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# The Legal 500 Country Comparative Guides

# Canada

# INTERNATIONAL ARBITRATION

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This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Canada.

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# CANADA
# INTERNATIONAL ARBITRATION

## 1. What legislation applies to arbitration in your country? Are there any mandatory laws?

Each province and territory has its own domestic and international arbitration legislation, while federal commercial arbitration is governed by the Commercial Arbitration Act. Parties to an arbitration agreement may agree to vary or exclude certain provisions of the legislation, with the exception of various mandatory requirements (e.g. the parties must be treated equally and fairly).

## 2. Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?

Yes. However, Canada declared pursuant to Article I of the Convention that the Convention applies only to differences arising out of legal relationships, whether contractual or not, which are considered 'commercial' under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation.

## 3. What other arbitration-related treaties and conventions is your country a party to?

Canada is a party to the ICSID Convention and numerous bilateral investment treaties, treaties with investment protection provisions, and free trade agreements.

## 4. Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?

Canada adopted the UNCITRAL Model Law ("**Model Law**") in June 1986 via the *United Nations Foreign Arbitral Awards Convention Act*. The Model Law provides the basis for all international arbitration legislation in Canada, with the exception of Quebec. Each province's legislation is somewhat idiosyncratic and varies to different degrees in their reliance on the Model Law.

## 5. Are there any impending plans to reform the arbitration laws in your country?

As of August 22, 2022, both Prince Edward Island and the Northwest Territories have bills currently before their legislative assemblies to amend their respective legislation.

## 6. What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?

here are a number of Canadian arbitral institutions (e.g. the ADR Institute of Canada Inc. ("**ADRIC**"), the International Centre for Dispute Resolution of Canada ("**ICDR**"), and the Canadian Arbitration Association ("**CAA**")), as well as several regional institutions (e.g. the Vancouver International Arbitration Centre ("**VanIAC**")).

The Canadian ICDR rules were last amended in 2015, while the ADRIC and the CAA rules were amended in 2016. VanIAC amended its domestic rules in 2020, and its international rules in 2022. A review of the ADRIC rules is currently in progress.

## 7. Is there a specialist arbitration court in your country?

No.

## 8. What are the validity requirements for an arbitration agreement under the laws of your country?

Under some domestic arbitration statutes, the arbitration

 

agreement must be in writing.

Under international arbitration statutes, except for Ontario and British Columbia, an arbitration agreement must be in writing and in the form of a document signed by the parties, an exchange of communication that provides a record of the agreement, or an exchange of pleadings in which the existence of an agreement is alleged and not denied.

Ontario and British Columbia have adopted the 2006 Model Law amendments, which provide that the agreement can be concluded orally, by conduct, or other means, but the content must be in writing.

## 9. Are arbitration clauses considered separable from the main contract?

Arbitration clauses are considered separable from the main contract. For international arbitration, all common law statutes provide that an arbitration clause shall be treated as an agreement independent from the other terms of the contract. In Quebec, the Civil Code contains a similar provision to this effect. While not all domestic statutes expressly provide that arbitration clauses are separable, courts will apply the common law doctrine of separability to arbitration agreements.

## 10. Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?

Canadian courts have not applied or considered a validation principle.

## 11. Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?

Most domestic arbitration statutes in Canada provide that multi-party and multi-contract arbitrations can be consolidated if all parties consent to the consolidation. If consolidation is desired by the parties, express consent to multi-party arbitration should be included in the arbitration agreement.

## 12. In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?

In Canada, there are no unique principles or legislation that specifically provide a court or an arbitral tribunal with the jurisdiction to implead third parties into an arbitration. However, third parties may be bound on the grounds of agency, piercing the corporate veil, or estoppel, as well as ‘drag-along’ provisions in a contract that compel participation in an arbitration arising from a related contract. Recent relevant decisions on this topic include Petrowest Corp. v. Peace River Hydro Partners, 2020 BCCA 339 (“Petrowest”), Wittman v. Blackbaud, Inc., 2021 BCSC 2025, and Royal Bank of Canada v. Mundo Media Ltd., 2022 ONCA 607.

