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Mr. Heintzman practised with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, broadcasting and telecommunications, construction and environmental law.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

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The New Canada-China Foreign Investment Agreement: Will the UNCITRAL Arbitration Rules Result In Enforceable Justice?

Canada has recently signed a **Foreign Investment Promotion and Protection Agreement (FIPA)** with the People's Republic of China. Under the Agreement, a complaining investor is entitled to submit a claim and have it dealt with under the **UNCITRAL Arbitration Rules**. The real questions about this Agreement are:

- Will the UNCITRAL Arbitration rules in FIPA provide real and enforceable protection for Canadian investments in China?
- Will the UNCITRAL Arbitration Rules be sufficient to overcome Canadian concerns about the lack of responsiveness of the Chinese government to domestic public opinion and the lack of independence of the Chinese judiciary?

Parliament and the Canadian public have not had a large role in the discussions about the wisdom of entering into the FIPA with China and the wisdom of the specific terms of that Agreement. The Agreement was signed in Vladivostok, Russia on September 9, 2012 and may come into force after it has been tabled with Parliament for 21 sitting days. The Agreement may be seen at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/china...

Protections in the Agreement

Part B of the FIPA with China contains broad expressions of protection to investors from one country when they are investing in the other country.

Part B contains:

Article 4:	guarantees for fair and equal treatment of investments
Article 5:	most-favoured-nation treatment
Articles 6 and 11:	treatment no less favourable than that accorded to nationals
Article 7:	protections for senior management and boards of directors
Article 10:	protection against expropriation except for a public purpose and only with compensation
Article 12:	protections for the free transfer of capital, profits, dividends and similar payments without delay
Article 15:	the dispute resolution mechanism between Canada and China as the Contracting Parties.

The protections for Canadian investors contained in Part B may be ineffective without a Chinese government encouraged by public opinion to adhere to these protections. After all, remedial protections are of little use if governments actually do renounce their contractual obligations. Canadian investors may not view the Chinese government as under any compulsion of domestic public opinion to continually and fully implement these protections in the future. Indeed, the real impetus for China (or indeed any country) to adhere to its obligations under bilateral treaties may be international opinion.

Remedial protections in any agreement are ineffective if no system for enforcing a judgment is available. The need for effective enforcement may be greater to the extent that a government is not compelled by domestic public opinion to adhere to its agreements. Canadian investors might not view an action in the Chinese courts as leading to an impartial access to justice if the protections are withdrawn.

In this setting, the remedial aspects of FIPA are critically important from a perceptual standpoint, but not a complete answer from an enforcement standpoint.

Dispute Resolution System in the Agreement

Part C of the Agreement contains the dispute resolution system for an investor of a contracting party which wishes to assert a claim against the other Contracting State.

Before submitting a claim, the disputing investor must give notice of intent to submit a claim to arbitration, and consultations between the disputing parties must be held within 30 days of that notice unless the disputing parties agree otherwise.

Before submitting its claim, the disputing party must agree to arbitration under this Part of the Agreement, and at least six months must have elapsed from the date of the events giving rise to the claim and at least four months from the notice of intent to submit the claim to arbitration. A three year limitation period is established, and the claim must be made within three years of the date when the investor first acquired or should have first acquired knowledge of the alleged breach and knowledge of the alleged loss or damage. (Article 21)

Annex C.21 requires that a Canadian investor wishing to make a claim under the Agreement shall first participate in the "administrative reconsideration procedure" that is apparently available in China, and withdraw any claim in a Chinese court.

Article 22 of the FIPA provides that the investor can submit the claim under any one of three regimes:

1. The **ICSID Convention**, provided that both Canada and China are parties to that Convention. That Convention is the ***Convention on the Settlement of Investment Disputes between States and Nationals of other States,*** made at Washington, D.C. in 1885. While China has ratified this Convention, Canada has signed but not ratified the Convention because several of the provinces have not approved it. The English version of the ICSID Convention can be viewed at the ICSID's website: **https://icsid.worldbank.org/icsid**

2. **The Additional Facility Rules** of ICSID, if one of Canada or China is not a party to the ICSID Convention. China is a signatory to the ICSID Convention, so investors could use the Facility Rules if they wish to do so. The Additional Facilities Rules can also be viewed at ICSID's website. Those rules provide an *ad hoc* form of arbitration similar to the UNCITRAL Arbitration Rules.

