THE EFFECT IN ONTARIO OF THE NEW YORK CONVENTION ON THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

William G. Horton[*]

The new *International Commercial Arbitration Act*[1] (the "new *ICAA*") which went into effect in Ontario on March 22, 2017 is noteworthy in that it explicitly adopts, and attaches as a Schedule, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (the "New York Convention" or the "Convention"). As with Ontario's previous *International Commercial Arbitration Act* (the "old *ICAA*"), the new *ICAA* also adopts and attaches as a schedule the UNCITRAL Model Law on International Arbitration (the "Model Law"). By including the New York Convention in the new *ICAA*, Ontario followed the recommendation of the Uniform Law Conference of Canada in 2014 as set out in the *Uniform International Arbitration Act* ("UIAA") which the ULCC promulgated in 2014. In doing so, Ontario has confirmed its longstanding adherence to the New York Convention and has put to rest erroneous suggestions to the contrary which have hitherto found currency in some quarters.

However, any lingering doubt as to the continuous application of the New York Convention in Ontario since 1986 also implies that there continue to be misconceptions as to the precise relationship between the New York Convention and the provinces of Canada, and the precise manner in which the New York Convention should be applied by Canadian courts with respect to foreign arbitration awards and international arbitration agreements. The subject therefore remains worthy of discussion, especially now that the Convention itself has been integrated verbatim into the legislation of at least one province.

Ontario Statutes Regarding the Convention

The basis for suggestions that Ontario was previously a "non-New York Convention jurisdiction" appears to be the fact that, when Ontario adopted the UNCITRAL Model Law on International

* William G. Horton, C.Arb., FCI Arb. The author practises as an arbitrator of Canadian and international business disputes.

1. S.O. 2017, c. 2, Sch. 5.

Commercial Arbitration ("the Model Law") in the process of enacting the old *ICAA* in 1988, it simultaneously repealed the *Foreign Arbitral Awards Act* which it had enacted in 1986 specifically to implement the New York Convention. The Convention had been mentioned by name in the *Foreign Arbitral Awards Act* but not in the old *ICAA* which replaced it. Over time the suggestion began to be made that implementation of the Model Law by the enactment of ICAA was not equivalent to implementation of the Convention because most but not all of the provisions of the Convention are mirrored in the Model Law.[2] One example that was given of this difference is that Article III of the New York Convention is not explicitly quoted in the Model Law or *ICAA*. Article III of the Convention provides:

> There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

The argument then continued that since there is no similar provision in the Model Law or in the old *ICAA*, the possibility that the court may grant such a request made by a respondent to an application to enforce a foreign, commercial arbitration award placed Ontario in noncompliance with the New York Convention. Although this has never actually happened as far as is known from reported cases,[3] the argument concluded that Ontario arbitral

2. For example, this concern was raised by J. Brian Casey in *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (Juris, 2011), pp. 25-26. The recently released 3rd edition of this leading work on Canadian arbitration law contains an entire appendix (Appendix 2) putting this issue into context and assuaging any lingering concerns. The suggestion that Canada's status as a Contracting State had been compromised by the manner in which Ontario had chosen to implement the New York Convention was first put forward by Professor J.G. Castel in the mid-90s. However, subsequent editions of his book since the editorship was assumed by Professor Janet Walker have deleted the prior reference to this speculative argument and added the comment that the old ICAA "incorporates the essence of the [Convention]".
3. An extensive search was conducted on December 8, 2015 when the research for this paper was first conducted. No decisions were located at that time, or since, where security for costs were imposed on a foreign litigant seeking to enforce an arbitration award in Ontario. The only case where security for costs was considered in an application to enforce an arbitration award is *Donaldson International Livestock Ltd. v. Znamensky Selekcionno-Gibridny Center LLC*, 2010 ONCA 137, 81 C.P.C. (6th) 199, 101 O.R. (3d) 314 (Ont. C.A. [In Chambers]) (hereinafter "*Donaldson*"). In *Donaldson*, the Court of Appeal rejected a request to impose security for costs against the Appellant who was appealing a decision which enforced a foreign arbitration award.

awards may not have been enforceable in countries which have adopted the option of requiring reciprocity pursuant to Article I (3) of the New York Convention. However, all of this analysis misconstrued both the legislative intent of Ontario at the time the old *ICAA* was adopted and the manner in which the New York Convention became and remained operative in all parts of Canada, including Ontario.

