



Arbitration

in 55 jurisdictions worldwide

Contributing editors: Gerhard Wegen and Stephan Wilske

2011



Published by
GLOBAL ARBITRATION REVIEW
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Arbitration 2011

Contributing editor: Gerhard Wegen and Stephan Wilske Gleiss Lutz

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Marketing assistant

Alice Hazard

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Nadine Radcliffe
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Davet Hyland
Chloe Harries

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Arbitration 2011

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
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ISSN 1750-9947

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

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Canada

John A M Judge, Peter J Cullen, Douglas F Harrison and Marc Laurin

Stikeman Elliott LLP

Canada is a federal state comprising ten provinces, three territories and the federal parliament. Other than the province of Quebec, which is a civil law jurisdiction in the continental European tradition, all Canadian jurisdictions follow the common law. Aside from a limited range of federal powers that are governed by the federal Commercial Arbitration Act, commercial arbitration falls constitutionally within the exclusive legislative jurisdiction of the provinces and territories.

Our answers to the questions below will be restricted to international arbitration under the federal and provincial statutes (including Quebec's Civil Code and Code of Civil Procedure) governing international arbitration (the International Arbitration Acts). References to particular provincial legislation will generally be restricted to the four largest provinces: Ontario, Quebec, British Columbia and Alberta.

Laws and institutions

1 Multilateral conventions

Is your country a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Since when has the Convention been in force? Were any declarations or notifications made under articles I, X and XI of the Convention? What other multilateral conventions relating to international commercial and investment arbitration is your country a party to?

Canada acceded to the New York Convention on 12 May 1986. Since then, the New York Convention has been made applicable to arbitral awards and arbitrations in all Canadian jurisdictions, with only minor amendments in some provinces. For most provinces, it applies whether the award was rendered before or after the enactment of the respective provincial statute.

Pursuant to article I of the Convention, Canada applied the commercial reservation and declared upon signing that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada. The commercial reservation applies in all Canadian jurisdictions except Quebec. Canada has not applied the reciprocity reservation pursuant to article I of the Convention and it has made no declarations pursuant to articles X or XI.

Since 1991, the recognition and enforcement of foreign arbitral awards in Ontario has followed the Model Law. Ontario's International Commercial Arbitration Act expands the scope of foreign awards which may be enforced under articles 35 and 36 of the Model Law, permitting enforcement of a commercial arbitral award made outside Canada even if not international.

Canada is not a party to any other international multilateral convention governing arbitration solely among private parties, although it should be noted that the North American Free Trade Agreement (NAFTA) creates binding investor-state arbitration against host governments for breach of substantive investment obligations and state-to-state arbitration with respect to certain tariff disputes. Additionally, Canada has signed, but not ratified, the International Centre

for Settlement of Investor Disputes (ICSID) Convention. While a non-party, it can still use the ICSID Additional Facilities Rules 1978.

2 Bilateral treaties

Do bilateral investment treaties exist with other countries?

Canada is a party to 23 international bilateral investment treaties that facilitate investor-state arbitration with a multitude of countries (Argentina, Armenia, Barbados, Costa Rica, Croatia, Czech Republic, Ecuador, Egypt, Hungary, Jordan, Latvia, Lebanon, Panama, Philippines, Poland, Romania, Russia, Slovakia, Thailand, Trinidad and Tobago, Ukraine, Uruguay and Venezuela). Claims under NAFTA (which includes the US and Mexico) and the Canada-Chile and Canada-Peru Free Trade Agreements are expressly deemed to be commercial arbitrations pursuant to the federal Commercial Arbitration Act.

3 Domestic arbitration law

What are the primary domestic sources of law relating to domestic and foreign arbitral proceedings, and recognition and enforcement of awards?

The UNCITRAL Model Law has been adopted, either integrally or by incorporation, by the federal government and each of the nine common law provinces with respect to international arbitrations. In the case of the federal government, the UNCITRAL-based Commercial Arbitration Act applies equally to national (domestic) and international arbitrations. The 2006 amendments to the Model Law have not yet been implemented in any Canadian jurisdiction. For domestic arbitrations falling within their respective jurisdictions, the common law provinces have enacted separate arbitration statutes, most of which are modelled on the Uniform Arbitration Act of the Uniform Law Conference of Canada. Quebec's law on international and domestic arbitrations is based on the Model Law.

Under the International Arbitration Acts, an arbitration is 'international' if:

- the parties have their places of business in different countries;
- one of the parties' place of business is situated outside Canada;
- the place with which the subject matter is most closely connected is outside Canada;
- a substantial part of the commercial obligations to be performed is outside Canada; or
- (with the exception of the province of Ontario) the parties have expressly agreed in writing that the subject matter is international.

In Ontario, if an arbitration agreement is not in writing, it is governed by default by the province's domestic arbitration statute, the Arbitration Act, 1991.

