CANADA

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IBA SUB-COMMITTEE ON THE RECOGNITION AND ENFORCEMENT OF AWARDS – PUBLIC POLICY IN CANADA

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I. INCORPORATION OF ARTICLE V OF THE NEW YORK CONVENTION AND ARTICLE 36 OF THE MODEL LAW INTO CANADIAN LAW

The UNCITRAL Model Arbitration Law (the "Model Law") and the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") have been adopted in Canada through provincial and territorial legislation.[1] In some provinces and one territory (*i.e.*, British Columbia, Yukon Territory, Saskatchewan, and in the federal legislation), the New York Convention is adopted under legislation specifically relating to the enforcement of foreign arbitral awards,[2] and the Model Law is adopted under provincial and territorial *International Commercial Arbitration Acts* ("*ICAA*").[3] In the remaining provinces and territories, both the Model Law and the New York Convention are incorporated into the *ICAA*.[4]

There are no material differences between the language in Article V.2(b) of the New York Convention and Article 36(1)(b)(ii) of the Model Law, on the one hand, and the language adopted by the Canadian provinces and territories on the other hand. It is common for enforcement applications to be brought under both the *ICAA* and the *FAA* of the relevant province (if applicable), or under both the Model Law

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1 Canada is a federation of ten provinces as three territories and although there is federal (*i.e.*, Government of Canada) legislation dealing with arbitration, international commercial arbitration is almost exclusively addressed in provincial and territorial legislation. Generally, these provincial statutes adopt the Model Law and New York Convention in full, but there are some slight differences between jurisdictions. Currently, the Uniform Law Commission of Canada is working towards drafting revised, uniform legislation that takes into account the 2006 revisions to the Model Law and clarifies inconsistencies in current legislation.

2 *Foreign Arbitral Awards Act*, RSBC 1996, c 154; *Foreign Arbitral Awards Act*, RSY 2002, c 93; *Enforcement of Foreign Arbitral Awards Act*, SS 1996, c E-9.12; *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp). For convenience, the legislation of each province will be referred to as the *FAA* throughout this report (*e.g.* Saskatchewan *FAA*).

3 *International Commercial Arbitration Act*, RSBC 1996, c. 233; *International Commercial Arbitration Act*, RSY 2002, c. 123; *International Commercial Arbitration Act*, SS 1988-89, c. I-10.2.

4 *International Commercial Arbitration Act*, RSA 2000, c. I-5; *International Commercial Arbitration Act*, RSNL 1990, c. 1-15; *International Commercial Arbitration Act*, RSPEI 1988, c. I-5; *International Commercial Arbitration Act*, RSNS 1989, c. 234; *International Commercial Arbitration Act*, RSO 1990, c. I.9; *International Commercial Arbitration Act*, RSNB 2011, c. 176; *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c. 1-6; *International Commercial Arbitration Act*, RSNWT (Nu) 1988, c. 1-6; *International Commercial Arbitration Act*, SNB 1986, c. I-12.2; *International Commercial Arbitration Act*, CCSM c. C151. For convenience, the legislation of each province will be referred to as such throughout this report (*e.g.*, Ontario *ICAA*).

and the New York Convention provisions in the *ICAA* (if applicable). In one of the leading cases on the application of the public policy defence, the Ontario Superior Court of Justice expressly stated that "authorities relating to Article V of the New York Convention are applicable to the corresponding provisions in Articles 34 and 36 of the Model Law."[5] Given that the legislation before the courts mirrors both the Model Law and the New York Convention, it is not surprising that Canadian courts tend not to differentiate between them, and often refer only to Model Law.

II. THE CANADIAN NOTION OF "PUBLIC POLICY"

Canadian courts take a deferential approach to the enforcement of international arbitral awards and a narrow approach to the "public policy" defences under the New York Convention and the Model Law. Courts approach applications to enforce arbitral awards and applications to set them aside in a similar manner which embraces a narrow definition of public policy, limiting parties' ability to escape enforcement.

A. Public Policy as a Defence to Enforcement of International Arbitral Awards

The leading case in Canada on the definition of the public policy defence under Article V.2(b) of the New York Convention and Article 36(1)(b)(ii) of the Model Law (which mirror one another) is *Schreter v Gasmac Inc.*[6] In *Schreter*, Gasmac argued that the arbitral award against it should not be enforced because: (1) the arbitrator had failed to give reasons, and (2) the award included an acceleration of future damages which Gasmac claimed was contrary to the law of Ontario and therefore public policy. In dismissing Gasmac's application, the Court explained the purpose and scope of the public policy defence 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.

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5 *Corporacion Transnacional de Inversiones v. Stet International S.p.A,* (1999) 45 OR (3d) 183 (SCJ), aff'd 49 OR (3d) 414 (CA) [*Corporation Transnacional*] at para. 26.

6 *Schreter v. Gasmac Inc.* (1992) 7 OR (3d) 608, add'l reasons 89 DLR (4th) 380 (Ont. Gen. Div) [*Schreter*].

This passage has since been widely accepted as the relevant test for enforcement when considering the public policy defences under the New York Convention and the Model Law.[7]

For example, the Ontario Superior Court of Justice adopted and refined the *Schreter v. Gasmac Inc.* test in *Corporation Transnacional de Inversiones v. Stet International S.p.A,* which involved cross-applications to enforce an arbitral award and to set it aside under the Ontario *ICAA.* The Court applied the same standard to both the enforcement and set aside applications, holding that:

> [T]o succeed on [the public policy] 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. [8]

Citing a report of the United Nations Commission on International Trade Law, the Court concluded that instances of corruption, bribery or fraud would fit into the prescribed framework as violations of both the essential morality of Ontario and notions of justice common to legal systems worldwide. Other than referring to international "notions of justice", Canadian courts have not indicated whether the public policy defence requires the application of international or domestic public policy or both. However, as will be evident from the cases discussed below, Canadian courts do not consider a breach of a Canadian law as equivalent to a breach of public policy in most circumstances.