The Reciprocity Issue and Federal States

In assessing this theory, the wording of Article I of the Convention is important:

> . . . any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards *made only in the territory of another Contracting State*. [Emphasis added.]

In considering this provision of the Convention, it must be remembered that the Convention does not have a modern federal state clause which would permit the Convention to be enacted separately by each political subdivision in a federal state within the area of its legislative responsibility. It does not require, or even provide for, political subdivisions of a state to become signatories to the Convention nor does it prescribe specific methods (or any methods) of legislative implementation in each province or state of a Contracting State which is non-unitary in its internal political structure. By ratifying the Convention, a country becomes a "Contracting State" and undertakes to ensure the implementation of the Convention throughout its territory. Only the country as a whole (be it Canada, the United States or Switzerland, by way of example) is a "Contracting State". There is no such thing as "a reciprocating territory of a Contracting State". If there were such a thing, it is by no means clear what it would mean in the context of the myriad ways in which federal states are organized internally.

Furthermore, the fact that the Convention does not assess compliance and reciprocity on the basis of political subdivisions of a Contracting Party that is a federal state is not an oversight. Consider Article XIV which provides as follows:

> A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

As has been explained by Marike Paulsson in her book *The New York Convention in Action*:

> The drafters originally inserted this provision as part of the federal-state clause contained in Article XI. The intention was to provide that if a constituent State or province of a Contracting State was not bound to apply the Convention, other Contracting States were not bound to apply it to awards made in such constituent State or province. It was then decided to upgrade this provision to a general reciprocity clause because some Conference delegates observed that no corresponding provisions were found in the second reservation of Article 1(3) ("commercial reservation") and in Article XI, and that a general provision could remedy this lacuna.[4]

Based on Article XIV, in order for a state which has adopted the reciprocity option under the New York Convention to resist enforcing an arbitration award emanating from Canada on the basis of a lack of reciprocity, it would have to establish that Canada is not, or has ceased to be, a Contracting State as a result of whatever complaint the foreign state has regarding implementation of the Convention in Canada.

If Canada has lost its status as a Contracting State under the Convention, *all* awards emanating from Canada would be adversely affected, not just awards emanating from a particular province. This is the result of the deliberate "upgrading" of the reciprocity requirement as described by Paulsson. Fortunately, Canada is very much a Contracting State. Canada has bound itself to apply the Convention. There is no instance in which Canada, or any of its constituent provinces and territories have failed to comply with the Convention, notwithstanding some unjustified confusion from time to time as to whether was it was actually in effect in Ontario.[5]

The Meaning of "Compliance"

It has been suggested that the case of *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.*[6] is an exception. In that case, an Ontario Court enforced a foreign arbitration award despite the absence of a translation as required by Article IV(2) of the Convention. In dispensing with the requirement, the application judge held that the requirement was not engaged because the

4. Marike Paulsson, *The New York Convention in Action* (Wolters Kluwer, 2016), p. 38.
5. See for example *Automatic Systems Inc. v. Bracknell Corp.* (1994), 113 D.L.R. (4th) 449, 12 B.L.R. (2d) 132, 18 O.R. (3d) 257 (Ont. C.A.) which is discussed below.
6. (1992), 40 C.P.R. (3d) 451, 4 B.L.R. (2d) 108, 7 O.R. (3d) 779 (Ont. Gen. Div.), affirmed (1995), 60 C.P.R. (3d) 417, 22 O.R. (3d) 576, 54 A.C.W.S. (3d) 463 (Ont. C.A.).

respondent "offered no evidence that the Convention was in force in Ontario". It has been suggested by Professor Anthony Daimsis that this is an instance of the failure to apply the Convention in Ontario.[7] However, that is not the case. The failure of counsel to establish how the Convention is applicable in Ontario does not amount to a finding that the Convention is inapplicable. Furthermore, as Marike Paulsson has pointed out, "it is impossible to violate the New York Convention by enforcing an award, only when *not* enforcing it".[8] The Convention does not create any limitations upon the enforcement of arbitral awards. It creates minimum standards which, when met, require enforcement. Thus, if an award is enforceable in Ontario without the need for a translation, the fact that the Convention calls for the enforcement of an award when a translation is provided does not create a violation of the Convention.

The explicit adoption by Ontario of the Convention in the new *ICAA*, creates an opposite risk that the Convention will now be applied in a more literal and restrictive manner, as mistakenly contemplated by the court in *obiter* in *Kanto Yakin Kogyo Kabushiki-Kaisha v. Can-Eng Manufacturing Ltd.* This is one reason it is important to understand the Convention more broadly in its historical context and how it has come to be interpreted and applied in the era following the creation of the Model Law and statues such as *ICAA*.

