Canadian and International Arbitration

A guidebook for effective arbitration

OSLER

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Introduction

What is arbitration?

Arbitration is a form of private dispute resolution whereby parties agree to submit their dispute to an independent, impartial arbitrator or arbitrators. The arbitrator(s) will issue an award following an arbitration that is conducted through a procedure that the parties agreed on, which can be enforced[1] by a court. Parties to an arbitration agreement typically have considerable flexibility in determining the arbitrator, the procedure (including rights of appeal) and the forum.

An arbitration agreement is a contract in which the parties agree to resolve certain disputes by way of arbitration rather than through a court process. Arbitration agreements can be stand-alone agreements or clauses within larger contracts; they may also be negotiated pre-dispute or after a dispute arises.

Dispute resolution clauses that include arbitration clauses are often found in commercial agreements, particularly where the contracting parties are from different jurisdictions. Arbitration clauses are also common in contracts where specialized expertise may be beneficial to decide the dispute or where a confidential resolution is desirable.

Parties may also decide that arbitration is appropriate after a dispute arises, for the same reasons, and because it gives the parties the ability to tailor the dispute resolution process to the specific dispute that has arisen.

1 Subject to limited exceptions, typically specified in legislation.

What is the difference between arbitration and a court action?

The key difference between arbitration and a court action is arbitration's adaptability. In arbitration, parties may choose the arbitration procedure, the degree of confidentiality and the finality of the award.

Arbitration		Court action
Private dispute resolution		Usually resolved by the public courts
Arbitration agreement typically establishes the rules for resolution of the dispute		Generally, a one-size-fits-all approach
Arbitration can be confidential		Obtaining a sealing order for confidential and sensitive information is difficult
Parties can choose who resolves the dispute	vs.	No input into decision-maker
Parties can tailor the procedure including by using creative processes to bridge distance		Limited input into procedure, such as proceeding by way of small claims court or the Commercial List (in Ontario), depending on the nature of the dispute
Parties can restrict or eliminate appeal rights		Multiple levels of appeal may be available to both the plaintiff and defendant

Procedure

Parties have limited power to select procedures in a court action. Depending on the amount of the claim, parties may bring a civil proceeding in small claims court by way of the simplified procedure in the superior court (if available in the province) or by way of the ordinary rules of the provincial superior court. Parties also have some power to choose to bring an action (involving a trial with evidence) or an application (where the matter is decided on a "paper record") and to choose to bring a proceeding before a specialized court, such as the Toronto Commercial List. Parties are also limited in selecting which jurisdiction to seek relief from.

In contrast, parties in an arbitration can typically select the decision-maker, the procedure, the forum and the applicable law, among other things. These matters may be decided by agreement or decided by the arbitrator upon hearing submissions from both parties.

Arbitration can also be leveraged to resolve disputes when a traditional court process is not available, because of the urgency of the issue or as a result of the need to maintain social distancing practices as is required during the COVID-19 pandemic.

A party may bring an application to court seeking a determination on whether an arbitrator has jurisdiction to decide a particular dispute. However, the general principle is that an arbitrator is to decide, in the first instance, whether they have jurisdiction to decide the dispute (which decision can then be appealed to the courts).

Confidentiality

Arbitration is a private dispute resolution process, while a court action is public.

In most court systems, court records are public, and court sessions can be attended by the public with limited exceptions, such as publication bans and sealing orders. Sealing orders and publication bans may be obtained at common law; however, the party seeking confidentiality must meet the high burden of demonstrating that the requested restriction is necessary in order to prevent a serious risk and that the salutary effects of the order must outweigh the deleterious effects, including the effects on the right to free expression.[2]

In contrast, many institutional arbitration rules provide that all aspects of the arbitration, including the hearing and the arbitration decision, remain confidential. However, it is important to note that while arbitration hearings are not typically open to the public, an arbitration in general is not automatically confidential – either the arbitration agreement or the rules governing the arbitration must specifically provide for confidentiality.

Confidentiality over an arbitration procedure can be lost, however, if there are appeals or applications/motions to court.

Arbitration decisions do not create precedent. If a party wishes to resolve a matter in a manner that sets a binding precedent that will guide future judicial decisions, arbitration may not be the right choice.

It is important to note that while arbitration hearings are not typically open to the public, an arbitration in general is not automatically confidential – either the arbitration agreement or the rules governing the arbitration must specifically provide for confidentiality.

Finality

Most court systems give parties at least one appeal by right (depending on the type of decision), and some decisions can be appealed several times, delaying a final resolution of the matter, possibly for years.

Arbitration agreements can be drafted such that they restrict, or even effectively eliminate, typical appeal rights, or specify that any appeal will be to another arbitrator(s) (thereby extending confidentiality over such appeal). While court intervention in an arbitration cannot be entirely excluded, arbitration is subject to court review only on limited grounds such as validity, procedural fairness and bias.