In addressing procedural concerns raised in the applications in *Corporation Transnacional,* the Court held that judicial intervention would only be warranted "when the Tribunal's conduct is so serious that it cannot be condoned under the law of the enforcing state."[9]

Following *Schreter* and *Corporation Transnacional,* Canadian courts have repeatedly confirmed that public policy is an "exceptional defence" to enforcement that should be interpreted narrowly.[10]

Reasoning from decisions regarding the enforcement of foreign judgments may also be applicable in the realm of arbitral awards. For example, courts considering the validity of arbitral awards have relied on

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7 See, for example: *NYSE v. Orbixa*, 2013 ONSC 5521 at para. 24, leave to appeal refused 2014 ONCA 219, *Depo Traffic v. Vikeda International*, 2015 ONSC 999 [*Vikeda*] at para. 45, *Yugraneft Corporation v. Rexx Management Corporation*, 2007 ABQB 450 at para. 76, aff'd 2010 SCC 19; *Assam Co. India Ltd v. Canoro Resources*, 2014 BCSC 370 [*Assam Co.*] at para. 41; *CE International Resources Holdings LLC v. Sit*, 2013 BCSC 1804 at para. 41.

8 *Corporation Transnacional* at para. 30.

9 *Corporation Transnacional* at para. 34.

10 See, *e.g., Vikeda* at paras. 45, 47; *Assam Co.* at paras. 41, 42.

Boardwalk Regency Corp. v. Maalouf[11] for the principle that an award may be enforceable despite the fact that it conflicts with the law of the Canadian forum.[12] In that case, the plaintiff successfully enforced a New Jersey judgment based on a gambling debt despite Ontario's *Gaming Act*[13] prohibiting the collection of gambling debts. The Court held that the issue was not whether the laws were in conflict, but whether the *Gaming Act* was an expression of public policy and essential morality sufficient to make it offensive to enforce the foreign judgment. The Court defined essential morality as principles that "run through the fabric of society to the extent that it is not consonant with our system of justice and general moral outlook to countenance the conduct, no matter how legal it may have been where it occurred" and held that the Ontario *Gaming Act* did not meet the definition.[14] This definition of public policy has also been applied in applications to set aside international commercial arbitral awards.[15]

B. Public Policy as Grounds to Set Aside an Arbitral Award

As mentioned above, *Corporation Transnacional de Inversiones v. Stet International S.p.A* involved applications to both set aside and enforce an award. The Court concluded that the test to be applied to the public policy grounds of both applications is virtually identical.[16] Accordingly, the test for setting aside an award on the basis of public policy is also whether the award "is contrary to our notions of morality and justice." The Supreme Court of Canada has also recognized that the concept of public policy is variable, making it difficult to arrive at an exhaustive definition.[17]

In the application to set aside the award considered in *Corporation Transnacional*, the Court was faced with CTI's assertion that it had been denied procedural fairness and equality because: (1) it did not receive disclosure of a key document, (2) the Tribunal refused to subpoena a key witness, and (3) the Tribunal failed to consider whether a settlement had been reached. CTI had withdrawn from the arbitration due to these concerns. The Court dismissed CTI's application, holding that only "egregious

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11 *Boardwalk Regency Corp. v. Maalouf*, [1992] OJ No. 26 (Ont. CA) [*Maalouf*].

12 *Bad Ass Coffee Company of Hawaii Inc. v. Bad Ass Enterprises Inc*., 2007 ABQB 581 at para. 69-71; *Corporation Transnacional* at para. 29*; Abener Energia, S.A. v. SupOpta Inc.*, (2009) 61 BLR (4th) 313 (Ont. SCJ), aff'd 2010 ONCA 57 at para. 23.

13 *Gaming Act*, RSO 1980, c. 183.

14 *Maalouf* at p. 743.

15 *Holding Tusculum, b.v. c. Louis Dreyfus, s.a.s. (SA Louis Dreyfus & Cie)*, 2008 QCCS 5904 [*Holding Tusculum*] at para. 140.

16 *Bayview Irrigation District #11 v. United Mexican States*, [2008] OJ No. 1858 (Ont. SCJ) at para. 58.

17 *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17 [*Desputeaux]* at para. 52.

and injudicious conduct by a Tribunal" would amount to procedural unfairness.[18] A party's "own failures or strategic choices" (*i.e.* to withdraw from the arbitration) will not assist its application to set the award aside. The Court went on to acknowledge that in certain circumstances, non-disclosure could constitute a serious concern potentially sufficient to set aside an award; for example, if a Tribunal deliberately concealed documents or obtained and relied on evidence that it failed to disclose to the parties.[19]

The Supreme Court of Canada recently considered "public order", an analogous of public policy, in the context of an application to set aside an arbitral award under the *Civil Code of Quebec.*[20] The Court recognized that arbitrators have jurisdiction to consider questions of public policy in resolving disputes before them. The remaining question for courts is whether "the disposition of a case, or the solution it applies, meets the relevant criteria [rather than] whether the specific reasons offered for the decision do so", looking at the award as a whole and in consideration of the purpose of the provision: to preserve certain values that are considered to be fundamental in a legal system.[21]

"Public policy" does not refer to the political position of Canada on a particular issue, but instead refers to "fundamental notions and principles of justice".[22] This distinction is highlighted in *Dynafund Ltd. c. Italsav srl,*[23] in which Dynafund's ability to perform the parties' contract was arguably impeded by the Cuban government's questionable seizure of its bank accounts, including money owed to Italsav. The Court rejected Dynafund's argument that the award sanctioned a breach of international law, holding that the risk of the Cuban government's non-compliance with the rule of law should be borne by both parties, and could not invalidate the award where the underlying contract was legal.