More useful, in the context of the new *ICAA*, will be the approach that was taken in the context of the old *ICAA* in the case of *Automatic Systems Inc. v. Bracknell Corp.*[9] In that case, the Ontario Court of Appeal was not provided with correct information regarding the status of the New York Convention in Ontario but decided to apply the Convention in any event. As Daimsis observes:

> The court placed emphasis on the fact that Parliament, as well as other provinces, had implemented the treaty. To this end, the court called attention to the fact that "predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale".[10]

7. Anthony R. Daimsis, "Canada's Indoor Arbitration Management: Making Good on Promises to the Outside World", in *Is Our House in Order? Canada's Implementation of International Law* (University of Toronto Press, May 2009), p. 217; available at https://ssrn.com/abstract=2143310.
8. *Ibid.*, p. 2.
9. (1994), 113 D.L.R. (4th) 449, 12 B.L.R. (2d) 132, 18 O.R. (3d) 257 (Ont. C.A.)
10. Daimisis, *supra*, footnote 6.

Assessment and Enforcement of Compliance Under the Convention

Article XI of the Convention is a cited on occasion[11] as further support for the proposition that compliance with the Convention is to be assessed on a unit by unit basis in a non-unitary state. Article XI provides as follows:

> In the case of a federal or non-unitary State, the following provisions shall apply:
>
> (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
>
> (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
>
> (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

While Article XI does provide that one Contracting State may request another Contracting State to supply a statement showing the extent to which effect has been given to any particular provision of the Convention by legislative or other action, it is a significant leap of law and logic to conclude that any response indicating imperfect implementation (if such a response were to be given) would entitle the inquiring state to treat the responding state as no longer having the status of a Contracting State. A more likely conclusion is that the inquiring state would be entitled to request the responding state to implement the Convention more perfectly if it finds the explanation it receives to be deficient. There is absolutely no authority to support the proposition, and one would not expect as a matter of common sense, that any state is able to abrogate its obligations under the Convention on the basis of a *theoretical* deficiency in the

11. Casey, *supra*, footnote 2 at p. 26.

implementation by another Contracting State. Indeed, the global success of the Convention would be seriously undermined if such a fragile approach were adopted in light of widespread variations, and manifold examples of less than perfect compliance across all 156 countries that have ratified the Convention.[12]

The suggestion that Article XI and the repeal of the *Foreign Arbitral Awards Act* may have operated to place Ontario or Canada in a position of non-compliance with the Convention has been made in circumstances in which:

a) no request has been made of Canada by any other state[13] under Article XI with respect to any "particular provision" of the Convention,
b) no deficiency has been acknowledged by Canada;
c) no rectification of the alleged deficiency has been requested;
d) Canada has been given no opportunity to explain or correct any (hypothetical) deficiency; and
e) there has been no actual or arguable failure to comply with the Convention and no prejudice to anyone, in any (hypothetical) requesting state or anywhere else, seeking to enforce an award from the inquiring state, as a result of the alleged deficiency.

The Obligations of Canada and its Provinces with Respect to the Convention

By enacting the United Nations Foreign Arbitral Awards Convention Act in 1986, Canada approved and declared the New York Convention to have the force of law in Canada. It thereby undertook that the New York Convention would be implemented by each of the provinces and the territories in their spheres of constitutional jurisdiction. This did in fact occur as all provinces, including Ontario, adopted legislation implementing the Convention. No such legislation, and no specific form of implementation, is required by the New York Convention. Rather, it may (or may not) be a function of the internal workings of some federal states that implementing legislation in the constituent subdivisions of the country is necessary.

The closing words of Article XI (c) make it clear that a State responding to an inquiry as to the extent to which any *particular provision* of the Convention has been implemented may respond by "showing the extent to which *effect has been given* to that provision

12. Paulsson, *supra*, footnote 4 at p. xxii.
13. Based on an inquiry initiated by the author, the Canadian government has confirmed that the number of requests received by Canada under Article XI over the entire period that Canada has been a Contracting State is **zero**.

by legislative *or other action*" [emphasis added]. It is clear from this wording that explicit legislation, mentioning the Convention, in subdivisions of a country is not required by the Convention itself. The requirement is implementation in substance regardless of form, *i.e*. that "effect has been given". There is no instance in which effect has not been given by the courts in Ontario to the provisions of the Convention, whether or not they thought (perhaps as a result of the very controversy under discussion in this paper) that there was a legal obligation to do so.