## 13. Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?

Criminal and quasi-criminal matters are non-arbitrable in Canada. The arbitrability of other matters depends on the relevant jurisdiction’s laws. Recently, the Supreme Court of Canada (the “SCC”) has held that certain consumer agreements (Telus Communications Inc. v. Wellman, 2019 SCC 19) and claims with a genuine challenge to the validity of the arbitration agreement that the arbitrator might not resolve (Uber Technologies Inc. v. Heller, 2020 SCC 16) are non-arbitrable. However, there is a high bar for escaping an arbitration clause (General Entertainment and Music Inc. v. Gold Line Telemanagement Inc., 2022 FC 418).

## 14. Are there any recent court decisions in your country concerning the choice of law applicable to an arbitration agreement where no such law has been specified by the Parties?

No.

## 15. How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?

The substantive law applicable to a dispute is determined by looking to the agreement of the parties. If the agreement is silent, then the arbitral tribunal will apply the law it considers applicable taking into consideration the terms of the contract and trade usages applicable to the transaction.

 

### 16. Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?

Canadian courts have not applied the UNIDROIT principles as substantive law. In limited cases, courts have referred to the principles as guidance for interpretation.

### 17. In your country, are there any restrictions in the appointment of arbitrators?

Besides independence and impartiality, there are no standard requirements for the appointment of an arbitrator under Canadian arbitration statutes. However, as is common of Model Law jurisdictions, arbitrators in international arbitrations cannot be excluded based on nationality.

### 18. Are there any default requirements as to the selection of a tribunal?

There are default requirements for arbitration procedures under both domestic and international statutes. The institution administering the arbitration, if any, will also typically provide a procedure for selecting the tribunal if the parties cannot agree on the arbitrator.

### 19. Can the local courts intervene in the selection of arbitrators? If so, how?

The court may appoint an arbitrator on the application by either party if the institution or selected rules does not provide a procedure for selecting an arbitrator, the parties cannot agree on any proposed candidates, or the parties cannot agree on the procedure for selecting an arbitrator.

### 20. Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?

Generally, a party may challenge an arbitrator on the grounds of a reasonable apprehension of bias (including conflicts of interest that would impair independence and impartiality) and/or a lack of necessary qualifications as agreed to by the parties. Failing agreement, depending on the jurisdiction, the party who wishes to challenge an arbitrator will generally have 15 days after becoming aware of the circumstances for a challenge to send a written statement of reasons to the arbitral tribunal.

### 21. Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators

Recently, the Federal Court held that the mere fact that the arbitrator has a spousal relationship with a member of the firm representing one of the parties, is not enough to raise a reasonable apprehension of bias (Grey v Whitefish Lake First Nation #459, 2020 FC 949). Similarly, the Ontario Superior Court of Justice also held that vigorous questioning of some witnesses does not by itself raise a reasonable apprehension of bias if the questions are reasonable, aimed at uncovering or clarifying evidence, and not intended to intimidate or harass (Dufferin v. Morrison Hershfield Ltd., 2022 ONSC 3485).

### 22. Have there been any recent decisions in your concerning arbitrators' duties of disclosure, e.g., similar to the UK Supreme Court Judgment in Halliburton v Chubb?

No. Under international arbitration legislation, an arbitrator must disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence.

### 23. What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?

If an arbitrator is unable to continue, whatever procedure the parties have agreed to will govern the appointment of a new arbitrator. If the agreement is silent, most arbitration legislation contains a procedure for court appointment of a substitute arbitrator.

### 24. Are arbitrators immune from liability?

Absent fraud or bad faith, arbitrators are generally immune from civil liability. Canadian courts have typically held that arbitrators are immune from contractual and tortious liability for acts performed while exercising their arbitral duties.

 

### 25. Is the principle of competence-competence recognized in your country?

The competence-competence principle has been widely accepted across Canada and recognized by the Supreme Court of Canada. The principle can be found in most arbitration statutes, providing that an arbitral tribunal may rule on its own jurisdiction.

### 26. What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?

In international arbitration, courts are required to stay an action and refer the parties to arbitration if there is a valid arbitration agreement and a party has requested the stay in a timely matter. In domestic arbitration, most statutes provide narrow exceptions to the requirement that court proceedings be stayed pending arbitration. In Carillion Construction Inc. v Imara (Wynford Drive) Limited, 2015 ONSC 3658, the court declined to stay a class action lien proceeding to permit arbitration between the employer and the contractor based on a concern regarding prejudice to the subcontractor lien claimants.

