

# International Arbitration Comparative Guide

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# International Arbitration Comparative Guide

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Canada



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Egypt Nigeria Sweden
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# 1. Legal framework

1.1 What is the relevant legislation on arbitration in your jurisdiction? Are there any significant limitations on the scope of the statutory regime – for example, does it govern oral arbitration agreements?

Canada has a federal legal system and the legislation governing arbitration is primarily found at the provincial/territorial level (as opposed to the federal level). Each province has separate legislation for international and domestic arbitration.



# 1.2 Do any special regimes or provisions apply to specific types of alternative investment funds?

With regard to international arbitration, each province and territory (with the exception of Quebec, discussed below) has adopted the UNCITRAL Model Law, with corresponding legislation to adapt the model law (United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985 (Vienna: United Nations, 1985), adopted by Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Yukon, Nunavut and Northwest Territories (under Nunavut's legislation); and United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006 (Vienna: United Nations, 2006), adopted by British Columbia and Ontario.) For instance, British Columbia and Ontario modified the model law to exclude interprovincial arbitration from its application (International Commercial Arbitration Act, RSBC 1996, c 233; International Commercial Arbitration Act, RSO 1990, c I-9). The provincial international arbitration acts require arbitration agreements to be in writing (International Commercial Arbitration Act, RSBC 1996, c 233; International Commercial Arbitration Act, RSA 2000, c 1-5; International Commercial Arbitration Act, SS 1988-1989, c I-10.2; International Commercial Arbitration Act, CCSM, c C-151; International Commercial Arbitration Act, RSO 1990, c I-9; Civil Code of Procedure, R.S.Q., c C-25 (as am.), Articles 940-952; Québec Civil Code, S.Q. 1991, c 64, Articles 2638-2643, 3121, 3133, 3148 and 3168; International Commercial Arbitration Act, SNB 1986, c I-12.2; International Commercial Arbitration Act, RSNS 1989, c 234; International Commercial Arbitration Act, 1988, c I-5; International Commercial Arbitration Act, RSN 1990, c I-15; International Commercial Arbitration Act, RSNWT 1988, c I-6; International Commercial Arbitration Act, RSY 2002, c 123).

All provinces and territories have enacted legislation governing domestic arbitration agreements, the appointment of arbitrators, and the conduct and jurisdiction of arbitral tribunals (Arbitration Act, RSA 2000, c A-43; Arbitration Act, RSBC 1996, c 55; Arbitration Act, CCSM c A120; Arbitration Act, RSNB 2014, c 100; Arbitration Act, RSNL 1990, c A-14; Arbitration Act, RSNS 1989, c 19; Arbitration Act, 1991, SO 1991, c 17; Arbitration Act, RSPEI 1988, c A-16; Arbitration Act, 1992, SS 1992, c A-24.1; Arbitration Act, RSNWT 1988, c A-5; Arbitration Act, RSY 2002, c 8; Civil Code of Procedure (RSQ, c C-25 (as am), Articles 940-952); Quebec Civil Code (SQ 1991, c 64, Articles 2638-2643, 3121, 3133, 3148 and 3168)). The legislation varies among provinces, particularly with respect to appeal rights and contracting-out of certain procedural provisions. Whether a domestic arbitration agreement must be in writing varies by province and context (for example, Newfoundland, Northwest Territories and Nunavut, Yukon, Prince Edward Island and Quebec require arbitration agreements to be in writing. Meanwhile, the relevant statutes in Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan expressly state that arbitration agreements need not be in writing).

There is one federal statute, which is based on the UNCITRAL Model Law (Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp). This legislation applies only in relation to matters where at least one of the parties to the arbitration is the crown, a federal departmental corporation or a crown corporation, or in relation to a maritime or admiralty matter (International Commercial Disputes: A Guide to Arbitration and Dispute Resolution in APEC Member Economies (Singapore: APEC Secretariat, 1999)).

In Quebec, arbitration is governed by the Civil Code of Quebec (CCQ) and the Code of Civil Procedure (CCP). Although Quebec has not incorporated the model law, the relevant legal provisions in the CCP and in the CCQ are essentially in line with international conventions. The criteria for the validity and interpretation of an arbitration agreement are set out in Articles 2638 to 2642 of the CCQ and correspond to Sections 7(1) and 7(2) of the model law. The conduct of the arbitration is regulated by the CCP, which also covers the recognition and enforcement of the arbitration award. The provisions of the CCP apply when no agreement to the contrary has been concluded.



# 1.2 Does this legislation differentiate between domestic arbitration and international arbitration? If so, how is each defined?

The legislation governing arbitration is primarily found at the provincial/territorial level (as opposed to the federal level), and is divided between international and domestic arbitration.

With regard to international arbitration, each province and territory has adopted the UNCITRAL Model Law and adapted it (Corporacion Transnacional de Inversiones, SA de CV v STET International, SpA, [1999] OJ No 3573, 45 OR (3d) 183 (Ont SCJ)).

In addition, each province has legislation which regulates domestic commercial arbitrations. These laws vary from province to province, particularly with respect to appeal rights, contracting-out of procedural provisions, the power of courts to issue a stay of proceedings, the consolidation of arbitration proceedings and the relationship between mediation and arbitration (Commercial Arbitration Act (RSC 1985, c 17 (2nd Supp)) (Canada); International Commercial Arbitration Act (RSBC 1996, c 233) (British Columbia); International Commercial Arbitration Act (RSA 2000, c 1-5) (Alberta); International Commercial Arbitration Act (SS 1988-1989, c I-10.2) (Saskatchewan); International Commercial Arbitration Act (CCSM, c C-151) (Manitoba); International Commercial Arbitration Act (RSO 1990, c I-9) (Ontario); Civil Code of Procedure (RSQ, c C-25 (as am), Articles 940-952); Quebec Civil Code (SQ 1991, c 64, Articles 2638-2643, 3121, 3133, 3148 and 3168) (Quebec); International Commercial Arbitration Act (SNB 1986, c I-12.2) (New Brunswick); International Commercial Arbitration Act (RSNS 1989, c 234) (Nova Scotia); International Commercial Arbitration Act (1988, c I-5) (Prince Edward Island); International Commercial Arbitration Act (RSN 1990, c I-15) (Newfoundland and Labrador); International Commercial Arbitration Act (RSNWT 1988, c I-6) (Northwest Territories, and Nunavut under the Nunavut Act (SC 1993 c 28, s 29); International Commercial Arbitration Act (RSY 2002, c 123) (Yukon Territory)).

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In Quebec, Chapter VIII of the CCP provides that international trade interests are considered to be involved in arbitration proceedings in certain circumstances.

If international trade interests, including interprovincial trade interests, are involved in arbitration proceedings, consideration may be given, in interpreting Chapter VIII of the CCP, to the model law, its amendments and certain related documents.

# 1.3 Is the arbitration legislation in your jurisdiction based on the UNCITRAL Model Law on International Commercial Arbitration?

Yes, international arbitration legislation in Canada and its provinces and territories is modelled on the UNCITRAL Model Law (United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985 (Vienna: United Nations, 1985), adopted by Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland, Yukon, Nunavut and Northwest Territories (under Nunavut's legislation); and United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with Amendments as Adopted in 2006 (Vienna: United Nations, 2006), adopted by British Columbia and Ontario).



The one federal statute is based on the UNCITRAL Model Law (Commercial Arbitration Act, RSC1985, c 17 (2nd Supp)). This legislation applies only in relation to matters where at least one of the parties to the arbitration is the crown, a federal departmental corporation or a crown corporation or in relation to a maritime or admiralty matter (Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp) at Article 5(2)).

In June 1986 Canada became the first country to adopt the UNCITRAL Model Law.

Although the Quebec legislature did not choose to adopt the model law in 1986, when the Quebec legislature introduced a complete reform of the arbitration provisions of the CCP, the substance of several concepts was incorporated into the legislation, which is more compatible with the style of the civil law tradition. At the time of their adoption, Quebec's National Assembly made it very clear that these concepts would constitute the "faithful reflection" of the model law. In principle, it is therefore important always to interpret the rules relating to conventional arbitration in force in Quebec, taking into account the relevant transnational sources.

In 2016, while the latest reform of the CCP was taking place, the Quebec legislature maintained its position by choosing to not adopt the model law, but nevertheless reflected its concepts in the drafting of the legislation.

### 1.4 Are all provisions of the legislation in your jurisdiction mandatory?

Not all provisions of the various arbitration legislation are mandatory. Generally, parties are free to define the nature and scope of disputes they wish to have determined by arbitration and the procedure to be followed. However, there are certain mandatory requirements of any arbitration seated in a Canadian jurisdiction. For example, the parties must be treated equally and be given a full opportunity to present their cases (Arbitration Act, RSA 2000, c A-43, ss 3, 19; Arbitration Act, SM 1997, c 4, CCSM, c A120, ss 3, 19; Arbitration Act, 1991, SO 1991, c 17, ss 3 [rep & sub 2006, c 1, s 1(3)], 19; Arbitration Act, 1992, SS 1992, c A-24.1, ss 4(b), 20).

Article 6 of the CCP enshrines the principle that the applicable procedure is primarily the responsibility of the parties and the third party involved. However, the rules of Title II, "Arbitration" of Book VII, ¡§Private Modes of Conflict Prevention and Resolution; of the CCP supplement (if necessary) the choices of the parties. In that regard, Article 622 of the CCP provides that the parties cannot, through their agreement, depart from the provisions of Title II which determine the jurisdiction of the court, or from those relating to the application of the adversarial principle or the principle of proportionality, the right to receive notification of a document, or the homologation or the annulment of an arbitration award.