As in the context of enforcement, an award tainted by corruption or fraud will usually amount to a violation of public policy, although an award need only be set aside to the extent that it is affected by the fraud (*e.g.*, the discounting of fraudulent expenses).[24] It is important to note that if the issue of corruption or misrepresentation by a party is raised before the Tribunal, courts will rarely permit the re-litigation of the allegations on an application to set the award aside.[25] Lack of "clean hands" is generally not sufficient

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18 *Corporation Transnacional* at para. 78.

19 *Corporation Transnacional* at para. 52.

20 *Civil Code of Quebec*, CQLR c C-1991; *Desputeaux.*

21 *Desputeaux* at para. 54.

22 *Canada (Attorney General) v. SD Myers Inc*., 2004 FC 38 [*SD Meyers*] at para. 55.

23 *Dynafund Ltd. c. Italsav srl*, 2014 QCCS 3772 at para. 28.

24 *United Mexican States v. Metalclad Corp.,* 2001 BCSC 664 [*Metalclad*] at paras. 115.

25 *Metalclad* at para 112.

grounds to justify setting aside an award. In *United Mexican States v. Feldman Karpa*, the Court held that it was within the Tribunal's jurisdiction to assess the extent to which Feldman's wrongdoings (overclaiming taxes and exporting to a fictitious company) affected his entitlement to compensation.[26]

As noted above, Canadian courts have held that an error of law will not justify setting aside an award (or refusing to enforce one).[27] However, where an arbitrator's error is "patently unreasonable" or "clearly irrational", it may justify setting aside an award as well as refusing to enforce it. In the context of jurisdictional decisions, an error amounts to a violation of public policy where an arbitrator has completely disregarded the law so that "the decision constitutes an abuse of authority amounting to a flagrant injustice".[28] On review of the factual issues giving rise to such circumstances, an award will only be nullified if the arbitrator's conclusions were affected by fraud or were patently unreasonable.[29] An arbitrator's failure to apply a mandatory statutory provision will not provide a basis for annulling an award unless the outcome of the arbitration contradicts fundamental principles of public order.[30]

Canadian courts have also questioned whether the violation of certain legal principles can be grounds to set aside an award for public policy reasons. Although in *obiter*, courts have commented that claims of champerty and maintenance[31] and the principle of *res judicata*[32] likely do not give rise to public policy concerns sufficient to nullify an arbitral award.

III. AVOIDING ENFORCEMENT ON PUBLIC POLICY GROUNDS IN CANADIAN COURTS

Given the narrow definition of the public policy defences, it is not surprising that few applicants have successfully avoided enforcement of an arbitral award on public policy grounds. In fact, only two Canadian appeal courts have refused to enforce an award on the basis of public policy. The applications that have been successful are largely fact-specific.

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26 *United Mexican States v. Feldman Karpa*, (2005) 74 OR (3d) 180 (Ont. CA).

27 *Navigation Sonamar Inc.* v. *Algoma Steamships Ltd*., (1995), 1 MALQR 1 (Que. SC) [*Navigation Sonamar*].

28 *Navigation Sonamar*; *SD Myers* at para. 55.

29 *Karaha Boda Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 ABQB 616 at para. 59.

30 *Desputeaux* at para. 54.

31 *Banglar Progoti Ltd. v. Ranka Enterprises Inc.*, (2009) OJ No. 1470 (Ont. SCJ) at paras 18-19.

32 *Holding Tusculum* at paras 150-152.

C. Successful Applications

(a) Procedural Challenges

In *Dalimpex Ltd. v Janicki*,[33] the Ontario Court of Appeal considered the effect of ongoing appeals on the enforceability of an award. After a Polish Tribunal rendered its award, Dalimpex applied to have it set aside in Poland. Concurrently, the claimant moved to enforce the award under the Ontario *ICAA*. Dalimpex argued that the award was not binding on parties until the appeal was disposed of and that it would be contrary to public policy to enforce the award before the issues under appeal were decided. The Ontario Court of Appeal found that to enforce the award would render Article 36 of the Ontario *ICAA* meaningless; neither party had addressed the merits of the Polish appeals before the court, but if the appeals failed, Dalimpex had a right to challenge enforcement in Ontario on the same grounds. To ensure that Dalimpex retained this opportunity to challenge enforcement on the merits, the Court adjourned the application pursuant to Article 36(2) of the Ontario *ICAA* until after the Polish appeals had concluded.

(b) Substantive Challenges

Subway Franchise Systems of Canada v. Laich,[34] involved an award in favour of Subway against a franchisee. Subway had terminated the franchise agreement after finding the defendant in breach of an operations manual. Both the franchise agreement and the arbitral award incorporated a term requiring the franchisee to pay $250 per day for every day after an award was rendered that the franchisee used Subway's trademarks. After the award was rendered, and notwithstanding Subway's termination of the agreement, both parties continued to operate as if the agreement remained in force, with the franchisee remitting royalties to Subway for the use of its trademarks, and Subway accepting such royalties.

In challenging enforcement of the award under both the New York Convention and the Model Law (pursuant to the Saskatchewan *ICAA* and the *FAA*, respectively), the franchisee argued that it would be contrary to public policy to enforce an award that would amount to double recovery; Subway had already been compensated for the use of the trademarks by way of the royalties. The Court agreed, finding that Subway had waived its right to the award by continuing to accept royalties from the franchisee.[35] The Court agreed that double recovery was contrary to the public policy of Saskatchewan, and concluded that

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33 *Dalimpex Ltd. v Janicki*, (2003) 64 OR (3d) 737 (Ont. CA).

34 *Subway Franchise Systems of Canada v. Laich*, 2011 SKQB 249 [*Subway*] at paras 36, 37.

35 *Subway* at paras 36, 37.