2 Subject to limited exceptions, typically specified in legislation.

The advantages and disadvantages of arbitration

Advantages

Speed

- Set and shorten timelines
- More efficient procedures
- Reduce delays caused by court availability

Control

- Control who makes decisions
- Control how decisions are made
- Ready availability of arbitrator to resolve procedural issues

Customization

- Ability to agree on and customize the procedure
- Maximize flexibility to adopt a procedure that takes into account the parties' ongoing relationships

Confidentiality

- Parties may agree that the dispute and associated documents be kept confidential
- Generally unavailable in a court action in respect of a commercial dispute

Arbitration offers a number of potential advantages over a traditional court proceeding:

1. Parties can select more efficient, tailored procedures that will expedite the dispute, saving both time and money. For example, parties can limit the discovery process in both time and scope to shorten the length of the dispute resolution. Parties can also determine how evidence is presented; for example, evidence-in-chief can be delivered through witness statements with only cross-examination occurring at the hearing. A hearing could be conducted virtually if the parties decided to do so given the technological infrastructure that many arbitration centres and tribunals have. Counsel can leverage virtual proceedings to ensure that evidence is still obtained in a strategic and compelling manner.
2. Parties may select their decision-maker. In international cases, this avoids decisions by foreign judges or losing "home court" advantage. Arbitrators can be selected for specialized expertise if that is important in the context of the dispute.
3. Parties can limit appeal rights. For example, parties can preclude appeals on the merits altogether, or select an expedited process with limited rights of appeal (subject to applicable law) in place of potentially years of protracted court proceedings.
4. Arbitration is private, and the parties can include confidential protections in their arbitration agreement that keep the decision, disputes and associated documents confidential.

Disadvantages

Arbitration also has a number of limitations; some are inherent to arbitration and some are dependent on the arbitration clause/agreement:

1. Although arbitration is often promoted as a cheaper, faster alternative to traditional litigation, in certain cases arbitration can be more expensive than litigation because the parties are paying for the decision-makers, facilities, etc. Arbitration typically tends to be faster, but this is not assured and may depend on the nature of the dispute.
2. Confidentiality may be lost, for example, if a party seeks to appeal or to enforce an arbitration award through the courts. In such cases, at a minimum, the award will be filed with the courts and form part of the public record.
3. Parties may wish to use a more structured, established procedure that does not require party consent. For example, parties usually prefer to have disputes about their intellectual property decided by a court with full appeal rights.
4. Parties cannot join a third party to an arbitration without the third party's consent. This can give rise to parallel proceedings, which risks inconsistent outcomes.

Due to arbitration's flexibility, the benefits and consequences of arbitration are highly dependent on the procedure selected, the conduct of the parties and the quality of the arbitration clause.

Arbitration, unlike other forms of alternative dispute resolution, is governed by specific legislation. The legislation provides both a default set of procedural principles (but not rules) for arbitration and certain minimum requirements.

Governing legislation: Domestic and international

Arbitration, unlike other forms of alternative dispute resolution, is governed by specific legislation. The legislation provides both a default set of procedural principles (but not rules) for arbitration and certain minimum requirements. These principles address matters such as when a court can intervene and the grounds on which an arbitral award can be appealed or set aside.

An arbitration clause typically names the location or the "seat" of the arbitration. The arbitration legislation of the seat will govern the arbitration.

Each common law province/territory has:

- An international commercial arbitration act (the *ICAA*)
- A domestic arbitration act[3]

In Québec, the *Code of Civil Procedure* applies to domestic and international commercial arbitrations seated in the province, and the *Civil Code of Québec* covers certain matters related to arbitrations (e.g., the validity of arbitration agreement).[4]

3 See Appendix A.
4 See Appendix B.

The provincial international commercial arbitration acts are generally based on, and frequently incorporate large parts of, the United Nations Commission on International Trade Law (UNCITRAL) Model Law (Model Law).[5] According to article 1(3) of the Model Law, an arbitration is international if one of three criteria is met:

1. The parties to an arbitration have, at the time of the conclusion of that agreement, their places of business in different states.
2. One of the following places is situated outside the state in which the parties have their place of business:
   a. the place of arbitration provided for in the arbitration agreement;
   b. any place where a substantial part of the obligations of the commercial relationship is to be performed; or
   c. the place with which the subject matter of the dispute is most closely connected.
3. The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Most provincial international commercial arbitration statutes provide that the word "state" in this context is a country (i.e., nation state, not a province).

The provincial international commercial arbitration acts require arbitration agreements to be in writing; however, an arbitration agreement concluded through email correspondence can satisfy this requirement in Ontario and British Columbia with the adoption of the most recent amendments to the Model Law.

Although Québec has not incorporated the Model Law, the relevant legal provisions in the *Civil Code of Québec* and in the *Code of Civil Procedure* are essentially in line with international conventions.