Other issues from which parties cannot derogate include the procedure for the appointment of arbitrators, their dismissal and recognition by the court of their jurisdiction. The chapters relating to court approval and the application for annulment of the arbitration award are of public policy (the CCQ uses the term 'public policy'). Article 643 of the CCP, which provides that the judge may make an order to safeguard the rights of the parties in the context of a request for rectification of the arbitration award, is also of public policy. These public policy provisions are put in place to ensure the independence and impartiality of the arbitrators - essential elements to a fair and equitable judicial procedure.

# 1.5 Are there any current plans to amend the arbitration legislation in your jurisdiction?

As of September 2018, there are no bills in any of the provincial or territorial legislative assemblies that would amend any of the arbitration acts. Federally, Bill C-79 was at its first reading as of 14 June 2018. It would amend the Commercial Arbitration Act to incorporate reference to the Trans-Pacific Partnership Agreement.



# 1.6 Is your jurisdiction a signatory to the New York Convention? If so, have any reservations been made?

Canada is a signatory to the New York Convention. The provincial legislatures and the federal Parliament have enacted legislation to apply the New York Convention to commercial relationships, other than in Quebec, where no such limitation applies.

#### 1.7 Is your jurisdiction a signatory to any other treaties relevant to arbitration?

In November 2013 Canada ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Pierre Bienvenu and Martin Valasek, Arbitration Guide: Canada (Montreal: IBA Arbitration Committee, February 2018) (pdf)).

#### 2 Arbitrability and restrictions on arbitration

#### 2.1 How is it determined whether a dispute is arbitrable in your jurisdiction?

In Canada, arbitrability is determined largely by common law considerations. That is, the right to arbitration and the force of arbitral awards are contractual obligations based on the mutual intention of the parties. Public policy exemptions to arbitrability have narrowed in recent years, especially in the international arbitration context (for example, Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc, 723 F 2d 155 (1st Cir 1983); Scherk v Alberto-Culver Co, 417 US 506 (1974)). Similarly, public policy considerations do not preclude arbitrators from hearing charter or constitutional arguments which may arise in the dispute (Douglas/Kwantlen Faculty Assn v Douglas College (1990), 52 BCLR (2d) 68 (SCC)).

Nonetheless, legislatures and courts in various provinces have ruled on the arbitrability of certain types of disputes. For example, in Quebec, disputes over the status and capacity of persons, family matters or other matters of public policy may not be submitted to arbitration (Quebec Civil Code, SQ 1991, c 64, s 639). The Supreme Court of Canada in Seidel v Telus Communications Inc acknowledged that certain types of relief in British Columbia's Business Practices and Consumer Protection Act are available only through a superior court and are therefore not arbitrable ([2011] 1 SCR 531, at paras 7, 34, 41). The Ontario Consumer Protection Act similarly precludes mandatory arbitration clauses in consumer contracts, as defined under that legislation (Consumer Protection Act, SO 2002, c 30, s 7(2)). Advanced Explorations Inc v Storm Capital Corp summarises the principles underpinning cases that limit arbitrability: "if the legislature wishes to preclude an issue from being the subject of arbitration, it must expressly state this intention ... it is not enough that the subject matter over which arbitration is sought be subject to regulation or concern the public order." (2014 CarswellOnt 8794, 2014 ONSC 3918 (Ont SCJ), at paras 61-72).

Legislative limits on the arbitrability of disputes are imposed in Quebec. For example, Section 11.1 of the Consumer Protection Act provides that any stipulation that obliges the consumer to refer a dispute to arbitration is prohibited. There are other constraints preventing parties from submitting their disputes to arbitration, including constitutional constraints for disputes involving federal or provincial charters.

Canadian courts rarely rely on arbitrability to refuse a stay and the question of arbitrability is largely a non-issue (Eiffel Developments Ltd v Paskuski, [2010] AJ No 1173, 2010 ABQB 619 (Alta QB)).



### 2.2 Are there any restrictions on the choice of seat of arbitration for certain disputes?

The parties have significant flexibility when selecting the arbitration's seat. The seat is often, but need not necessarily be, the jurisdiction where the hearing takes place. The seat may also, but need not necessarily be, in the same legal jurisdiction as the governing law of the contract. In Quebec, the Civil Code of Quebec and the Code of Civil Procedure are silent about the choice of seat for arbitration.

#### 3. Arbitration agreement

### 3.1 What are the validity requirements for an arbitration agreement in your jurisdiction?

Under Canada's federal arbitration legislation, an international arbitration agreement must be in writing (Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp), Sched 1, art 7(2) [renumbered 2012, c 26, s 25]). The right to arbitration and the binding force of arbitral awards are contractual obligations based on the mutual intention and agreement of the parties. The principles of formation and interpretation of contract apply (UNCITRAL Model Law, Article 7(2)).

The UNCITRAL Model Law, which forms the basis for provincial international arbitration legislation, requires an arbitration agreement to be in writing in one of the following forms (UNCITRAL Model Law, Article 7(2)):

- a document signed by the parties;
- an exchange of letters, telex, telegrams or other means of telecommunication that provide a record of the agreement; or
- an exchange of pleadings in which the existence of an agreement is alleged and not denied.

The 2006 amendments to the UNCITRAL Model Law specifically provide that the requirement that an arbitration agreement be in writing can be met by electronic communication (2006 Amendments to UNCITRAL Model Law, Article 7(4)). In other words, the arbitration agreement can be concluded orally, by conduct or by other means, provided that its content is recorded. The requirement that the agreement be in writing can be met through the use of electronic communications, including electronic mail.

In relation to domestic arbitration, the formal requirements are set out in provincial legislation. Agreement to arbitrate is required – in some provinces, agreements need not be in writing, whereas in others, written agreements are required (Arbitration Act (Alberta), RSA 2000, c A-43, ss 1, 2; Arbitration Act (British Columbia), RSBC 1996, c 55, ss 1, 2; Arbitration Act (Manitoba), CCSM c A120, ss 1, 2; Arbitration Act (New Brunswick), RSNB 2014, c 100, ss 1, 2; Arbitration Act (Newfoundland and Labrador), RSNL 1990, c A-14, ss 2, 3; Arbitration Act (Nova Scotia), RSNS 1989, c 19, ss 2, 4; Arbitration Act, 1991 (Ontario), SO 1991, c 17, ss 1, 2; Arbitration Act (Prince Edward Island), RSPEI 1988, c A-16, ss 2, 4; Civil Code of Quebec, CCQ-1991, art 2638; Arbitration Act, 1992 (Saskatchewan), SS 1992, c A-24.1, ss 2, 3; Arbitration Act (Northwest Territories), RSNWT 1988, c A-5, ss 1, 2; Arbitration Act (Yukon), RSY 2002, c 8, ss 1, 2). In Ontario, for example, an arbitration agreement need not be in writing.

The key to a valid multi-party arbitration agreement is the consent of all of the parties involved, ideally within the same arbitration agreement. The fact that a number of parties have signed similar contracts for the same project, each containing an identical arbitration clause, may not be sufficient to demonstrate consent to a single arbitration. The arbitration agreement should also provide clearly for multi-party arbitrations in order to ensure one consolidated proceeding (Pierre Bienvenu and Martin Valasek, Arbitration Guide: Canada (Montreal: IBA Arbitration Committee, February 2018) (pdf)).



In Quebec, the Civil Code of Quebec (CCQ) specifies that an arbitration agreement shall be evidenced in writing. Section 2640 of the CCQ provides that the arbitration agreement is deemed to be evidenced in writing if it is contained in an exchange of communications which attests to its existence or in an exchange of proceedings in which its existence is alleged by one party and is not contested by the other party.

# 3.2 Are there any provisions of legislation or any other legal sources in your jurisdiction concerning the separability of arbitration agreements?

All common law provinces have incorporated into their international arbitration legislation Article 16 of the UNCITRAL Model Law, which provides that an arbitration clause must be treated independently from the other terms of the contract in which it is contained, and that the nullity of the contract does not entail, by operation of law, the invalidity of the arbitration clause (UNCITRAL Model Law, Article 16).

As for domestic arbitration, the common law doctrine of separability has been incorporated into several provincial arbitration acts (Arbitration Act (Alberta), RSA 2000, c A-43, s 17(3); Arbitration Act (Manitoba), CCSM c A120, s 17(3); Arbitration Act (New Brunswick), RSNB 2014, c 100, s 17(2); Arbitration Act, 1992 (Saskatchewan), SS 1992, c A-24.1, s 18(3); Civil Code of Quebec, CCQ-1991, art 2642). Courts in provinces that have not included separability in their respective arbitration acts have applied the doctrine nonetheless. According to case law, the part of the contract containing an arbitration agreement is considered to be a separate and independent contract (James v Thow [2005] BCJ No 1292, 5 BLR (4th) 315 (BCSC); Hebdo Mag Inc v 125646 Canada Inc, [1992] BCJ No 2960, 22 BLR (2d) 72 (BCSC)).

In Quebec, the CCQ provides that an arbitration agreement contained in a contract is considered to be an agreement separate from the other clauses of the contract. The CCQ also provides that in the situation where the arbitrators find the contract to be null, the arbitration agreement is not for that reason rendered null.

