Volume 27 Number 1 2026 pp. 24-41 www.usask.ca/esteyjournal

The Estey Journal of International Law and Trade Policy

International Commercial Arbitration and Public Policy: The View from Canada

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Abstract

Understanding when municipal courts might intervene in an international arbitral award on public policy grounds requires looking at what courts in the states that are signatory to the UNCITRAL Model Law on International Commercial Arbitration have actually done and said when seized of applications to stay an award or refuse its enforcement. This paper seeks to offer a clarity on the position of Canadian common law courts on this issue. After examining Canada's statutory regime vis-à-vis international arbitration, it examines leading cases from different Canadian common law jurisdictions on the public policy question. This paper concludes by outlining a number of principles and insights gleaned from the jurisprudence that can be said to form the basis of the Canadian conception of the public policy of provisions of the Model Law.

Keywords: arbitration, commercial litigation, dispute resolution, international arbitration, international law, judicial review, public policy

Introduction

There is a consensus – among international arbitration practitioners, academics, and

parties that commercial utilize international arbitration to resolve disputes – that arbitral awards and the arbitration process ought generally to be protected from rampant judicial meddling by municipal courts. There is, of course, widespread disagreement as to the extent that judicial intervention should be permissible.[2] But consensus has also seemingly been reached that where an international arbitral award offends the 'public policy' of the state in which the arbitration is hosted – or in which a successful party is attempting to enforce an award – a court may intervene to either set aside the award, or refuse to enforce it as the case may be. This consensus is reflected in the UNCITRAL Model Law on International Commercial Arbitration (the "Model Law').[3]

The Model Law's Explanatory Notes concede that with regards to applications for setting aside an arbitral award on the basis of public policy and refusals to enforce an arbitral award on the basis of public policy, "the grounds relating to public policy and non-arbitrability may vary in substance with the law applied by the court (in the State of setting aside or in the State of enforcement)."[4]

Understanding when municipal courts might intervene in an international arbitral award on public policy grounds thus necessitates examining what courts in the states that are signatory to the Model Law have actually done and said when faced with arguments about public policy. This paper seeks to offer a clarity on the Canadian viewpoint on this question by reviewing select cases from common law courts in British Columbia, Ontario, Alberta, and the Supreme Court of Canada's decision in *Uber Technologies Inc. v Heller*[5]. The Canadian viewpoint on the public policy exception is then compared to the English approach taken by courts in the United Kingdom. It concludes by outlining a number of principles gleaned from this jurisprudence that can be said to form the basis of the Canadian conception of the public policy of provisions of the Model Law, and positioning these principles as essentially in line with the English approach. The paper thus says that this approach can accurately be characterized as the "Anglo-Canadian" viewpoint on the Model Law's public policy exception to enforcement and recognition of international arbitral awards.

The legal framework in Canada

In Canada, a federal country, jurisdiction over arbitration regimes generally lays with the provinces. All Canadian provinces have adopted the Model Law.[6] Each province has its own individual statute that adopts an incorporates the Model Law into provincial law.

Canada can thus safely be considered a Model Law jurisdiction. The Model Law provisions on public policy, incorporated by the provinces through their specific statutes, centre on applications to municipal courts to set aside arbitral awards and

applications to enforce international arbitral awards. Article 34 pertains to set aside applications:

> (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if:
> […]
> (b) the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the award is in conflict with the public policy of this State.[7]

Article 36 pertains to the enforcement of international arbitral awards:

> (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:
> […]
> (b) if the court finds that:
>
> (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
>
> (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.[8]

Articles 34(2)(b)(ii) and 36(1)(b)(ii) are thus the narrow provisions of the Model Law that allow municipal courts to interfere with awards issued by international tribunals constituted pursuant to the freely negotiated dispute settlement provisions of the commercial contracts at-issue on the basis of 'public policy' concerns. The language of these two provisions is mirrored in the various Canadian provincial legislative schemes incorporating the Model Law. What, then, do Canadian courts say when parties to an international arbitration plead public policy concerns either to have an award set aside, or to convince a court to refuse the enforcement of an award in Canada?

Case review on public policy considerations

British Columbia

In Canada, the Court of Appeal for British Columbia in its decision in *Quintette Coal Ltd. v Nippon Steel Corp.*[9] ("*Nippon Steel*") set out the leading principles with regards to the general principles that courts are to be cognisant of when asked to review or set aside arbitral awards. *Nippon Steel* was decided under an old British Columbian statutory regime that pre-dated Canadian adoption of the Model Law. The appellate

court's guidance, however, has been cited widely in courts across Canada (including both provincial superior courts, the Federal Court, and the Supreme Court of Canada), as well as by courts in New Zealand and Australia[10] Any discussion of judicial intervention in the decisions of arbitration tribunals in Canada must thus start with *Nippon Steel*, given its lasting influence both in Canadian law and across Commonwealth jurisdictions.

