Fraternal Twins: An Overview of Arbitration Law in the U.S. and Canada

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INTRODUCTION

The United States shares many things with Canada, including a 5,525 mile border, the English language, and professional sports leagues. The United States and Canada have also incorporated arbitration into their legal regimes in similar manners. However, a number of important differences exist of which companies doing business in North America and their counsel should be aware.

This article addresses four important issues that parties doing business in North America should consider when drafting an arbitration clause:

1. Whether the arbitration clause is governed by federal or state law (in the U.S.), or federal or provincial law (in Canada);
2. Whether the arbitration will be international or domestic;
3. Whether institutional or ad hoc rules will apply; and
4. The extent to which class actions can be accommodated or excluded.

These issues should be fully understood and appreciated by contract drafters to ensure that the arbitration clause meets the expectations of the parties.

SOURCES OF LAW

United States: Arbitration law in the United States is codified through three mechanisms: federal law, state law, and international agreements. The United States is a federal system, and therefore the arbitration regimes at the federal and state levels differ to a certain extent.

The principal piece of federal legislation is the Federal Arbitration Act (“FAA”). Passed in 1925 and applicable in both federal and state courts, the FAA regulates arbitrations in which the underlying transaction involves “interstate commerce,” which is defined as “commerce among the several States or with foreign nations.” The FAA therefore applies to both domestic and international arbitration. The FAA is divided into three chapters. The first chapter lays the basic groundwork for arbitration procedure and court enforcement. The second chapter is the implementing legislation for the New York Convention, which regulates “the recognition and enforcement of arbitral awards made in the territory
of a State other than the State where the recognition and enforcement of such awards are sought.” The third chapter is the implementing legislation for the Panama Convention, which regulates the conduct of international commercial arbitrations and the enforcement of arbitral awards as between 19 members of the Organization of American States. The federal government has not adopted the UNCITRAL Model Law, but federal courts have interpreted the FAA consistently with the UNCITRAL Model Law.

At the individual state level, arbitration acts govern arbitrations with underlying transactions that take place completely within that state. Most states have adopted some version of the Uniform Arbitration Act, and some have adopted variations of the UNCITRAL Model Law.

The United States is a common law jurisdiction, and therefore case law exists as a source of law on arbitration at both the federal and state levels. For example, the U.S. Supreme Court recently held that Section 1 of the FAA exempting “contracts of employment” from regulation “capture[s] any contract for the performance of work by workers” and therefore includes independent contracting agreements.[1]

The United States has entered into several international agreements regarding arbitration. The U.S. is a party to the New York Convention, the Panama Convention, and the ICSID Convention. The U.S. also has included arbitration clauses in a number of its free trade agreements (“FTAs”) and bilateral investment treaties (“BITs”).

**Canada:** Like the United States, Canada is a federal system, with parallel federal and provincial arbitration regimes. In contrast to the United States, however, the key legislation governing arbitration in Canada is found primarily at the provincial level – rather than the federal – level. While a federal arbitration statute does exist, it applies only in limited circumstances where at least one of the parties to the arbitration is the Crown, a federal departmental corporation, or a Crown corporation. The legislation governing Canadian arbitrations is largely the realm of the provinces, which have enacted discrete statutes pertaining to both international and domestic arbitrations.

Each province and territory has adopted legislation applicable to international commercial arbitration between private parties of different countries.[4] With the exception of Quebec, each province and territory has adopted the UNCITRAL Model Law either wholesale or in modified form. In Quebec, Canada’s only civil law jurisdiction, arbitration is governed by the Civil Code of Quebec and the Quebec Code of Civil Procedure.[5]

Domestic arbitrations between two or more Canadian parties fall within a separate legislative regime. In addition to international arbitration statutes, all provinces and territories have adopted separate legislation governing domestic arbitration.[4] These statutes vary from province to province, particularly on issues such as the validity of contracting out of statutory procedures, the power of courts to stay court proceedings in favor of arbitration, the consolidation of arbitration proceedings, the relationship between mediation and arbitration, and the right to appeal.

Canadian arbitration law also involves international agreements. Like the United States, Canada has ratified the New York Convention and the ICSID Convention. Arbitration provisions are also contained in Canada’s FTAs and BITs.

**ARBITRATION RULES**

**United States:** Arbitration rules in the United States ultimately derive from the will of the parties. The FAA provides some foundational rules for arbitration proceedings such as requiring that agreements be in writing,[7] but leaves much of the details to the parties. On numerous occasions, the FAA only prescribes
rules when the parties have not agreed on an issue. For example, the FAA outlines a method for choosing arbitrators only in the absence of party agreement. \[8\]

The FAA provides some guidance on evidence and the review process. Regardless of the parties’ agreement, the FAA allows parties to “summon . . . any person to attend before them . . . as a witness and . . . to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case.”\[9\] If the parties wish to have a more elaborate discovery process, they must incorporate such a provision into their arbitration agreement or subsequently agree. In terms of review, the FAA allows courts to vacate an arbitral award only on limited grounds such as “corruption, fraud, or undue means.”\[10\]

Parties have the option of conducting an ad hoc arbitration or administering an arbitration through any number of arbitration institutions. Preeminent institutions in the United States include the International Chamber of Commerce (“ICC”), JAMS, the International Institute for Conflict Prevention & Resolution (“CPR”), and the American Arbitration Association (“AAA”) and its international arm, the International Centre for Dispute Resolution (“ICDR”). Each institution has arbitration rules that address, among other things, constituting the tribunal, challenging arbitrators, and document production. Some of these rules are broadly the same across institutions, while others differ based on the institution’s policy choices.

