Arbitration 2021

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LEXOLOGY®
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the sixteenth edition of *Arbitration*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique Lexology Getting The Deal Through format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Hong Kong, Macau, Spain, Sri Lanka and Zambia.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Lexology Getting The Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Gerhard Wegen and Stephan Wilske of Gleiss Lutz, for their continued assistance with this volume.

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Multilateral conventions relating to arbitration

1 | Is your jurisdiction 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?

Yes, Canada is a contracting state to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The New York Convention came into force in Canada on 10 August 1986.

In the enabling legislation, the *United Nations Foreign Arbitral Awards Convention Act,* R.S.C. 1985, c. 16 (2nd Supp.) (see https://www.canlii.org/en/ca/laws/stat/rsc-1985-c-16-2nd-supp/latest/rsc-1985-c-16-2nd-supp.html), Canada declared pursuant to article I of the Convention that the Convention would apply only to differences arising out of commercial legal relationships, whether contractual or not.

Canada is also party to several other conventions, including the ICSID Convention and USMCA.

Bilateral investment treaties

2 | Do bilateral investment treaties exist with other countries?

Canada is party to over 50 bilateral investment treaties and other treaties with investment protection provisions.

Domestic arbitration law

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

Constitutionally, Canada is a federation, comprised of ten provinces, three territories and the federal government itself. The primary source of domestic arbitration law in Canada is federal and provincial or territorial legislation – each province or territory (province or provincial, as the case may be) has its own statutes for domestic and international arbitration, while federal legislation governs arbitrations involving federal entities (eg, Crown corporations). The New York Convention is incorporated into international arbitration legislation across the country, and is thus the source of recognition and enforcement of awards in international arbitrations.

Domestic arbitration and UNCITRAL

4 | 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?

Each province's domestic arbitration legislation differs and the more modern pieces of provincial legislation are based to varying degrees on the Model Law – for example, British Columbia's recently overhauled domestic legislation more closely resembles the Model Law than other provinces, although it is not based on the Model Law per se (see https://www.canlii.org/en/bc/laws/stat/sbc-2020-c-2/latest/sbc-2020-c-2.html). Accordingly, while domestic arbitration legislation, broadly speaking, differs from province to province, it is not possible to identify specific differences between provincial legislation and the Model Law that are true for all provinces. By contrast, the provinces' international arbitration legislation tends to be based upon the UNCITRAL Model Law, and most often incorporates the bulk of the Model Law.

Mandatory provisions

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

Domestic and international arbitration legislation tends to allow for the parties to agree to the applicable procedure, subject to certain mandatory provisions parties are not permitted to contract out of. For example, provincial legislation generally dictates that parties cannot contract out of provisions involving the fair and equal treatment of the parties, the setting aside and enforcement of awards, the extension of time limits for setting aside awards and the seeking of a declaration of an arbitration's invalidity.

Substantive law

6 | 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 are free to select the substantive law that the arbitral tribunal is required to apply. If the parties do not include a provision in their arbitration agreement with respect to the governing substantive law, then the substantive law is determining by interpreting the contract as a whole. This includes, for example, determining what law has the most substantial connection to the contract.

Arbitral institutions

7 What are the most prominent arbitral institutions situated in your jurisdiction?

The Alternative Dispute Resolution Institute of Canada (ADRIC, whose website is available at https://adric.ca/) is currently the most prominent arbitral institution in Canada and has provincial branches. ADRIC offers procedural rules and institutional administration of arbitrations, as well as accreditation for qualified arbitrators. The Canadian branch of the Chartered Institute of Arbitrators (whose website is available at https://www.ciarbcanada.org/) also plays a prominent role. In addition, there are regional institutions, which play a less prominent role in Canada, but tend to offer similar services in terms of procedural rules and the administration of disputes.

ARBITRATION AGREEMENT

Arbitrability

8 Are there any types of disputes that are not arbitrable?

Criminal and quasi-criminal matters cannot be arbitrated. Family law matters can be arbitrated in some provinces but not in others; where it is allowed, the governing legislation tends to place greater limitations on the arbitration itself in terms the extent to which the parties can control the procedure, as well as the parties' ability to contract out of the governing legislation. For example, parties in Ontario cannot contract out of the right to appeal a question of law.

By contrast, IP, antitrust, competition law, securities transactions and intra-company disputes can be arbitrated.

Requirements

9 What formal and other requirements exist for an arbitration agreement?

Formal requirements vary between provinces and pieces of legislation. Whereas certain pieces of domestic legislation do not require that an arbitration agreement be in writing (eg, Ontario – see https://www.canlii.org/en/on/laws/stat/so-1991-c-17/latest/so-1991-c-17.html), international arbitration legislation – which is typically based on the Model Law – tends to require that the arbitration agreement be reduced to writing in one of three forms: (1) a document signed by the parties; (2) an exchange of communications that evidence an agreement to arbitrate; or (3) an exchange of pleadings in which a party alleges the existence of an arbitration agreement and the other party does not deny the allegation (see, for example, Ontario's international arbitration legislation, the *International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5, at https://www.canlii.org/en/on/laws/stat/so-2017-c-2-sch-5/latest/so-2017-c-2-sch-5.html).