Subway had not suffered any losses and was not entitled to both accept royalties and enforce an award for penalty fees in respect of the same trademarks.[36]

In *TMR Energy Ltd. v. State Property Fund of Ukraine et al.,*[37] Ukraine applied under the Newfoundland *ICAA* (incorporating both the New York Convention and the Model Law) to set aside an *ex parte* order of the Court enforcing TMR's award. Ukraine argued that the federal *State Immunity Act*[38] applied to the recognition of an arbitral award as a judgment of the province, which TMR had failed to disclose. Acknowledging that the limitations imposed by the *State Immunity Act* could bar enforcement of TMR's award, the Court set aside the lower court's order and refused to enforce the award.[39]

In *Quinette Coal Ltd. v. Nippon Steel Corp.*[40], Nippon, an arbitral creditor, challenged an order permitting Quinette to prepare an arrangement under the *Companies Creditors Arrangement Act*[41] (similar to a bankruptcy). The order prohibited Nippon from setting off its debts to Quinette with the amount owed under the arbitral award, which would have allowed it to avoid sharing Quinette's assets with other creditors. While not specifically addressing the Model Law or New York Convention, the Court dismissed Nippon's application to set the order aside, holding that it would be contrary to public policy to permit Nippon to gain preference over Quinette's domestic creditors by allowing Nippon to enforce its arbitral award by way of set off.

D. Unsuccessful Applications

(a) Procedural Challenges

In *Depo Traffic v. Vikeda International,*[42] Vikeda opposed enforcement of an award rendered in China by the Shanghai International Arbitration Commission in favour of Depo, on the basis that the Tribunal had failed to adhere to the principles of fundamental justice by ignoring its defence of double recovery. The Court disagreed with Depo on both the facts and the law, noting that it was evident in the Tribunal's reasons that they had been alive to the defence. While acknowledging that it would have been preferable for the Tribunal to give factual findings, the Court held that there was no evidence of misconduct on the

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36 *Subway* at paras 39, 42.

37 *TMR Energy Ltd. v. State Property Fund of Ukraine et al.*, 2004 NLSCTD 244 [*TMR Energy*].

38 *State Immunity Act*, RSC 1985, c. S-18.

39 *TMR Energy* at para. 63.

40 *Quinette Coal Ltd. v. Nippon Steel Corp*.(1990), 47 BCLR (2d), aff'd 51 BCLR (2d) 105 (BCCA).

41 *Companies Creditors Arrangement Act*, RSC 1985, c C-36.

42 *Depo Traffic v. Vikeda International*, 2015 ONSC 999 [*Vikeda*].

part of the Tribunal that would amount to an act "repugnant" to the fundamental principles of the province under the Ontario *ICAA*.[43]

In *Assam Co. India v. Canoro Resources*, 2014 BCSC 370,[44] Canoro appealed to the court to refuse enforcement over complaints that the Tribunal had been improperly constituted. Under the parties' agreement, both Canoro and Assam had a right to appoint one member of three-member Tribunal. The final member was to be appointed by the two arbitrators, with the moving party holding a right to appoint the last member if agreement could not be reached, which Assam exercised. Canoro challenged Assam's appointment of the third member of the Tribunal, first to the Tribunal, and then to the Supreme Court of India. Before the merits of the objection were decided in either forum, Canoro withdrew its petition to the Supreme Court and abandoned the arbitration entirely.

Before the British Columbia Supreme Court, Canaro argued that the method of appointment of the Tribunal rendered Canoro fundamentally unable to present its case, in breach of the principles of natural justice and public policy under Article 36 of the British Columbia *ICAA*. The Court rejected this argument, holding that Canoro had been given a full opportunity to present its case and had chosen to withdraw on its own accord.[45] Further, the Court noted that it was improper for Canoro to attempt to re-litigate the same issues it had abandoned previously, holding that it ought to have pursued relief in India. In the Court's words, Canoro was bound to "live with the consequences" of its decision.[46]

In *NYSE v. Orbixa,*[47] the Ontario Court of Appeal considered the effect of parallel regulatory proceedings on the enforcement of NYSE's award. The dispute involved an agreement under which Orbixa was required to pay NYSE fees in exchange for market data. NYSE claimed the fees were unpaid, while Orbixa claimed it had been overbilled. The arbitrator found in favour of NYSE. Orbixa sought review of the award by the Securities and Exchange Commission ("SEC"), which, notably, is not a "court" under Article 36(2) of the Ontario *ICAA*.[48] In response to NYSE's application to enforce the award, Orbixa argued that it would offend public policy to enforce the award while the SEC proceedings were ongoing.

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43 *Vikeda* at paras. 47-49.

44 *Assam Co. India v. Canoro Resources,* 2014 BCSC 370 [*Assam Co.*].

45 *Assam Co.* at para. 53.

46 *Assam Co.* at para. 54.

47 *NYSE v. Orbixa*, 2013 ONSC 5521, aff'd 2014 ONCA 219 [*NYSE*].

48 This distinguishes *NYSE* from *Dalimpex Ltd. v Janicki* (discussed earlier), in which the application to set aside the award was made to a competent court under Article 36(2), which expressly permits the enforcing court to adjourn proceedings in the face of ongoing appeals.

The Court held that the regulatory proceedings had no bearing on the enforceability of the award. Although Orbixa remained free to exercise its right of review, there was no basis on which to conclude that enforcing the award would offend principles of justice and fairness.[49]

In *Activ Financial Systems Inc. v. Orbixa Management Services,*[50] the arbitrator awarded Activ $553,070 plus 9% interest but did not provide reasons. Orbixa argued that the award was unreasonable in light of the harm caused by its breach of contract, and was therefore contrary to New York law. In challenging enforcement of the award, Activ argued that to enforce a *prima facie* illegal award without the benefit of reasons would be contrary to public policy.