**Canada**: The formal requirements to enter into an arbitration agreement in Canada are minimal. Arbitration agreements may be freestanding documents or included as clauses to an existing contract. Legislation governing international arbitrations which incorporate the UNCITRAL Model Law typically require that a binding arbitration agreement be in writing and signed by the parties. The formal requirements for domestic arbitration agreements are found in provincial legislation, which differ between the provinces. For instance, while most provinces require arbitration agreements to be in writing, this is not required under Ontario’s domestic arbitration statute. Canadian courts have long enforced arbitration agreements freely agreed to by the parties. Unless it is clear that the agreement is void, inoperative, or incapable of being enforced, Canadian courts typically defer to the parties’ intent and broadly interpret and enforce arbitration agreements.

As in the United States, parties to Canadian arbitrations have significant flexibility to choose their own arbitral procedure, including determining the scope of pre-hearing disclosure of documents and other evidence. Provincial statutes for domestic arbitrations establish some default procedural rules, but parties are generally permitted to opt out by selecting their own procedural rules. Depending on the specific legislative provisions, parties may waive procedural and other rights. Under legislation implementing the UNCITRAL Model Law, parties are able to tailor the procedural rules which will govern their arbitration. Arbitrators under the Model Law have broad procedural discretion, including the authority to order parties to produce documents and to request a court’s assistance in taking evidence. Canadian courts have been willing to lend their enforcement powers to facilitate arbitral proceedings, including by ordering witnesses to attend hearings, give evidence, or produce documents.

Parties may adopt a specific set of arbitration rules from an arbitral institution or may create their own ad hoc procedural rules. Canada has a strong tradition of ad hoc domestic arbitration as no truly national arbitral institution has existed until recently. The ADR Institute of Canada (“ADRIC”), based in Toronto, has adopted the National Arbitration Rules relating to domestic disputes and administers arbitrations under these rules. The ICC is also active in Canada, while the British Columbia International Commercial Arbitration Centre (“BCICAC”) is often used for arbitrations centered in Vancouver.
CLASS ACTIONS

United States: In the United States, class action arbitrations are governed by the consent of the parties. The U.S. Supreme Court has explained that due to the flexibility and contractual nature of arbitration agreements, parties can “specify with whom they choose to arbitrate their disputes"\(^4\) and courts and arbitrators must “give effect to the contractual rights and expectations of the parties.”\(^5\) Therefore, if parties explicitly allow for class actions in their arbitration agreements, those provisions are valid and must be enforced.

In cases where an arbitration agreement is silent on class actions, the U.S. Supreme Court has held that an arbitrator cannot institute a class action because it would “change the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator.”\(^6\) For the same reason, an ambiguous arbitration agreement cannot provide “the necessary ‘contractual basis’ for compelling class arbitration.”\(^7\)

In the United States, agreements that waive class action rights are “valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.”\(^8\) The U.S. Supreme Court has prohibited the institution of a class action arbitration where an arbitration agreement has an explicit class action waiver.\(^9\)

Canada: In Canada, the law on the relationship between class actions and arbitrations is more uncertain than in the United States, including on the use of class action waiver clauses. Arbitration clauses are typically enforceable in the context of commercial contracts but may be unenforceable in the context of consumer contracts. Several Canadian provinces have amended their consumer protection statutes to limit the circumstances in which consumer disputes (including class actions) may be submitted to arbitration.\(^10\) Canadian courts have interpreted such legislation as permitting consumer class proceedings despite the existence of mandatory arbitration clauses in the underlying consumer contracts.\(^11\) In a recent class action decision involving both business and consumer claimants, the Supreme Court of Canada affirmed that business customers remain bound by arbitration clauses in their contracts, even where the consumer claimants’ rights to avail themselves of the class action regime were explicitly preserved by statute and could not be vitiated by contract.\(^12\) While the use and permissible scope of arbitration clauses in employment contracts is the subject of ongoing litigation before the Supreme Court of Canada, parties should be mindful that such clauses may not be fully enforceable in the Canadian employment context by virtue of the governing employment legislation.\(^13\)

CONCLUSION

Several similarities – but also some notable differences – exist between the U.S. and Canadian arbitration regimes. By properly understanding these similarities and differences, in particular with respect to sources of law, arbitration rules, and class actions, contract drafters can ensure that the arbitration clause fully meets the expectations of the parties.

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5 Civil Code of Procedure, R.S.Q., c C-25 (as am.), Arts. 940-952; Québec Civil Code, S.Q. 1991, c 64, Arts. 2638-2643, 3121, 3133, 3148, 3168.


8 Id. at § 5.

9 Id. at § 7.

10 Id. at § 10.


16 Epic Systems Corp. v. Lewis, No. 16-285, slip op. at 8 (May 21, 2018).

17 For instance, the Ontario Consumer Protection Act, S.O. 2002, Chapter 30, Schedule A, prohibits a waiver of the right to participate in class actions (s. 8(1)) and expressly exempts consumer contracts from mandatory arbitration (s. 7(1)).


19 Telus Communications Inc. v. Wellman, 2019 SCC 19.

20 The Supreme Court of Canada has granted leave to appeal from the decision in Heller v. Uber.
Technologies, 2019 ONCA 1.

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