Enforceability

10 In what circumstances is an arbitration agreement no longer enforceable?

Given that an arbitration agreement is, fundamentally, a contract, the standard grounds for finding a contract unenforceable apply with equal force to an arbitration agreement.

For example, the recent case of *Uber Technologies Inc v Heller* (see https://www.canlii.org/en/ca/scc/doc/2020/2020scc16/2020scc16.html) considered the question of whether to refuse to enforce an arbitration agreement on the grounds of unconscionability or public policy, or both. A majority of the Supreme Court of Canada determined that the arbitration agreement in question – between Uber and one of its drivers – was unconscionable, while a minority of the Court found that the arbitration agreement was unenforceable as a matter of public policy based on the finding that the prospect of arbitration was illusory (that is, it was so prohibitively expensive for Heller that there was no real prospect an arbitration would occur).

Entering into an arbitration agreement under an incapacity is also a ground for finding the agreement inoperative at common law and under arbitration legislation (particularly domestic legislation) To the extent the Model Law is incorporated into arbitration legislation, the courts retain the discretion to determine that the arbitration agreement is 'null and void, inoperative or incapable of being performed'.

Separability

11 Are there any provisions on the separability of arbitration agreements from the main agreement?

Domestic arbitration legislation generally provides that if the arbitration agreement forms part of another agreement, it is treated as a separate agreement for the purpose of jurisdictional issues and may survive a finding that the main contract is invalid.

International arbitration legislation – to the extent it is based on the Model Law – similarly provides that an arbitration clause is an independent agreement from the rest of the contract, and a decision that the contract is null and void does not render the arbitration agreement invalid.

In addition, Canadian common law recognises the doctrine of separability.

Third parties – bound by arbitration agreement

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

Canadian law does not recognise any principles unique to the arbitration context that bind third parties and there is no legislation in Canada that provides a court or an arbitral tribunal with the jurisdiction to implead strangers to the agreement to arbitrate.

In the construction context, this issue sometimes arises in the context of a subcontract (ie, the agreement between the main, or general, contractor and a subcontractor) that incorporates the terms of the prime contract (ie, the agreement between the general contractor and owner), which prime contract provides for arbitration of disputes arising in respect of the construction project.

Otherwise, typical rules of contract law apply with equal force in the arbitration context, such as where a non-party is the principal in an agency relationship with one of the parties, or where the corporate veil is pierced.

Third parties – participation

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

An arbitral tribunal does not have jurisdiction over persons who are not parties to the arbitration agreement. Unless there is a 'drag-along' provision in a contract that compels participation in an arbitration with another party – for example, a provision in a subcontract compelling a subcontractor to participate in an arbitration between general contractor and owner – third parties cannot be obliged to participate. For additional parties to join an arbitration, all parties must agree to the addition of the additional party (or parties).

That being said, there is some case law that suggests third parties can be compelled participate as a witness.

Groups of companies

14 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?

In Canada, privity of contract generally prevents non-signatory parties from arbitrating disputes with a signatory under the arbitration agreement. A third party must establish that the parties to an arbitration agreement intended for the third party to benefit from the arbitration. That being said, there are certain circumstances where a parent company, for example, may be added as a party to an arbitration, such as where the parent company was intimately involved in the contractual relationship such that there was no substantive distinction between the parent company and the subsidiary. Generally, the 'group of companies' doctrine does not form a part of the Canadian common law.

Multiparty arbitration agreements

15 What are the requirements for a valid multiparty arbitration agreement?

The key requirement to creating a valid multi-party arbitration agreement in Canada is the consent of all of the parties involved. Ideally, the consent of all the parties involved would be within the same arbitration agreement. Even if multiple parties have signed similar contracts for the same project that each contain an identical arbitration clause, this is insufficient in demonstrating consent to a single arbitration. Thus, to ensure clarity and ease of consolidation, if desired by the parties, the arbitration agreement should expressly provide for multi-party arbitrations.

Consolidation

16 Can an arbitral tribunal in your jurisdiction consolidate separate arbitral proceedings? In which circumstances?

In general, consolidations of separate arbitrations can only be ordered with the consent of all parties, unless the applicable arbitral rules expressly provide for the consolidation of arbitrations absent consent. Occasionally, tribunals and courts have found express or implied consent to order consolidation.

The domestic arbitration legislation of both Ontario and British Columbia provides mechanisms for consolidations of arbitrations by way of recourse to court. In Ontario, on the application of all the parties to more than one arbitration, the court may order that (1) the arbitration be consolidated, (2) the arbitrations be conducted simultaneously or consecutively, or (3) any of the arbitrations be stayed until any of the other arbitrations are completed. Importantly, this provision does not prevent the parties to more than one arbitration from agreeing to consolidate the arbitrations.