The International Arbitration Acts are available on the websites for each of the federal, provincial and territorial governments, as per the table below:

- Canada (federal)
 - Commercial Arbitration Act, RSC 1985, c. 17 (2nd Supp) <http://lois.justice.gc.ca/PDF/Statute/C/C-34.6.pdf>
- Ontario
 - International Commercial Arbitration Act, RSO 1990, c.1.9 www.e-laws.gov.on.ca/html/statutes/english/elaws_statutes_90i09_e.htm
- Quebec
 - Civil Code of Quebec, SQ 1991, ch 64, Title XIII A, Articles 2638-2643 www2.publicationsduquebec.gouv.qc.ca/dynamisSearch/telecharge.php?type=2&file=/CCQ/CCQ_A.html
 - Code of Civil Procedure, RSQ, c. C-25, Book VII, Title I, Articles 940-952 www2.publicationsduquebec.gouv.qc.ca/dynamisSearch/telecharge.php?type=2&file=/C_25/C25_A.html
- British Columbia
 - International Commercial Arbitration Act, RSBC 1996, c. 233 www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96233_01
- Alberta
 - International Commercial Arbitration Act, RSA 2000, c. I-5 www.canlii.org/ab/laws/sta/i-5/20061113/whole.html
- Manitoba
 - International Commercial Arbitration Act, C.C.S.M, C151 <http://web2.gov.mb.ca/laws/statutes/ccsm/c151e.php>
- New Brunswick
 - International Commercial Arbitration Act, SNB 1986, c. I-12.2 www.gnb.ca/0062/PDF-acts/i-12-2.pdf
- Newfoundland and Labrador
 - International Commercial Arbitration Act, RSNL 1990, c. I-15 <http://assembly.nl.ca/Legislation/sr/statutes/i15.htm>
- Nova Scotia
 - International Commercial Arbitration Act, RSNS 1989, c. 234 <http://nslegislature.ca/legc/statutes/internlc.htm>
- Prince Edward Island
 - International Commercial Arbitration Act, RSPEI 1988, c. I-5 www.gov.pe.ca/law/statutes/pdf/i-05.pdf
- Saskatchewan
 - International Commercial Arbitration Act, RSS 1988, c. I-10.2 www.qp.gov.sk.ca/documents/English/Statutes/Statutes/I10-2.pdf
- Northwest Territories
 - International Commercial Arbitration Act, RSNWT 1988, c. I-6 www.canlii.org/nt/laws/sta/i-6/20061114/whole.html
- Nunavut
 - International Commercial Arbitration Act, RSNWT (Nu) 1988, c. I-6 www.canlii.org/en/nu/laws/stat/rsnwt-nu-1988-c-i-6/latest/part-1/rsnwt-nu-1988-c-i-6-part-1.pdf
- Yukon
 - International Commercial Arbitration Act, RSY 2002, c. 12 www.canlii.org/yk/laws/sta/123/20060728/whole.html

4 Domestic arbitration and UNCITRAL

Is your domestic arbitration law based on the UNCITRAL Model Law? What are the major differences between your domestic arbitration law and the UNCITRAL Model Law?

Canada was the first country to adopt the UNCITRAL Model Law (in 1986). The Model Law serves as the basis of each of the International Arbitration Acts.

Note, however, that Ontario's International Commercial Arbitration Act introduces certain key differences:

- despite article 1(3)(c) of the Model Law, section 2(3) prevents Ontario parties from simply designating their arbitration as international by way of express agreement;
- section 5 overrides Model Law article 11(1) and eliminates the parties' ability to preclude an arbitrator by virtue of his or her nationality; and
- section 9 states that an order of the arbitral tribunal under article 17 of the Model Law for an interim measure of protection and the provision of security is subject to the provisions of the Model Law as if it were an award.

Therefore, Ontario is one of the few jurisdictions in the world in which an award for an interim measure would be enforced in the same way as a final award under articles 35 and 36 of the Model Law (British Columbia is another such jurisdiction and in certain instances Quebec law provides a similar recourse).

5 Mandatory provisions

What are the mandatory domestic arbitration law provisions on procedure from which parties may not deviate?

The International Arbitration Acts allow parties to opt out of the majority of Model Law articles contained therein, with the exception of:

- article 18 (equal treatment of parties);
- article 24 (hearings and written proceedings);
- article 31 (form and contents of awards);
- article 32 (termination of proceedings); and
- articles 35 and 36 (recognition and enforcement).

6 Substantive law

Is there any rule in your domestic arbitration law that provides the arbitral tribunal with guidance as to which substantive law to apply to the merits of the dispute?

Parties to an arbitration can select the substantive law applicable to the dispute pursuant to article 28(2) of the Model Law. Otherwise the arbitral tribunal is entitled to apply the law determined by the conflict of laws rules that it considers to be applicable, or, in the case of Ontario, to be appropriate in the circumstances. The standard test in Canada is 'substantial connection'.

7 Arbitral institutions

What are the most prominent arbitral institutions situated in your country?

There are many privately-operated institutions that specialise in arbitral services, of which the most prominent are:

- ADR Chambers (www.adrchambers.com/ca/);
- ADR Institute of Canada (www.adrcanada.ca/);
- ADR Institute of Ontario (www.adrontario.ca/);
- British Columbia International Commercial Arbitration Center (www.bicac.com/);
- Canadian Commercial Arbitration Centre (www.ccac-adr.org/en/); and
- Institut de médiation et d'arbitrage du Québec (www.imaq.org)

In addition, international arbitrations seated in Canada are also conducted under the auspices of international institutions such as the ICC, the LCIA and the ICDR.

There is also a significant amount of ad hoc arbitration in Canada.

Arbitration agreement

8 Arbitrability

Are there any types of disputes that are not arbitrable?