### 27. How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?

Parties are permitted to agree on a method of commencing arbitration. Absent an agreement, international arbitration is generally initiated by requesting that a given dispute be referred to arbitration, and domestic arbitration is initiated in any way recognizable by law (e.g. notice demanding arbitration).

Limitation periods may apply to the arbitration as according to the laws governing the contract for international arbitration, or by provincial limitation period laws for domestic arbitration. Parties may also specify contractual limitation periods within their agreement.

### 28. In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?

This is a contextual determination dependent on the facts of each case. The State Immunity Act governs foreign state immunity in Canada.

### 29. What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?

An arbitrator has broad powers and may continue the proceedings without the respondent's participation and make an award on the evidence before it. That being said, given the fundamental principle that each party to an arbitration is entitled to present their case, arbitrators will be reluctant to proceed with an arbitration in the absence of a party.

Canadian courts cannot compel a party to participate in arbitration in the absence of a contractual obligation on that party to participate. Should such an obligation exist, then a court could order participation on that basis in order to ensure compliance with the parties' contract.

### 30. Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?

Generally, all parties must consent for a third party to join in an arbitration. The arbitration agreement will determine whether third parties can voluntarily join the arbitration proceeding, and tribunals generally honour this decision. If the agreement is silent, the tribunal will look to the relevant law in that province. However, unless there is a "drag-along" provision in the third party's contract with one of the participating parties that compels the third party's participation, a tribunal cannot compel a third party to participate. Conversely, if the existing parties and the third parties all agree to the joinder of the third party to the arbitration, then the tribunal may in theory be compelled to admit the third party into the arbitration.

### 31. Can local courts order third parties to participate in arbitration proceedings in your country?

In Canada, there is no legislation that provides a court with the power to compel a third party to arbitrate. However, in certain circumstances, courts have ordered

 

third parties to participate in arbitration as a non-party (e.g. producing evidence).

### 32. What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?

An arbitral tribunal has broad discretion to grant interim relief under both international and domestic legislation. Before the constitution of the tribunal, courts can issue interim relief if requested by either the parties or the tribunal. Interim relief may include interim injunctions and stays of court proceedings in favour of arbitration. Similarly, a tribunal may in some circumstances be entitled to recourse to the court to enforce its orders (e.g. if the tribunal orders the production of evidence and a party refuses to comply with the tribunal's order).

### 33. Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?

While anti-suit injunctions are available across Canada, they are generally difficult to obtain. As for anti-arbitration injunctions, the law in Canada is still developing. In 2019, the British Columbia Court of Appeal (the "BCCA") issued an anti-arbitration injunction as the parties had expressly agreed to not pursue arbitration in the specific circumstances of the case (Li v. Rao, 2019 BCCA 264).

### 34. Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?

Subject to the arbitration agreement, arbitrators have broad discretion is determining evidentiary rules. The court can assist in taking evidence and compelling witnesses to participate if requested by the arbitral tribunal or by a party with the tribunal's approval.

### 35. What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?

In Canada, each province's legal regulatory body sets out standards to which lawyers are held, including ethical and professional obligations. Given that most arbitrators in Canada are also lawyers, those ethical and professional obligations continue to apply. Arbitrators are also required to be independent and impartial, and some arbitral institutions provide additional ethical rules.

### 36. In your country, are there any rules with respect to the confidentiality of arbitration proceedings?

Confidentiality is not addressed in domestic or international legislation, except for in British Columbia and Quebec. However, arbitral institutions and arbitration agreements often impose confidentiality obligations.

### 37. Are there any recent decisions in your country regarding the use of evidence acquired illegally in arbitration proceedings (e.g. 'hacked evidence' obtained through unauthorized access to an electronic system)?

No.

### 38. How are the costs of arbitration proceedings estimated and allocated?

Subject to the arbitration agreement, the arbitral tribunal typically has broad discretion when awarding costs. Generally, the successful party will seek either partial or substantial indemnity, and in rare circumstances, full indemnity is awarded.