Interestingly, the Court of Appeal relied heavily on the Supreme Court of the United States' landmark decision in Mitsubishi Motors Corp. v Soley Chrysler-Plymouth Inc.[11] ("Mitsubishi Motors"). The appellate court confirmed and endorsed the fact that the jurisdictions worldwide were increasingly uniform in the principle that judicial intervention in international arbitration ought to be restrained.[12] The key passage of Blackmun J. from Mitsubishi Motors that animated the court was:

> ... we conclude that concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in the domestic context.[13]

The Court of Appeal found that this over-arching principle was "as compelling in this jurisdiction as they are in the United States or elsewhere. It is meant therefore, as a matter of policy, to adopt a standard which seeks to preserve the autonomy of the forum selected by the parties and to minimize judicial intervention when reviewing international commercial arbitral awards in British Columbia."[14]

Critically, then, a clear principle emanating from *Nippon Steel* is that the mere fact that the result of an international arbitral proceeding would not have been the same result that a municipal Canadian court would arrive at is insufficient grounds for the setting aside of such an arbitral award. It is thus not a public policy ground to nullify the decision of an international arbitral tribunal on the basis that the result would have been different – presumably, even wildly different – if the dispute had been litigated in Canadian courts. *Nippon Steel* continues to also stand for the general over-arching principle that judicial intervention in international arbitration must be exercised sparingly and cautiously.

While *Nippon Steel* is certainly the most significant contribution the courts of British Columbia have made to global international arbitration jurisprudence, there has also been specific commentary on the specific provisions pertaining to public policy interventions in the Model Law.

A well-known and oft-cited case[15] is the Supreme Court of British Columbia's[16] decision in *United Mexican States v Metalclad Corp*.[17] ("*Metalclad*"). *Metalclad* was a challenge to an investment treaty arbitration award issued against Mexico by an arbitral

tribunal constituted pursuant to the investor-state dispute settlement ("ISDS") provisions of the North American Free Trade Agreement ("NAFTA"), which has since been renamed the United States Mexico Canada Free Trade Agreement ("USMCA"). Given the controversy that ISDS often attracts, *Metalclad* was noteworthy as a relatively early opportunity for a court to opine on issues stemming from an ISDS proceeding.

Mexico's petition to have the award set aside was ultimately dismissed by the court. Mexico sought to have the award set aside on – *inter alia* – public policy grounds as allowed for in the statutory regime in place in British Columbia at the time. One of the bases which Mexico argued that public policy had been contravened was that the tribunal had made a patently unreasonable error in a discrete ruling as to whether a claim it ultimately adjudicated on was within its jurisdiction.[18] The Supreme Court found that no such error had been made, and declined to ultimately decide whether or not a "patently unreasonable error" of an international arbitral tribunal was sufficient grounds upon which to set aside an arbitral award on the basis of public policy.[19] However, the court did offer suggestive commentary, in that it relied on a passage in *Nippon Steel* for the proposition that the notion of a "patently unreasonable error" – which was a domestic feature of Canadian administrative law – was not applicable to the review of international arbitrations.[20] The relationship between Canadian administrative law standards of review and standards of review of arbitration awards remains unresolved in Canadian jurisprudence to this day.[21]

Mexico also argued that there were "improper acts on the part of Metalclad which were not explicitly addressed by the Tribunal" and that "these improper acts render the Award in conflict with the public policy in British Columbia and that the Award should be set aside."[22] The alleged improper acts were that witnesses for Metalclad were improperly affiliated with and received payments from the company, and that Metalclad deceived the tribunal by misrepresenting expenses it had occurred stemming from its investment.[23] The court found that neither of these allegations were made out or amounted to an improper act that conflicted with public policy. Notably, Mexico's charge of bribery was found by the court to not be substantiated, but the court suggests that bribery in arbitral proceedings would sustain a claim that the proceeding violated British Columbian public policy.[24]

Another milestone case considering the nature of public policy in the context of the Model Law was the Supreme Court of British Columbia's decision in *CE International Resources Holdings LLC v Sit*[25] ("*CE International*"). This case sought enforcement of an international arbitral award that was seated in New York.[26] The court set out the philosophy enunciated in *Mitsubishi Motors* and *Nippon Steel* (and set out above) as

providing the overarching principles that must guide British Columbian courts when determining whether to refuse enforcement of a foreign arbitral award.[27] The respondent resisting enforcement essentially advanced two arguments that enforcement of the award would contravene public policy: first, that the tribunal's determination under New York law that he was a party to the arbitration violated public policy; and second, the tribunal's scheduling of the arbitral hearing even though one of the respondent's counsel who was an expert in the law of Thailand was unavailable was a violation of public policy.

