for several reasons. Firstly, provincial legislation provides that arbitral tribunals may only order interim measures in respect of the subject matter of the dispute. Therefore, parties will have no choice but to turn to the ordinary courts if they require urgent relief prior to the formation of an arbitral tribunal, or relating to an ancillary but related matter that is not squarely within the subject matter of the dispute. In the same vein, a preservation order from a court will also be required in situations involving third parties who do not fall within the jurisdiction of arbitral tribunals (i.e. parties who are not bound by a bilateral arbitration clause)[29]. Finally, interim measures ordered by an arbitral tribunal are of no force or effect without the enforcement of such orders provided by courts, while interim relief granted by courts is enforceable as such in its own right[30].

However, it remains that national courts continue to show great deference towards arbitral tribunals, thus abiding by the general rule that they may only intervene in exceptional circumstances[31]. Furthermore, provisions relating to the courts' inherent powers in granting interim measures have been interpreted narrowly so as to not allow parties to evade the application of arbitration clauses[32].

The province of Ontario has taken additional steps in modifying its international arbitration legislation in order to expressly recognize the types of interim measures that may be ordered by arbitral tribunals[33].

APPLICATION FOR APPOINTMENT OF ARBITRATORS

The procedure for appointment of arbitrators in both territories is once again dependent upon the seat of arbitration, and may impact commercial parties' selection of the venue for their arbitration, particularly where the method of selecting an arbitrator and for dealing with disputes arising in that context is not specifically addressed by contract.

India

The appointment of Arbitrators in India is governed by Section 11 of the *Indian Act*, Article 11 being the concomitant provision of the *Model Law*. As for appointment of Arbitrators in a Canada-seated Arbitration, Part I of the *Indian Act* has no application. In these cases, the domestic law of the Canadian province in which the Arbitration is seated would be relevant, as explained above.

Canada

In Canada, provincial legislation provides that courts may only intervene in the appointment of arbitrators when there is discord between the parties in this regard. Parties may decide upon the composition of the arbitral tribunal as they see fit. If they fail to do so, the arbitral tribunal will, by

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[27] *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, 1994 CanLII 117 (SCC); Hon. J. Edgar Sexton & Adam Lazier, *supra* note 22.
[28] art. 511 CCP.
[29] Huberman, *supra* note 23, at 331.; J Kenneth McvEwan & Ludmila B. Herbst, *Commercial arbitration in Canada :a guide to domestic and international arbitrations,* Aurora, Ont. : Canada Law Book, c2004, at 6-31.
[30] Paul Mitchell, "Interim Measures in Canadian Commercial Arbitration", 32 Advoc. Q. 413 at 433.
[31] *Model Law*, art. 5.; *Ibid*., at 417.
[32] Hon. J. Edgar Sexton & Adam Lazier, *supra* note 22.
[33] *Burden Reduction Act*, 2017, S.O. 2017, c. 2 - Bill 27, Schedule 5, *International Commercial Arbitration Act*, s.16: "The Act set out in this Schedule comes into force on the day the Burden Reduction Act, 2017 receives Royal Assent". [i.e. Received Royal Assent on March 22, 2017].

default, consist of three arbitrators[34]. If the parties fail to agree on the procedure for appointing their arbitrators, each party may appoint one arbitrator, who will then appoint a third arbitrator. Following a request by the other party, if a party fails to appoint an arbitrator within 30 days of receipt of that request, or if the two arbitrators are unable to decide upon a third arbitrator, a court appointed arbitrator will be assigned to the parties. In addition, a party may request the court to enforce the arbitrator appointment procedure agreed upon by the parties[35].

It is important to note that any measures taken by the court regarding the appointment of arbitrators may not be appealed. An arbitrator may only be replaced if there is reasonable doubt as to his or her impartiality or independence in respect of the arbitral proceedings[36].

APPLICATION FOR CHALLENGING / ENFORCEMENT OF THE AWARD

The law governing the enforcement/challenge to an arbitral award is extremely relevant, and especially so, in the case of an International Commercial Arbitration. This is because an award remains a mere written instrument until it can be enforced in the relevant country and compliance can be ensured. Both India and Canada recognize foreign arbitral awards; the applicable particularities are described in further detail in this section.

India

In an arbitration seated in a foreign territory, Part II of the *Indian Act* is applicable. Part II of the Act deals with enforcement of certain foreign awards in India. These awards are either awards passed in New York Convention Territories, or Geneva Convention Territories, Canada being a New York Convention Country.