# 3.3 Are there provisions on the seat and/or language of the arbitration if there is no agreement between the parties?

Parties are free to agree on the seat and language of an arbitration in their agreement (Commercial Arbitration Act (RSC, 1985, c 17 (2nd Supp)), Ch 5 Sch 1 Arbitration Act, 1991 (Ontario), c 17, s 22 (1)). Failing this, the tribunal will exercise its discretion to determine the procedure to be followed in an arbitration, including both the seat and language. The limitation on this power is that the parties must have an equal opportunity to make their case and meet the one against them (Moreau-Bérubé v New Brunswick (Judicial Council), [2002] SCJ No 9, [2002] 1 SCR 249 (SCC); Dr Q v College of Physicians and Surgeons of British Columbia, [2003] SCJ No 18, [2003] 1 SCR 226 (SCC); Canadian Union of Public Employees, Local 2404 v Grand Bay-Westfield (Town), [2005] NBJ No 404, 293 NBR (2d) 211 (NBQB)).

In Quebec, the law applicable to arbitration is provided for in the CCQ under Article 3121, which states that in the absence of a designation by the parties, an arbitration agreement is governed by the law applicable to the principal contract or, where that law invalidates the agreement, by the law of the state where arbitration takes place. However, the parties remain free to designate another applicable law and their will then prevails.

In the absence of an explicit choice, the arbitrators themselves must determine the seat.



In Quebec, the Code of Civil Procedure and the CCQ are silent about the choice of language. Arbitration agreements often specify the language in which the award will be made, as well as the language that will be used during the proceedings. The choice of language is left to the arbitration tribunal and will generally be the language used in the commercial contract at the source of the dispute between the parties.

### 4. Objections to jurisdiction

# 4.1 When must a party raise an objection to the jurisdiction of the tribunal and how can this objection be raised?

Typical objections to jurisdiction are based on arguments that the subject matter of the dispute is not arbitrable because it falls outside the scope of the arbitration agreement or because of public policy. Canadian jurisdictions recognise the competence-competence principle, which provides that the arbitral tribunal has the authority to determine its own jurisdiction, making the arbitral tribunal the first port of a call for a jurisdictional objection. The court can then determine whether the dispute is arbitrable (United Mexican States v Cargill, Inc, [2011] OJ No 4320 at para 45, 2011 ONCA 622 (Ont CA), citing Dunsmuir v New Brunswick, [2008] SCJ No 9 at para 59, 2008 SCC 9 (SCC)).

Time limits to make jurisdictional objections will depend on the local procedural rules. For example, Ontario legislation provides no specific time limit beyond the UNCITRAL Model Law's requirement that the application be brought no later than when submitting a first statement on the substance of the dispute. A party will be considered to have waived its right to ask for a stay of proceedings when submitting its first statement on the substance of the dispute (UNCITRAL Model Law, Article 8).

### 4.2 Can a tribunal rule on its own jurisdiction?

A tribunal can rule on its own jurisdiction. The competence-competence principle is applicable in Canada ([2011] 1 SCR 531, at para 114).

# 4.3 Can a party apply to the courts of the seat for a ruling on the jurisdiction of the tribunal? In what circumstances?

Court review of jurisdiction is governed by the applicable arbitration legislation. The domestic acts and the UNCITRAL Model Law provide for court review of the arbitrator's decision that he or she has jurisdiction to conduct the arbitration. This includes jurisdiction over the entire substance of the case. A party cannot go directly to the courts with a challenge; it must first apply to the tribunal. If unsuccessful, the party may then request, within 30 days, that a court decide the matter (J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) p 424). In international arbitration, challenging the tribunal's jurisdiction should generally be done before the first submission of the respondent. Challenging the scope of the tribunal's authority must be done as soon as the subject matter is raised during the proceedings (UNCITRAL Model Law, Article 16(2)).

With regard to the domestic acts, a party that wishes to challenge the tribunal's jurisdiction must make the objection by the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal. If a party has an objection during the proceeding, it must make it known as soon as possible, keeping in mind that the tribunal will then decide its jurisdiction. A party will have the right to make an application to the court to decide the matter while the arbitration is proceeding only if the tribunal rules on the objection as a preliminary question (J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) p 424).



### 5. The parties

### 5.1 Are there any restrictions on who can be a party to an arbitration agreement?

Parties to an arbitration agreement are determined in accordance with ordinary principles of contract law. Therefore, privity of contract limits who can be a party to an arbitration agreement. Persons that do not have the capacity to contract cannot submit to arbitration (J Brian Casey, International and Domestic Commercial Arbitration (Scarborough: Carswell, 1993-99, loose-leaf) at para 3.10(2)(a)).

Further, persons cannot be bound to arbitration proceedings without their consent (J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) at para 3.10(2)(d)).

There is no legislative regime in Canada enabling the joinder of third parties to an arbitration. In certain circumstances, non-parties can be bound through the operation of doctrines of contract law such as agency and assignment (MJ Mustill and SC Boyd, The Law and Practice of Commercial Arbitration in England, 2nd ed (London: Butterworths, 1989), at pp137-138). Non-parties may also be bound:

- when a contract between a party and non-party incorporates the arbitration clause by reference;
- when a non-party is in a parent-subsidiary corporate relationship with a party and it is justified to hold one legally accountable for the other; or
- by estoppel (DNM Systems Ltd v Lock-Block Canada Ltd, 2015 CarswellBC 3179, 2015 BCSC 2014 at para 77).

Under Section 11.1 of the Consumer Protection Act, a Quebec consumer cannot be forced to go to arbitration whether it is an internal or cross-border transaction. In all cases, the consumer will have the choice to have the dispute settled by the judicial system, notwithstanding the presence of an arbitration clause in the contract concluded between the consumer and the merchant. Employees in Quebec benefit from generally similar protections.

# 5.2 Are the parties under any duties in relation to the arbitration?

Under the voluntary International Bar Association Guidelines, a party has a duty to inform the arbitrator, other parties and the arbitration institution about any direct or indirect relationship between it (or a related company) and the arbitrator. Parties must do so at their own initiative before the proceeding commences, or as soon as they become aware of the relationship (International Bar Association, "IBA's Guidelines on Conflicts of Interest in International Arbitration", www.ibanet.org). Neither the UNCITRAL Model Law nor the domestic statutes contain the same requirements for parties to disclose any relationship with the arbitrator(s). The onus is typically on the arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her impartiality or independence (UNCITRAL Model Law, Art 12(1); Commercial Arbitration Act (RSC, 1985, c 17 (2nd Supp), Ch 5 Sch 1, Art 12(1); International Commercial Arbitration Act, RSBC 1996, c 233, s 12(1)).

While it is unclear whether a duty of confidentiality arises in respect to international arbitrations, there is a prevalent assumption that parties are under a duty of confidentiality with respect to communications and documents disclosed or prepared in relation to arbitration, except when disclosure is agreed to by the parties or required by law. However, an international arbitration cannot be assumed to be confidential in the absence of an express agreement or applicable rule in the procedural rules selected by the parties. UNCITRAL's Notes on Organizing Arbitral Proceedings articulate that parties cannot assume that a duty of confidentiality will be recognised in a given jurisdiction unless the parties' agreement or arbitration rules expressly address confidentiality (UNCITRAL's Notes on Organizing Arbitral Proceedings, Section 6, at para 31).



With respect to arbitration awards, any duty incumbent on the parties to obey the award arises solely from the contract of submission (Winter v White (1819), 1 Brod & Bing 350 at p357, 129 ER 758).

There is no clear duty to comply with an arbitration agreement. One party's failure to comply with its obligations pursuant to an arbitration agreement does not exempt the other party from continuing with the arbitration process; the arbitrator may address the breach of the arbitration agreement (J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) at para 3.14, citing Bremer Vulkan Schiffbau and Maschinenfabrik v South India Shipping Corp, [1981] AC 909 (HL); Paal Wilson & Co. A/S v Partenreederei Hannah Blumenthal, [1983] 1 All ER 34 (HL)).

In Quebec, neither the Code of Civil Procedure (CCP) nor the Civil Code of Quebec (CCQ) contains provisions regarding any express duties on parties in relation to the arbitration.

### 5.3 Are there any provisions of law which deal with multi-party disputes?

The term 'multi-party' refers primarily to the situation where there is one contract, but more than two parties. The principal concern is ensuring equal treatment of all parties and creating mechanisms for joinder of third parties to an arbitral reference. There is no legislative regime in Canada enabling the joinder of third parties to an arbitration. In certain circumstances, non-parties can be bound through the operation of doctrines of contract law, such as agency and assignment (MJ Mustill and SC Boyd, The Law and Practice of Commercial Arbitration in England, 2nd ed (London: Butterworths, 1989), at pp37-138).

The term 'multi-contract' generally means that there are a number of contracts, possibly binding different parties. The main challenge is ensuring that all parties to the various contracts agree to consistent dispute resolution procedures, such as mechanisms for consolidation of proceedings. There is no national legislative provision providing for consolidation of claims in multi-contract scenarios; nor is there an applicable model provision under the UNCITRAL Model Law, which has been incorporated into the legislation of every province except Quebec. British Columbia, however, legislated a mechanism allowing for court-enforced consolidation, provided that the parties consent (International Commercial Arbitration Act, RSBC 1996, c 233, s 27(2)). In Quebec, neither the CCP nor the CCQ contains provisions that deal with multi-party disputes.