Any commercial matter may in principle be arbitrated, whether it is based on contract, tort or a statutory claim. In the course of a 2003 ruling in which it held that copyright matters may be subject to arbitration, the Supreme Court of Canada determined that parties have virtually unfettered autonomy in identifying disputes that may be arbitrable. These would include sale of goods and equipment, construction and engineering agreements, licensing of technology, distribution and agency agreements, exploration agreements, joint ventures, financing, banking, etc. Internal corporate disputes, including shareholder disputes and oppression claims, may also be subject to arbitration. However, employment agreements are not generally regarded as commercial agreements and are therefore generally not arbitrable under the International Arbitration Acts.

Where a public statute establishes an administrative investigation and enforcement mechanism for dealing with public matters, that mechanism cannot be ousted by an arbitration clause. The federal Criminal Code and Competition Act and the provincial Securities Acts are examples.

9 Requirements

What formal and other requirements exist for an arbitration agreement?

Canada's International Arbitration Acts have an 'in-writing' requirement, which is satisfied by the creation of signed documents, by the exchange of documents providing a record or evincing agreement, or through incorporation by reference. There are no other formal preconditions. The formal requirement for writing may be waived if timely objection is not taken.

While no Canadian jurisdiction has adopted the 2006 amendments to the Model Law, which inter alia expand the means of satisfying the writing requirement to include electronic means, electronic commerce legislation in Canada establishes that an electronic exchange meets the writing requirement. Under their domestic arbitration laws, some provinces – including Ontario, British Columbia and Alberta – permit oral arbitration agreements.

10 Enforceability

In what circumstances is an arbitration agreement no longer enforceable?

According to the International Arbitration Acts, an arbitration agreement is unenforceable if it is 'null and void, inoperative or incapable of being performed'. However, the validity of an arbitration clause does not depend on the validity of the contract in which it is embedded.

An arbitration agreement can be held null or void on the basis of non est factum, duress, fraud, mistake or other defences relating to the initial formation of the arbitration agreement. An arbitration agreement is prima facie valid, and establishing a claim of fraud or unconscionability with respect to the contract as a whole does not automatically render the arbitration agreement or clause of no force or effect.

Inoperability arises when an arbitration agreement is initially valid, but on some ground ceases to have effect, for instance, if waiver principles apply, a time limit has expired or subsequent or competing legislation overrides it. Parties may, by agreement or by their implied conduct, revoke an arbitration agreement.

An arbitration agreement is incapable of being performed when there is an impediment to the conduct of the prospective proceeding beyond the parties' control (such as the death of a named arbitrator or the misnaming of an institution) that makes performance in accordance with the terms of the agreement impossible.

11 Third parties – bound by arbitration agreement

In which instances can third parties or non-signatories be bound by an arbitration agreement?

A third party or non-signatory may be bound through its consent. While express consent is usually hard to obtain, it can sometimes be implied under a number of legal theories, including:

- agency – a signatory acting as agent within his or her authority may bind the non-signatory principal;
- incorporation by reference – an arbitration clause may be incorporated by reference into another agreement to bind those other signatories;
- assumption – a party by its conduct may assume obligations to arbitrate;
- equitable estoppel – a party may, by its conduct, be estopped from asserting the absence of its signature on a contract where that party has consistently sought enforcement for its benefit; and
- the 'piercing the corporate veil' or 'alter ego' doctrine.

Cases in which third parties have been successfully bound through the application of implied consent doctrines are rare in Canada, however.

12 Third parties – participation

Does your domestic arbitration law make any provisions with respect to third-party participation in arbitration, such as joinder or third-party notice?

There is no statutory basis on which a non-consenting third party may be joined to an arbitration. There is also no procedure allowing a respondent to issue a third party notice against a non-party in order to assert a claim for contribution or indemnity. Such procedures exist only in court litigation.

An interested non-signatory may be able to claim the benefit of an arbitration clause as a claimant based on some of the contract theories noted above, such as a non-signatory principal. A trustee in bankruptcy may also adopt an agreement and enforce an arbitration agreement while also being bound to arbitrate. Successor corporations arising from mergers are entitled to enforce an arbitration clause, while also being bound. In the case of an assignment of a contract containing an arbitration clause, it is unclear on the case law whether the assignee of a contract, such as a bank enforcing security, can force the other contracting party to arbitrate.

13 Groups of companies

Do courts and arbitral tribunals in your jurisdiction extend an arbitration agreement to non-signatory parent or subsidiary companies of a signatory company, provided that the non-signatory was somehow involved in the conclusion, performance or termination of the contract in dispute, under the 'group of companies' doctrine?

Arbitral tribunals and a court in Ontario have relied upon the 'group of companies' doctrine to allow a non-signatory parent company to participate with its subsidiary in asserting a claim and receiving the benefit of a substantial award. No reported Canadian case has yet relied on the group of companies doctrine to add a non-signatory member of a group as a respondent against its will.

14 Multiparty arbitration agreements

What are the requirements for a valid multiparty arbitration agreement?

Multiparty arbitration agreements and disputes are not specifically contemplated or addressed in the International Arbitration Acts. However, it is not uncommon in larger, complex transactions for there to be multiple parties to an agreement with an arbitration

clause. This is common in joint venture and consortium agreements where all parties are party to the same agreement.