While all of the provinces, including Ontario, clearly evinced a legislative intention to adopt and implement the New York Convention, Ontario adopted the view that once the Model Law was implemented by passing ICAA, it was unnecessary and potentially confusing to have two statutes that did the same thing. Therefore, the *Foreign Arbitral Awards Act* of 1986 was repealed. However, it cannot be seriously, or fairly, suggested that Ontario had an actual legislative intention to abrogate its participation in the implementation of that Convention when it adopted the Model Law. There is absolutely nothing in the legislative history that would suggest such a thing and a conversation with anyone involved in the legislative process at the time would establish otherwise.[14]

In Ontario, the intention to implement the Convention was also evident from the fact that Ontario specifically modified the Model Law in order to align with the New York Convention in one respect in which the Convention is more inclusive. Section 10 of the old *ICAA* made it clear that *ICAA* applies to any commercial arbitral award made outside Canada, even if the arbitration to which it relates is not international as defined in Article I(3) of the Model Law. This maximally fulfilled the key obligation of enforcement of foreign awards under the Convention (Article I(1)) which applies to "arbitral awards made in the territory of a State other than the State where recognition and enforcement of such awards is sought" without any specific requirement that the award itself be "international".[15]

Furthermore, legislation such as the old *ICAA*, which implements a Convention in Canada, does not have to mention the Convention by name. In the article, "Promoting Equality: Economic and Social Rights for Persons with Disabilities under Section 15", the authors discuss the various ways a treaty or convention may be implemented:

14. The author would be happy to provide an introduction and specifics. See also, Daimsis, *supra*, footnote 7, at endnote 42.
15. However, this provision has not been continued in the new *ICAA*, which explicitly adotps the Convention.

> Parliament or provincial legislature may implement the treaty obligation by explicitly adopting the text of the international convention into a legislative act. It may reproduce all or part of the treaty within the body of the act or as a schedule to the act . . . As such, when treaty obligations have been expressly implemented into domestic law these are legally binding on Canadian courts.
>
> Second, and more difficult to identify, Parliament or a provincial legislature may internalize the *substance* of the convention into domestic law. We see provisions included in the *Charter* that reaffirm provisions under the *International Covenant on Civil and Political Rights (ICCPR)*, including the right to be tried in a reasonable time.[16]

With respect to Article III of the New York Convention, *ICAA* complies with the requirement that "There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which [the] Convention applies" by providing for the recognition and enforcement of such arbitral awards without any provisions imposing substantially more onerous conditions, higher fees or charges.

Relationship of the Model Law to the Convention

The Model Law was created by UNCITRAL as a means for the implementation of the international standards for commercial arbitrations, including the standards of enforcement brought about by the Convention. Its provisions regarding the enforcement of awards mirror the provisions of the New York Convention verbatim with one modification relating to the issue of legal capacity (Article 36(1)(a)(i)).[17] It also addresses a major omission in the Convention in that it makes it clear that the setting aside of an international award can only be done on the basis of the same grounds as those on which an award may not be enforced. Finally, and notably, the general reciprocity provisions of Article XIV of the Convention are not duplicated in the Model Law.

This raises the point that the Convention is not a complete code with respect to the enforcement of international arbitration awards. It has many gaps and is subject to interpretation on many points. Furthermore, the pro-enforcement bias of the Convention means a Contracting State does not violate the Convention by adopting the

16. Chadha and Sheldon, "Promoting Equality: Economic and Social Rights for Persons with Disabilities under Section 15 (2004), 16 Nat'l J. Const. L. 27, at 12.
17. Deletion of the words "under the law applicable to them" with reference to the issue of capacity in Article V(1)(a) of the Convention.

Model Law even when the Model Law creates more favourable conditions for enforcing foreign and international arbitration awards, for example by omitting any reciprocity requirement.

UNCITRAL serves as the international custodian of the Convention and the UNCITRAL Model Law was brought into being and continues to function both as "a uniform international understanding of the smallest common denominator necessary to allow the Convention to function smoothly" and as "the preferred strategy for modernizing and harmonizing the interpretation of the New York Convention".[18] The Convention has never been amended in its almost 60 years of existence. All improvements to the regime established by the Convention have been brought about through the Model Law, and amendments to the Model Law.