Neither argument was successful. The court was clear that "there is nothing in the arbitrator's determination on the issue [the respondent's] status as a party that can be said to offend our local principles of justice and fairness."[28] The tribunal allowed the respondent submissions on the issue of his status as a party and came to a determination. Thus, *CE International* is clear authority that the public policy category of recourse is not a vehicle for disappointed arbitral parties to appeal or re-litigate adverse procedural determinations.

On the issue of the scheduling of hearing dates, the court found on the record that the tribunal had "to considered procedural fairness issues in setting the hearing dates". Given the fact the tribunal was alive to procedural fairness issues and that, ultimately, the court noted that "there was no issue of Thai law decided adversely to [the respondent]"[29] the court found that nothing in the arbitral proceedings "gives rise to an unfairness that comes close to satisfying any public policy basis for refusing to recognize the Final Award."[30]

As long as arbitral tribunals allow submissions on procedural issues and demonstrate an awareness of procedural issues broadly, *CE International* suggests that a British Columbian court will not set aside an arbitral award on the basis of the public policy provisions of the Model Law.

Ontario

The Ontario Superior Court of Justice – Ontario's superior court of first-instance inherent jurisdiction – has produced one of the leading decisions on the meaning and scope of the public policy provisions of the Model Law.

In *Schreter v Gasmac Inc.,*[31] ("*Schreter*") the applicant sough enforcement of an arbitration award that was issued by an arbitral panel seated in the U.S. state of Georgia. The respondent resisted the award's enforcement on a number of grounds, including the public policy provisions of the Model Law. *Schreter* contains the most thorough consideration of the concept of public policy in the Canadian jurisprudence on this subject. The decision canvassed at length a 1985 report of the United Nations

Commission on International Trade Law that discussed the intended scope of the public policy provisions of the Model Law.[32]

The key passage of Ontario superior court's decision in *Schreter* that has enjoyed wide citation across Canada and neatly encapsulates the Canadian approach to public policy considerations in the setting aside and enforcement of international arbitral award is as follows:

> The concept of imposing our public policy on foreign awards is to guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way, and in a way which the parties could attribute to the fact that the award was made in another jurisdiction where the procedural or substantive rules diverge markedly from our own, or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts.[33]

Schreter goes on to caution that the public policy provisions of the Model Law must not be used to try and relitigate the merits of a dispute, lest "the enforcement procedure of the Model Law could be brought into disrepute."[34]

The court in *Schreter* cited the U.S. Court of Appeals for the Second Circuit's decision in *Waterside Ocean Navigation Co. v. International Navigation Ltd*. approvingly for the principle that an arbitral award will offend Ontarian public policy where it offends fundamental principles of justice and fairness. The American appellate court in that case noted that, "this court has unequivocally stated that the public policy defense should be construed narrowly. It should apply only where enforcement would violate our 'most basic notions of morality and justice.'"[35]

In *Schreter*, the court made note of the fact that "the respondent had a full hearing and full argument in front of the arbitrator. The arbitrator did not accept its evidence or its position on the law."[36] Thus, similar to the British Columbian jurisprudence in this area, *Schreter* also appears to stand for the proposition that so long as arbitral tribunals allow submissions on the issues from the parties, an award will not be set aside or refused enforcement pursuant to the Model Law's public policy provisions.

Although *Schreter* is an older decision, it has mostly recently been cited as providing "the leading statement of Ontario law under [the public policy provisions of the Model Law]" by the Ontario Court of Appeal.[37] In Canadian caselaw, *Schreter* is commonly cited together with the Superior Court of Justice's decision seven years later in *Corporacion Transnacional de Inversiones S.A. de C.V. v STET International S.p.A.*[38] ("*Corporacion Transnacional de Inversiones*"), which cited the principles quoted above from *Schreter* approvingly and summarized that:

> to succeed on this ground the Awards must fundamentally offend the most basic and explicit principles of justice and fairness in Ontario, or evidence

> intolerable ignorance or corruption on the part of the Arbitral Tribunal. The applicants must establish that the Awards are contrary to the essential morality of Ontario.[39]

Another Ontarian case of note is the Ontario Court of Appeal's decision in *United Mexican States v Karpa* ("*Karpa*").[40] *Karpa* is another ISDS case, wherein Mexico sought to set aside an award issued against it by a NAFTA tribunal. The NAFTA tribunal found that Mexico "engaged in discriminatory conduct by granting tax rebates to domestic companies that were denied to the Respondent's American owned company engaged in a similar business."[41]

Before the courts in Ontario – which had jurisdiction to hear the set aside application as the arbitration was seated in that province – Mexico argued that "the damages awarded to Mr. Feldman's company were based upon unlawful rebates and are, therefore, contrary to public policy" and that because the rebates claimed by the claimant in the arbitration was engaged in accounting practices that may have been motivated principally by tax avoidance considerations.[42]