Consent to a multiparty proceeding may also be found in several contracts with back-to-back arbitration provisions, ie, an arbitration agreement with essentially the same terms incorporated into separate agreements that make express reference to one another, including an express agreement to the consolidation of all arbitral proceedings. In Ontario, an order for consolidation may be obtained from the court under the International Commercial Arbitration Act. Consolidation requires consent of all parties, which is a reason for providing for consolidation in the arbitration agreement.

Given the absence of formal procedural rules that expressly deal with multiparty arbitration cases, issues that arise with respect to the composition of the tribunal or the procedures to be followed may require recourse to the courts or to the applicable arbitral institution in order to effect a fair resolution. From a practical perspective, parties may appoint the same tribunal in different but related arbitral proceedings and hold concurrent hearings.

Constitution of arbitral tribunal

15 Appointment of arbitrators

Are there any restrictions as to who may act as an arbitrator?

Apart from the standard rules requiring independence and impartiality, there are no qualifications for arbitrators required by law for either international or domestic arbitration. Parties may appoint any natural person having legal capacity to act. Judges are not prevented by any legislation from being arbitrators (though they cannot receive remuneration except for reasonable compensation for related expenses). However, it is the general policy of the judiciary that judges should not sit as arbitrators. The Ontario and British Columbia International Arbitration Acts have amended the Model Law so that parties can no longer require that an arbitrator be of a specific nationality, nor can they exclude any particular nationality.

16 Appointment of arbitrators

Failing prior agreement of the parties, what is the default mechanism for the appointment of arbitrators?

In the absence of an agreement by the parties on the number of arbitrators and method of appointment, the International Arbitration Acts set the number of arbitrators at three and specify a method of appointment. Typically, each party appoints one arbitrator and those two appointees then select the presiding arbitrator.

Upon a default in an appointment for a sole arbitrator or with a panel of three, a party can apply to the court or to an agreed appointing authority to make the appointment.

17 Challenge and replacement of arbitrators

On what grounds and how can an arbitrator be challenged and replaced? Please discuss in particular the grounds for challenge and replacement and the procedure, including challenge in court.

In the event that an arbitrator becomes ill or is otherwise unable to carry out his or her function, or where the arbitrator has unduly delayed the process, any party may ask the court to remove that arbitrator.

Pursuant to the Model Law, a party may challenge an arbitrator in the event of:

- a reasonable apprehension of bias giving rise to justifiable doubt about the arbitrator's impartiality or independence; or
- the arbitrator's lack of qualifications agreed to by the parties.

The 'reasonable apprehension of bias' test asks whether a reasonably informed bystander would view the arbitrator as having acted in a biased manner. An arbitrator has an ongoing duty from the time of

its appointment to disclose to the parties any special circumstances relating to its impartiality or independence. A party may challenge an arbitrator whom it appointed directly, or in whose appointment it participated, but only on the basis of facts discovered after the appointment.

Where the parties have not agreed to another procedure for challenging an arbitrator, a party must make its claim in writing to the tribunal within 15 days of discovering the ground for challenge. Unless the arbitrator resigns or the other party agrees, the tribunal then decides the matter. If it rejects the challenge, the challenging party has 30 days to petition to the courts, whose ruling cannot be appealed. In the event of a successful challenge, there is no recourse to the courts. From a practical perspective, few arbitrators would attempt to continue in such a situation in any event.

In Ontario, if an arbitrator is replaced, all proceedings that had already taken place must be restarted unless the parties agree otherwise.

18 Relationship between parties and arbitrators

What is the relationship between parties and arbitrators? Please elaborate on the contractual relationship between parties and arbitrators, neutrality of party-appointed arbitrators, remuneration, and expenses and liability of arbitrators.

Arbitrators are bound contractually to both sides. All arbitrators must abide by the principles of neutrality and independence, no matter who appointed them. The Supreme Court of Canada has ruled that partiality is unacceptable in international commercial arbitration. Other than in respect of the appointment of an arbitrator or the selection of a chair, it is generally inappropriate for an arbitrator to have any direct communication with one party in the absence of the other.

With respect to remuneration for ad hoc arbitrations, arbitrators' fees are typically negotiated on hourly or daily rates. The preferred practice is for the arbitrators to remit to the chair their respective accounts for delivery to the parties to be borne equally. The chair will then receive and distribute the fees. Deposits and cancellation fees are common. In institutional arbitration, fees are typically paid through the institution in accordance with its rules and policies.

Generally, arbitrators enjoy immunity from suit for their conduct during the proceedings, including negligence and breach of contract. It has yet to be established whether this immunity extends to intentional acts or bad faith.

Jurisdiction

19 Court proceedings contrary to arbitration agreements

What is the procedure for disputes over jurisdiction if court proceedings are initiated despite an existing arbitration agreement, and what time limits exist for jurisdictional objections?

In such a circumstance, the court, on a motion, will refer the parties to arbitration and stay the related judicial proceedings. The motion must be brought by the party seeking arbitration before it submits its first statement of substance in the judicial proceedings. Otherwise, the right to insist on arbitration will be waived. In Canada, the standard for judicial review of the arbitration agreement is that of a prima facie review, the result of which may be appealed in accordance with the rules of the jurisdiction in question.

20 Jurisdiction of arbitral tribunal

What is the procedure for disputes over jurisdiction of the arbitral tribunal once arbitral proceedings have been initiated and what time limits exist for jurisdictional objections?