By way of example, the original UNCITRAL discussion papers on the Model Law explain that the language of the Convention was "modified [in the Model Law] since it was viewed as containing an incomplete and potentially misleading conflict-of-law-rule". Could it be seriously suggested that any Contracting State which has adopted the Model Law with the modified wording ceased to be in compliance with the Convention, let alone has ceased to be a Contracting State, because of that difference between the wording of the Convention and the Model Law?[19] Obviously, UNCITRAL itself considers that there is some room for variation in the form of implementation, and slavish adherence to the precise words of the Convention is not required. Additionally, "the lack of precision in the formulation of some provisions of the Convention may result in considerable disparities in their interpretation".[20] The important point, for present purposes, is that these differences where they exist do not give rise to any issue regarding *reciprocity* and it is not correct or helpful to lend any credence to the notion that they do.

Article XIV of the Convention (the general reciprocity provision) has not generally been used as a basis for failing to recognize foreign awards based on different interpretations of the Convention in the state in which the award originated as opposed to the state where the application to enforce is made. As Gary Born has said:

18. Renaud Sorieul, "The Influence of the New York Convention on the UNCITRAL Model Law on International Commercial Arbitration" (2008), 2:1 *Dispute Resolution International* at pp. 28-32.
19. It should be noted that the new UIAA makes the implementation of the new York Convention "subject to" the provisions of the Act. Therefore, the Convention is still required to be interpreted and aplied as it has been adopted and applied by Ontario legislation, including the Model Law.
20. *Supra*, footnote 18 at p. 30.

> Most courts have concluded that Article XIV only requires inquiry into whether a state has formally acceded to the Convention, not inquiry into either the state's reservations or its court's interpretation of the Convention.[21]

Once again, the words of Marike Paulsson are apt:

> As things have turned out, courts have tested the enforceability of awards under Article V alone rather than to engage in what would be a dangerous calculation to the effect that "we won't enforce more than you," which could easily escalate into subjective value judgments and speculations as to the intentions and reliability of foreign judges.[22]

The Convention and the Model Law both leave the *procedure* to be adopted with respect to an application to enforce a foreign award to domestic practice in the adopting States. It is obvious from the context of the Model Law and the discussion papers relating to it that "procedure" refers to such matters as whether it is necessary to file an original of the award with the court when seeking enforcement.

Theoretically, an overly broad interpretation of "procedure" by any court in any Contracting State could give rise to all sorts of measures that could be considered to be in violation of the letter or spirit of Article III of the Convention. One real world example is the application of the doctrine of *forum conveniens* by United States courts in the Second Circuit to deny applications to enforce foreign arbitral awards.[23] There is no mention in the Convention of *forum conveniens* as a permissible ground for refusing to enforce a foreign arbitral award.

No Contracting State has been immune from judicial decisions that have conflicted with obligations relating to the New York Convention, or other conventions. Has the United States lost its right to be considered a Contracting State because of these decisions by the District Court in the Second Circuit? If arguable violations such as these, actually put into effect by the judiciary in a Contracting State, do not invalidate the status of that country in terms of the reciprocity option why would hypothetically possible violations in a Canadian province have that effect?

If, on the other hand, both actual and theoretical violations could invalidate the status of a country as a Contracting State, how would

---

21. Gary Born, *International Commercial Arbitration*, 2nd ed. (Wolters Kluwer, 2014).
22. Paulsson, *supra*, footnote 4 at p. 38.
23. *Figueiredo Ferraz v. Republic of Peru*, 2011 WL 6188497 (2d Cir. Dec. 14, 2011); *Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir., 2002).

the purposes of the Convention in enforcing such international norms be served? Such an approach would only serve to facilitate non-compliance with treaty obligations based on illusory allegations or transient instances of non-compliance (or merely possible non-compliance) with the Convention. It is not appropriate to lend any credence to this kind of approach, even if one could, by the exercise of legal imagination, conjure up a judge of some unknown state who might be misguided enough to adopt it.

Interpreting Provincial Legislation in Light of Federally Adopted Conventions

A much more effective approach is to interpret legislation within a Contracting State and its subdivisions, wherever possible, on the basis that the legislative intent is to *comply* with the Convention. This is in fact the correct approach in Canadian law. The Supreme Court of Canada, in *Baker v. Canada (Minister of Citizenship & Immigration)*,[24] held in part:

> As stated in R. Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. 1994, at p. 330:
>
> > "[T]he legislature is presumed to respect the values and principles contained in international law, both customary and conventional. These constitute a part of the legal context in which legislation is enacted and read. In so far as possible, therefore, interpretations that reflect these values and principles are preferred."

