COUNTRY COMPARATIVE GUIDES 2023

The Legal 500 Country Comparative Guides

Canada

INTERNATIONAL ARBITRATION

Contributor

Singleton Urquhart Reynolds Vogel LLP

Bruce Reynolds

Co-Managing Partner | breynolds@singleton.com

Sharon Vogel

Partner | svogel@singleton.com

Nicholas Reynolds

Associate | nreynolds@singleton.com

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

For a full list of jurisdictional Q&As visit **legal500.com/guides**

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 September 29, 2023, 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?

There 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. The Quebec *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?

No.

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. Similarly, in certain industries that involve a series of vertically integrated contracts (e.g. construction), it is not uncommon for subcontracts to contain “drag-along” provisions that compel subcontractors to participate in arbitration between a general contractor and owner under the prime contract.

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. Recently, in *Tessier v. 2428-8516 Québec inc.*, 2022 QCCS 3159, the Superior Court of Quebec may have expanded the court’s powers in this respect, as the court compelled a non-signatory to participate in an arbitration on the basis of the interests of justice and the principle of proportionality. Courts in common law provinces have not yet commented on, applied, or otherwise relied upon this decision.

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 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. 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.

17. 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.

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

The court may appoint an arbitrator on an 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.

19. 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.

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

A court of first instance in Ontario recently raised the issue of whether an arbitrator being retained by the same counsel or firm on multiple matters (even where those multiple matters are not related to each other) gives rise to a reasonable apprehension of bias. In *Aroma Franchise Company v Aroma Espresso Bar*, 2023 ONSC 1827, the Ontario Superior Court of Justice determined that an arbitrator's failure to disclose to the parties to one arbitration that he had been appointed by the same counsel to a second, unrelated arbitration gave rise to a reasonable apprehension of bias. This decision has caused some concern – there is a limited pool of highly-qualified arbitrators with subject matter expertise in specialized practice areas, such that arbitrators tend to be appointed by the same parties and/or counsel on multiple matters in those practice areas. This case is currently under appeal before the Court of Appeal for Ontario.

21. 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.

22. 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.

23. 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.

24. 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 lien proceeding to permit arbitration between the employer and the contractor based on a concern regarding a multiplicity of proceedings and prejudice to the subcontractor lien claimants; however, this case was arguably anomalous and is in any event inconsistent with subsequent appellate case law which supports stays of litigation even in circumstances where it would result in a multiplicity of proceedings (e.g. *Telus Communications Inc. v. Wellman*, 2019 SCC 19).

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

While an arbitrator has broad powers and may continue the proceedings without the respondent's participation and make an award on the evidence before it, 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 (however, see our answer above to Question 12 regarding Quebec courts).

26. 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. 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 (however, see the answer to Question #12 above regarding the state of the law in Quebec). Conversely, if the existing parties and the third party 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.

27. 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).

28. 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 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).

29. 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 in 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.

30. 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.

31. 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.

32. 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.

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.

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

Question answered above.

34. 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 Model Law jurisdictions. 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.

35. 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 COVID-19 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. While court backlogs have improved somewhat from the height of the pandemic, timelines for even straightforward court proceedings remain protracted compared to pre-pandemic timelines.

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

36. 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 (the "**SCC**") 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). In 2021, a minority of the SCC held that the standard of review for a question of law in an arbitral decision was correctness; however, as the majority decided not to weigh-in on this issue, the standard of review remains uncertain (*Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7). Although the SCC has not yet clarified the applicable standard of review, some lower courts have opined on the issue (e.g. *lululemon athletica canada inc. v. Industrial Color Productions Inc.*, 2021 BCCA 428 held that international arbitral awards set aside for lack of jurisdiction would be reviewed on a correctness standard and *Christie Building Holding Co. v. Shelter Canadian Properties Ltd.*, 2022 MBKB 239 held that pre-Vavilov law continued to apply and that the standard of review for arbitral awards was reasonableness). Generally, the standard of review will depend on the law of the seat (i.e. it varies from province to province).

37. 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.

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

Depending on the jurisdiction, certain domestic arbitration legislation provides that there may be a default right of appeal on questions of law, or a party may seek leave to appeal from a judge. By contrast, international arbitration legislation (consistent with the Model Law) does not allow for appeals.

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.

39. 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.

40. 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.

41. 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 and in the arbitrator bar more generally.

42. 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. Accordingly, this is one factor to consider when deciding to proceed with an *ad hoc* arbitration or an institutional one.

43. 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.

44. 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.

45. 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).

46. 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 with respect to an arbitral award was most recently considered in Toronto Standard Condominium Corp. No. 1466 v. Weinstein, 2021 ONSC 1306. 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.

47. 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. As the pandemic has drawn to a close, parties have typically adopted a hybrid approach whereby procedural meetings and case conferences proceed virtually, while merits hearings mostly proceed in-person.

48. 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.

49. 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. Notably, in a landmark decision, the Ontario Superior Court of Justice held that a *Canadian Charter of Rights and Freedoms* application against the Government of Ontario for actions taken related to climate change was a justiciable issue (*Mathur v. His Majesty the King in Right of Ontario*, 2023 ONSC 2316). Although the application was ultimately dismissed, this decision may have a significant impact on climate change litigation in Canada.

50. 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. The Alberta Court of King's Bench recently considered the impact of the Russian sanctions in an application to stay an enforcement order of an arbitral award where the award would be paid to a company controlled by a Russian designated entity (*Angophora Holdings Ltd. v. Ovsyankin*, 2022 ABKB 711). The Court dismissed the application and in its decision stated that while it is in the public interest to enforce the Russian sanctions, it would be contrary to the public interest to allow the sanctions to be used by a judgment debtor without any further recourse as a method of delaying execution of an arbitral award.

51. Has your country implemented any rules or regulations regarding the use of artificial intelligence, generative artificial intelligence or large language models in the context of international arbitration?

Broadly speaking, Canadian courts and arbitral institutions have not yet developed comprehensive rules or regulations regarding this issue. That being said, some Canadian courts have issued general practice directions that require parties to indicate how artificial intelligence has been used (if at all) in the drafting of court materials. Similarly, the Canadian Judicial Council (which performs an oversight role of Canadian judges) is in the process of drafting guidelines for the use of artificial intelligence by judges. Conversely, as of the date of this publication, arbitral institutions and arbitral legislation have not yet taken or set out any similar steps.

Contributors

Bruce Reynolds
Co-Managing Partner
breynolds@singleton.com

Sharon Vogel
Partner
svogel@singleton.com

Nicholas Reynolds
Associate
nreynolds@singleton.com