Section 44 of the *Indian Act* provides that in order for a foreign award to be recognized as such under Part II, Chapter I (New York Convention Awards), certain conditions must be fulfilled, as follows:-

i. The territory should be signatory to the New York Convention
ii. The Indian Central Government should have notified in the Official Gazette that it has reciprocal provisions with such a territory.

Since, in the case of Canada, both the above conditions are met, the awards are recognized as Foreign Awards in India and the enforcement mechanism provided under Part II of the Indian Act applies[37].

I. Recognition and Enforcement of Foreign Award

Section 47 of the *Indian Act* provides that a party, when applying for the enforcement of a foreign award, apart from the procedural aspects of certification and authenticity, has also to produce such evidence as is necessary to prove that the award fulfils the conditions described above.

Furthermore, Section 48 of the *Indian Act* provides the grounds to challenge the enforcement of a foreign award which include (i) party incapacity, (ii) invalidity of agreement under the law of the seat, (iii) absence of proper notice to the party regarding appointment, or (iv) inability of a party to present his or her case, (v) non-arbitrability of the dispute, (vi) matters beyond scope of arbitration,

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[34] *Model Law*, art. 10; Halsbury's Laws of Canada, *supra* note 13 at para HDR-79 "Three arbitrators unless otherwise determined".
[35] *Ibid.,; Model Law*, art. 11.
[36] *Model Law*, art. 11-12.; Halsbury's Laws of Canada,*supra* note 13 at para HDR-80 "Grounds for Challenge".
[37] http://www.egazette.nic.in/WriteReadData/2003/E_275_2011_022.pdf

(vii) irregular composition of tribunal, (viii) that the award has not become binding as per the law of the seat of arbitration, or (ix) is against the public policy of India.

II. Setting aside a Foreign Award

Once the award has survived a challenge or has been successfully reviewed for enforcement and the Court is satisfied that the foreign award is enforceable under this Chapter, the award shall be deemed to be a decree of that Court[38]. After this stage it can be executed under Order XXI of the Code of Civil Procedure, 1908 in the same manner as a decree from an Indian court.

Canada

Where an arbitration is seated in Canada, the only recourse available to parties against the arbitral award is an application to courts for *setting aside* the award. Furthermore, the award must be recognized by courts in order to have binding legal effect.

I. Setting Aside an Arbitral Award

In Canada, parties are generally barred from appealing a duly recognized arbitral award on the merits[39]. The legislative grounds for challenging or setting aside arbitral awards include: (i) party incapacity; (ii) invalidity of the arbitration agreement pursuant to the laws of Canada or Quebec; (iii) absence of proper notice of the appointment of an arbitrator or of the arbitral proceedings; (iv) inability of a party to present his or her case; (v) non-arbitrability of the dispute; (vi) matters beyond the scope of arbitration; (vii) irregular composition of the tribunal or (viii) the award's infringement of Canadian or Quebec public policy[40]. These grounds are essentially based on rules of due process and principles of fundamental justice. This restrictive approach towards the challenge of arbitral awards is also in line with the general principle that courts should rarely interfere with arbitral proceedings. While arbitral awards are not "immune from challenge", applicants should bear in mind that there is a strong presumption in favour of upholding the validity and recognition of these decisions[41].

Additionally, the party seeking to challenge an arbitral award bears the onus of proving one or more of the relevant grounds enumerated above to the competent provincial court[42]. It is also important to note that the courts' power to set aside an arbitral award is discretionary; even if a party is successful in establishing that the requirements for setting aside an arbitral award are met, courts may still uphold the decision rendered by the arbitral tribunal[43].

II. Recognition and Enforcement of an Arbitral Award

The same rules apply for the recognition and enforcement of both Canadian and foreign arbitral awards; these are described in this section.

A. Procedure

In the Canadian provinces governed by common law, an arbitral award must be confirmed by the relevant provincial courts in order to be enforceable against the parties[44]. Parties applying for the recognition of an arbitral award must provide the court with an original or certified copy of (i) the

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[38] Section 49 of the Indian Act
[39] *Bayview Irrigation District #11 v. Mexico*, [2008] O.J. No. 1858 (Ont. S.C.J.), para 11 [*Bayview*].
[40] *Model Law*, art. 34; art. 648 al. 1; 646 CCP.
[41] *Bayview*, supra note 39, at para 63.
[42] *Model Law*, art. 34 ; Huberman, *supra* note 23, at 400.
[43] Huberman. *supra* note 23, at 401-402.
[44] *Model Law*, art. 34-35; Halsbury's Laws of Canada, *supra* note 13, at para HDR-94 "Award binding".

arbitral award and (ii) the arbitration agreement[45]. More importantly, the applicants must supply the court with a duly certified translation of the arbitral award if the original document is not in English or in French[46]. Once the award has been recognized, it is solely binding upon the parties to the arbitration agreement[47].