The Ontarian appellate court ultimately rejected these arguments and found that "the award of damages is not contrary to public policy. There is nothing fundamentally unjust or unfair about the award."[43] The court cautioned that while the accounting practices that the claimant engaged in – which seemed to involve seeking tax rebates for factiously produced invoices – were not conduct that the court would condone, the tribunal allowed arguments on these issues and considered them in its analysis, and thus the award did not contravene the public policy of Ontario.[44]

Karpa is of note, because it really demonstrates the high threshold involved in meeting the public policy threshold. Arguably, given that Canada has adopted a general anti-avoidance provision in its tax legislation[45], the kind of conduct engaged in by the claimant in *Karpa* which the NAFTA tribunal ultimately concluded should have resulted in the issuance of a tax rebate would violate Canadian public policy – at least from a narrow tax policy perspective. Nonetheless, at least in part because "the tribunal made allowances for the inflated rebate claims in its assessment of damages",[46] there was no finding that public policy demanded a setting aside of the award.

A very recent decision of the Ontario Court of Appeal is also noteworthy for its discussion of the requirements of procedural fairness in the international commercial arbitration context, and for its finding that an ISDS award issued under NAFTA must be set aside. In *Vento Motorcycles, Inc. v Mexico*[47] ("*Vento Motorcycles*"), the appellate court heard an appeal of a decision of judge of Ontario's superior court dismissing Vento's application to have a NAFTA award set aside under Article 34. The NAFTA tribunal unanimously ruled that Mexico had not breached its NAFTA obligations and dismissed Vento's claim. After the Award's release, however, Vento learned that

Mexico's appointed arbitrator had undisclosed communications with Mexican officials, including the lead counsel for Mexico, the Director General of the Legal Office of International Trade at the Ministry of Economy. The crux of the communications was that officials at the Mexican public legal office had invited the arbitrator to apply to be listed as an arbitrator available to adjudicate USMCA disputes – there was no evidence of any communications related to the actual ISDS dispute, only these administrative communications.[48] There was no allegation of any bias on the part of the other two members of the arbitral tribunal.

Vento Motorcycles was not decided with specific reference to the public policy provision in Article 34. Instead, more broad issues of procedural fairness writ-large were the ultimate basis for which the Ontario Court of Appeal ordered that the tribunal's decision be set aside due to what it called the Mexican appointed arbitrator's 'reasonable apprehension of bias.' However, the appellate court – citing its earlier decision in a case called *Popack v Lipszyc*[49] – said that regardless of which subparagraph of Article 34 is relied on to characterize a problem of procedural fairness, "the essential question remains the same – what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of fairness in the process?"[50] Insofar as Canadian considerations of the Model Law's public policy provisions often hinge in issues of procedural fairness and due process, *Vento Motorcycles* is relevant to our purposes in this paper.

The judge in the trial-level decision in *Vento Motorcyles* found that while there may have been a reasonable apprehension of bias, she would not exercise her discretion under Article 34 to set aside the award. The appellate court found that this was an error, noting that while "procedural infirmities or irregularities in commercial arbitration – fair hearing errors – do not necessarily raise the same concerns as they do in the exercise of public authority,"[51] ultimately "the parties to an arbitration are entitled to an independent and impartial tribunal, not simply the decision of a quorum of panel members who are unbiased."[52] The email correspondence of the Mexican appointed arbitrator was sufficient to amount to "poisoning the well."[53]

The decision in *Vento Motorcycles* stands in contrast to the jurisprudence overviewed so far. Given that the purpose of the impugned email correspondence was to simply administer the tribunal member's admittance to a standing list of arbitrators available to adjudicate ISDS cases, one wonders whether setting aside an award solely because of such correspondence is congruent with Blackmun's J.'s pronouncements endorsed in *Nippon Steel* for the needs for courts to respect "concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity

to the need of the international commercial system for predictability in the resolution of disputes."[54]

Alberta

The Alberta Court of King's Bench has authored two decisions that offer commentary on the concept of public policy in the Model Law provisions.

In *Karaha Bodas Co. L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*[55] ("*Karaha*"), Alberta's superior court quoted the following passage from a leading Canadian textbook on conflict of laws approvingly:

> Canadian Courts will not recognize or enforce a foreign law or judgment or a right, power, capacity, status or disability created by a foreign law that is contrary to the forum's fundamental public policies, its "essential public or moral interest", or its "conception of essential justice and morality". Public policy serves a corrective function. Its use is generally defensive. ... It is difficult to give a precise definition of public policy; nor can a general statement be made about its scope. Evidence of public policy can be found in the total body of the constitutional and statute law as well as the case law of the forum, since it will reflect the local sense of justice and public welfare ... Fundamental values must be at stake.[56]

Kahara was an application or enforcement of an arbitral award that was made by a tribunal seated in Switzerland.[57] One of the arguments advanced by the respondent under the cover of the public policy provisions in the Model Law to resist enforcement was that the claimant failed to disclose to it that it carried political risk insurance. The court – again echoing a familiar theme in cases from British Columbia and Alberta – did not accept this argument, on the basis that "arbitral tribunal dealt extensively" with the issue at the hearing: a witness "was asked about insurance at the hearing, and said he wasn't sure, and the tribunal specifically gave an opportunity to respondents' counsel to follow this up and he declined. It would appear that if counsel for the respondents had regarded this issue as relevant they would surely have thoroughly explored it at the arbitration hearing."[58] *Kahara* again suggests that Canadian courts will be very unlikely to accept arguments that a certain issue may run afoul of public policy if the arbitral tribunal allowed for full and fair submissions on that issue.