### 6. Applicable law issues

# 6.1 How is the law of the arbitration agreement determined in your jurisdiction?

In accordance with the principle of party autonomy, arbitral tribunals generally defer to the parties' choice of the substantive law to be used in resolving disputes, if such a choice has been designated (See UNCITRAL Model Law, Art 28(1), Commercial Arbitration Act (RSC, 1985, c 17 (2nd Supp), Ch 5 Sch 1, Art 28(1). See also domestic arbitration statutes, including Arbitration Act, 1991, SO 1991, c 17, s 32(1); Arbitration Act, SNB c A-10.1, s 32(1); Arbitration Act, RSA 1991, c A-43.1, s 32(1); Arbitration Act, SMS 1997, c 4 (CCSM c A120), s 32(1); Commercial Arbitration Act, SNS 1999, c 5, s 35(1); and Arbitration Act, 1992, SS 1992, A-24.1, s 33(1)).

Parties may address choice of law in a pre-dispute agreement or once the dispute has arisen via a submission agreement or terms of reference for the arbitrator (E Gaillard and J Savage, eds, Fouchard, Gaillard, Goldman on International Commercial Arbitration (The Hague: Kluwer Law International, 1999), at p790).



# 6.2 Will the tribunal uphold a party agreement as to the substantive law of the dispute? Where the substantive law is unclear, how will the tribunal determine what it should be?

Per provincial domestic legislation, an arbitral tribunal generally defers to the parties' choice of the substantive law to be used in resolving the dispute, if such a choice has been designated. However, the parties' choice may be circumscribed by reasons of public policy, by the effect of mandatory rules in a relevant jurisdiction or if the choice was designed to evade mandatory provisions of the legal system with the closest connection to the subject matter of the dispute (H Yu, "Choice of Laws for Arbitrators: Two Steps or Three" (2001), 4(5) Int ALR 152, at pp157-8; N Voser, "Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration", (1996), 7 Am Rev Int'l Arb 319).

Consistent with the UNCITRAL Model Law (UNCITRAL Model Law, Article 28(2)), domestic legislation in most provinces provides that if no rules of law are designated by the parties, in deciding a dispute a tribunal should apply the rules of the law it considers appropriate. British Columbia's International Commercial Arbitration Act (RSBC 1996, c 233, s 28(3)) is more liberal, allowing the tribunal to apply the rules of law it considers to be "appropriate given all the circumstances surrounding the dispute". In determining what rules are appropriate, tribunals in modern disputes have engaged in various approaches, including the cumulative approach, jurisdiction theory, the proper law of the contract and the international conflict of laws system. These approaches represent a departure from the traditional method, in which tribunals applied the conflict of laws rules of the jurisdiction in which the arbitration occurred (G Herrmann, "The British Columbia Enactment of the UNCITRAL Model Law", in RK Paterson and BJ Thompson, eds, UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation (Toronto: Carswell, 1987), at p72).

### 7. Consolidation and third parties

# 7.1 Does the law in your jurisdiction permit consolidation of separate arbitrations into a single arbitration proceeding? Are there any conditions which apply to consolidation?

Separate arbitrations can be consolidated into a single arbitration proceeding, with the consent of the parties. Where the parties consent to consolidation, but cannot agree as to the choice of procedure or choice of arbitrators, the court has the power to order these specifics without explicit consent from the parties. Essentially, if the parties agree to the concept of consolidation, this gives the court broad power to order on the specifics of consolidation (SI Strong, "Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or Proper Equitable Measure" (1998), 31 Van J Transnat'l L 915 at p946). Despite this, the requirement for consent to the concept of consolidation may be changing in instances where the statute can be read broadly enough to permit otherwise.

In the international context, this issue of consolidation is not addressed in the UNCITRAL Model Law; however, all provincial international commercial arbitration legislation permits a court to order consolidation of arbitral proceedings on application by the parties. Whether consent is required for such an order varies by province.



The legislation in Ontario (International Commercial Arbitration Act, RSO 1990, c 1.9, s 8(1)) and British Columbia (International Commercial Arbitration Act, RSBC 1996, c 233, s 27.01) requires all parties to agree to the consolidation of proceedings; whereas the Alberta International Commercial Arbitration Act (International Commercial Arbitration Act, RSA 2000, c I-5, s 8(1)) is silent on consent and the Alberta Court of Queen's Bench has found that it has jurisdiction to hear an application for consolidation that is brought without the consent of both parties (Priscapian Development Corp v BG International Ltd, 2016 CarswellAlta 2297, 2016 ABQB 611).

Domestic arbitration legislation in the majority of provinces provides that upon the application of all parties to more than one arbitration, the court may order, on terms that it considers just, that:

- the arbitrations be consolidated;
- the arbitrations be conducted simultaneously or consecutively; or
- any of the arbitrations be stayed until any of the others are completed.

The British Columbia legislation (International Commercial Arbitration Act, RSBC 1996, c 233, s 21) further provides that disputes that have arisen under two or more arbitration agreements may be heard in one arbitration if the disputes are similar and all parties to those agreements agree on the appointment of the arbitrator and the steps to be taken to consolidate the disputes into one arbitration.

# 7.2 Does the law in your jurisdiction permit the joinder of additional parties to an arbitration which has already commenced?

The international commercial arbitration legislation in Canada does not address joinder of additional parties to an arbitration which has already commenced. However, the UNCITRAL Model Law does provide that if the continuation of an arbitration becomes impossible, the proceedings shall be terminated (UNCITRAL Model Law, Article 32(2)). In light of this, some have argued that this provision may be effective in "persuading recalcitrant parties to consent to joinder of intervention by a third party, if the arbitrators take the position that it would be impossible to proceed fairly without the participation of a third party. The existing parties would then have the choice of allowing the third party to join the arbitration or having the arbitration terminated and the dispute litigated" (SI Strong, "Intervention and Joinder as of Right in International Arbitration: An Infringement of Individual Contract Rights or Proper Equitable Measure" (1998), 31 Van J Transnat'l L 915 at p976 and p992). The issue of joinder may already be dealt with in the arbitration clause itself, including through institutional procedural rules (For example, Article 7 of the Rules of Arbitration of the International Chamber of Commerce).

# 7.3 Does an arbitration agreement bind assignees or other third parties?

In general, arbitration agreements do not create rights or obligations for non-signing third parties. Arbitration agreements can be binding on third parties only in specific circumstances, such as the following:

- The clause is incorporated by reference into a contract of the third party;
- There is an agency relationship between a party and a non-signing third party;
- The corporate relationship between a corporate parent and subsidiary is sufficiently close as to justify piercing the corporate veil; or
- A non-party is bound by an estoppel (DNM Systems Ltd v Lock-Block Canada Ltd, 2015 CarswellBC 3179, 2015 BCSC 2014 at para 77).



#### 8. The tribunal

### 8.1 How is the tribunal appointed?

Article 11(2) of the UNCITRAL Model Law provides that the parties are free to agree on a procedure for appointing the arbitrators subject to Articles 11(4) and (5) of the UNCITRAL Model Law. Failing such an agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators shall appoint the third. If a party fails to appoint an arbitrator or the two appointed arbitrators fail to agree on a third within 30 days, the court will make an appointment upon request by one of the parties. For arbitrations with one arbitrator, the court shall appoint the arbitrator upon request of the parties.

Article 11(4) provides that a party may request a court to take the "necessary measure" if:

- a party fails to act as required under such procedure;
- the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or
- a third party, including an institution, fails to perform any function entrusted to it under such procedure, unless the agreement on the appointment procedure provides other means for securing an arbitrator.

Article 11(5) provides that the court or other authority that appoints an arbitrator pursuant to Article 11(4) shall have due regard to any qualifications of the arbitrator required by the agreement of the parties, and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

The British Columbia International Commercial Arbitration Act has similar provisions, the only difference being that it requires that the appointment be made by the chief justice rather than the court (International Commercial Arbitration Act, RSBC 1996, c 233, s 27.01).

In Quebec, Chapter II of the Code of Civil Procedure (CCP) provides that the parties appoint an arbitrator to decide their dispute. They do so by mutual agreement, unless they ask a third party to make the appointment. The parties may choose to appoint a panel of arbitrators, in which case each party appoints one arbitrator and the two so appointed appoint the third. If an arbitrator must be replaced, the procedure for the appointment of an arbitrator under Article 624 of the CCP applies.

Arbitration by a panel of three arbitrators should be reserved for dispute resolution where the interest involved and the complexity of the case warrant it. Usually, when arbitration is limited to legal issues, it is not necessary to have recourse to three arbitrators. When arbitration raises highly technical issues, it may be advantageous to choose two subject-matter experts and a lawyer as chair. The chair will be able to ensure the smooth running of the hearing and the respect of the rules of natural justice.

# 8.2 Are there any requirements as to the number or qualification of arbitrators in your jurisdiction?

Parties are free to choose the number of arbitrators in international arbitration. In the absence of agreement, arbitrations conducted under the UNCITRAL Model Law are determined by a panel of three arbitrators.

In relation to the domestic context, if an agreement is silent, then the arbitration is usually conducted by one arbitrator. However, the federal statute ¡V the Commercial Arbitration Act ¡V provides that three arbitrators shall be appointed if the parties fail to agree on a number.



Parties are free to agree on the qualifications of the arbitrators. Under the UNCITRAL Model Law, an arbitrator for an international arbitration is required to be impartial and independent. The federal Commercial Arbitration Act has a similar requirement for independence and impartiality. However, none of the provincial arbitration acts imposes this requirement.