Aside from a difference in nomenclature, the procedure for having arbitral awards recognized in Quebec is identical to the one applicable in Canadian common law provinces. According to Quebec's *Civil Code of Procedure,* once an arbitral award is *homologated* by the court, it acquires the force and effect of a judgment[48].

B. Grounds for Refusing the Recognition and Enforcement of an Arbitral Award

In Canada, the grounds for refusing to recognize or to *homologate* an arbitral award are the same as those required for setting aside an award, which include: (i) party incapacity; (ii) invalidity of the arbitration agreement pursuant to the law governing the arbitration; (iii) absence of proper notice of the appointment of an arbitrator or of the arbitral proceedings; (iv) inability of a party to present his or her case; (v) non-arbitrability of the dispute; (vi) matters beyond the scope of arbitration; (vii) irregular composition of the tribunal or (viii) the award's infringement of public policy pursuant to the laws of the seat of the arbitration[49].

The Canadian courts' power in granting recognition of an arbitral award is also discretionary. As such, it is open to Canadian courts to either enforce or dismiss the application for recognition of foreign arbitral awards that have been set aside in another jurisdiction[50]. As a result, it is possible for Canadian courts to recognize an arbitral award that has been otherwise set aside by courts in India. Finally, arbitrating parties should take note of the fact that courts throughout Canada will refuse to recognize arbitral awards only in cases of serious misconduct[51].

APPEALS ARISING FROM ORDERS OF INTERIM RELIEFS OR ORDERS OF ENFORCEMENT OF FOREIGN AWARDS

The process for ensuring enforcement of, and/or challenging interim decisions or arbitration awards is also important for parties to consider.

India

It follows from the discussion above that where an interim relief is given under Section 9, automatically an appeal against such Orders would lie to Indian Courts under Part I, Section 37 of the *Indian Act*. Similarly, in case an order of an Indian court in respect of a challenge to an award passed in Canada under Part II needs to be appealed, Section 50 of Act would become applicable and again the Appeal would lie in India.

However, in a scenario where Indian courts have not been approached for the execution, enforcement or challenge of the award passed in Canada, then Indian Courts would not have any role to play in the appeal process either.

Canada

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[45] *Ibid*.; *Model Law*, 35 (2);.
[46] *Ibid*.; *Model Law*, 35 (2); *Official Languages Act*, RSC 1985, c 31 (4th Supp).
[47] *Ibid.*
[48] art. 645-647 CCP.
[49] *Model Law*, art. 36; art. 646; 652-654 CCP.
[50] Model Law, art. 36 (2); art. 646; 652-654 CCP; Halsbury's Laws of Canada, *supra* note 13, at para HDR-94 "Award binding".
[51] Huberman, *supra* note 23, at 399-403.

In Canada, parties to arbitration must follow the regular appeal procedures when challenging interim orders issued by national courts. While the standard of review of interim court measures is outside the scope of this article, parties should note that appealing interim court orders may lead to a review on the merits, particularly for questions of law. With regard to interim relief ordered by arbitral tribunals, neither Provincial legislation nor the *Model Law* provide for the *setting aside* or appeal of these interlocutory procedural measures; as such, an interim arbitral award will be without appeal and must be presented before the courts to ensure enforcement[52].

Conclusion

To conclude, it may be said that the courts in both India and Canada would play different roles in International Commercial Arbitrations seated in Canada. Firstly, the seat of arbitration must be determined, as well as the curial law which is attracted. Thereafter for different remedies, different courts can be approached.

Both India and Canada have sophisticated legal systems with established frameworks for considering commercial arbitration involving a foreign element and for enforcing duly rendered arbitral awards. Canadian courts have also highlighted the importance of limiting their intervention in the arbitration process and recognizing arbitral awards in order to promote greater stability and predictability in international business relations. Courts will seldom intervene in arbitral proceedings in order to respect the freedom of contract of parties who wish to resolve their disputes outside the national court system.

Moreover, in India, the 2015 amendment has given more leeway to Indian courts as far as interim reliefs are concerned, thus providing additional protection to Canada based parties vis-a-vis Indian parties. In view of the above, India is fast becoming an arbitration and foreign investor friendly country.