The other Albertan case in which the public policy provisions of the Model Law were discussed at some length is *Yugraneft Corp. v Rexx Management Corp.*[59] ("*Yugraneft*"). This case was also an application by a claimant for recognition of an arbitral award issued in Russia.[60] The court in *Yugraneft* cited the Ontarian decisions in *Schreter* and *Corporacion Transnacional de Inversiones* approvingly, reiterating the principle that in order to resist enforcement of an international arbitral award (or

succeed in setting one aside) on the basis of public policy, the award must somehow "offend the basic principles of morality of Alberta."[61]

The respondent who attempted to resist the enforcement of the Russian arbitral award argued that there was serious evidence of fraudulent activity that resulted in a corporate takeover by the claimant, and that allowing for the enforcement of the award would condone such activity and offend Albertan public policy.[62] The court rejected this argument for a reason that should now ring familiar: the respondent had a fair chance to raise this issue to the tribunal. As the court found:

> [the respondent] had the opportunity to have a full hearing and make full arguments in front of the arbitrators. In my opinion, it was incumbent upon [the respondent] to raise the issue of the alleged takeover at this time. The Tribunal consisted of three Russian jurists, one of whom was [the respondent's] nominee. [the respondent] benefited from the presence of their chosen arbitrator. The decision of the Tribunal was unanimous. I see no evidence of corruption or fraud on the part of the Tribunal.[63]

Uber Technologies v Heller

A discussion of public policy in Canadian arbitration law would be remiss without mention of the Supreme Court of Canada's decision in *Uber Technologies v Heller*[64] ("*Heller*") – especially the concurring reasons of Justice Russell Brown.

In *Heller*, an Ontarian individual used the UberEats app to earn money delivering food. He commenced a proposed class action against Uber, alleging that it had violated Ontario's employment and labour protections legislation. The service agreement that governed his relationship with Uber was governed by Dutch law, and contained a binding arbitration clause, the initiation of which would have cost Heller USD $14,500.00.[65] Uber obtained a stay of proceedings in the Ontario superior court in favour of arbitration, but this was reversed by the Ontario Court of Appeal which found that "the arbitration agreement was unconscionable based on the inequality of bargaining power between the parties and the improvident cost of arbitration."[66]

A majority of the Supreme Court of Canada agreed with the Ontario Court of Appeal and struck down the arbitration clause, calling it "a classic case of unconscionability."[67] More interesting for the purposes of this paper, however, are the concurring reasons of Brown J., who would also have found the arbitration clause invalid, but not on the basis of the doctrine on unconciousbility. Instead, Brown J.'s rationale relied on the doctrine of public policy to find that the arbitration clause "undermine[s] the rule of law by denying access to justice, and are therefore contrary to public policy."[68]

Brown J.'s commentary on the scope of public policy is not specific to that concept in relation to the Model Law, but is of interest as he sets out the notion of public policy

from the more Archimedean perspective of the role of public policy doctrine in Canadian contract law more generally. Brown J. helpfully sets out the parameters of public policy as such:

> Freedom of contract is of central importance to the Canadian commercial and legal system and, to promote the certainty and stability of contractual relations, often trumps other societal values […] Indeed, a hallmark of a free society is the freedom of individuals to arrange their affairs without fear of overreaching interference by the state, including the courts. […] But while privileging freedom of contract, the common law has never treated it as absolute. Quite simply, there are certain promises to which contracting parties cannot bind themselves. As this Court has stated: … there are cases in which rules of law cannot have their normal operation because the law itself recognizes some paramount consideration of public policy which over-rides the interest and what otherwise would be the rights and powers of the individual. […] This public policy doctrine has been described by this Court as fundamental to Canadian contract law.[69]

Brown J. relied on what he considered to be a well-established "head of public policy"[70] that precludes the oustering of the court's jurisdiction where doing some would undermine access to civil justice and penalize or prohibit a party from enforcing the terms of a contract to which they are a party, which in turn undermines the administration of justice.[71] Thus according to Brown J., it is a fundamental aspect of the public policy of Canadian contract law that persons have access to dispute resolution and that the state provide for administration of justice: "Access to civil justice is a precondition not only to a functioning democracy but also to a vibrant economy, in part because access to justice allows contracting parties to enforce their agreements. A contract that denies one party the right to enforce its terms undermines both the rule of law and commercial certainty."[72] Brown J.'s concern in the context of *Heller* on the importance of access to judicial resolution of disputes was likely highlighted in the specific facts of the case given the significant power differentials involved: the respondent was a food delivery driver trying to get a remedy for perceived unfairness, whereas the appellant was a multinational corporation valued at billions of dollars. Public policy's sensitive to access to dispute resolution was, clearly for Brown J., particularly engaged in this context.