In British Columbia, if all parties to two or more arbitral proceedings agree to consolidate those proceedings, a party, with notice to the other parties, may apply to the Supreme Court for an order that the proceedings be consolidated. Similar to the provision in Ontario's domestic legislation, this provision above does not limit the parties' ability to consolidate arbitral proceedings without a court order.

CONSTITUTION OF ARBITRAL TRIBUNAL

Eligibility of arbitrators

17 Are there any restrictions as to who may act as an arbitrator? Would any contractually stipulated requirement for arbitrators based on nationality, religion or gender be recognised by the courts in your jurisdiction?

The arbitration agreement and the arbitral rules selected by the parties will govern the requirements relating to the number, qualifications and characteristics of the arbitrator. Under international arbitral legislation, unless otherwise agreed by the parties, no person can be precluded by reason of their nationality from acting as an arbitrator. That being said, it is an open question as to whether a sitting judge could act as an arbitrator; while this is a topic of current interest in other jurisdictions, it is not currently a live issue in Canada.

Other than the requirements of independence and impartiality, there are currently no uniform national arbitration qualification standards for arbitrators in Canada. Parties are free to specify required qualifications in their arbitration agreement but will often avoid doing so to avoid delay in the selection of an arbitrator or to avoid the possibility of the appointment of an arbitrator being challenged due to the arbitrator lacking one of the qualifications set out in the agreement.

Background of arbitrators

18 Who regularly sit as arbitrators in your jurisdiction?

Since there are no uniform qualification standards for arbitrators in Canada, parties are free to agree to the appointment of lawyers or non-lawyers, such as engineers or architects, as arbitrators. Before selecting an arbitrator, counsel and their clients should investigate the expertise and competency of likely candidates before submitting their names for appointment. Desirable skills parties should look for in an arbitrator include ensuring that the candidate understands the subject matter of the dispute, has a thorough knowledge of the arbitration process, is an effective communicator, and is impartial, fair and free from bias.

Default appointment of arbitrators

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

If the arbitration is administered by an institution and the parties cannot agree on an arbitrator, the institution's rules will typically provide a procedure for appointing arbitrators. If the selected rules do not provide a procedure for appointing arbitrators, the parties cannot agree on any of the proposed candidates and cannot reach an agreement on the procedure for appointing the arbitrator, the court may appoint the arbitrator on application by either party.

Challenge and replacement of arbitrators

20 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. Is there a tendency to apply or seek guidance from the IBA Guidelines on Conflicts of Interest in International Arbitration?

Under international legislation, the appointment of an arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to their impartiality or independence. Further, the appointment of an arbitrator may be challenged if they do not possess the qualifications agreed to by the parties, becomes unable to perform their functions, or fails to act without undue delay. Parties to an arbitration agreement are

free to agree on a procedure for challenging the appointment of an arbitrator. Failing such agreement between the parties, a party who intends to challenge an arbitrator shall, within 15 days of becoming aware of the circumstances, send a written statement of the reasons for the challenge to the arbitral tribunal.

To initiate a challenge under domestic legislation in Ontario, British Columbia, Alberta (see https://www.canlii.org/en/ab/laws/stat/rsa-2000-c-a-43/latest/rsa-2000-c-a-43.html), Manitoba (see https://www.canlii.org/en/mb/laws/stat/ccsm-c-a120/latest/ccsm-c-a120.html), New Brunswick (see https://www.canlii.org/en/nb/laws/stat/rsnb-2014-c-100/latest/rsnb-2014-c-100.html) and Saskatchewan (see https://www.canlii.org/en/sk/laws/stat/ss-1992-c-a-24.1/latest/ss-1992-c-a-24.1.html), a party must send to the arbitral tribunal a statement of the grounds for the challenge within 15 days of becoming aware of them. Domestic legislation in various provinces, including Ontario, provides that a party may challenge the participation of an arbitrator on grounds of reasonable apprehension of bias or a lack of qualifications that the parties have agreed are necessary.

Relationship between parties and arbitrators

21 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 of arbitrators.

Arbitrators must be independent, impartial and free from bias. The contractual relationship between the arbitrators and the parties is as set out in the arbitrator's terms of appointment.

Domestic legislation in Canada typically provides that, in the absence of an agreement as to the arbitrator's fees and expenses, the fees and expenses paid to an arbitrator cannot exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred.

Duties of arbitrators

22 What are arbitrators' duties of disclosure regarding impartiality and independence throughout the arbitral proceedings?

Both the international and domestic legislation in Canada require that an arbitrator be independent of the parties and act impartially. Under the international legislation, when a person is approached in connection with their possible appointment as an arbitrator, the candidate must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. This obligation continues throughout the arbitral proceedings. By way of example, under the domestic legislation in Ontario, before accepting an appointment as arbitrator, the candidate must disclose to all parties to the arbitration any circumstances they are aware of that may give rise to a reasonable apprehension of bias.