As discussed throughout this article, the legal framework applicable to international arbitration is nuanced. As such, arbitration clauses should be carefully drafted with a view to ensuring that the parties' decision to submit their disputes to arbitration is unequivocal. A model arbitration clause has been provided below for reference; it contemplates an agreement for parties to submit to arbitration in Canada, subject to the substantive laws of India:

> *Any dispute, controversy or claim arising under, out of or relating to this agreement (and any amendment, restatement, replacement or renewal hereof) including, without limitation, as to its formation, validity, binding effect, interpretation, performance, breach or termination, as well as non-contractual claims relating hereto, shall be determined by final and binding arbitration, to the exclusion of courts (with the exception of injunctive relief sought by either party), in accordance with the Rules of Arbitration of the International Chamber of Commerce. The sole arbitrator shall be appointed by the International Chamber of Commerce in accordance with said rules and must have expertise and experience relevant to the subject matter of this agreement. The place of arbitration shall be Montreal, Quebec, Canada. The language to be used in the arbitral proceedings shall be English. The dispute, controversy or claim shall be decided in accordance with the laws of India. The parties hereby expressly agree to confer upon the arbitrator the powers to fill gaps, cure contractual omissions and to perform all other activities which said arbitrator may deem necessary and/or opportune in reaching its decision. The parties undertake to fully and punctually abide by the award rendered by the arbitrator. Payment of the award, including interest from the date of breach and violation, shall be made in*

[52] Huberman, *supra* note 23 at 322.

accordance with the relevant provisions of this agreement. This section constitutes an arbitration agreement between the parties.

Each of the parties agrees to the enforcement of any award rendered by the arbitrator or any injunctive relief granted by a court of competent jurisdiction in respect of this agreement, before the Courts of India, Montreal, or elsewhere.

This sample clause is meant to serve solely as an example and parties should seek the advice of specialized legal counsel when drafting arbitration clauses with a view to ensuring that their interests are addressed.

Firms Profile[53]

Singhania & Partners LLP

A sharp rise in international business transactions, Global bidding for contracts and Foreign direct investment many Companies have to deal with International Arbitrations. Parties that are signatories to international contracts often want to avoid using the home courts of one of the parties in order to ensure neutrality as well as unbiased decisions thus avoiding the problem faced due to unfamiliar or unpredictable local court procedures. Singhania and Partners LLP has strong experience in handling International arbitrations keeping the seat in India and outside India like Singapore, U.K, China, Switzerland, Canada and many more. The Firm also provides consultation at the time of negotiation of contracts to incorporate effective arbitration clauses. We conduct both institutional and ad hoc arbitrations. The firm is a member of TerraLex which is a premier network of law firms offices worldwide. The membership of TerraLex provides the firm with trusted advisors in more than 153 jurisdictions in cross-border matters.

Lapointe Rosenstein Marchand Melançon, L.L.P.

Lapointe Rosenstein Marchand Melançon., L.L.P. is one of the largest independent law firms in the Province of Quebec, Canada and comprises several dozen lawyers practicing in a wide range of practice areas including commercial law, international transactions, franchising, real estate, banking and finance, bankruptcy and insolvency, licensing and technology, intellectual property, tax, labour and employment, as well as civil and commercial litigation.

The firm has also actively sought out and developed an international practice in order to better serve its clients in the face of increasing globalization and market expansion. Lapointe Rosenstein Marchand Melançon's membership in TerraLex, an international organization of attorneys in over 100 countries, provides it with access to a worldwide network of legal and other business advisors.

Lapointe Rosenstein Marchand Melançon systematically provides its clients with a full range of top-tier legal services tailored to their specific needs, and consistently surpasses its clients' expectations for expertise, availability and reliability through elevated standards of professional service, promptness and efficiency. The firm's commitment to its clients is to provide value-added service and loyalty through a team of highly-qualified professionals and international reach. Lapointe Rosenstein Marchand Melançon enjoys a reputation built upon a tradition of professional excellence, ingenuity and foresight - the cornerstone of the firm's philosophy is to understand its clients' activities in order to become their trusted and valued legal and business advisors, and its attorneys are creative, flexible and responsive, always in search of solutions and the best tailored results for clients.

Lapointe Rosenstein Marchand Melançon has a team of experienced litigators and negotiators who help clients understand the issues at hand with a view to determining and implementing a strategy that is suited to their needs. The firm's attorneys also have significant experience in commercial arbitration and mediation, as well as in enforcing foreign judgments and arbitral awards.

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