The scope of the tribunal's jurisdiction (or its competence) is determined by the scope of the arbitration agreement. However, the tribunal

has competence to rule on the scope of its own jurisdiction, which includes any objections to the existence or validity of the arbitration agreement.

An objection to the tribunal's jurisdiction must be raised no later than the submission of the statement of defence, and an objection that the tribunal is exceeding its authority must be raised as soon as the conduct giving rise to that objection occurs. Failure to object by those times constitutes waiver. Within 30 days of receiving notice of the tribunal's ruling on jurisdiction, any party may bring the matter before a court for a determination. While the judicial decision is pending, the tribunal may proceed with the arbitration and render an award.

Arbitral proceedings

21. Place and language of arbitration

Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings?

Failing agreement, the arbitral tribunal is empowered to make these determinations, having regard to the facts of the case.

22. Commencement of arbitration

How are arbitral proceedings initiated?

Under the International Arbitration Acts, unless agreed otherwise, arbitral proceedings are deemed to start on the date a request for arbitration is received by the respondent. While the form of the notice of arbitration is not stipulated in the Acts, the rules of the Canadian arbitration institutions, as well as the UNCITRAL Rules, ICC Rules and other international arbitration rules, set out the required content clearly and comprehensively. In the case of institutional arbitration, most arbitral rules require the delivery of a notice or request for arbitration to the particular institution, at which time the arbitration is deemed to have commenced. Failure to do so, according to a 2009 Ontario court ruling, constitutes a failure to properly commence the arbitration which may have significant consequences if a limitation period has expired.

23. Hearing

Is a hearing required and what rules apply?

Failing agreement by the parties, the arbitral tribunal has the discretion to conduct an oral hearing or a hearing by written documents. It is required to hold a hearing at the request of a party. Some jurisdictions (eg, British Columbia) require that the hearing be held in camera. Tribunals have discretion to hold hearings and conduct tasks such as document inspection at any convenient location, regardless of the place (or seat) of the arbitration. By default, should a party fail to appear at a hearing, the tribunal may proceed with the hearing and make an award on the basis of the evidence before it.

The trend in Canada is toward shorter hearings and reliance on documentary evidence.

24. Evidence

By what rules is the arbitral tribunal bound in establishing the facts of the case? What types of evidence are admitted and how is the taking of evidence conducted?

The Model Law empowers the tribunal to conduct the arbitration as it considers appropriate, including determining the admissibility, relevance, materiality and weight of evidence.

The IBA Rules of Taking Evidence in International Commercial Arbitration often apply by agreement or order, or are otherwise of persuasive guidance.

Witnesses

Witnesses usually provide evidence in chief through written statements with cross-examination under oath at the hearing. While some parties request full examinations in chief, this is done less frequently. A summons to a witness within the jurisdiction may be issued through the assistance of the courts. Letters of request (formerly called letters rogatory) are necessary to compel evidence of witnesses outside of the jurisdiction, with prior approval of the tribunal.

Experts

Experts are frequently required and are in practice invariably retained by the parties rather than by the tribunal (although the tribunal has the power to appoint its own experts). The party expert should provide objective, independent expert opinion, without obvious bias in favour of the party calling him or her. Experts' reports are exchanged well in advance of a hearing and delivered to the tribunal.

Documents

The tribunal will first look to the parties to agree on the authenticity of documents, and will if necessary rule on authentication and relevance. The tribunal may also order either party to produce particular documents. Issues of privilege may arise in connection with documents and the tribunal may inspect those documents to determine the issue. The tribunal will generally ask for the delivery of agreed books of documents prior to the hearing.

Party evidence

Parties and corporate officers are entitled and expected to testify if they have relevant evidence and adverse inferences may be drawn by the tribunal if they do not.

25. Court involvement

In what instances can the arbitral tribunal request assistance from a court and in what instances may courts intervene?

As provided in the Model Law, the tribunal (or a party with the tribunal's consent) may request assistance from the court in taking evidence for the purposes of the arbitration (but not with respect to pre-hearing discovery) and the court may follow its own rules in doing so. Under the Model Law, the arbitral tribunal lacks the power to issue a summons to a witness, although this power may exist under domestic legislation such as Ontario's Evidence Act. The safe practice is to follow the Model Law. For witnesses within the jurisdiction, the tribunal may ask or authorise a party to ask a court to issue a summons to compel a witness to attend the arbitration and produce documents. If the witness is outside the jurisdiction, the Court may be asked to issue letters of request (formerly called letters rogatory) directed to the court in the jurisdiction where the witness is situated for assistance in securing the evidence of that witness.

26. Confidentiality

Is confidentiality ensured?

Parties generally expressly contract for confidentiality in their arbitration agreements, which govern subject to court intervention. If the agreement is silent with respect to confidentiality, it may be addressed by the institutional rules chosen by the parties or by the tribunal in a procedural order. Failing that, it can be argued that confidentiality is an implied term of an agreement to arbitrate, although the extent of this implication is not yet established or uniform in Canada. British Columbia is the only Canadian jurisdiction to expressly require in camera hearings.

Confidentiality will generally apply to the proceedings and information disclosed therein, to materials submitted, to awards and orders rendered and to the dispute itself. However, the arbitration may cease to be private once an award is brought into subsequent

judicial proceedings for enforcement or for setting the award aside. A recent Ontario court ruling granted a sealing order to preserve confidentiality of materials filed in court about a pending arbitration.