Immunity of arbitrators from liability

23 To what extent are arbitrators immune from liability for their conduct in the course of the arbitration?

Generally, arbitrators are immune from civil liability, except in instances of fraud. In Canada, the limitation of arbitrators' liability is demonstrated in two ways. First, several institutional rules provide for a limitation of an arbitrator's liability, as do typical bespoke terms of appointment. Second, courts have regularly held that arbitrators are immune from legal action with respect to acts performed while exercising their duties as arbitrator. This immunity applies to contractual liability that arises out of the arbitration agreement, as well as to tort liability that arises from the arbitrator's acts and omissions.

The approach taken by Canadian courts in relation to arbitrator immunity reflects a policy decision to encourage the use of arbitration as an alternative dispute resolution method.

JURISDICTION AND COMPETENCE OF ARBITRAL TRIBUNAL

Court proceedings contrary to arbitration agreements

24 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?

Under domestic and international legislation, parties may apply to court for a stay of court proceedings if the matter is one that is to be submitted to arbitration pursuant to an arbitration agreement. That being said, the decision of a court to stay a proceeding will often turn on whether and to what extent any preconditions to arbitration have been met, and whether the arbitration agreement intends to provide the sole forum for dispute resolution in relation to the contract. If arbitration is not the sole forum and the preconditions have not been met, then a court may decline to stay proceedings.

Although domestic and international legislation across Canada contains fairly straightforward rules with respect to the time for objecting to an arbitral tribunal's jurisdiction, that same legislation is silent with respect to the time for objection to a court's jurisdiction over a dispute.

Jurisdiction of arbitral tribunal

25 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?

Domestic and international arbitration both contain relatively straightforward rules with respect to the time for objection to an arbitral tribunal's jurisdiction. Under international legislation, a party must raise a jurisdictional dispute no later than the submission of a statement of defence. Similarly, if a jurisdictional issue arises in the course of the proceedings, a party wishing to object on jurisdictional grounds must raise the issue as soon as the subject matter of the jurisdictional issue is addressed in the arbitration.

Under domestic legislation in many provinces, any objection as to the tribunal's jurisdiction must occur no later than the start of the hearing, or if there is no hearing, no later than the time at which the party delivers its first statement to the tribunal.

With respect to who rules on jurisdictional disputes, the competence-competence principle is widely accepted across Canada – that is, the arbitral tribunal has the jurisdiction to rule on challenges to its own jurisdiction.

ARBITRAL PROCEEDINGS

Place and language of arbitration, and choice of law

26 Failing prior agreement of the parties, what is the default mechanism for the place of arbitration and the language of the arbitral proceedings? How is the substantive law of the dispute determined?

Parties are free to agree on the language in which the arbitration is to be conducted, failing which the arbitral tribunal is typically empowered to decide the language. In Canada, outside of Quebec, arbitration agreements almost invariably provide for the arbitration to be conducted in English. Of course, in Quebec, arbitrations may be conducted in French.

Similarly, the parties are free to agree on the place of the arbitration, failing which the arbitral tribunal will determine the place having regard to the circumstances of the case, including the convenience of the parties. If an arbitration is conducted under institutional rules, certain institutions specifically provide in those rules for the place of arbitration.

Commencement of arbitration

27 | How are arbitral proceedings initiated?

Under international legislation, an arbitration is generally initiated by a request that a given dispute be referred to arbitration. That being said, it is permissible for parties to agree to a different method by which to initiate arbitration. Similarly, domestic legislation typically provides that an arbitration can be initiated 'in any way recognised by law', which includes service of (1) a notice to appoint or participate in the appointment of an arbitrator, (2) a notice to appoint an arbitrator delivered to a third-party whom the parties have agreed will have the power to appoint an arbitrator, or (3) a notice demanding arbitration. The proper method by which to commence arbitration will therefore vary depending on the precise wording of the arbitration agreement.

Hearing

28 | Is a hearing required and what rules apply?

Hearings are typically not mandatory under domestic arbitration legislation, although certain statutes provide that the tribunal may hold hearings as it deems fit or must hold a hearing if a party to the arbitration requests it.

Evidence

29 | 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?

Arbitrators generally have a broad discretion in respect of evidentiary rules. Generally, arbitrators are empowered to take evidence in the same manner as a court (ie, with respect to determining issues of admissibility and weight), and depending on the rules agreed to by the parties, may take a more relaxed approach to the admission of hearsay evidence.

Typically, instead of examination in chief, fact witnesses deliver their evidence via witness statements and are then cross-examined by opposing counsel. It is also common in the construction context to retain one or more experts to deliver opinion evidence and, in some cases, the tribunal itself may retain its own expert (depending on the terms of the arbitration agreement).

Court involvement

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

As part of the courts' curial jurisdiction, a tribunal can in most provinces apply to the court in order to enforce directions and awards; this includes, for example, recourse to court for the purpose of enforcing subpoenas to third-party witnesses. In addition, the tribunal can also apply to the court to determine a question of law. By contrast, courts cannot intervene in procedural objections and issues unless a party brings an application to set aside an award on grounds of procedural unfairness (eg, unequal treatment of the parties).

Confidentiality

31 | Is confidentiality ensured?