The Supreme Court of Canada has affirmed these principles:

> The presumption of conformity is based on the rule of judicial policy, that as a matter of law, courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result. [T]he legislature is presumed to act in compliance with Canada's obligations as a signatory of international treaties and as a member of the international community. In deciding between possible interpretations, courts will avoid a construction that would place Canada in breach of those obligations. The presumption applied equally to customary international law and treaty obligations.[25]

Similarly, in *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, the Supreme Court of Canada held:

---

24. *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193, 14 Admin. L.R. (3d) 173 (S.C.C.), at paras. 69-70.
25. *R. v. Hape*, 2007 SCC 26, [2007] 2 S.C.R. 292, 280 D.L.R. (4th) 385 (S.C.C.) [*Hape*], at paras. 53-54.

> In interpreting legislation which has been enacted with a view towards implementing international obligations, as is the case here, it is reasonable for a tribunal to examine the domestic law in the context of the relevant agreement to clarify any uncertainty. Indeed, where the text of the domestic law lends itself to it, one should also strive to expound an interpretation which is consonant with the relevant international obligations.[26]

In an article entitled *Rethinking the Relationship between International and Domestic Law*, the authors state in part:

> . . . recall that the interpretive presumption of conformity cited by Justice L'Heureux-Dubé in *Baker* instructs officials and judges, wherever possible, to interpret domestic law consistently with Canada's international obligations. Van Ert claims that the presumption of conformity "*requires* our courts to interpret domestic law consistently with Canadian treaty obligations – whatever the subject-matter of the treaty may be." **But even if the presumption is merely persuasive in the sense that it simply "informs" interpretations of domestic law, *Baker* makes clear that this presumption is now a principle of Canadian administrative law that governs discretionary grants of power.** Like all common law presumptions, it can be rebutted by legislation, but clear and express statutory language is required to accomplish this.[27] **[Emphasis by bolding added.]**

All of these principles are applicable, with considerable interpretive force in relation to Ontario's adoption of the Model Law through the old *ICAA* with the clear intent to implement Canada's ratification of the Convention. There can be no good reason to suggest or presume otherwise.

Various provinces have gone about the implementation of the substance of the New York Convention in a variety of ways. Some (for example British Columbia and Quebec) have chosen not to adopt the Model Law directly but rather to provide other legislative solutions consistent with the Convention and the Model Law. It is unfortunate, and ultimately self-defeating given the holistic nature of Canada's adherence to the New York Convention itself, for anyone to suggest that these differences imply a lesser degree of commitment to the principles of the New York Convention by any province.

---

26. *National Corn Growers Assn. v. Canada (Canadian Import Tribunal)*, [1990] 2 S.C.R. 1324, 74 D.L.R. (4th) 449, 45 Admin. L.R. 161 (S.C.C.), at para. 43.
27. de Mestra and Fox-Decent, "Rethinking the Relationship between International and Domestic Law" (2008), 53 McGill L.J. 573, at 40.

Ontario and the Convention

Ever since the adoption of the New York Convention by Canada and the provinces in 1986, there has been a widespread, unqualified judicial support for the principles of the New York Convention in relation to foreign arbitral awards across Canada. Indeed, in many respects Ontario courts have been the most enthusiastic, even going so far as to suggest that there is a "powerful presumption" in favour of the jurisdiction of international arbitral tribunals, a suggestion which had to be restrained in subsequent jurisprudence.[28]

The enactment of the new ICAA puts to rest any suggestion to the contrary. In any case, those who have conducted arbitrations in growing numbers in Ontario over recent decades need have no concern regarding the enforceability under the Convention of past or future awards rendered in this province. Ontario has always been and remains an exceptionally good venue in which to site an international arbitration.[29]

28. *United Mexican States v. Cargill Inc.*, 2011 ONCA 622, 341 D.L.R. (4th) 249, 107 O.R. (3d) 528 (Ont. C.A.), at paras. 19, 33, 45-47, leave to appeal refused (2012), 301 O.A.C. 397n, 2012 CarswellOnt 5747, 2012 CarswellOnt 5748 (S.C.C.).
29. See Charles River Associates Study, September 6, 2015: www.crai.ca/sites/default/files/publications/Arbitration-in-Toronto-An-Economic-Study.pdf.