# A REVIEW OF LEGISLATED SET-ASIDE REMEDIES: WHAT WORKS, WHAT DOESN'T, AND WHAT MAY NEED SOME TWEAKING

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It has been over 30 years since Canada and the provinces introduced modern arbitration legislation. After the ratification of the New York Convention in 1985 through the *United Nations Foreign Arbitral Awards Convention Act*,[1] Canada and the provinces went on to adopt the UNCITRAL Model Law on International Commercial Arbitration. Thereafter, many of the provinces used the Model Law as a framework for modernizing their domestic arbitration legislation,[2] in a flurry of new legislation that ended in approximately 1991. This article will focus on what are known as the set-aside provisions in our legislation with a view to opining on what, after 30 years, still works, what doesn't work, and what may just need some tweaking.

In 2006, UNCITRAL introduced amendments to the Model Law. For the most part these amendments consisted of extensive new sections dealing with interim measures; the provisions regarding the court's power to set aside an arbitral award remained unchanged. These amendments were reflected in the Uniform Law Commission of Canada's promulgation of a

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[1] *United Nations Foreign Arbitral Awards Convention Act*, RSC 1985, c 16 (2nd Supp) [UNFAC].

[2] Ontario *Arbitration Act,* 1991, SO 1991, c 17; Alberta *Arbitration Act*, RSA 2000, c A-43; BC *Arbitration Act*, RSBC 1996, c 55; replaced by *Arbitration Act*, RSBC 2020 c 2; Manitoba *The Arbitration Act*, CCSM, c A120; New Brunswick *Arbitration Act*, RSNB 2014, c 100; Nova Scotia *Commercial Arbitration Act*, SNS 1999, c 5; Saskatchewan *Arbitration Act,* SS 1992, c a-24.1.

Uniform International Commercial Arbitration Act in 2014. To date, only three provinces have amended their international acts to adopt the amended Model Law. British Columbia amended its *International Commercial Arbitration Act* in 2018,[3] Québec amended its *Code of Civil Procedure* in 2016,[4] and Ontario introduced a new *International Commercial Arbitration Act* in 2017.[5] The amendments respecting interim measures of protection are extremely valuable, particularly with respect to enforcement. While beyond the remit of this paper, I would strongly urge the provinces that have not done so to update their international arbitration acts to conform with the current Model Law.

On the domestic side, the Uniform Law Commission of Canada proposed a new uniform domestic Arbitration Act in 2016 but, since then, only British Columbia has updated its domestic arbitration Act.[6] We are thus left with the situation in which legislation dealing with the ability of the court to set aside an arbitral award has not been updated in approximately 30 years. On the one hand, if it ain't broke, don't fix it. But on the other, after 30 years of judicial interpretation and developments in arbitral practice, it is time for legislatures to review what has worked, what hasn't, and what might just need some tweaking.

## I. BACKGROUND-TRACING THE LANGUAGE

With respect to the grounds upon which a court may set aside an arbitral award, the analysis starts with the grounds for recognizing and enforcing foreign arbitral awards under New York Convention Article V. The first part of Article V deals solely

[3] *International Commercial Arbitration Act*, RSBC 1996, c 233.

[4] Quebec *Code of Civil Procedure*, Book VII, Title II.

[5] Ontario *International Commercial Arbitration Act*, SO 2017, c 2, Sch 5.

[6] *Arbitration Act*, RSBC 2020, c 2. Québec's *Code of Civil Procedure* covers both international and domestic arbitration and was updated in 2016.

with the procedural validity of the arbitration. The grounds for refusing enforcement include:

- the parties were under some incapacity when they signed the arbitration agreement;
- the arbitration agreement was not valid under the law to which the parties have subjected it;
- the respondent was not given provided proper notice or was otherwise unable to present his case;
- the award deals with an issue not within the terms of the submission to arbitration; and
- the tribunal was not constituted in accordance with the arbitration agreement.[7]

When the Model Law was drafted by UNCITRAL, there was an effort made to harmonize the grounds for setting aside at the place of arbitration with the grounds in place for refusing recognition and enforcement under the New York Convention. The idea was to make it clear that an arbitral award would be enforced unless it had been set aside at the place of arbitration for one of the same and exclusive grounds listed in the New York Convention; an award set aside at the place of arbitration on some ground other than those in the New York Convention could still be enforced in other countries.

The Model Law was designed to assist states in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It reflected a worldwide consensus on key aspects of international arbitration practice across all regions and legal or economic systems of the world.

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[7] *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958 (entered into force 7 June 1959, 24 signatories, 166 parties), 330 UNTS 3, art V [*New York Convention*].

There is no question that the state has an interest in protecting a person's right to have an arbitration conducted in accordance with its local mandatory arbitration law. It is also unquestioned that at the very least a state should see to it that arbitrations conducted in its territory meet basic standards of procedure that provide for equality and a reasonable opportunity to present a case. As a result, in addition to the grounds for set-aside listed above, article 34(2)(a) provides that an arbitral award may be set aside if the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the Model Law.