Confidentiality is not addressed in domestic or international legislation, although it is typically addressed in institutional rules and is often provided for in the arbitration agreement itself. That being said, there are common exceptions to confidentiality, such as where court intervention is required in order to enforce or set aside an award; in such circumstances, parties may move to have the court record sealed, but there is no guarantee of success in this regard. In the absence of a sealing order, it is possible that many relevant documents from the arbitration (including the pleadings and any awards) will become part of the public record. The production of arbitral documents in collateral proceedings, including the award, is currently unresolved in Canadian law.

INTERIM MEASURES AND SANCTIONING POWERS

Interim measures by the courts

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

Courts generally have a fairly wide discretion to grant interim relief if they are called upon by the parties or the tribunal. That being said, courts do not exclusively hold the authority to grant any particular forms of interim relief, given that arbitral tribunals are empowered (explicitly so under domestic arbitration) to grant equitable relief (including specific performance).

Where the tribunal has not yet been constituted and a party wishes to seek relief, and if the arbitration is not being conducted under institutional rules that provide for an emergency arbitrator, then the courts will by default have the exclusive authority to grant interim relief.

Interim measures by an emergency arbitrator

33 | Does your domestic arbitration law or do the rules of the domestic arbitration institutions mentioned above provide for an emergency arbitrator prior to the constitution of the arbitral tribunal?

Canadian legislation does not currently include any provisions in relation to emergency arbitrators, although institutional rules typically address the issue.

Interim measures by the arbitral tribunal

34 | 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?

Once the arbitral tribunal has been constituted, the tribunal has a wide discretion to grant interim relief. Under international legislation, the tribunal may order interim protection measures that the tribunal considers necessary in respect of the subject matter of the dispute and may require security from a party (or parties) in relation to interim measures. Domestic legislation also typically grants the tribunal a wide discretion to grant interim relief; in Ontario, for example, the tribunal may make orders regarding preservation or inspection of property, or both.

Sanctioning powers of the arbitral tribunal

35 Pursuant to your domestic arbitration law or the rules of the domestic arbitration institutions mentioned above, is the arbitral tribunal competent to order sanctions against parties or their counsel who use 'guerrilla tactics' in arbitration? May counsel be subject to sanctions by the arbitral tribunal or domestic arbitral institutions?

Although Canadian arbitration legislation is silent specifically with respect to misconduct by parties or their counsel, such legislation is typically worded broadly with respect to a tribunal's ability to make costs awards such that a tribunal can plausibly make such awards against parties or their counsel in respect to abusive or vexatious conduct.

Similarly, various institutional rules provide that the parties' behaviour may be considered as a factor in the tribunal's ultimate costs award at the close of proceedings.

AWARDS

Decisions by the arbitral tribunal

36 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?

Under international legislation, unless otherwise agreed to by the parties, the decision of an arbitral tribunal that is composed of more than one member must be made by a majority of all its members. However, if authorised by the parties or all members of the tribunal, questions of procedure may be decided by a presiding arbitrator.

Certain domestic legislation, such as that of Ontario, provides that if an arbitral tribunal is composed of more than one member, a decision of the majority will stand as the decision of the arbitral tribunal. If there is no majority or unanimous decision, the decision of the chairperson will govern. Similarly, domestic legislation in British Columbia provides that in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal must be made by a majority of all its members. However, if there is no majority decision, the decision of the presiding arbitrator will govern. If authorised by the parties or all the members of the tribunal, questions of procedure may be decided by the presiding arbitrator.

Dissenting opinions

37 How does your domestic arbitration law deal with dissenting opinions?

Arbitration legislation in Canada is silent in relation to an arbitrator's ability to deliver a dissenting opinion. Various provinces require in their domestic arbitration legislation that an arbitral tribunal provide reasons for an arbitral award, unless the award is made on consent or the parties agree otherwise. Therefore, the tribunal does not require specific legislative authority to deliver a dissent. Nor will the existence of a dissent invalidate a majority award.

Form and content requirements

38 What form and content requirements exist for an award?

International legislation provides that an award must be made in writing and be signed by the arbitrators. The award must also state the date and place of the arbitration. Unless the parties agree that the tribunal need not provide reasons or if the award is on consent, the award must include the tribunal's reasons.

Domestic legislation similarly provides that an award must be made in writing and, other than awards made on consent, must state the reasons on which it is based. Similar to international legislation, domestic legislation mandates that the award indicate the place and date on which it was made and must be dated and signed by all members of the arbitral tribunal, or by a majority if an explanation of the omitted signature is provided.

Time limit for award

39 Does the award have to be rendered within a certain time limit under your domestic arbitration law or under the rules of the domestic arbitration institutions mentioned above?

International legislation is silent with respect to time limits for the delivery of an award.

The time limit for delivery of an award in domestic arbitration legislation varies among provinces. In British Columbia, unless otherwise agreed to by the parties or directed by the tribunal, the tribunal must issue an award within 60 days of the later of (1) the close of the hearing and (2) the last written submissions received by the tribunal. However, under the expedited procedures of British Columbia legislation, the tribunal must issue an award within 30 days of the last written submissions received by the tribunal where no oral hearing has been ordered, or within 45 days of the conclusion of the oral hearing, if ordered.