Since arbitrators and third parties (eg, witnesses and experts) may not be bound by a duty of confidentiality, separate confidentiality agreements should be considered to preserve confidentiality.

Interim measures

27 Interim measures by the courts

What interim measures may be ordered by courts before and after arbitration proceedings have been initiated?

According to the International Arbitration Acts, a court is empowered to grant interim relief including injunctions to freeze assets or prevent actions from being taken, including orders affecting non-parties, before initiation of arbitral proceedings and without compromising the arbitration agreement. Courts may make ex parte orders. Security for costs is not expressly provided for in the International Arbitration Acts, though parties may give the tribunal the power to grant security for costs through the adoption of institutional rules or through express or implicit agreement in the arbitration agreement. In Quebec, the capacity to order provisional interim measures, such as seizure before judgment, judicial sequestration and injunctions, appears under recent jurisprudence to belong to a judge rather than to an arbitral tribunal (the case law is evolving on this point). Courts are limited to ordering such measures as permitted under their respective place of jurisdiction, or *lex arbitri*.

28 Interim measures by the arbitral tribunal

What interim measures may the arbitral tribunal order after it is constituted? In which instances can security for costs be ordered by an arbitral tribunal?

Unless the parties decide otherwise by express agreement, the tribunal may order any type of interim measure that it deems necessary relating to the subject matter of the dispute or preservation of evidence.

In both Ontario and British Columbia, an order for interim measures of protection may be enforced as an award. Under Quebec law, there is no provision barring such enforcement.

Deposits or advances to secure arbitrator fees are regularly obtained. Security for costs for legal fees may be ordered only where the tribunal has been so empowered by the agreement of the parties or institutional rules. It is not provided for in the International Arbitration Acts.

Awards

29 Decisions by the arbitral tribunal

Failing party agreement, is it sufficient if decisions by the arbitral tribunal are made by a majority of all its members or is a unanimous vote required? What are the consequences for the award if an arbitrator dissents?

Decisions are made by majority rulings. Unanimity is not required, though it is desirable. A dissenting arbitrator may refuse to sign and date an award rendered by the tribunal. However, a refusal to sign, for any reason, must be explained in the written award of the majority. If a dissenting opinion is part of an award, this may interfere with its subsequent enforcement in jurisdictions that do not permit dissenting opinions.

30 Dissenting opinions

How does your domestic arbitration law deal with dissenting opinions?

Canada's domestic arbitration law does not deal with dissenting opinions but the standard viewpoint in practice is that a dissenting

opinion should not form part of the award. However, the fact of a dissent should be noted in the award. According to an Ontario court ruling, a separate dissenting opinion can be released, but a party may not use it as an evidential basis for a subsequent challenge of the award.

31 Form and content requirements

What form and content requirements exist for an award?

In order to ensure its validity and enforceability, an arbitral award must dispose finally of all matters referred to arbitration and must:

- be in writing;
- be signed and dated by all members of the tribunal (or by a majority of them, provided that the reason for the missing signature or signatures is stated);
- state the reasons for the decision (unless otherwise decided or waived by the parties);
- state the date and the place of the award; and
- be delivered to each party.

The language of the award is generally the language of the arbitration and it may be made in any currency.

32 Time limit for award

Does the award have to be rendered within a certain time limit under your domestic arbitration law?

Time limits for making awards may be provided for by the procedural rules governing the arbitration, but the International Arbitration Acts do not impose a time limit.

33 Date of award

For what time limits is the date of the award decisive and for what time limits is the date of delivery of the award decisive?

Parties are afforded 30 days after notice of a preliminary award determining jurisdiction of the tribunal to apply to the court to decide the issue, with no appeal permitted.

A party is allowed to make an application for setting aside an award within three months of the date on which the award is received. See also the discussion of interpretations and corrections of awards in question 38.

34 Types of awards

What types of awards are possible and what types of relief may the arbitral tribunal grant?

The International Arbitration Acts follow the Model Law where no mention of partial or interim awards or their enforcement is to be found, save the British Columbia Act which specifically contemplates interim awards. However, interim and partial awards are not precluded by law in Canada and are regularly rendered.

35 Termination of proceedings

By what other means than an award can proceedings be terminated?

A party's failure to produce a statement of claim on time constitutes grounds for the arbitral tribunal to terminate proceedings. According to the Model Law, the tribunal will also issue an order for termination when: the claimant withdraws its claim, unless the respondent has a legitimate interest in continuing; the parties agree; or the tribunal finds the continuation of proceedings unnecessary or impossible.

If, during the proceedings, the parties reach a settlement, the tribunal must terminate the arbitration. Upon termination by settlement, the tribunal may also record the settlement in the form of

a final award if requested by the parties and not opposed by the tribunal. The award on agreed terms by the parties takes the form of a normal award and may be enforced and set aside as a normal award. The majority of Canadian jurisdictions have added that the tribunal may encourage a settlement and that if the parties agree, the tribunal 'may use mediation, conciliation or other procedures' to facilitate settlement. Under the Quebec Civil Code, if the parties settle the dispute, the arbitrators must record the agreement in an arbitration award.

36 Cost allocation and recovery

How are the costs of the arbitral proceedings allocated in awards?
What costs are recoverable?