When the provinces came to draft legislation for domestic arbitrations, the set-aside provisions were taken almost word-for-word from the Model Law. It is one of those sections for which the various provinces' domestic acts are most similar.

By now you may be wondering why anyone would write an article on possible reform of legislative provisions for setting aside an arbitral award, when there does not appear to be much if anything to change. However, a closer look points to a few areas that could benefit from some tweaking.

## II. EQUAL TREATMENT

As stated above, one of the grounds for setting aside an arbitral award is that the procedure that was followed did not comply with the Model Law. Article 18 of the Model Law states:

> The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.[8]

[8] United Nations Commission on International Trade Law, *Model Law on International Commercial Arbitration* (21 June 1985), UN Doc A/40/17, Annex 1 [*Model Law*], art 18.

At first blush, one can see a losing party taking advantage of the language that they were not given a "full opportunity" of presenting their case. While the words "full opportunity of presenting his case" appear expansive and uncurtailed in article 18, courts in a variety of Model Law jurisdictions have held that the words must be interpreted as being limited by considerations of reasonableness and fairness to both sides. For example, in *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another*, the Singapore Court of Appeal stated:

> What constitutes a "full opportunity" is a contextual inquiry that can only be meaningfully answered within the specific context of the particular facts and circumstances of each case. The overarching inquiry is whether the proceedings were conducted in a manner which was fair, and the proper approach a court should take is to ask itself if what the tribunal did (or decided not to do) falls within the range of what a reasonable and fair-minded tribunal in those circumstances might have done.[9]

There do not appear to be any cases where the words of article 18 have been taken literally and expansively, so it is debatable whether legislative action is necessary to amend article 18. That said, for the avoidance of doubt, British Columbia's international Act has changed the words of the Model Law to provide a party must be given "a <u>reasonable</u> opportunity to present its case".[10]

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[9] *China Machine New Energy Corp v Jaguar Energy Guatemala LLC and another*, [2020] SGCA 12 (Singapore).

[10] *International Arbitration Act*, RSBC 1996 CH 233, s 18.

The TCAS initiative respecting legislative reform in Ontario has also recommended that Ontario adopt the same language.

*The Domestic Acts*

The point made above respecting a reasonable opportunity to present a case has been followed in the domestic Acts. For example, the Alberta domestic Act provides:

> 19(1) An arbitral tribunal shall treat the parties equally and fairly.[11]
>
> (2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases.[12]

A careful look at this section however shows that Alberta and most of the other provinces have added a separate obligation of "fairness." For example section 46(1)(5) of the Ontario domestic Act provides, as a ground for setting aside:

> The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case,[13]

At first blush, one might ask: what could be wrong with requiring "fairness"? Adding such a word should cause no difficulty whatsoever, as it is clear an arbitrator must treat the parties fairly. However, the addition of the word "fairly" has opened the door for courts to examine the details of the procedures followed in the arbitration, compare them to local court procedure, and decide, in the court's opinion, if what was done was "fair". The argument from counsel goes as follows: if I can't have the full rights I have under my local court system—

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[11] *Arbitration Act*, RSA 2000, c A-43, s 19(1).

[12] *Ibid,* s 19(1)—(2).

[13] *Arbitration Act*, SO 1991, c 17, s 46(1)(5).

which is of course perfection—and if I do not have the full ability to plead any allegation, without proof, and then have unlimited discovery of persons and documents in the hope of being able to prove the allegation at a hearing years in the future, my client has not been treated fairly. The problem with fairness is its subjectivity. It is not a word used in the Model Law. Rather the Model Law requires the more objective test of the parties having been treated equally and having been given a reasonable opportunity to present their case.

Various responses are possible. The Alberta domestic Act in section 45(1)(f) has tempered the generous review criterion of "fairness" by providing that the impugned procedure or behaviour must be *manifestly* unfair.

> (f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator;[14]

By contrast, the new British Columbia domestic Act reverts to the original language of the Model Law and does not speak of "fairness" at all The proposed language under the TCAS initiative for legislative reform in Ontario also reverts to the Model Law language.

*Equality- Domestic Acts Suggested Change No. 1*

If legislatures are of the view that they must have the word "fairly" in their domestic legislation, then any legislative reform should include the word "manifestly", as in the Alberta domestic Act, in order to modify the requirement of fair treatment by removing some of its subjectivity. A better solution—since it discourages courts from delving too deeply into the procedure

[14] *Arbitration Act*, RSA 2000, c A-43, s 45(1)(f).

followed, and imposing their own litigation-oriented sense of procedural fairness—would be simply to follow the wording of the Model Law.