In Quebec, neither the Civil Code of Quebec (CCQ) nor the CCP imposes obligations regarding the qualifications of the arbitrators. The arbitrators will be chosen based on their areas of expertise and their expertise in general, but also on case management and the administration of evidence, and certainly their availability  $f\{$  not only to start and hear the case within a reasonable period, if not in the short term, but also to deliver the award within a reasonably short term after the debate.

# 8.3 Can an arbitrator be challenged in your jurisdiction? If so, on what basis? Are there any restrictions on the challenge of an arbitrator?

The law governing grounds for challenge of an arbitrator is identical under the UNCITRAL Model Law and in the domestic context.

An arbitrator can be challenged only on the basis of bias or if he or she lacks the necessary qualifications agreed to by the parties. The challenging party must have been unaware of the reasons for the challenge if it participated in the selection and appointment process. The prevailing Canadian standard for disqualification of an arbitrator is one of reasonable apprehension of bias.

In Quebec, the CCP provides that an arbitrator may be recused if there is serious reason to question his or her impartiality or if the arbitrator does not have the qualifications agreed to by the parties. Article 626 of the CCP provides that an arbitrator is required to declare to the parties any fact that could cast doubt on the arbitrator's impartiality and justify a recusal.

### 8.4 If a challenge is successful, how is the arbitrator replaced?

When an arbitrator is removed, a replacement is appointed using the same procedure as the appointment of the original arbitrator. This is true under both the UNCITRAL Model Law and the various provincial arbitration acts.

The CCP provides that if an arbitrator must be replaced, the procedure for the appointment of an arbitrator under Article 624 of the CCP applies.

# 8.5 What duties are imposed on arbitrators? Are these all imposed by legislation?

The following duties have been imposed on arbitrators by legislation:

- a duty to treat parties equally (for example, UNCITRAL Model Law, Article 18);
- a duty to give each party a full opportunity to present its case (for example, UNCITRAL Model Law, Article 18); and
- a duty requiring arbitrators to disclose circumstances that likely lead to a conflict of interest (UNCITRAL Model Law, Article 12 and Alexander Gay and Alexandre Kaufman, Annotated Ontario Arbitration Legislation 2nd ed (Toronto: Thomson Reuters), p564).



In the domestic context, the various provincial arbitration acts echo the UNCITRAL Model Law's requirements to treat parties fairly and provide each party with an opportunity to present its case. Arbitrators must:

- listen fairly to both sides;
- give both parties a fair opportunity to contradict or correct prejudicial statements;
- not receive evidence from one party behind the back of the other; and
- ensure that a responding party knows the case it has to meet.

Arbitrators must respect the principles of natural justice. A breach of these rules allows a court to pronounce the annulment of the arbitration award. Thus, it is important for the arbitrators to ensure that the parties whose rights may be affected by the award are heard, in order to respect the principle of justice codified in Article 17 of the CCP, which provides that a claim may not be made by a party unless it has been heard or duly summoned.

The audi alteram partem rule also has a specific application to conventional arbitration, since Paragraph 4 of Article 646 of the CCP specifically provides that a violation of this principle may be raised to prevent the homologation of the arbitral award by the court.

8.6 What powers does an arbitrator have in relation to: (a) procedure, including evidence; (b) interim relief; (c) parties which do not comply with its orders; (d) issuing partial final awards; (e) the remedies it can grant in a final award and (f) interest?

a) Procedure, including evidence?

Parties are free to determine the applicable procedural rules. In the absence of the parties' agreement, the tribunal can generally conduct an arbitration in the manner it considers appropriate (UNCITRAL Model Law, Article 19).

The UNCITRAL Model Law provides general procedural rules concerning:

the exchange of statements; the holding of oral hearings; and the production of documents.

Domestic arbitrations follow similar guidelines. Most provincial statutes regulating arbitration set some default rules, but generally allow parties to select their own procedure.

As further guidance, the Supreme Court of Canada has held that the procedure to be followed in an arbitration is established by the tribunal, exercising its discretion, provided that the parties are given an equal opportunity to make their case and meet the case made against them (Moreau-Bérubé v New Brunswick (Judicial Council), [2002] SCJ No 9, [2002] 1 SCR 249 (SCC)).

The CCP provides that the arbitrator may require each party to send the arbitrator, within a specified time, a statement of its contentions and any exhibits mentioned, and to send such statement to the other party, if not already done. Any expert reports and other documents on which the arbitrator may base the arbitration award must also be sent to the parties. The arbitrator, or a party with leave of the arbitrator, may request the assistance of the court to obtain evidence, including to compel a witness who refuses, without valid reason, to attend, answer or produce real evidence in their possession.



#### (b) Interim relief?

Both international and domestic tribunals may exercise their discretion to grant interim measures when justified. However, under the UNCITRAL Model Law, parties can agree that arbitrators are barred from awarding interim relief. Where interim measures are granted, the arbitral tribunal may require any party to provide appropriate security in connection with such measures (Quintette Coal Ltd v Nippon Steel Corp, [1988] BCJ No 1354, 29 BCLR (2d) 233 (BCSC)).

Various provincial arbitration acts provide that the arbitral tribunal may grant interim measures at the request of a party. Interim awards may be enforced in the same manner as final awards. Further, the acts provide that interim awards may be challenged in the same manner as final awards (for example, Avenue Canadian Ventures, Corp v No 151 Cathedral Ventures Ltd, [2009] BCJ No 246, 2009 BCSC 171 (BCSC)). In provinces where arbitrators have not been given express legislative authority to grant interim measures, courts have still granted them such powers based on overall legislative intention (Farah v Sauvageau Holdings Inc, [2011] OJ No 1242, 11 CPC (7th) 363 (Ont SCJ)).

However, these powers do not extend a Canadian tribunal's jurisdiction to parties which are not bound by the arbitration agreement. To the extent that an interim order purports to bind any non-party, the order will be set aside by a court. Accordingly, there has been conflicting law in Canada as to whether interim relief can include injunctive relief, as these orders often enjoin or direct the conduct of strangers to the arbitration agreement which are not bound by the jurisdiction of the arbitral tribunal (Farah v Sauvageau Holdings Inc, [2011] OJ No 1242, 11 CPC (7th) 363 (Ont SCJ)).

In Quebec, the CCP provides that the arbitrator may, on a party's request, take any provisional measure or any measure to safeguard the parties' rights, subject to the conditions that the arbitrator determines and, if necessary, the requirement that a suretyship be provided to cover costs and the reparation of any prejudice that may result from such a measure. Such a decision is binding on the parties; but one of the parties may, if necessary, ask the court to homologate the decision to give it the same force and effect as a judgment of the court.

#### (c) Parties which do not comply with its orders?

Arbitral tribunals are not granted any express powers in relation to parties that do not comply with their orders. If a party chooses not to comply with a given award, the party seeking to enforce the award must seek recourse through the courts.

Canadian courts enforce arbitral awards just as they do their own judgments. In British Columbia, Northwest Territories, Nova Scotia, Prince Edward Island and Yukon, the arbitration acts provide that judgment is simply entered in the terms of the award. However, each of the other provinces requires either leave of the court (Newfoundland and Labrador) or an application process (Alberta, Manitoba, New Brunswick, Ontario and Saskatchewan) to enforce the award.

#### (d) Issuing partial final awards?

Arbitral tribunals may render partial awards on key issues when doing so could result in a more efficient arbitration process.

In domestic arbitrations, various provincial acts provide that partial awards may be enforced in the same manner as final awards. Further, partial awards may be challenged in the same manner as final awards (For example, Avenue Canadian Ventures, Corp v No 151 Cathedral Ventures Ltd, [2009] BCJ No 246, 2009 BCSC 171 (BCSC)).



In Quebec, neither the CCP nor the CCQ contains provisions regarding the possibility of issuing partial final awards. However, the question is considered at length, and the authors are of the opinion that if the circumstances justify it - such as where there is a serious question as to the jurisdiction of the court - the court may decide to hold a separate hearing on this issue and then order a partial award.

#### (e) The remedies it can grant in a final award?

A remedy granted by an arbitral tribunal will vary depending on the arbitration agreement and the circumstances of each arbitration. Generally speaking, international arbitral tribunals seated in Canada can order any relief that is available under the applicable law. The arbitration acts of Alberta, Manitoba, New Brunswick, Ontario and Saskatchewan expressly entitle arbitral tribunals to decide a dispute in accordance with law, including equity, and to order specific performance, injunctions and other equitable remedies.

However, it is unclear whether arbitrators conducting domestic proceedings in some provinces have jurisdiction to order equitable relief, such as injunctions and specific performance. For example, several trial court decisions in British Columbia have found that arbitral tribunals only have jurisdiction to order equitable relief where the parties had expressly provided for that remedy after the start of the arbitration, as part of an agreement waiving appeal rights. However, the British Columbia Court of Appeal ultimately ruled that arbitrators can grant equitable relief.

Finally, because arbitral tribunals lack inherent jurisdiction, it has also been held that an arbitrator has no power to award punitive damages unless such a power is expressly provided for in the arbitration agreement or in legislation. However, punitive damages have been found to fall within an arbitrator's jurisdiction in other cases. The parties' agreement about what is being submitted to arbitration must be considered.