Under the domestic arbitration legislation in Nova Scotia (see https://www.canlii.org/en/ns/laws/stat/rsns-1989-c-19/latest/rsns-1989-c-19.html), the arbitrator shall render a decision within ten days after the completion of the arbitration. Whereas under domestic legislation in Prince Edward Island (see https://www.canlii.org/en/pe/laws/stat/rspei-1988-c-a-16/latest/rspei-1988-c-a-16.html), Newfoundland and Labrador (see https://www.canlii.org/en/nl/laws/stat/rsnl-1990-c-a-14/latest/rsnl-1990-c-a-14.html), and the Northwest Territories (see https://www.canlii.org/en/nu/laws/stat/rsnwt-nu-1988-c-a-5/latest/rsnwt-nu-1988-c-a-5.html), the domestic legislation provides that the tribunal shall render their award within three months of entering on the reference.

Domestic legislation in various provinces such as Ontario, Alberta and Prince Edward Island consider the authority of a court to extend the time within which a tribunal is required to make an award, whether or not the time for rendering the award has expired.

Date of award

40 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?

For the purpose of correcting typographical errors in the award, international arbitration legislation typically provides for a deadline of 30 days from the date of the award. Similarly, a party can, with notice to the other party and within 30 days of receipt of the award, request the tribunal to (1) make an additional award as to claims presented in the arbitral proceedings but omitted from the award, or (2) correct any typographical error in the award, or, if agreed to by the parties, give an interpretation of a specific point of the award. Also, an arbitral tribunal can extend, the period of time within which it can make a correction, interpretation or an additional award.

Relatedly, international legislation generally limits the time to make an application for setting aside an award to three months after the date on which the party making that application received the award or, if a request had previously been made to correct, interpret or make an additional award, from the date on which that request had been disposed of by the arbitral tribunal.

Domestic arbitration legislation is more varied from province to province. In Ontario, for example, a party has 30 days following receipt of the award to request that the arbitral tribunal explain any matter.

Similarly, some domestic legislation (eg, Ontario and British Columbia) allows for a tribunal, on its own initiative within 30 days of making an award or at a party's request made within 30 days after receiving the award, to correct any typographical error in the award.

In Ontario, the domestic legislation also allows the tribunal, on its own initiative, to amend the award to correct an injustice caused by an oversight of the tribunal. This same legislation also allows for the tribunal, on its own initiative at any time or at a party's request made within 30 days after receiving the award, to make an additional award to deal with a claim that was presented in the arbitration but omitted from the earlier award.

Types of awards

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

Under both international and domestic legislation, arbitral tribunals have the authority to order interim remedies (unless otherwise agreed by the parties). Tribunals can also deliver partial awards and final awards, as well as order security for costs when a party seeks an interim measure of protection. Consent procedural orders and awards are also permissible.

In addition, tribunals typically have jurisdiction to grant several types of relief in addition to compensation. Domestic legislation in Ontario, for example, allows an arbitral tribunal to order specific performance, injunctions and other equitable remedies. The domestic legislation in British Columbia mirrors Ontario's provision in this regard.

Termination of proceedings

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

Pursuant to international legislation, proceedings may be terminated in ways other than by the rendering of an award. Under the Model Law, unless otherwise agreed to by the parties, if, without showing sufficient cause, the claimant fails to communicate their statement of claim, the arbitral tribunal is required to terminate the proceedings. Additionally, if the parties settle the dispute during arbitral proceedings, the tribunal is required to terminate the proceedings. Best practices typically dictate documenting a settlement by way of consent award.

Similarly, under domestic legislation such as legislation in Ontario and British Columbia, the arbitral tribunal must terminate the arbitration if the parties settle the dispute during arbitration. Other domestic legislation, such as that of British Columbia, also allows a tribunal to terminate the proceedings in relation to the party's claim if, after the commencement of proceedings, a party fails to comply with a procedural time limit.

Cost allocation and recovery

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

Across Canada, both domestic and international legislation typically provide arbitral tribunals with the discretion to award costs (which may include, among other things, the fees and expenses of the arbitrators and expert witnesses, legal fees and expenses, any administration fees and any other expenses incurred in connection with the arbitral proceedings).

Generally, when it comes to awarding costs, arbitrators may be bound by the rules of cost allocation in provincial court proceedings if the parties have agreed to such an approach; however, generally speaking the discretion accorded to arbitrators is much more flexible than under the rules of court. Typically, this means that the successful party will be indemnified for part of its costs, except for rare circumstances in which full indemnification may be ordered. Typically, a party will seek either 'partial indemnification' or 'substantial indemnification', with the former category typically ranging anywhere from 25–50 per cent of costs and the latter ranging up to about 75 per cent.