### 39. Can pre- and post-award interest be included on the principal claim and costs incurred?

While international arbitration legislation does not provide a tribunal with the power to award interest, a tribunal may make an award based on the underlying contract where appropriate. Some domestic legislation provides the arbitrator with the same power as a court for pre- and post-award interest, but this is not uniform across Canada. The arbitration agreement may also expressly provide that the tribunal has this power.

### 40. What legal requirements are there in your country for the recognition and enforcement of an award? Is there a

 

### requirement that the award be reasoned, i.e. substantiated and motivated?

A party must make an application in writing to a competent court to enforce an arbitral award. The specific procedure for enforcing an award and the relevant limitation period depends on the jurisdiction. Generally, the party relying on the award or applying for its enforcement must supply the authenticated original award and the original arbitration agreement, or certified copies thereof.

With respect to the award itself, the requirements are generally consistent with other jurisdictions that rely upon the Model Law as the basis for arbitration legislation. Broadly speaking, the award must state the reasons upon which it is based (unless the parties have agreed that no reasons are necessary), must have become operative, must be consistent with the public policy of the enforcement jurisdiction, etc.

### 41. What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?

The timeframe is difficult to estimate as it depends on the complexity of the issues, whether the proceeding is contested or unopposed, and the procedural requirements within each jurisdiction. Furthermore, due to the pandemic, usual timelines for court proceedings have become quite varied across Canada such that there is no standard timeframe for an enforcement application to be heard and judgment rendered.

A motion may be brought *ex parte* for enforcement in limited circumstances, consistent with the availability of such an option in litigation.

### 42. Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?

In Canada, the standard of review of arbitral awards is currently uncertain. In 2019, the Supreme Court of Canada significantly revised the general framework for standard of review, but did not address how it would apply to arbitration decisions (Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65). Generally, the standard of review will depend on the law within the seat of the jurisdiction. However, the BCCA recently held that international arbitral awards set aside for lack of jurisdiction would be reviewed on a correctness standard (lululemon athletica canada inc. v. Industrial Color Productions Inc., 2021 BCCA 428).

### 43. Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts

In Canada, except for Quebec, the law does not impose restrictions on the availability of remedies, and all remedies are enforceable by the courts. In many provinces, applicable legislation is explicit that tribunals are empowered to provide equitable remedies. By contrast, in Quebec, arbitral tribunals cannot grant injunctions.

### 44. Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?

Depending on the jurisdiction, there may be a default right of appeal on questions of law, or a party may seek leave to appeal from a judge. Therefore, parties would be well-advised to review applicable legislation when drafting an arbitration agreement, in order to determine the extent to which appeals are allowed in that jurisdiction.

Grounds for challenging an award under international legislation are generally limited to those stated in the Model Law, while the grounds for challenging a domestic arbitration award may be slightly broader depending on the jurisdiction. The applicable procedure(s) will also depend on the jurisdiction, including the timeline for bringing such applications.

### 45. Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?

Domestic arbitration statutes provide that parties cannot contract out of the provisions regarding setting aside an award, although they can contract out of rights of appeal. Under international legislation, there are no rights of appeal, and parties cannot contract out the right to challenge an award.

### 46. To what extent might a state or state

 

### entity successfully raise a defence of state or sovereign immunity at the enforcement stage?

In Canada, the *State Immunity Act* governs foreign state immunity. There are two main exceptions to state immunity that courts often rely on: where the state has explicitly or implicitly waived its immunity, and where the proceeding is related to a commercial activity.

### 47. In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?

A tribunal generally does not have the power to bind third parties to an arbitral award. However, exceptions include where one of the parties was the agent of the third party or where the corporate veil is pierced. A third party may challenge an award if they are bound to it.

### 48. Have there been any recent court decisions in your jurisdiction considering third party funding in connection with arbitration proceedings?

No. However, it is a growing topic of interest in secondary literature.

### 49. Is emergency arbitrator relief available in your country? Are decisions made by emergency arbitrators readily enforceable?

Emergency arbitrator relief is available in Canada. Though most statutes do not include provisions regarding emergency arbitrators, institutional rules typically address this issue. Generally, decisions made by emergency arbitrators are interim binding, and courts are supportive of the relief.