#### (f) Interest?

The Supreme Court of Canada has held that provincial arbitration acts generally empower arbitrators to award interest (British Columbia (Forests) v Teal Cedar Products Ltd, [2013] SCJ No 51, 2013 SCC 51 (SCC)). However, this power is limited to simple interest, unless legislation specifically provides the power to award compound interest (Tepei v Insurance Corp of British Columbia, [2009] BCJ No 1018, 2009 BCSC 684 (BCSC).

There are no provisions in the UNCITRAL Model Law that speak to an arbitrator's ability to award interest.

# 8.7 How may a tribunal seated in your jurisdiction proceed if a party does not participate in the arbitration?

The powers of the tribunal depend on what the parties have agreed to. If there is a valid arbitration clause in the agreement and the parties do not agree to different terms, the UNCITRAL Model Law applies:

- If, without showing sufficient cause, the claimant fails to communicate its statement of claim, the arbitral tribunal must terminate the proceedings;
- If the respondent fails to communicate its statement of defence, the proceedings continue without treating such failure in itself as an admission of the claimant's allegations; and
- If any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it (UNCITRAL Model Law, Article 25).

In Quebec, neither the CCP nor the CCQ contains provisions regarding this issue.



#### 8.8 Are arbitrators immune from liability?

In the absence of bad faith, an arbitrator is immune from all types of civil liability as a matter of public law because of the similarity of arbitration to the judicial function (Flock v Beattie, [2010] 11 WWR 177 (Alta QB)).

An arbitrator is not liable to be sued for want of skill (Pappa v Rose (1872), LR 7 CP 525) or for negligence (Chambers v Goldthorpe (1901), [1901] 1 KB 624 (Eng CA); Campbell Flour Mills Co v Bowes (1914), 32 OLR 270 (Ont CA)) in the conduct of the arbitration, but an arbitrator who is a party to the submission may incur legal liability through refusing to act (Pappa v Rose (1872), LR 7 CP 525). Therefore, if an arbitrator delays in making an arbitration award – and even if such delay contravenes the provisions of the arbitration agreement – the arbitrator is immune from an action for breach of contract in the absence of bad faith or fraud (Flock v Beattie (2010), [2010] 11 WWR 177 (Alta QB)).

Many institutional arbitration rules also provide that neither the institution nor the tribunal will be liable to any party for any act or omission in connection with any arbitration conducted under the institution's rules, and that the tribunal and the institution have the same protection and immunity as a judge of the superior court in the province or territory in which the arbitration takes place. This is also a common provision in ad hoc arbitration agreements. Article 12 of the UNCITRAL Model Law further provides that liability on the part of the arbitrators and appointing authorities is excluded to the extent possible under the applicable law (UNCITRAL Model Law, Article 12).

Article 621 of the CCP provides that arbitrators cannot be prosecuted for an act performed in the course of their arbitration mission, unless they acted in bad faith or committed an intentional or gross fault.

# 9. The role of the court during an arbitration

# 9.1 Will the court in your jurisdiction stay proceedings and refer parties to arbitration if there is an arbitration agreement?

Canadian courts generally apply local law of the forum (domestic arbitration legislation) to determine stay applications. Stay provisions vary across provinces, but can be grouped into three categories: mandatory, discretionary and the Civil Code of Quebec. In stay applications, if a party to an arbitration agreement commences a proceeding in respect of a matter covered by the arbitration agreement, any party to the agreement can apply to the court in which the proceeding is commenced to stay the proceeding in favour of arbitration (Penn-Co Construction Canada (2003) Ltd v Constance Lake First Nation, 2008 ONCA 768, [2007] OJ No 3940).

Mandatory stay provisions require stays of proceedings in favour of arbitration where an arbitration agreement exists, subject to limited well-defined exceptions. For example, the statutes in Alberta, Manitoba, New Brunswick, Nova Scotia, Ontario and Saskatchewan provide that the court must stay the proceeding unless:

- a party entered into the arbitration agreement while under a legal incapacity;
- the arbitration agreement is invalid;
- the subject matter of the dispute is not capable of being the subject of arbitration under provincial law;
- the motion was brought with undue delay; or
- the matter is a proper one for default or summary judgment (Arbitration Act, RSA 2000, c A-43, s 7; Arbitration Act, CCSM c A120, s 7; Arbitration Act, RSNB 2014, c 100, s 7(2); Arbitration Act, RSNS 1989, c 19, s 7; Arbitration Act, 1991, SO 1991, c 17, s 7; Arbitration Act, 1992, SS 1992, c A-24.1 s 8).



British Columbia's stay provision requires that the court grant a stay of proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed (Arbitration Act, RSBC 1996, c 55, s 15).

The second category comprises discretionary stay provisions. The courts in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, Northwest Territories and Yukon may stay proceedings at their discretion. A court may grant a stay if it finds that:

- there is no sufficient reason why the matter should not be referred to arbitration in accordance with the parties' submissions; and
- the applicant was, at the time the proceedings started, and still is, ready and willing to do all things necessary for the proper conduct of the arbitration (Arbitration Act, RSNL 1990, c A-14, s 4; Arbitration Act, RSNS 1989, c 19, s 7; Arbitration Act, RSPEI; 1988, c A-16, s 7; Arbitration Act, RSNWT 1988, c A-5, s 10; Arbitration Act, RSY 2002, c 8, s 9).

In Quebec, only "[d]isputes over the status and capacity of persons, family members or other matters of public order" may not be determined by arbitration (Civil Code of Quebec, CCQ-1991, art 2639).

Though stay provisions are conceptualised to prevent multiple proceedings, courts in at least two provinces - Ontario and Alberta - have ruled that potential multiple proceedings do not constitute a valid reason to refuse referring a matter to arbitration (Novatrax International Inc v Hägele Landtechnik GmbH, 2016 ONCA 771, [2016] OJ No 5410 at para. 52, citing UCANU Manufacturing Corp v Calgary (City), [2015] AJ No 58 at para 7, 2015 ABCA 22 (Alta CA)). In Desputeaux v Éditions Chouette (1987) inc, in which some claimants were not party to an arbitration clause at issue, the Supreme Court of Canada offered three guiding factors for deciding applications for stays of proceeding:

- whether the issues in the arbitration are substantially the same as the issues in the action;
- whether the defendant has satisfied the court that the continuance of the action would work an injustice; and
- whether the stay would cause an injustice to the plaintiff (2003 SCC 17, [2003] SCJ No 15).

Therefore, the effect of an arbitration agreement is not an automatic stay of proceedings and courts do not order the specific performance of arbitration agreements. Instead, a party can traditionally commence or continue litigation proceedings despite the existence of an arbitration agreement, unless another party applies for a stay (Bott v Sorley, [1998] BCJ No 2023 (SC)).

Some case law and commentary suggest that damages may be claimed for breach of contract against a party that pursues a claim in court despite the existence of an arbitration agreement (Doleman and Sons v Ossett Corp [1912] 3 KB 257 (CA) at pp268-270).

Despite the liberal interpretation of arbitration clauses by the courts, the mandatory use of arbitration must be explicitly provided for in a clause. This was clearly addressed in the matter of Zodiak (Zodiak International v Polish People's Republic [1983] 1 RCS 529) and has been reaffirmed many times since. When the clause provides that all disputes must be submitted to arbitration, it is clear that arbitration is mandatory. However, where a clause uses more permissive wording and provides that the parties "may" submit their dispute to arbitration, the courts will look at the entire clause rather than the precise words of the clause to determine whether the parties' intention was to settle their disputes by arbitration.



# 9.2 Does the court in your jurisdiction have any powers in relation to an arbitration seated in your jurisdiction and/or seated outside your jurisdiction? What are these powers? Under what conditions are these powers exercised?

Courts in Canada have some power to intervene in international or domestic arbitrations seated in Canada, but it is relatively rare for them to do so. Canadian courts respect the right of parties to engage in arbitration and will prevent inappropriate delay tactics which may be brought before them by parties attempting to frustrate an arbitration proceeding.

Specifically, domestic arbitration legislation throughout Canadian provinces states, in varying language, that courts may not intervene except for certain enumerated exceptions:

- to assist in the conduct of arbitrations;
- to ensure that arbitrations are conducted in accordance with arbitration agreements;
- · to prevent unequal or unfair treatment of parties; and
- to enforce awards (For example, Arbitration Act, 1991, SO 1991, c 17, s 6; Arbitration Act, CCSM c A120, s 6; Arbitration Act, 1992, SS 1992, c A-24.1, s 7; Arbitration Act, RSA 2000, c A-43, s 6; and Arbitration Act, RSNS 1989, c 19, s 8).

A court may also intervene to determine a question of law which arises during or before the arbitration, on application of the tribunal or party, with the consent of the tribunal and other parties (Arbitration Act, 1991, SO 1991, c 17, s 8(2); Arbitration Act, CCSM c A120, s 8(2); Arbitration Act, RSNB 2014, c 100, s 8(2); Arbitration Act, RSNS 1989, c 19, s 10(2); Arbitration Act, 1992, SS 1992, c A-24.1, s 9(2); Arbitration Act, RSBC 1996, c 55, s 34(1)).

Judicial review of international arbitration is normally impossible because arbitral tribunals are private bodies established by contract (Bansal v Stringam, 2009 ABCA 87 at para 16).

Parties seeking anti-suit injunctions in Canadian courts against foreign arbitrations may be unsuccessful, as this practice has been criticised as being contrary to limitations on judicial intervention, the doctrine of competence-competence and parties' contractual right to arbitrate (Ontario Medical Assn v Willis Canada Inc, 2013 ONCA 745 at paras 19-37).