Interest

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

International arbitration legislation does not provide that a tribunal can award interest, although an entitlement to interest based on the underlying contract will typically form the basis of an award of interest where appropriate. By contrast, some domestic legislation provides the arbitral tribunal with the same power as a court with respect to the ability to grant interest. For example, Ontario's domestic legislation provides that the sections regarding pre-judgment and post-judgment interest of the Courts of Justice Act apply to an arbitral tribunal (for the Courts of Justice Act, see https://www.canlii.org/en/on/laws/stat/rso-1990-c-c43/latest/). Further, the domestic legislation in British Columbia allows for the tribunal, unless otherwise agreed to by the parties, to award simple or compound interest for the time period and at the rate that the tribunal considers appropriate.

In any event, parties can provide the tribunal with the power to award interest in their arbitration agreement.

PROCEEDINGS SUBSEQUENT TO ISSUANCE OF AWARD

Interpretation and correction of awards

45 | 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 Model Law provides for the arbitral tribunal to correct any computation, clerical or typographical error in the award on its own initiative within 30 days of the date of the award.

Also, a party may request (if it so agreed by the parties) that the tribunal provide an interpretation of a specific point of the award. Interestingly, the arbitral tribunal may extend, if necessary, the period of time within which it makes a correction, interpretation or an additional award.

Similarly, domestic legislation in both Ontario and British Columbia allows for a tribunal, on its own initiative within 30 days of making an award or at a party's request made within 30 days after receiving the award, to correct any computation, clerical or typographical error in the award. The Ontario legislation also the arbitral tribunal, on its own initiative at any time or at a party's request made within 30 days after receiving the award, to make an additional award to deal with a claim that was presented in the arbitration but omitted from the earlier award.

Challenge of awards

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

For awards under domestic legislation, grounds for challenging an award vary from province to province, but tend to include some combination of:

- a party having entered into the arbitration agreement while under an incapacity;
- the arbitration agreement is invalid;
- the arbitral award exceeds the tribunal's jurisdiction;
- the composition of the tribunal was contrary to the arbitration agreement or the legislation;

- the subject matter of the dispute was not arbitrable;
- one of the parties was not treated equally or fairly (such as by not being able to present its case or respond to the other party's case);
- an arbitrator exhibited a reasonable apprehension of bias; or
- the award was obtained by fraud.

For awards under international legislation, grounds for challenging the award tend to be limited those articulated in the Model Law. This therefore includes:

- a party having entered into the arbitration agreement while under an incapacity;
- a party having not received notice of the appointment of an arbitrator of the arbitration, or was deprived of the opportunity to present its case;
- the arbitral award exceeds the tribunal's jurisdiction;
- the composition of the tribunal was contrary to the arbitration agreement or the legislation;
- the subject matter of the dispute was not arbitrable;
- the award was set aside by a competent authority in the jurisdiction in which the award was made; or
- enforcement of the award would be contrary to public policy in the jurisdiction where enforcement is sought.

Levels of appeal

47 | 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?

The question of whether an appeal is available at all will depend upon the wording of the arbitration agreement and the wording of the applicable legislation, including whether the arbitration legislation allows the parties to contract out of a statutory right to appeal. For example, in Ontario, the domestic legislation provides for a right to appeal on questions of law, but not questions of fact. That legislation also allows parties to contract out of that appeal right, such that an arbitral award may be final and binding. In practice, it is often the case that the parties provide in the arbitration agreement that arbitral awards shall be final and binding.

Otherwise, and depending on the province, there are typically either one or two levels of appeal. Under one model, an award may first be appealed to the province's superior court (ie, its trial-level court) and then to the court of appeal. Under the second model, appeals may lie directly to the court of appeal. Parties may seek leave of the Supreme Court of Canada to appeal a decision from the court of appeal, but leave is rarely granted and, broadly speaking, is only granted on issues of national importance.

The successful party in a court proceeding is typically awarded some portion of their legal costs, the percentage of which may vary according to a number of factors (including consideration of settlement offers, and the extent to which the winning party was successful).

Recognition and enforcement

48 | 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?

International legislation provides for Model Law and New York Convention recognition and enforcement rights. Creditors of international arbitral awards generally have access to the same enforcement remedies available to domestic litigants. Award creditors may apply for recognition and enforcement of arbitral awards in the appropriate provincial courts. In Ontario, the Superior Court of Justice - Commercial List is a specialised commercial court intended to provide more efficient procedures and experienced judges for commercial matters, including in respect of arbitration.

Time limits for enforcement of arbitral awards

49 | Is there a limitation period for the enforcement of arbitral awards?

In Ontario, the limitation period for enforcing an award is 10 years from the date the award was received. This limitation period is the same in the domestic legislation as it is in the international arbitration.

Limitations periods vary in length as among Canada's other provinces, the legislation for some of which is silent on this issue.

Enforcement of foreign awards

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

Given the implementation of the New York Convention in Canada, and given the judicial policy of supporting arbitration, Canadian courts are generally receptive to recognising foreign awards, subject to the exceptions identified in article V of the New York Convention. Accordingly, while parties in Canada may contest an application to enforce a foreign award, they must show good cause consistent with the New York Convention.