The Court disagreed, following the reasoning in *Schreter v. Gasmac* and holding that a lack of reasons is not grounds for refusing enforcement if the court can determine whether the award is contrary to public policy on the record. As in *Schreter v. Gasmac*, the Court had adequate information to assure itself that the award did not offend public policy.[51]

As described above, *Corporacion Transnacional de Inversiones v. Stet International S.p.A.*[52] is another example of an unsuccessful procedural challenge in which the Court dismissed CTI's challenge, holding that CTI had an opportunity to present its case and forfeited that right by withdrawing.[53] In the absence of evidence that the Tribunal had concealed evidence or otherwise misconducted itself in a fundamental way, the Court held that there was no basis to resist the award.[54] The Court held that the procedural protections provided by the Model Law (and the Ontario *ICAA*) were meant to control injudicious and egregious conduct by the Tribunal, not to protect a party from its own poor strategic choices.[55] The Court gave similar short shrift to CTI's substantive argument, confirming that Canadian courts will not permit a party to relitigate the merits of its case on an enforcement application.

Likewise, as described above, *Schreter v. Gasmac Inc.*[56] addressed a strikingly similar argument to that in *Activ Financial*. Gasmac argued that the arbitrator's failure to give reasons was a denial of natural justice

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49 *NYSE* at paras. 22-24.

50 *Activ Financial Systems Inc. v. Orbixa Management Services*, 2011 ONSC 7286 [*Activ Financial*].

51 *Activ Financial* at paras. 51-52.

52 *Corporacion Transnacional de Inversiones v Stet International S.p.A*, (1999) 45 OR (3d) 183, aff'd 49 OR (3d) 414 (Ont. CA) [*Corporation Transnacional*].

53 *Corporation Transnacional* at para. 7.

54 *Corporation Transnacional* at para. 52

55 *Corporation Transnacional* at para. 78.

56 *Schreter v. Gasmac Inc.* (1992), 7 OR (3d) 608 (Ont. Gen. Div.) [*Schreter*].

and prevented the Court from evaluating whether the acceleration of damages contemplated by the award was contrary to the law of Ontario. The Court held that a failure to give reasons alone does not constitute a breach of public policy. In the absence of reasons, it is proper for a court to look to the evidentiary record to decide whether the award offends public policy.[57] On the basis of the record, the Tribunal concluded that the damages award would not offend "local principles of justice and fairness", and allowed Schreter's application to enforce it in Ontario.[58]

(b) Substantive Challenges

In *Sanum Beteiligungsgesllschaft MbH v. PDC Biological Health Group Corporation,*[59] the Court considered PDC's argument that a "commercially absurd" award was contrary to public policy. Sanum had acquired all of the shares in PPS and subsequently agreed to sell PPS to PDC. Sanum purported to terminate the agreement on the basis of a failed condition precedent and PDC refused to pay the balance of the purchase price. Sanum succeeded in arbitration and PDC was ordered to pay the remainder of the purchase price, notwithstanding the termination.

Before the British Columbia Supreme Court, PDC argued that it would be "commercially absurd" and contrary to public policy to give Sanum a $3.3 million windfall, with PDC receiving nothing in return. The Court rejected PDC's argument under the British Columbia *ICAA* as an attempt to reargue its case, noting that the arbitrator had considered the issue and had found against PDC. Without expressing whether a commercially absurd award could ever contravene public policy, the Court labelled the application an abuse of process and a collateral attack on the arbitrator's findings.[60]

In *CE International Resources Holdings LLC v. Yeap Soon Sit*,[61] Mr. Yeap opposed enforcement of CEIR's award under the British Columbia *ICAA* and *FAA* on the basis of the Tribunal's decision that as a non-signatory to the parties' contract, he was nevertheless a party to the arbitration agreement. The Court deferred to the arbitrator's decision, noting that Yeap had not objected to the enforcement of interim orders against him, and holding that there was nothing in the arbitrator's decision regarding Yeap's status

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57 *Schreter* at paras. 37-38.

58 *Schreter* at para. 42.

59 *Sanum Beteiligungsgesllschaft MbH v. PDC Biological Health Group Corporation*, 2015 BCSC 570 [*Sanum*].

60 *Sanum* at paras. 52-54.

61 *CE International Resources Holdings LLC v. Sit,* 2013 BCSC 1804 [*CEIR*].

as a party that would offend fundamental principles of justice and render the award contrary to public policy.[62]

In *Accentuate v. Asigra,*[63] the Court considered the effect of parallel proceedings on the enforceability of an award. In response to Asigra's request for arbitration, Accentuate counterclaimed, in part for relief under certain European Union Regulations. The arbitrator held that the regulations did not apply, but awarded Accentuate substantial damages.

A preliminary ruling was sought from the arbitrator on the applicability of the Regulations. In response to the arbitrator's ruling that the Regulations did not apply, Accentuate brought proceedings in England for relief under the Regulations. Asigra successfully applied for a stay of proceedings in the United Kingdom High Court of Justice, but Accentuate successfully appealed (after the award had been granted in the arbitral proceedings). Accentuate's action continued and at the time of the enforcement application, the United Kingdom proceedings were still underway. However, the United Kingdom proceedings had been discontinued by the time the Ontario Court of Appeal dismissed Asigra's challenge to the enforcement of the award.

In challenging enforcement of the award in Ontario under the Ontario *ICAA*, Asigra argued that parties ought to be held to the full terms of their bargain; it would be contrary to public policy to allow Asigra to enforce one aspect of an award while re-litigating another aspect through the English courts.[64] The Court acknowledged that it might have been improper for Accentuate to bring the English proceedings, but held that it had nothing to do with the enforceability of the award. The potential for diverging opinions of the arbitrator and the English court regarding the applicability of the Regulations was not grounds to defeat the award.[65]

In *Abener Energia, S.A. v. SunOpta Inc.,*[66] the parties or their associated entities were involved in two separate arbitrations. In the first, Abener was awarded 1.3 million euros and sought enforcement in Ontario. SunOpta argued that it had an equitable claim of set off against Abener arising from the second, ongoing arbitration that justified the court piercing the corporate veil and staying enforcement of the award, pursuant to Article 36 of the Ontario *ICAA*. The Court rejected this argument, holding that even if

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62 *CEIR* at paras. 41-42.