The International Arbitration Acts do not address rules for the allocation of costs, save for the British Columbia Act which expressly provides that costs of the arbitration shall be in the discretion of the tribunal. The jurisdiction to award costs may also be expressly set out in the arbitration agreement or in institutional rules. Absent an agreement, arbitral rules or a statutory basis for awarding costs, the law recognises an equitable right to award costs as justice requires. Canada has generally followed a tradition of loser pays, with costs following the event. Costs are normally awarded to the prevailing party, which may result in an apportionment where success is divided. Costs would normally include the reasonable legal and expert fees of the parties, as well as the cost of the arbitrators, hearing room, transcripts, etc. It should be noted that a more modest tariff for legal fees is applied in Quebec, absent an agreement to the contrary by the parties.

37 Interest

May interest be awarded for principal claims and for costs and at what rate?

The International Arbitration Acts do not expressly confer upon tribunals the power to award interest, save for the British Columbia Act. The power may also be found in the express or implied provisions of the contract, the law of the contract, the arbitration agreement, or the *lex arbitri*. Pre-judgment interest is substantive, not procedural, and may be awarded by an arbitrator at law where the law of the contract at issue provides or otherwise on general principles of equity or fairness.

Proceedings subsequent to issuance of award

38 Interpretation and correction of awards

Does the arbitral tribunal have the power to correct or interpret an award on its own or at the parties' initiative? What time limits apply?

The tribunal may, within 30 days of the date of the award or the parties' receipt of the award, by request or on its own initiative, correct any computational, clerical or typographical errors or any of the like. Within that same period, again by request or on its own initiative, it may also provide an interpretation of a specific part of the award, which then forms part of the final award, or address a claim which had been omitted from the award.

39 Challenge of awards

How and on what grounds can awards be challenged and set aside?

Applications for setting aside awards can be made by parties to the court, on limited grounds. As Canada is a pro-arbitration jurisdiction, its courts are inclined to uphold the validity of awards. However, an order to set aside will be rendered where it is proven that:

- a party was under an incapacity;

- the arbitration agreement was invalid under the applicable law;
- the applying party was not given proper notice of an arbitrator's appointment or of the proceedings, or was otherwise unable to properly present its case; or
- the award addresses a dispute beyond the scope of the submission to arbitrate or the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement.

Further, a court may set aside an award if it finds on its own account that:

- the subject matter of the dispute is not arbitrable; or
- the award conflicts with public policy that is specifically supported by a federal, provincial or territorial law.

An application to set aside must be made within three months from the date of receipt of the award. There is no automatic stay of enforcement while the challenge is pending in court.

40 Levels of appeal

How many levels of appeal are there? How long does it generally take until a challenge is decided at each level? Approximately what costs are incurred at each level? How are costs apportioned among the parties?

A court order on a challenge to an award may be appealed. Note, however, that there is no appeal right with respect to the merits. Parties may appeal to the court of appeal of the jurisdiction and subsequently (if leave is obtained) to the Supreme Court of Canada. Although times vary from jurisdiction to jurisdiction, it typically takes approximately six to nine months to appeal. It generally takes approximately 14 to 18 months to have an appeal heard by the Supreme Court of Canada.

Costs are entirely dependent on the length and complexity of the matter. As noted, the Canadian cost regime follows the loser pays principle, from which courts depart only rarely and only with good reason. The costs to appeal are awarded based on tariffs that differ in each jurisdiction.

41 Recognition and enforcement

What requirements exist for recognition and enforcement of domestic and foreign awards, what grounds exist for refusing recognition and enforcement, and what is the procedure?

The enforcement of awards is left to the courts. An arbitral award, once recognised by the court, is enforceable in the same manner as a judgment or order of the court. Canadian courts are generally favourable to enforcement of arbitral awards.

For the purposes of recognition and enforcement under the Model Law, the award must be commercial and international as defined in the International Arbitration Acts. Certified copies of the arbitration agreement and the award, and (as and where required) English or French translations thereof, must accompany the recognition application.

Under article 36 of the Model Law, the grounds for refusing recognition or enforcement of an award are the same as those for setting aside an award (see question 39), with the addition of the following:

- the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which or under the law of which the award was made;
- the subject matter is not arbitrable under the law of the enforcing state; or
- recognition is contrary to the public policy of the enforcing state.

The public policy ground is interpreted narrowly, and must relate to concepts of essential justice and morality.

Update and trends

Canada was a respondent in a NAFTA claim by Merrill & Ring Forestry LP arising from the impact of forestry regulation in British Columbia on timber exports. The decision released on 31 March 2010 dismissed the claim and provides an illuminating review of the principles of expropriation and fair and equitable treatment.

Claims are also pending by ExxonMobil against Canada under NAFTA in connection with investments in the Hibernia and Terra Nova petroleum projects near Newfoundland and Labrador, relating to actions of the provincial government.

In a decision released on 20 May 2010, the Supreme Court of Canada determined that the two-year limitation period in Alberta for the enforcement of an arbitral award applied equally to a domestic and an international arbitral award. As a result, the enforcement of an international award rendered in arbitration proceedings through a Russian arbitral institute was time barred. The decision is controversial, less on its narrow legal reasoning than on the basis of public policy concerns relating to the international enforcement of awards.

While Alberta limitations legislation imposes a ten-year limitation period on claimants seeking remedial orders based on judgments or orders for the payment of money, the Supreme Court held that an international arbitral award could not be classified as a judgment or court order because it was not legislatively defined as such.