Enforcement of orders by emergency arbitrators

51 | Does your domestic arbitration legislation, case law or the rules of domestic arbitration institutions provide for the enforcement of orders by emergency arbitrators?

Orders by emergency arbitrators are generally not addressed in domestic legislation. That being said, institutional rules generally provide for recourse to an emergency arbitrator, such that an award from an emergency arbitrator can be enforced in court by way of urgent application to court for an injunction. Due to the lack of applicable domestic arbitration, and due to the relatively recent implementation of emergency arbitrator provisions in institutional rules, there is a dearth of relevant case law in Canada.

Cost of enforcement

52 | What costs are incurred in enforcing awards?

It is difficult to articulate any general proposition as to the costs associated with seeking enforcement of an arbitral award. For example, the costs of enforcement may vary depending on whether the enforcement is contested and whether the judicial decision in respect of enforcement is appealed to a higher court.

OTHER

Influence of legal traditions on arbitrators

53 | What dominant features of your judicial system might exert an influence on an arbitrator from your jurisdiction?

Canada is a bijural jurisdiction. Nearly all provinces and territories are common law jurisdictions, except for Quebec, which is Canada's only civil law jurisdiction. Accordingly, most Canadian arbitrators will have a common law background, and will therefore tend closer towards UK or US-style discovery than the civil law's narrower approach.

That being said, Canadian common law arbitrators tend to adopt a 'middle of the road' approach by limiting or altering the scope and form of certain components of discovery, such as (1) by allowing for the

giving of evidence by way of witness statement rather than direct examination, and (2) conducting documentary discovery by way of Redfern schedules rather than US-style fulsome documentary discovery.

Professional or ethical rules

54 | Are specific professional or ethical rules applicable to counsel and arbitrators in international arbitration in your jurisdiction? Does best practice in your jurisdiction reflect (or contradict) the IBA Guidelines on Party Representation in International Arbitration?

In Canada, lawyers are held to rules of professional conduct that are set out in legislation or rules of professional ethics established by the province's regulating body (eg, the Law Society of Ontario).

Third-party funding

55 | Is third-party funding of arbitral claims in your jurisdiction subject to regulatory restrictions?

Although third-party funding was historically prohibited or heavily restricted due to it being considered champertous, these restrictions have loosened in recent years such that third-party funding has grown more common. That being said, restrictions on third-party funding vary from province to province, such that parties would be advised to consult with a lawyer regarding restrictions on such funding.

In the construction context, third-party funding remains uncommon in both arbitration and litigation.

Regulation of activities

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

There are no particularities in regard to arbitration in Canada in respect of which a foreign practitioner need be overly concerned.

UPDATE AND TRENDS

Legislative reform and investment treaty arbitration

57 | Are there any emerging trends or hot topics in arbitration in your country? Is the arbitration law of your jurisdiction currently the subject of legislative reform? Are the rules of the domestic arbitration institutions mentioned above currently being revised? Have any bilateral investment treaties recently been terminated? If so, which ones? Is there any intention to terminate any of these bilateral investment treaties? If so, which ones? What are the main recent decisions in the field of international investment arbitration to which your country was a party? Are there any pending investment arbitration cases in which the country you are reporting about is a party?

Two topics of recent and current interest in Canada are the applicability of arbitration agreements in standard-form consumer contracts and the applicability of arbitration agreements to receivers in instances of bankruptcy or insolvency.

On the former topic, a minority of the Supreme Court of Canada in *Uber Technologies Inc v Heller* considered the possibility that an arbitration agreement can be found unenforceable on the basis of public policy if in practice there exists no real prospect of the arbitration actually occurring, given that there would be no real prospect of access to justice. Given that this position was expressed by a minority of the court, it is not presently binding law in Canada, but it remains to be seen whether this position is taken up by lower courts in subsequent case law.

On the latter topic, the Supreme Court of Canada recently granted leave to appeal from a lower-court decision in which the British Columbia Court of Appeal found that arbitration agreements entered into pre-insolvency were not binding on the insolvent company's receiver, based on the doctrine of separability and the receiver's right to abrogate executory contracts.

Another notable development in the construction sector over the past few years has been the implementation of statutory adjudication for construction disputes. Initially implemented in Ontario, it has subsequently been implemented in other provinces.

With respect to legislative reform, there has been a growing interest in Ontario in overhauling the province's domestic legislation to ensure greater consistency with international arbitration practice and incorporate industry norms more common of commercial disputes (eg, providing for opt-in rights of appeal from arbitral awards rather than the current default of opt-out rights).

Coronavirus

58 | What emergency legislation, relief programmes and other initiatives specific to your practice area has your state implemented to address the pandemic? Have any existing government programs, laws or regulations been amended to address these concerns? What best practices are advisable for clients?

There has been myriad provincial and federal legislation across Canada in response to the pandemic, as well as relief programmes for small business and unemployed persons. However, there has been no initiative to date specifically targeted at the arbitration community. Generally, in Canada there is no absolute right to a physical hearing.

LAW STATED DATE

Correct on:

59 | Give the date on which the information above is accurate.

14 June 2021.

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