While Brown J. is careful to note that arbitration clauses do not inherently offend public policy and indeed do "provide a comparable measure of justice"[73], the terms of an arbitration clause cannot be such so that their practical import is to effectively prohibit a party from dispute resolution and thus preclude access to justice.[74] The overarching theme here is that persons in Canada have a fundamental right to the fair hearing and fair adjudication of their disputes. They must be offered a forum or venue

for full consideration of arguments and positions they advance. Only where this right to fair dispute resolution is impeded, as Brown J. found Uber's arbitration clause in its services contract did, will Canadian public policy be offended.

The English Approach

The common law across Canada was midwifed from the common law of England and Wales. It is thus worthwhile briefly casting our eyes across the Atlantic to survey the position of English law on the Model Law's public policy provisions.

A leading decision in England discussing public policy in the general context of enforcement of cross-border contractual obligations is *Lemenda Trading Co . Ltd v African Middle East Petroleum Co. Ltd.*[75] ("*Lemenda*"). In that decision, Philips J. found that, "[t]he principles underlying the public policy […] are essentially principles of morality of general application" and that "English courts should not enforce an English law contract which falls to be performed abroad where […] relates to an adventure which is contrary to a head of English public policy which is founded on general principles of morality."[76] The familiar theme of framing public policy concerns as concerns of general morality – as found in the Canadian cases *Schreter*, *Corporacion Transnacional de Inversiones*, *Karaha*, and *Yugraneft* – emerges in English jurisprudence on this subject.

Simiarly, in *Soleimany v Soleimany,* the Court of Appeal endorsed the principle that there would be a requirement to refuse to order the performance of some contractual obligation that would be "illegal under English law or contrary to the recognised morals of this country."[77] The Court of Appeal has also stated that "[c]onsiderations of public policy can never be exhaustively defined, but they should be approached with extreme caution […] It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised."[78]

The concern of morality or the public good was again echoed by the House of Lords in the landmark decision of *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)*[79] ("*Kuwait Airways"*). In that decision – which dealt with whether an Iraqi airline company was liable under English law for converting Kuwait Airways' aircraft, which were unlawfully seized during Iraq's invasion of Kuwait and incorporated into its fleet under Iraqi law – their lordships found the following on the question of enforcement of foreign legal decisions in England:

> Blind adherence to foreign law can never be required of an English court. Exceptionally and rarely, a provision of foreign law will be disregarded when it would lead to a result wholly alien to fundamental requirements of

> justice as administered by an English court. A result of this character would not be acceptable to an English court. In the conventional phraseology, such a result would be contrary to public policy. Then the court will decline to enforce or recognise the foreign decree to whatever extent is required in the circumstances.
>
> This public policy principle eludes more precise definition. Its flavour is captured by the much repeated words of Judge Cardozo that the court will exclude the foreign decree only when it 'would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common wealth': see *Loucks v Standard Oil Co of New York* (1918) 120 NE 198, 202.[80]

This passage is interesting and insightful, as it underlines the connection between the public policy analysis with general principles of morality, and because it relies on American common law jurisprudence for this principle – just, as we saw earlier, as the British Columbia Court of Appeal did in *Nippon Steel*.

The bar to be met for a party to rely on the Model Law's public policy provisions to avoid enforcement or obtain a set aside can be just as high in England as it is in Canada. For instance, in *Honeywell International Middle East Ltd v Meydan Group LLC*[81], the court dismissed the claimant's argument seeking to refuse enforcement of an international arbitration award for contravening English public policy alleging the award was obtained through corrupt means, stating that even if bribery were proven, enforcing a contract obtained through bribery would not violate English public policy.

Conclusion

There are several principles that can be gleaned from this review of the Canadian viewpoint on the Model Law's public policy provisions. In understanding what the 'Canadian viewpoint is', it is important to start at the leading decisions most-often cited by courts seized of enforcement or set aside applications where the public policy provisions of the Model Law are raised. These continue to be *Nippon Steel* and *Schreter* – these cases from British Columbia and Ontario respectively must thus be the start-point of analysis in Canada.