63 *Accentuate v. Asigra,* 2010 ONSC 3364, aff'd 2011 ONCA 99 [*Accentuate*].

64 *Accentuate* at paras. 30, 36.

65 *Accentuate* at paras. 28-29.

66 *Abener Energia, S.A. v. SunOpta Inc.* (2009), 61 BLR (4th) 313 (Ont. SCJ), aff'd 2010 ONCA 57 [*Abener*].

SupOpta succeeded in the second arbitration, it would not "taint" the first award so as to make it contrary to public policy to enforce it immediately.[67]

In *Banglar Progoti Ltd. v. Ranka Enterprises Inc.,*[68] Ranka disputed enforcement of Banglar's award over allegations of maintenance (assistance or involvement in the proceedings for an improper motive) and champerty (wherein the maintainer shares the profits of the litigation) which Ranka argued made the award contrary to public policy to enforce. The Court dismissed Ranka's application under the Ontario *ICAA* in both law and fact, holding that its allegations were purely speculative and were unsupported by evidence. Further, the Court held that even if champerty and maintenance had been made out, it was an open question as to whether champerty and maintenance applied to arbitration or were sufficiently serious to be considered as contrary to public policy in Ontario.[69]

In *Yugraneft Corporation v. Rexx Management Corporation,*[70] Rexx alleged that it had evidence that Yugraneft had fraudulently concealed an illegal takeover from the Tribunal. However, it had not raised the issue during the arbitral proceedings. Nevertheless, Rexx argued that the possibility of fraudulent activity rendered the award unenforceable under the Alberta *ICAA.*

The Court held that it was incumbent on Rexx to raise the issue of takeover before the Tribunal and dismissed the public policy argument. Without evidence that the Tribunal itself was affected by fraud or corruption, the award was enforceable.[71] However, the Court refused to enforce the award on the basis that Rexx's application was time-barred under the applicable provincial limitation period.

In *Adamas Management & Services v. Aurado Energy,*[72] Aurado challenged an award that ordered it to transfer a large block of its shares to Adamas. In order to transfer the shares, Aurado required approval from its shareholders and the Toronto Stock Exchange. Aurado argued under both the New York Convention and the Model Law (which are incorporated into New Brunswick's *ICAA*) that it would be contrary to public policy to enforce an order against it that was not within its power to fulfill, possibly exposing Aurado to a finding of contempt.

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67 *Abener* at para. 24.

68 *Banglar Progoti Ltd. v. Ranka Enterprises Inc.,*[68] (2009) OJ No. 1470 (Ont. SCJ) [*Banglar Progoti*].

69 *Banglar Progoti* at paras. 18-19.

70 *Yugraneft Corporation v. Rexx Management Corporation*, 2007 ABQB 450, aff'd 2010 SCC 19 [*Yugraneft*].

71 *Yugraneft* at para. 80.

72 *Adamas Management & Services v. Aurado Energy*, 2004 NBQB 342 [*Adamas*].

The Court rejected Aurado's argument and concluded that it would not be contrary to public policy even if in fact Aurado might be held in contempt of court if it could not get regulatory approval for the transfer. The Court also said that if this was a true concern, Aurado should have taken steps to get approval immediately following the award, instead of relying on a challenge to enforcement to undo the award.[73]

Karaha Boda Company, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,[74] involved a complex dispute over a contract wherein KBC agreed to build a power facility for PLN in Indonesia. During the early stages of construction, the Indonesian government issued a presidential decree postponing the project indefinitely, leading PLN to refuse to purchase energy from KBC as required by the contract. In turn, KBC gave notice under the contract that the decree constituted a *force majeure*, which allowed it to avoid its own obligations to construct the facility. KBC succeeded in arbitration to enforce PLN's payment obligations.

PLN argued that the award required an interpretation of the contract that defied the law of Indonesia (*i.e.* the decrees), making it illegal and therefore contrary to public policy under the Alberta *ICAA*. PLN further claimed that KBC had failed to disclose documents related to its political risk insurance during the proceedings. The Court confirmed that the *force majeure* clause in the contract only excused KBC from performance, not PLN, and disagreed that enforcing the award would penalize obedience of the decrees.[75] On the disclosure issue, the Court noted that neither party had canvassed the insurance issue during the arbitration hearings, indicating that it was not particularly important to the disposition of the claim.[76]

Following the application, PLN paid the full amount of the award but sought leave to appeal to "clear its name".[77] Abandoning its substantive argument, PLN relied on its assertions that KBC had failed to disclose relevant documents (including the political risk insurance) and had made false allegations during the proceedings. The Court dismissed PLN's application except as to costs, and held in that the standard of review of a factual issue – the existence and effect of the political risk insurance – was "patent unreasonableness". The Court held that it is only when an arbitrator's findings are patently unreasonable that it would likely offend public policy to enforce the ensuing award.[78] However, "patent

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73 *Adamas* at para. 48.

74 *Karaha Boda Company, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2004 ABQB 918 [*Karaha Boda*].

75 *Karaha Boda* at paras. 43-44.

76 *Karaha Boda* at para. 48.

77 *Karaha Boda Company, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 2007 ABQB 616 [*Karaha 2*].

78 *Karaha 2* at para. 59.

unreasonableness" is not a ground for refusing to enforce an award in the Alberta *ICAA*, and no award has been set aside or had its enforcement refused on this ground in Canada.