## III. EXCLUSIVITY

The language of the Model Law establishing the grounds for setting aside makes it clear that the grounds are exclusive:

> 34(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.[emphasis added]
>
> (2) An arbitral award may be set aside by the court specified in article 6 only if: [emphasis added][15]

Most domestic legislation does not include the word "only".

A consequence of this language has been to allow the courts to explore the extent to which concepts of judicial review, applicable to reviews of administrative tribunals, may be imported into private consensual commercial arbitration in a set-aside application.

The seminal case on judicial review is *Dunsmuir v New Brunswick*.[16] For our purposes, one of the main findings of that case was that the decision of a tribunal could be reviewed to determine whether it was reasonable. The Supreme Court clarified aspects of *Dunsmuir* in *Canada (Minister of Citizenship and Immigration) v Vavilov*,[17] and affirmed *Dunsmuir* on the

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[15] *Model Law*, *supra* note 8 at arts 34(1)—(2).

[16] *Dunsmuir v New Brunswick*, 2008 SCC 9.

[17] *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

point that a court conducting judicial review of an administrative law decision can consider both the reasonableness of the reasoning process that led to the outcome and the reasonableness of the outcome itself.[18]

The problem is that judicial review jurisprudence has no application to a statutory right to set aside a consensual arbitral award, yet *Vavilov* and *Dunsmuir* keep being cited in arbitration set-aside cases for the proposition that an arbitrator's decision can be set aside if the award or the reasoning process was unreasonable. There is no such test in any of the legislative provisions dealing with setting aside awards, in the domestic or international acts.

The Ontario Court of Appeal in the *Alectra Utilities Corporation v Solar Power Network Inc.* appeal decision dealt directly, but in a cursory manner, with the question of whether the judicial review test of reasonableness applies to a set-aside application under the Ontario domestic arbitration Act. At the end of its decision, the Court stated:

> [44] For greater certainty I would add this: once the jurisdictional question is answered, in the absence of a right of appeal pursuant to s 45 the court has no authority to go on to review the arbitrator's award for reasonableness"[19]

To date the writer is unaware of any other decision making this point as clearly as the Ontario Court of Appeal. To reduce the risk that courts will import standards for judicial review into set-aside applications, the new British Columbia domestic Act clearly provides:

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[18] *Vavilov, supra* note 17 at para 87.

[19] *Alectra Utilities Corporation v Solar Power Network Inc,* 2019 ONCA 254 at para 44.

> A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds […][20]

The TCAS legislative reform proposal tracks the Model Law which makes it clear the grounds for setting aside are exclusive and exhaustive.

*Exclusivity- Domestic Acts Suggested Change No. 2*

Make sure the language for setting aside makes it clear that the grounds listed for setting aside are exclusive and exhaustive, using language such as "only if".

## IV. REMEDIES

Except for British Columbia, the provinces' domestic Acts provide that the court presiding over a set-aside application can, amongst other remedies, "give directions" to the arbitral tribunal. For example, section 45(8) of the Alberta domestic Act states:

> (8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration.[21]

While this section has not been frequently used, on its face it creates serious questions as to the extent to which a court may make mandatory procedural orders to an arbitrator directing them to conduct the arbitration in a particular manner. Are such "directions" binding on the arbitrator who has not appeared in the set-aside application and may not even have been given notice? Does the court have jurisdiction over the arbitrator? Do the arbitrator's terms of appointment contemplate further work after the award? What if the arbitrator has not been paid? How

[20] *Arbitration Act*, SBC 2020, c 2, s 58(1).

[21] *Arbitration Act*, RSA 2000, c A-43 s 45(8).

far should the court go in involving itself in procedural matters within the arbitration?

The Model Law and the international acts of the provinces have a completely different provision, which avoids the risks created by the domestic acts. Model Law article 34(4) states:

> (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.[22]

*1. Remedies- Domestic Acts Suggested Change No. 3*

Domestic legislation should follow the Model Law and simply provide that the court may adjourn the set-aside application to allow a tribunal time to consider its position, given the court's view of the procedural challenge. This is the recommendation of the TCAS legislative reform report.

## V. CONCLUSION

As can be seen from the discussion above, there are few differences between the Model Law for international commercial arbitrations and the provinces' domestic arbitration legislation when it comes to grounds for setting aside an arbitral award. If we review the present acts after some thirty years of experience, it can be seen that there are a few changes that should be made to our domestic legislation, but most of these would have the effect of better aligning the domestic acts with the Model Law. In general therefore, but particularly in this area of set aside, the question must be asked

[22] *Model Law*, *supra* note 8 at art 34(4).

why two separate statutes dealing with arbitration are necessary, when the wording between the Model Law and the domestic acts are so similar and—if the above recommendations are taken into account, would become more similar still? In this regard, the proposed single commercial Arbitration Act for Ontario, as proposed by the TCAS legislative reform committee makes sense.