Interestingly, both *Nippon Steel* and *Schreter* cite American jurisprudence for the proposition that a violation of public policy in this context means something that undermines basic societal concepts of justice and morality. Canadian courts have been adamant that international arbitration awards are to be enforced and will not be set aside unless they undermine fundamental principles of justice, fairness, and morality. Clear examples of actions that may contravene fundamental principles of justice, fairness, and morality are corruption, fraud, or intolerable ignorance.

Canadian courts put considerable emphasis on whether or not alleged public policy issues were put in front of the arbitration tribunal – if the tribunal fairly allowed for submissions on the issues and arrived at a reasoned conclusion, it is extremely unlikely that the court will intervene The guiding principle is a fundamental right to a fair hearing, as per Brown J.'s concurring reasons in *Heller* – thus the Canadian public policy analysis is akin to or even merged with a due process analysis.

The amalgamation of a Model Law public policy analysis with a due process analysis comes to the forefront in *Vento Motorcycles*, where Ontario's appellate court noted that set aside applications under Article 34 of the Model Law may be characterized under various headings (such as public policy), but often all boil down to procedural fairness complaints. In *Vento Motorcycles*, the court ultimately set aside the international arbitral award at issue, but it is submitted that this particular recent decision stands as an anomaly in the jurisprudence otherwise surveyed.

The takeaway is that a disappointed party to an international arbitration who finds themselves in front of a Canadian court on a set aside or enforcement application will face an uphill battle convincing the court to intervene based on the Model Law's public policy provisions – the recent decision in *Vento Motorcycles* notwithstanding. Parties are well-advised to fully brief the tribunal on these issues if there is concern that a Canadian court may be tasked with a possible future intervention. And arbitral panels are advised to ensure that parties are allowed full and fair submissions on and hearing of possible public policy issues – ultimately, *audi alteram partem* must guide a panel's proceedings in order to avoid a Canadian court intervening on a public policy basis.

The principles analyzed when Canadian courts consider public policy issues in international arbitration more-or-less mirror those considered by courts in the United Kingdom: general principles of morality, the public good, and fundamental principles of justice. International lawyers and keen observers of international arbitration should feel comfortable characterizing the adoption of these principles to judicial supervision of arbitral awards on a public policy basis as the *Anglo-Canadian approach to public policy in international arbitration*.

Endnotes

[1] Admitted to the bar of British Columbia. BA (KPU), MA (Victoria), LLB (London), LLM (UBC, Common law), LLM (UBC, Taxation).

[2] See, for instance, the United Kingdom Law Commission's *Review of the Arbitration Act 1996: Final Report and Bill*, where on the issue of appeals of arbitral awards a vibrant diversity of consultee voices were heard on the extent to which judicial recourse ought to be availability. See pps. 110 – 112, available at <https://s3-eu-west-2.amazonaws.com/cloud-platform-e218f50a4812967ba1215eaecede923f/uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf>

[3] UNCITRAL Model Law on International Commercial Arbitration ("Model Law"), Article 34(2)(b)(ii) and Article 36(1)(b)(ii).
[4] Model Law Explanatory Notes, pp. 36.
[5] *Uber Technologies Inc. v Heller* 2020 SCC 16.
[6] For instance: British Columbia, *International Commercial Arbitration Act*, RSBC 1996 Ch 233; Ontario, *International Commercial Arbitration Act*, 2017, SO 2017, c 2, Sch 5; Alberta, *International Commercial Arbitration Act*, RSA 2000, c I-5.
[7] Model Law, Article 34(2)(b)(ii).
[8] Model Law, Article 36(1)(b)(ii)
[9] *Quintette Coal Ltd. v Nippon Steel Corp* 1990 CarswellBC 232.
[10] Most cases analyzed in this paper cite *Nippon Steel* – and see also, for instance: *BWV Investments Ltd. v SaskFerco Products Inc*. 1994 CarswellSask 265 (SKCA); *Dunhill Personnel System Inc. v Dunhill Temps Edmonton Ltd.* 1993 CarswellAlta 137 (ABQB); *Cangene Corp. Octapharma AG* 2000 MBQB 111; *Geophysical Service Incorporated v Canada (Attorney General)* 2020 FC 984; *Seidel v Telus Communications Inc.* 2011 SCC 15. In New Zealand: *Downer-Hill Joint Venture v Government of Fiji* 2005 1 NZLR 554 (HC); In Australia: *Hebei Jikai Industrial Group Co Ltd. v Martin* [2014] ALMD 5, 827 (FCA).
[11] *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth Inc.,* 473 US 614 (1985).
[12] *Nippon Steel*, para 27.
[13] *Nippon Steel*, para 27 – 28.
[14] *Nippon Steel*, para 32.
[15] See, for instance, the Supreme Court of Victoria's citation of this case in *Cameron Australasia Pty Ltd v AED Oil Limited* [2015] VSC 163.
[16] The non-Canadian reader is advised of the perhaps somewhat counterintuitive nomenclature of courts in British Columbia: the Supreme Court of British Columbia is the province's trial-level first instance superior court of inherent jurisdiction, and the Court of Appeal for British Columbia is the province's appellate court to which decisions of the Supreme Court may be appealed. Decisions of the Court of Appeal may be appealed with leave to the Supreme Court of Canada.
[17] *United Mexican States v Metalclad Corp*. 2001 BCSC 664.
[18] *Metalclad*, paras 87 – 88.
[19] *Metalclad*, para 97.
[20] *Metalclad,* para 97 – 97.
[21] See: *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District* 2021 SCC.
[22] *Metalclad*, para 106.
[23] *Metalclad*, para 107.
[24] *Metalclad*, paras 108 – 111.
[25] *CE International Resources Holdings LLC v Sit* 2013 BCSC 1804.
[26] *CE International*, paras 1, 6.
[27] *CE International*, para 19.
[28] *CE International*, para 42.
[29] *CE International*, para 51.
[30] *CE International, para 52.*
[31] *Schreter v Gasmac Inc*. 1992 Carswell Ont 137.
[32]*Schreter*, para 49.
[33]*Schreter*, para 50 [emphasis added].
[34]*Schreter*, para 52.
[35]*Waterside Ocean Navigation Co. v International Navigation Ltd.* 737 F.2d 150 (2d Cir. 1984), para 152.
[36] *Schreter*, para 55.