In *Proctor v. Schellenberg,*[79] Schellenberg resisted enforcement of Proctor's award on the basis that the underlying contract, a broker agreement assigned to Proctor, was a personal service agreement and was therefore not capable of assignment under Manitoba law. The Court noted that the assignee went on to perform the services without protest, and held that (1) law prohibiting the assignment of personal services contracts did not apply to arbitration clauses, and (2) the potential illegality of the contract had to be considered in light of the overall objective and intention behind the Model Law as adopted in the Manitoba *ICAA*. Recognizing that the language used in Article 36 is discretionary, the Court enforced the award.[80]

In *Grow Biz v. DLT Holdings Inc.,*[81] DLT opposed enforcement of Grow Biz' award on the basis that there was an "inequality of bargaining power" between the parties when the contract was concluded, leading to unfairness that would be contrary to public policy and the Prince Edward Island *ICAA* to condone. The Court rejected DLT's argument on the facts, holding that there was no significant inequality. The Court's decision left open the issue of whether serious unfairness or unconscionability in the formation of a contract could lead to an award being contrary to public policy.[82]

In *Arcata Graphics Buffalo Ltd. v. Movie (Magazine) Corp.,*[83] Arcata argued that the 1.5% monthly interest awarded by the arbitrator was contrary to public policy because it was not expressed annually, as required by Ontario banking legislation. The Court acknowledged that the interest was considered illegal under Ontario law, but enforced the award, noting that the contract itself calculated interest on a monthly basis. Following jurisprudence on the enforcement of foreign judgments, the Court held that an arbitral award that is inconsistent with domestic law will be enforced unless the inconsistency is contrary to the "essential morality" of Ontario.[84]

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79 *Proctor v. Schellenberg* 2002 MBQB 135, aff'd 2002 MBCA 170 [*Proctor*].

80 *Proctor* at para. 16.

81 *Grow Biz v. DLT Holdings Inc,.* 2001 PESCTD 27 [*Grow Biz*].

82 *Grow Biz* at para. 47.

83 *Arcata Graphics Buffalo Ltd. v. Movie (Magazine) Corp,* [1993] OJ No. 568 (Ont. Gen. Div.) [*Arcata*].

84 *Arcata* at para. 6.

Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.,[85] is one of the first cases to enforce an arbitral award under the Ontario *ICAA*. Can-Eng argued that it would be contrary to public policy to allow Kanto, a Japanese company without any assets in or connection to Ontario, to enforce an award against it because it would leave Can-Eng without any recourse against Kanto for a related claim of fundamental breach. Confirming that the Model Law applied to the proceedings, the Court held that there were no real grounds on which to refuse enforcement, advising Can-Eng that it should have raised the issue of fundamental breach during the arbitration.[86]

85 *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd* (1992), 7 OR (3d) 779, aff'd (1995) 22 OR (3d) 576 (Ont. CA) [*Kanto Yakin*].

86 *Kanto Yakin* at para. 21.

Identification of the decision	Summary of the public policy argument	Substantive	Procedural	Enforcement denied	Enforcement accepted
Depo Traffic v. Vikeda International, 2015 ONSC 999	Lack of factual findings on a defence does not amount to violation of public policy absent evidence of misconduct; public policy is an "exceptional defence" that will only succeed where enforcing the award would offend local principles of justice and fairness, is illegal in the forum, or involves an act repugnant to the forum (such as corruption).		X		X
Sanum Beteiligungsgesellschaft MbH v. PDC Biological Health Group Corporation, 2015 BCSC 570	Courts will not permit re-litigation of the merits if arbitrator acted reasonably. Collateral attack on decision is an abuse of process; claim that award was contrary to public policy because it was "commercially absurd" rejected because arbitrator had already ruled on it.	X			X (PDC's pleadings struck)
Assam Co.India Ltd v. Canoro Resources, 2014 BCSC 370	Objections to the constitution of the Tribunal and subsequent abandonment of arbitration does not equate to an "inability" to present a party's case and is not a breach of natural justice. Where a party voluntarily withdraws from proceedings, it cannot argue that it had "no opportunity" to present its case. The public policy defence should be narrowly construed and requires a fundamental breach of justice and fairness.		X		X
CE International Resources Holdings LLC v. Sit, 2013 BCSC 1804	It is within an arbitrator's jurisdiction to decide whether a non-signatory to a contract is nevertheless a party to an arbitration agreement. Arbitrator's decision regarding Mr. Yeap's status did not offend principles of justice (including	X	X		X

	public policy), particularly since he had not objected to the enforcement of interim orders against him.				
NYSE v Orbixa, 2013 ONSC 5521, aff'd 2014 ONCA 219	Enforcing an award that is under regulatory review does not offend public policy; defendant's recourse is to seek a stay of proceedings. Parties are entitled to exercise their right of review, but this does not render it offensive to the principles of justice and fairness to enforce an award granted after a full hearing.	X			X
Subway Franchise Systems of Canada Ltd. v. Laich, 2011 SKQB 249	It is contrary to public policy to enforce an award where it would amount to double recovery. Where a party waives its rights under the award by acting as if the contract remained in force, it cannot both accept payment under the contract and enforce the penalty granted in the award.	X		X	
Activ Financial Systems Inc. v Orbixa Management Services Inc., 2011 ONSC 7286	Absence of reasons is not grounds for refusing to enforce award if court can determine on the record whether it is contrary to public policy. The liquidated damages claim, as applied by the arbitrator, did not offend public policy.		X		X
Accentuate v Asigra, 2010 ONSC 3364, aff'd 2011 ONCA 99	Related court proceedings commenced during arbitration as a pseudo-appeal do not affect the enforceability of an award. Even where bringing the litigation might be improper, it is not contrary to public policy to enforce the award while the arbitral creditor is actively litigating another aspect of the claim.	X			X