However, some case law suggests that Canadian courts can issue anti-suit injunctions to restrain parties from proceeding with litigation in foreign courts. The Federal Court of Appeal in Magic Sportswear Corp v OT Africa Line Ltd suggested that Canadian courts will give effect to exclusive forum clauses in favour of the Canadian courts, in alignment with English case law on the issue; by extension, Canadian courts will presumably also follow the English practice of applying the same principles to anti-suit injunctions (2006 FCA 284 at para 75, although see para. 88. For connection between anti-suit injunctions and exclusive forum clauses, see Welex, AG v Rosa Maritime Ltd [2003] 2 Lloyd's Rep 509 (CA) at paras 47-48 citing Donohue v Armco Inc, [2002] 1 Lloyd's Rep 425 (HL) at para 24). Recently, the Supreme Court of Canada observed that exclusive forum clauses operate to "oust an authority's jurisdiction" and "ensure the intention of the parties is respected in order to achieve legal certainty" (GreCon Dimter Inc v JR Normand Inc (2005), 2005 CarswellQue 5110, 255 DLR (4th) 257 (SCC), at para 45).



#### 9.3 Can the parties exclude the court's powers by agreement?

Parties' ability to exclude rights of appeal in an arbitration agreement varies depending on the legislation of the province where the arbitration is seated. For example, it is possible to do so in Ontario and Saskatchewan; while in British Columbia, parties may make a binding waiver of their appeal rights only once the arbitration procedure has started, in writing (Arbitration Act, 1992, SS 1992, c A-24.1, s 4 and Arbitration Act, 1991, SO 1991, c 17, s 3; Arbitration Act, RSBC 1996, c 55, ss 31, 33).

For such exclusion provisions to be effective, they must be clearly evidenced in the arbitration agreement and the parties' intention to waive a substantive right (right of appeal or right of other court intervention) must be clearly established. Once established, the parties' intentions are paramount (National Ballet of Canada v Glasco, [2000] 49 OR (3d) 230 at para 35, referring to Labourers' International Union of North America, Local 183 v Carpenters and Allied Workers, Local 27 (1997), 24 OR (3d) 472 at p479).

In Quebec, Article 7 of the CCP provides that participation in a private dispute prevention and resolution process other than arbitration does not entail a waiver of the right to act before the courts. However, the parties may undertake not to exercise that right in connection with the dispute in the course of the process, unless it proves necessary for the preservation of their rights.

They may also agree to waive prescription already acquired and the benefit of time elapsed for prescription purposes, or agree in a signed document to suspend prescription for the duration of the process. Prescription cannot, however, be suspended in advance for more than six months.

#### 10. Costs

# 10.1 How will the tribunal approach the issue of costs?

If the issue of costs is not dealt with in the agreement between the parties, the tribunal generally has discretion in awarding costs (Arbitration Act, RSA 2000, c A-43, s 53; Arbitration Act [title rep. & sub 2011, c 25, s 305], RSBC 1996, c 55, s 11; Arbitration Act, SM 1997, c 4, CCSM, c A120, s 53; Arbitration Act, 1991, SO 1991, c 17, s 54; Arbitration Act, 1992, SS 1992, c A-24.1, s 54; Brewer v Insurance Corp of British Columbia (1991), 1991 CarswellBC 213 (BC SC); Spence v Manitoba (1996), 1996 CarswellMan 293 (Man CA)) and can include in the award:

- the fees and expenses of the arbitrators and expert witnesses;
- the parties' legal fees and expenses;
- the fees of any administering institution; and
- any other expenses incurred in connection with the proceedings (Arbitration Act, RSA 2000, c A-43, s 53(1), (3); Arbitration Act, SM 1997, c 4, CCSM, c A120, s 53(1), (3); Arbitration Act, 1991, SO 1991, c 17, s 54(1), (2); Arbitration Act, 1992, SS 1992, c A-24.1, s 54(1), (2); Jager Industries Inc v Leduc (County) No 25 (1996), 1996 CarswellAlta 991 (Alta QB); affirmed (1999), 1999 CarswellAlta 468 (Alta CA); Pinheiro v GAN Canada Insurance Co (1998), 1998 CarswellOnt 2846 (Ont Insurance Comm).

When awarding costs, the tribunal may take into account settlement offers that have been rejected (Arbitration Act, RSA 2000, c A-43, s 53(6); Arbitration Act, SM 1997, c 4, CCSM, c A120, s 53(6); Arbitration Act, 1991, SO 1991, c 17, s 54(5); Arbitration Act, 1992, SS 1992, c A-24.1, s 54(5)). In the absence of an award dealing with costs, each party is responsible for its own legal expenses and an equal share of the fees and expenses relating to the arbitration. In British Columbia, when an arbitrator makes no order as to costs, a party may apply to the arbitrator for an order respecting costs (Arbitration Act, RSBC 1996, c 55, s 11(5)).



In international arbitrations, the UNCITRAL Model Law provides that if a party requests an interim measure or applies for a preliminary order and the tribunal determines that the measure or order should not be granted, that party is liable for any costs and damages caused by the measure or the order to any party. The arbitral tribunal may award such costs and damages at any point during the proceedings (UNCITRAL Model Law, Article 17G).

In some cases, tribunals are also able to order security for costs (Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp), Sched 1, art 17 [renumbered 2012, c 26, s 25]).

In Quebec, jurisprudence in this regard specifies that the attribution of costs does not fall within the jurisdiction of the arbitration tribunal since the Civil Code of Quebec, which establishes that the arbitration is governed by the rules of the Code of Civil Procedure (CCP), refers only to Title II of Book VII (Sections 620 to 655) and not to the entire CCP. These provisions, which deal specifically with arbitration tribunals, do not provide for any discretion to award costs. If the recovery of disbursements is not provided for in the arbitration agreement, the parties cannot avail themselves of it.

# 10.2 Are there any restrictions on what the parties can agree in terms of costs in an arbitration seated in your jurisdiction?

There are no restrictions on what the parties can agree to in terms of costs; in most of the Canadian legislation, this issue of costs is not addressed. The legislation in British Columbia intentionally does not restrict what the parties can agree to in terms of cost. The Law Reform Commission of British Columbia found no evidence that unfair terms as to costs contained in contracts of adhesion is an issue in that province (Law Reform Commission of British Columbia, Report on Arbitration, LRC 55 (Vancouver: Law Reform Commission, May 1982), at p28).

### 11. Funding

# 11.1 Is third-party funding permitted for arbitrations seated in your jurisdiction?

There are no Canadian statutes or regulations governing third-party funding directly; nor has there been any determination of the permissibility of third-party funding in arbitration (EDF (Services) Limited v Appleton & Associates, 2007 CanLII 36078 (Ont Sup Ct)). As it stands, the issue is being brought up through case law; for example, the Ontario Superior Court of Justice has held that class action plaintiffs must move to have a third-party funding agreement approved by the court (Bayens v Kinross Gold Corporation, 2013 ONSC 4974 at para 41). Parties in other provinces have sought court approval as well, but the courts have yet to take an explicit stance on this practice in class actions (Hobshawn v Atco Gas and Pipelines Ltd, Action 0101-04999 (Alta QB); MacQueen v Sydney Steel Corp, Hfx No 218010 (Murphy, J, NSSC); Hayes v The City of Saint John, 2016 NBQB 125). The Federal Court of Canada has found that there is no legal or logical basis to extend the requirement of pre-approval of third party funding agreements outside of class proceedings (Re Crystallex International Corporation, 2011 ONSC 7701).

In Quebec, neither the Code of Civil Procedure nor the Civil Code of Quebec contains provisions which permit or forbid third-party funding for arbitration.



#### 12. Award

### 12.1 What procedural and substantive requirements must be met by an award?

For domestic arbitration, the acts of Alberta, Manitoba, New Brunswick, Ontario and Saskatchewan provide that a decision of the majority of members of an arbitral tribunal constitutes the decision of the tribunal. Without a majority decision, the chair's decision governs. The tribunal's award must be made in writing and must state the reasons upon which it is based. It must indicate the place where and the date on which it was made, and be dated and signed by all members of the arbitral tribunal, or by a majority of them if there is an explanation for the omission of the others (Arbitration Act (Alberta), RSA 2000, c A-43, s 40; Arbitration Act (Manitoba), CCSM c A120, s 40; Arbitration Act (New Brunswick), RSNB. 2014, c 100, s 40; Arbitration Act, 1991 (Ontario), SO 1991, c 17, s 40; Arbitration Act, 1992 (Saskatchewan), SS 1992, c A-24.1, s 41).

Unless the parties agree otherwise, awards in international arbitration require that decisions of an arbitral tribunal be made by a majority of its members. Further, the award must be made in writing, and signed and dated by the arbitrators, unless there is an explanation for an omission.

In Quebec, Article 642 of the Code of Civil Procedure (CCP) provides that the award must be made in writing and be signed by the arbitrator or arbitrators, and include reasons. It must state its date and the place where it was made. The award is deemed to have been made on that date and at that place. In arbitration proceedings with more than one arbitrator, the arbitration award must be made by a majority of the panel. If one of the arbitrators refuses or is unable to sign the award, and the others record that fact, the award has the same effect as if it were signed by all of them.

### 12.2 Must the award be produced within a certain timeframe?

There is no statutory requirement that an award be produced within a certain timeframe in either domestic or international arbitration. Parties may include timing in their agreement.