[37] *Consolidated Contractors Group S.A.L. (Offshore) v Ambatovy Minerals S.A.* 2017 ONCA 939, para 99.
[38] *Corporacion Transnacional de Inversiones S.A. de C.V. v STET International S.p.A.* 1999 Carswell Ont 2988.
[39] *Corporacion Transnacional de Inversiones*, para 30.
[40] *United Mexican States v Karpa* 2005 Carswell Ont 32 (ONCA).
[41] *Karpa*, para 1.
[42] *Karpa*, paras 62 – 65.
[43]*Karpa*, paras 67.
[44] *Karpa*, para 68.
[45]*Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)) section 245.
[46] *Karpa*, para 68.
[47] *Vento Motorcycles, Inc. v Mexico* 2025 ONCA 82.
[48] *Vento Motorcycles*, paras 10 – 11.
[49] *Popack v Lipszyc* 2016 ONCA 135.
[50] *Vento Motorcylces*, para 40.
[51] *Vento Motorcycles*, para 37.
[52] *Vento Motorcycles*, para 46.
[53] *Vento Motorcycles*, para 48.
[54] *Nippon Steel*, para 27 – 28.
[55] *Karaha Bodas Co. L.L.C. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 2004 ABQB 918.
[56] *Kahara*, para 37.
[57] *Kahara*, para 2.
[58] *Kahara*, para 48.
[59] *Yugraneft Corp. v Rexx Management Corp.* 2007 ABQB 450.
[60] *Yugraneft*, paras 1 – 4.
[61] *Yugraneft*, para 80.
[62] *Yugraneft*, paras 48 – 49.
[63] *Yugraneft*, para 80. It should be noted that the ultimate decision of the Alberta Court of King's Bench in *Yugraneft* was that enforcement of the award was statute-barred by operation of Alberta's legislated limitation period – see para 72. Nonetheless, the court dealt at length on the issue of the public policy defense raised by the respondent since submissions were made on the issue and in the event an appeal was made. An appeal indeed was made, and the case eventually went to the Supreme Court of Canada (2010 SCC 19). The issues of public policy were not raised on appeal. The issue was solely the applicable limitation period, with Canada's apex court upholding the trial court finding. Thus, the trial court's enunciations on the public policy provisions of the Model Law were left undisturbed by subsequent appellate decisions.
[64] *Uber Technologies v Heller* 2020 SCC 16.
[65] *Heller*, para 2.
[66] *Heller*, para 3.
[67] *Heller*, para 4.
[68] *Heller*, para 101.
[69] *Heller*, paras 107 – 109. Internal citations omitted. Emphasis in original.
[70] *Heller*, para 111.
[71] *Heller*, paras 111 – 113.
[72] *Heller*, para 112.
[73] *Heller*, para 118.
[74] *Heller*, para 120 – 121.
[75] *Lemenda Trading Co . Ltd v African Middle East Petroleum Co. Ltd* [1988] 1 Q.B. 448.
[76] *Lemenda* at 321.
[77] *Soleimany v Soleimany* [1999] QB 785 at 800.

[78] *Deutsche Schachtbau- and Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co., Shell Intl Petroleum Co. Ltd* [1986 D No. 2196] [1987 R No. 273] - 24 Mar 1987.
[79] *Kuwait Airways Corporation v Iraqi Airways Co (Nos 4 and 5)* [2002] UKHL 19.
[80] *Kuwait Airways*, paras 16 – 17.
[81] *Honeywell International Middle East Ltd v Meydan Group LLC* [2014] EWHC 1344 (TCC).