In Ontario, however, the International Commercial Arbitration Act states that a recognised arbitral award is enforceable in the same

manner as a court order, and under Ontario limitations legislation, proceedings to enforce orders that may be enforced in the same way as court orders are not subject to a limitation period. Since the recognition of an international award is a precondition to enforcing the award as if it were a court order, it appears as if Ontario's standard two year limitation period applies to an award recognition application.

A recent decision of the Newfoundland Court of Appeal highlights the pro-arbitration stance taken by Canadian appellate courts. In this case, a ship owner and operator brought a claim against its insurer for the indemnification of losses it suffered as a result of settling a claim brought against it. The insurer had refused to defend the owner and operator in this claim. The insurer, pursuant to the insurance contract, commenced arbitration proceedings in England to adjudicate the dispute. The owner and operator refused to participate in this arbitration, as the matter was already before Canadian courts. While an applications judge dismissed the insurer's motion for a stay of proceedings in favour of arbitration, the Newfoundland Court of Appeal overturned this ruling, holding that the arbitration clause expressed the intention and agreement of the parties to refer disputes to an English arbitration tribunal. The Court noted that while the balance of convenience favoured having the matters heard in Newfoundland, this was not determinative, and having all claims heard in London would not cause a splitting of the claim or a loss of efficiency. Thus, it was not unreasonable or unjust to hold the parties to their agreement.

42 Enforcement of foreign awards

What is the attitude of domestic courts to the enforcement of foreign awards set aside by the courts at the place of arbitration?

Generally, they will not enforce them, though the court has a discretion to enforce.

43 Cost of enforcement

What costs are incurred in enforcing awards?

An application for enforcement to the court includes the costs of preparing and filing the application, which is supported by affidavit evidence. Given the limited grounds for refusal of enforcement, it is generally a fairly straightforward process. The associated costs are dependent on whether there are contested issues regarding enforcement. If the evidence of the grounds for recognition are non-controversial, an application for enforcement may be brought at a more modest cost. Once recognised, the award can be enforced using

the full range of remedies for execution of court judgments (at additional expense, the amount of which is fact-dependent).

Other

44 Judicial system influence

What dominant features of your judicial system might exert an influence on an arbitrator from your country?

Canada is an arbitration friendly jurisdiction. The courts of appeal and the Supreme Court of Canada have consistently maintained a pro-arbitration stance.

The Model Law allows for flexibility of documentary discovery as well as for the availability of oral examinations for discovery. The Canadian practice is to provide for documentary discovery, subject to the rules of privilege, and to disallow US-style discovery, particularly depositions of numerous witnesses. Generally, there are no pre-hearing oral examinations for discovery, but where they are

Stikeman Elliott LLP

John A M Judge
Peter J Cullen
Douglas F Harrison

jjudge@stikeman.com
pcullen@stikeman.com
dharrison@stikeman.com

1155 René-Lévesque Blvd West
40th Floor
Montreal, QC H3B 3V2
Canada
Tel: +1 514 397 3000
Fax: +1 514 397 3222

5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9
Canada
Tel: +1 416 869 5500
Fax: +1 416 947 0866
www.stikeman.com

permitted or agreed to by the parties they are commonly limited in time and scope. Note that, where the parties to arbitration are Canadian and American, there may be greater acceptance of pre-hearing oral examination, although it would still generally be limited in time and scope.

As witness statements are common in arbitrations, hearings are typically restricted to cross-examinations. Individual parties and corporate officers may be expected to testify if they are in a position to provide evidence (and an adverse inference may be drawn if they do not). The IBA Rules on the Taking of Evidence in International Arbitration are often adopted in Canadian arbitrations.

45 Regulation of activities

What particularities exist in your jurisdiction that a foreign practitioner should be aware of?

Foreign counsel and foreign arbitrators who appear in a single arbitration in Canada are unlikely to be required to charge VAT, which applies to those who 'carry on business' in Canada (as this term is defined under Canadian tax law) and who supply services valued at C\$30,000 or more in a twelve-month period. Canada's VAT is a federal tax known in some provinces as the Harmonized Sales Tax (HST) and in others as the Goods and Services Tax (GST). In the

provinces in which the HST applies – Ontario, British Columbia, Nova Scotia, New Brunswick and Newfoundland and Labrador – its rate ranges from 12 per cent to 15 per cent. In the remaining provinces (and in the territories), the GST applies at a uniform rate of 5 per cent. With the exception of Alberta, the provinces in which GST applies also levy provincial sales taxes (PSTs). While these tend to apply to the provision of goods rather than services, Quebec's PST is a VAT with a similar range of application to the GST or HST. In Quebec, the GST and the provincial PST effectively combine to produce an overall VAT rate of approximately 12.5 per cent.

Foreign counsel and foreign arbitrators travelling to Canada for an international arbitration seated in Canada must possess the normal travel documents from their country of origin, which may include a visa. A Canadian work permit would not normally be required to appear on a single case.

The conduct of Canadian counsel is regulated by the Rules of Professional Conduct prescribed by the respective provincial law societies. However, foreign counsel and arbitrators may appear in Canadian-seated arbitrations without restriction. While there has been some ambiguity on the scope of some provincial law society rules, Ontario's law society has recently confirmed that its professional rules do not affect foreign arbitration practitioners with cases in that province.

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