### 50. Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?

Some arbitral institutions have expedited procedures that parties can voluntarily agree to use, including ADR Chambers, ADRIC, and the CAA. Other institutions, including the ICDR, have expedited procedures for claims under a certain value.

### 51. Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?

In Canada, diversity is being actively promoted at multiple levels. Efforts to encourage diversity among arbitrators and counsel include creating detailed reports and working groups to identify ways to improve, holding conferences around diversity and inclusion, and offering targeted legal education opportunities.

### 52. Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?

There have not been any recent decisions considering setting aside an award that has been enforced internationally. However, within Canada, the Newfoundland and Labrador Supreme Court recently considered setting aside an arbitration award that was enforced in Ontario (Shoppers Drug Mart Inc. v. Retirement Home Specialists Inc., 2019 NLSC 44).

### 53. Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?

The issue of corruption has most recently been considered in R v Comparelli, 2020 QCCQ 8885, and R v Bebawi, 2020 QCCS 22. Foreign corruption is governed by the Corruption of Foreign Public Officials Act, and domestic corruption is governed by the Criminal Code. Under the Criminal Code, the prosecution has the burden of proving corruption beyond a reasonable doubt.

### 54. Have there been any recent court decisions in your country considering the judgments of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16), Republic of Moldava v Komstroy LLC (Case C-741/19) and Republiken Polen v PL Holdings Sarl (Case C-109/20) with respect to intra-

 

### European investor-state arbitration? Are there any pending decisions?

No.

### 55. Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?

No.

### 56. What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?

Measures taken in response to the COVID-19 pandemic varied amongst arbitral institutions. Generally, arbitral institutions facilitated and supported parties in conducting their arbitrations remotely.

### 57. Have arbitral institutions in your country implemented reforms towards greater use of technology and a more cost-effective conduct of arbitrations? Have there been any recent developments regarding virtual hearings?

Most institutions have digitalized administrative and procedural aspects of arbitration due to the COVID-19 pandemic. Some have also customized their video-conferencing platforms to provide the look and feel of an in-person hearing, along with enhanced security features to avoid public access to/dissemination of arbitration proceedings.

### 58. In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?

Yes. This topic is a current interest in Canada. In June 2021, the Supreme Court of Canada granted leave to appeal from a BCCA decision that held that arbitration agreements entered into pre-insolvency are not binding on the insolvent company's receiver (*Petrowest*). The SCC's judgment in *Petrowest* is currently under reserve and is likely to be released in the coming months.

### 59. Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?

No.

### 60. Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?

There have been several recent developments in Canada regarding climate-related cases. In March 2021, the Supreme Court of Canada confirmed the constitutionality of the federal Greenhouse Gas Pollution Pricing Act. There have also been several recent novel cases where citizens commenced lawsuits against the government for its contributions to climate change: Environnement Jeunesse (ENJEU) v. Canada (AG), 2021 QCCA 1871, La Rose v. Canada, 2020 FC 1008, and Misdzi Yikh v. Canada, 2020 FC 1059.

### 61. Has your country expressed any specific views concerning the work of the UNCITRAL Working Group III on the future of ISDS?

No.

### 62. Has your country implemented a sanctions regime (either independently, or based on EU law) with regard to the ongoing crisis in Ukraine? Does it provide carve-outs under certain circumstances (i.e., providing legal services, sitting as an arbitrator, enforcement of an award)?

Canada has imposed sanctions in response to the ongoing crisis in Ukraine. The regulations impose restrictions on engaging in any activity related to any property of designated persons or providing financial or related services to them, with limited exceptions. One exception is where financial services are required for a designated person to obtain legal services in Canada with respect to the application of any of the prohibitions in the Regulations.

 

### 63. Do the courts in your jurisdiction consider international economic sanctions as part of their international public policy? Have there been any recent decisions in your country considering the impact of sanctions on international arbitration proceedings?

Canadian courts have not commented on whether international economic sanctions are part of their international public policy. There are no recent decisions considering the impact of sanctions on international arbitration proceedings.

### 64. Have arbitral institutions in your country taken any specific measures to administer arbitration proceedings involving sanctioned individuals/entities? Do their rules address the issue of sanctions?

Arbitral institutions in Canada have not taken any specific measures regarding sanctioned individuals/entities.

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