In Quebec, the CCP provides that the arbitration award must be made within three months of the matter being taken under advisement; but the parties may agree, more than once, to extend the time limit or, if it is expired, set a new one.

#### 13. Enforcement of awards

# 13.1 Are awards enforced in your jurisdiction? Under what procedure?

Awards are enforced in the common law provinces of Canada. There is some variety between the provinces for domestic arbitration awards. The acts of British Columbia, Northwest Territories, Nova Scotia, Prince Edward Island and Yukon provide that they are treated the same way as court judgments (Arbitration Act (British Columbia), RSBC 1996, c 55, s 29; Arbitration Act (Nova Scotia), RSNS 1989, c 19, s 17; Arbitration Act (Prince Edward Island), RSPEI 1988, c A-16, s 13; Arbitration Act (Northwest Territories), RSNWT 1988, c A-5, s 25; Arbitration Act (Yukon), RSY 2002, c 8, s 24). In Newfoundland and Labrador, an award may be registered in the cause book of the court and enforced the same way as a judgment (Arbitration Act (Newfoundland and Labrador), RSNL 1990, c A-14, s 15).



The procedure to enforce domestic arbitral awards is different in Alberta, Manitoba, New Brunswick, Ontario and Saskatchewan. A person must first apply to the court for an order enforcing an award and notice must be given to the person against which enforcement is sought. If the award was made in the same jurisdiction where this application is made, there is no discretion involved, except in specific circumstances, such as if the period for commencing an appeal to set the award aside has not yet elapsed or the award is a family arbitration award (in Ontario, this can be enforced only under the Family Law Act). Extra-provincial awards are enforced under the legislation governing the reciprocal enforcements of judgments, such as the various arbitration acts and reciprocal enforcement of judgments acts (Reciprocal Enforcement of Judgments Act (Alberta), RSA 2000, c R-6; Court Order Enforcement Act (British Columbia), RSBC 1996, c 78; Reciprocal Enforcement of Judgments Act (Manitoba), CCSM c J20; Reciprocal Enforcement of Judgments Act (New Brunswick), RSNB. 2014, c 127; Reciprocal Enforcement of Judgments Act (Newfoundland and Labrador), RSNL 1990, c R-4; Reciprocal Enforcement of Judgments Act (Nova Scotia), RSNS. 1989, c 388; Reciprocal Enforcement of Judgments Act (Ontario), RSO 1990, c R 5; Reciprocal Enforcement of Judgments Act (Prince Edward Island), RSPEI 1988, c R-6; Reciprocal Enforcement of Judgments Act (Saskatchewan), 1996, SS 1996, c R-3.1; Reciprocal Enforcement of Judgments Act (Northwest Territories), RSNWT 1988, c R-1; Reciprocal Enforcement of Judgments Act (Yukon), RSY 2002, c 189).

In the international context, an arbitral award must be recognised as binding and enforced by an application in writing to a competent court. The party applying for its enforcement must supply the original award or a certified copy, as well as an original or certified copy of the arbitration agreement. A certified translation is necessary if the award or agreement is not in the official language of the province (Proctor v Schellenberg, [2002] MJ No 188, 164 Man R (2d) 188 (Man QB), affd [2002] MJ No 496, 2002 MBCA 170 (Man CA)).

An application to enforce an award is limited to parties to the arbitration and may be made by way of application for summary judgment. A foreign arbitral award is a remedial order for the purposes of domestic limitations legislation, and the limitation period under a province's limitations act begins to run as of the date the relevant appeal period expires. In Ontario, the Limitations Act, 2002 does not govern applications under the New York Convention or UNCITRAL Model Law for enforcement of awards. Instead, applications must be made within 10 years of the award (Duncan W Glaholt, Markus Rotterdam (Contributors) Halsbury's Laws of Canada - Alternative Dispute Resolution (2018 reissue) II. PRIVATE DISPUTE RESOLUTION11. International Commercial Arbitration (12) Recognition and Enforcement).

Article 645 of the Code of Civil Procedure (CCP) provides that the arbitration award is enforceable only after having been homologated by a court of law. Indeed, a party may apply to the court for the homologation of an arbitration award. As soon as it is homologated, the award acquires the force and effect of a judgment of the court.

The court to which an application for the homologation of an arbitration award is submitted cannot review the merits of the dispute. It may stay its decision if the arbitrator has been asked to correct, supplement or interpret the award. In such a case, if the applicant so requires, the court may order a party to provide a suretyship. The grounds upon which the court may base its refusal to homologate the arbitration award are the same as those for the annulment of such an award and are listed at Article 646 of the CCP.



### 14. Grounds for challenging an award

# 14.1 What are the grounds on which an award can be challenged, appealed or otherwise set aside in your jurisdiction?

International arbitral awards generally cannot be appealed, even if an attempt is made to provide appeal rights in the arbitration agreement (Xerox Canada Ltd v MPI Technologies Inc, 2006 ONSC 41006 (SCJ) at para 144; see also J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) p478). Whether it is possible to appeal depends on the contractual agreement to arbitrate and the mutual intention of the parties. A party can challenge an award only by bringing an application to set it aside on one of the listed grounds. To bring a challenge, a party must generally show that:

- it was legally incapable;
- it was not given proper notice of the arbitrator or proceeding;
- it was denied the opportunity to fully present its case; or
- the arbitrator's decision went beyond the scope of what was agreed upon (Bayview Irrigation District #11 v Mexico, [2008] OJ No 1858 (Ont SCJ)).

If the arbitration agreement is silent on appeal rights in the domestic context, arbitral awards are final and binding and can be varied or set aside only through the relevant arbitration acts (RH McLaren and JP Sanderson, Innovative Dispute Resolution: The Alternative (Toronto: Carswell, 2003) at 5-13, relying upon Anderson Industrial Doors Ltd v Genstar Construction Ltd, [1985] BCJ No 580, 16 CLR 208 (BCSC)). Most acts allow an appeal on a question of law with leave of the court, which is unlikely to be granted - even from awards that are considered flawed - without an element of public interest (6524443 Canada Inc v Toronto (City), [2017] OJ No 3045, 2017 ONCA 486 (Ont CA); Costa v Costa, [2008] OJ No 930, 89 OR (3d) 670 (Ont SCJ)). Appeals on questions of fact or mixed fact and law are allowed only in some jurisdictions and only if the arbitration agreement explicitly provides for this. If it does not, the appeal will be dismissed. Under all of the domestic acts, unless the arbitration agreement so provides, there is no appeal on a question of fact or of mixed fact and law (J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) p481).

In Quebec, an arbitration award may only be challenged by way of an application for its annulment under Article 648 of the Code of Civil Procedure. Such an application is subject to the same rules as those governing an application for the homologation of an arbitration award, with the necessary modifications.

# 14.2 Are there are any time limits and/or other requirements to bring a challenge?

A party to an international arbitration can challenge an award only by bringing an application to set it aside on one of the listed grounds. To bring a challenge, a party must generally show that:

- it was legally incapable;
- it was not given proper notice of the arbitrator or proceeding;
- it was denied the opportunity to fully present its case; or
- the arbitrator's decision went beyond the scope of what was agreed upon (UNCITRAL Model Law, Article 34(2)).

An application to set aside an award may not be made once three months have elapsed from the date on which the party making that application received the award or the date on which that request was disposed of by the arbitral tribunal (UNCITRAL Model Law, Article 34(3)).



In the domestic context, an appeal of an award or an application to set an award aside must be commenced within 30 days of receipt of the award, correction, explanation, charge or statement of reasons on which the appeal or application is based.

#### 14.3 Are parties permitted to exclude any rights of challenge or appeal?

International arbitral awards generally cannot be appealed, even if an attempt is made to provide appeal rights in the arbitration agreement (Xerox Canada Ltd v MPI Technologies Inc, 2006 ONSC 41006 (SCJ) at para 144; see also J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) p 478).

The law of the province in which the arbitration is seated dictates whether parties are permitted to exclude any rights of appeal in the domestic context. In Ontario and Saskatchewan, if the arbitration agreement prohibits appeals, there is no right of appeal. Other jurisdictions – including Alberta, New Brunswick and Manitoba – do not let parties contract out of the right of appeal, with leave, on a question of law (J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) p480).

If parties wish to restrict or contract out of their domestic appeal rights, they should do so expressly and clearly (J Brian Casey, Arbitration Law of Canada: Practice and Procedure, 3rd ed (Huntington: JurisNet, LLC, 2017) p481).

### 15. Confidentiality

# 15.1 Is arbitration seated in your jurisdiction confidential? Is a duty of confidentiality found in the arbitration legislation?

While the duty of confidentiality is often presumed to exist in the arbitration context in light of the private nature of the arbitration process, the UNCITRAL Notes of Organizing Arbitral Proceedings indicates that parties should not assume that all jurisdictions would recognise an implied commitment to confidentiality if they have not otherwise entered into an agreement addressing confidentiality obligations.

In light of this uncertainty, a confidentiality agreement or corresponding provision in the arbitration agreement should be employed. Certain procedural rules will expressly include that arbitration conducted pursuant to such rules are confidential.

In Quebec, Article 644 of the Code of Civil Procedure provides that the arbitrator is required to preserve the confidentiality of the arbitration process and protect secrecy, but violates neither by stating conclusions and reasons in the award.

# 15.2 Are there any exceptions to confidentiality?

Exceptions will depend on any confidentiality agreement between the parties or the procedural rules that apply to the arbitration.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.







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