3. The **UNCITRAL Arbitration Rules**, being the Arbitration Rules adopted by the United Nations Commission on International Trade Law, as amended from time to time. The UNCITRAL Arbitration Rules can be viewed at UNCITRAL's website: **http.www.uncitral.org**

Article 24 of the FIPA provides that the arbitration shall be heard by three persons, that the arbitrators are to be experienced in international law, trade, investment or dispute resolution and that they are to be independent of the contracting governments and disputing parties. If the dispute relates to financial institutions, then the parties may agree that, in addition, all the arbitrators shall have expertise or experience in financial institutions. At a minimum, however, the chair person is required to have that expertise or experience.

Under Article 26, claims with questions of fact or law in common can be consolidated.

Articles 27 to 32 of the Agreement provides for such matters as the production of documents of, and the participation and submissions by third parties, the public access to the hearings and documents, governing law, interim measures and the enforcement of an Award.

Article 32(4) requires Canada and China to provide for enforcement of the award in its respective territory. This is the sole provision in the FIPA that deals with enforcement of awards. This provision cannot be enforced by the investor, and can only be enforced by the other Contracting State. So it will be imperative for Canada to ensure that a system is implemented in China for the enforcement of awards under this FIPA, and to monitor the effectiveness of that system.

The UNCITRAL Arbitration Rules

The availability of the UNCITRAL Arbitration Rules should provide a good measure of administrative law fairness to the arbitration proceedings under the FIPA. Those Rules were adopted by the United Nations Commission on International Trade Law (UNCITRAL) which is the same body that developed the UNCITRAL Model Law. Among the countries that have adopted it, the Model Law provides a common basis for the conduct and enforcement of international commercial arbitrations, no matter where the arbitrations are conducted. The origins of the UNCITRAL Model Law are found in the 1958 Convention on the Recognition and Enforcement of

Foreign Arbitral Awards (the New York Convention). The Model Law can also be viewed on UNCITRAL's website.

The UNCITRAL Arbitration Rules were developed for use in international commercial arbitrations. First adopted in 1976, these rules have been successfully used for many years to ensure fairness in the conduct of international commercial arbitrations. It is the statutory adoption of the Model Law in the countries which have adopted that Law, not these Rules themselves, that requires courts in those countries to enforce the arbitral award.

The UNCITRAL Arbitration Rules go a long way to guaranteeing procedural fairness in the process leading to an award in the arbitration process provided to investors under FIPA. However, one aspect of the dispute resolution system in FIPA cannot be addressed by those Rules, and that is the enforcement of the arbitral award. As noted, Article 32 (4) of the FIPA requires Canada and China to provide for the enforcement of an award in each of their territories. Only Canada, and not a Canadian investor, can require China to implement such a system in that country. Only Canada, and not a Canadian investor, can commence proceedings under FIPA if such enforcement does not occur.

Until a tried and true enforcement mechanism is established by China, Canadian investors may be reluctant to conclude that the UNCITRAL Arbitration Rules, tried and true as they are, will ensure that the Chinese government complies with FIPA, or if it does not, that an arbitral award will actually result in compensation.

Conclusion

The UNCITRAL Arbitration Rules have been used in international commercial arbitration for many years, and also in other bilateral trade and investment agreements. However, their use in the agreement with China is significant since Canadian investors may be concerned about the responsiveness of the Chinese government to domestic public opinion and about the independence of Chinese courts compared to those in other countries with which Canada has bilateral treaties.

The use of the UNCITRAL Arbitration Rules in the FIPA with China will go a long way to giving confidence to Canadian investors that they will obtain procedural fairness in the arbitration of a dispute arising under the FIPA with China. However, procedural fairness is no substitute for actual adherence of governments to their agreements. The real issues will be whether both the Chinese and Canadian governments fully implement FIPA and whether awards made by the arbitral process are enforced.

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