Abener Energia, S.A. v SunOpta Inc., (2009) 61 BLR (4th) 313 (Ont SCJ), aff'd 2010 ONCA 57	A potential equitable right of set off against an arbitral creditor pursuant to a second, unrelated arbitration does not "taint" an arbitral award so as to make it contrary to public policy to enforce. An award is enforceable solely on its own merits.	X			X
Banglar Progoti Ltd. v. Ranka Enterprises Inc., (2009) OJ No. 1470 (Ont. SCJ)	Claims of champerty and maintenance likely do not make an award "contrary to public policy" to enforce and may not even apply to arbitration.	X			X
Bad Ass Coffee Co. of Hawaii v. Bad Ass Enterprises Inc., 2007 ABQB 581, aff'd 2008 ABQB 404	Although this case relates to a court judgment, it considers the meaning of public policy under the Alberta *ICAA.* Definition of public policy under common law extends to foreign arbitral awards. Court held that not every statute is an expression of public policy; the question is whether the breach of a statute offends a fundamental moral value.	X			X
Yugraneft Corporation v. Rexx Management Corporation, 2007 ABQB 450, aff'd 2010 SCC 19	Parties may not raise issues of fraud during enforcement proceedings that could have been raised during the arbitration. Where there is no evidence that the Tribunal was affected by fraud or corruption, there will be no grounds to consider whether alleged fraud has made an award unenforceable.	X		X (based on limitation period)	
Karaha Boda Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2007 ABQB 616 (application for leave to appeal from master)	Review of a factual issue should be on a patently unreasonable standard, because enforcing a patently unreasonable award would likely offend public policy. "Patent unreasonableness" has not been adopted as the relevant test in other provinces.	X		n/a	n/a

Adamas Management & Services v. Aurado Energy, 2004 NBQB 342	The fact that satisfaction of award is not completely within a party's control (and may result in contempt of court if unable to secure necessary approvals) is not contrary to public policy. It is incumbent on such parties to take steps to satisfy the award immediately so as to avoid complications.	X			X
Karaha Boda Company, L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 2004 ABQB 918	Failure to provide documents regarding an issue that was not pursued at arbitration is not contrary to public policy. Implied that in some cases, enforcing an award that would penalize obeying a foreign law could be contrary to public policy, but record did not support that claim**.**	X			X
TMR Energy Ltd. v. State Property Fund of Ukraine et al., 2004 NLSCTD 244	Implied that enforcing a judgment against a foreign state could be contrary to public policy insofar as it conflicted with the *State Immunity Act.*	X		X	
Dalimpex Ltd. v Janicki, (2003) 64 OR (3d) 737 (Ont. CA)	Contrary to public policy to enforce an award while appeals to set it aside are ongoing; court should adjourn the enforcement application under Article 36(2) until after the appeals have concluded.		X	X	
Proctor v. Schellenberg, 2002 MBQB 135, aff'd 2002 MBCA 170	Even if underlying contract (or assignment thereof) might be illegal, court has discretion to enforce the award despite the fact that it could be construed as contrary to public policy. Court noted that language in the Model Law, as expressed in the Manitoba *International Commercial Arbitration Act*, is permissive, and Courts should wherever possible be guided by the overall intention of the Legislature and the ICAA.	X			X

Grow Biz v DLT Holdings Inc., 2001 PESCTD 27	Court left open the question of whether it would be contrary to public policy to enforce an award where there was a power imbalance between the parties when the agreement was signed that led to unfairness. In this particular case, the Court held simply that there was no significant inequality, making the argument moot.	X			X
Corporacion Transnacional de Inversiones v Stet International S.p.A, (1999) 45 OR (3d) 183 (SCJ), aff'd 49 OR (3d) 414 (CA) ***** Leading case on definition of public policy***	Courts will not refuse to enforce an award on public policy grounds because a party claims it is "wrong in law"; not contrary to public policy to enforce an award where a party had an opportunity to present its case and chose to withdraw. ***Public policy should be narrowly construed, should only apply where enforcement would violate our "most basic notions of morality and justice". To succeed, applicant must establish that awards fundamentally offend basic and explicit principles of justice and fairness in Ontario, or evidence intolerable ignorance or corruption of the Tribunal.*** Possible situations involving disclosure would be if Tribunal deliberately concealed documents or obtained evidence on which it relied but failed to disclose.	X	X		X
Arcata Graphics Buffalo Ltd. v. Movie (Magazine) Corp., [1993] OJ No. 568	Not contrary to public policy to enforce an award that provides for interest at a rate that would be illegal in Ontario if provided for in the contract itself. To be "contrary to public policy", the illegality must go to the level of "essential morality". It is not sufficient that the laws of Ontario would make the interest rate illegal.	X			X

Schreter v Gasmac Inc. (1992) 7 OR (3d) 608, additional reasons 89 DLR (4th) 380 (Gen Div) *****Leading case on definition of public policy***	Failure to give reasons does not amount to breach of natural justice; proper for Court to evaluate whether a damage award would be contrary to public policy on the record (which it was not). ***Concept of imposing public policy on foreign award 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.***	X	X		X
Kanto Yakin Kogyo Kabushiki-Kaisha v Can-Eng Manufacturing Ltd., (1992) 7 Or (3d) 779, aff'd (1995) 22 OR (3d) 576 (CA)	If Model Law, as adopted in the Ontario *ICAA*, applies (as it did in this case), then it is not contrary to public policy to allow a foreign corporation without any connection to state to enforce its award against a domestic company.	X			X
Quintette Coal Ltd. v. Nippon Steel Corp, (1990) 47 BCLR (2d), aff'd 51 BCLR (2d) 105 (CA)	Court did not specifically address the Model Law or New York Convention, but held that it would be contrary to public policy to permit a foreign creditor holding an arbitral award to gain preference over domestic creditors by allowing the foreign creditor to enforce its arbitral award by way of set off.	X		X	