There is one federal statute, the *Commercial Arbitration Act,*[6] which is based on the Model Law. This legislation only applies 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.

5 A standard form set of arbitration rules established by the UN and adopted by a number of countries to govern international arbitrations; 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) (the Model Law); 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 2006 Amendments to Model Law).

6 R.S.C. 1985, c. 17 (2nd Supp.).

Investor-state arbitration

International arbitration can also occur between a private investor and a state. While foreign nationals cannot usually sue a state for economic loss, countries frequently enter into treaties that give investors such recourse. These agreements between states can be bilateral investment treaties, multilateral investment treaties, or comprehensive trade and economic agreements that have an investor-state chapter, such as the North American Free Trade Agreement (NAFTA) and the Canada-European Union Comprehensive Economic and Trade Agreement (CETA). A core feature of these agreements is that they give foreign investors substantive legal rights that they can use to protect their investments from state interference.

Under these agreements and disputes, investors and investments have been defined broadly. Nationality requirements are typically set out within the treaty, and investments can take on a variety of forms, including shares or other forms of participation in local companies, real and contractual property rights, intellectual property rights, bonds and concession contracts (i.e., for the exploitation of mineral resources).

Common protections for investors include the following:

- Fair and equitable treatment
- Protections against direct and indirect expropriation
- Non-discrimination
- Full protection and security
- Most-favoured nation and national treatment clauses
- Performance requirements

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2

How to draft an effective arbitration clause

Pre-dispute arbitration clauses versus negotiating arbitration after a dispute has arisen

Arbitration agreements should be made before a dispute arises, if possible. It may be difficult to negotiate an arbitration procedure after a dispute has arisen, as the relationship between the parties quite likely will have broken down, and parties may either refuse to agree to arbitration (arbitration agreements require the consent of both parties) or argue for a procedure that is tailored to give them a perceived advantage.

It is important to carefully draft the arbitration clause to ensure that disputes are not unintentionally excluded from its scope, given that an arbitration clause determines the arbitrator's jurisdiction.

Procedures may be modified once a dispute has arisen to better deal with the issues at hand.

Key elements of an arbitration clause

There are several key elements to consider when drafting an arbitration clause:

A Scope of the arbitration clause

B Arbitrator selection process

C Procedure of the arbitration

D Seat of the arbitration

E Confidentiality

F Maintaining the status quo

G Appeal rights

A

Scope of the arbitration clause

The arbitration clause must ensure that the arbitrator has jurisdiction to resolve the disputes the parties wish to arbitrate. A narrow arbitration clause limits the jurisdiction of the arbitrator. An unduly narrow arbitration clause can lead to a challenge of the jurisdiction of the arbitrator, and any issue with an arbitrator's jurisdiction can lead to a challenge to the validity of the award.

Arbitration clauses can also be too broad and limit remedies available for both parties. For example, "Scott and Avery" clauses[7] can force parties to proceed by arbitration before seeking a judicial remedy (i.e., "the award of an arbitrator shall be the condition precedent for either party to bring an action, suit or proceeding to a court of law"). The Supreme Court of Canada has ruled that, when a Scott and Avery clause is at play, the parties must submit the matter to arbitration first before a court can step in.[8] In this context, a party cannot bring an action at law because no cause of action actually arises until the arbitration award is made. This becomes a practical dilemma when a party needs to obtain urgent relief.

If the arbitration agreement is being concluded at the same time as other agreements with the same or other parties (e.g., a purchase agreement and ancillary agreements), parties should ensure that the arbitration provisions run throughout the contractual chain. Arbitration agreements are only effective against parties to the contractual arbitration agreement; therefore, parties should consider drafting language that requires the other party to include an arbitration provision in any sub-contract.

The arbitration clause must ensure that the arbitrator has jurisdiction to resolve the disputes the parties wish to arbitrate.

B

Arbitrator selection process

Arbitrator selection is a critical step in the arbitration process. Parties can ensure the decision-maker will be experienced and has the appropriate expertise and a good reputation.

There are many options in drafting an arbitrator selection process. By way of example, the agreement can be drafted such that:

- Each party can propose a name of an arbitrator.
- Each party can veto names proposed by the other party.
- The parties can agree in advance on a panel of standing arbitrators that have special expertise to address the subject of the agreement.
- The parties can agree to put the selection process partly or wholly into the hands of a third party (such as an arbitration institution).
- Each party can nominate one arbitrator and those two arbitrators select the panel chair.

7 Clauses that require parties to pursue arbitration before commencing a legal proceeding.
8 *Deuterium of Canada Ltd. et al. v. Burns & Roe Inc. et al.*, [1975] 2 SCR 124.

The arbitration agreement should clearly set out the process of selecting the arbitrator. It is important to be able to appoint an arbitrator quickly, otherwise this can be a cumbersome and time-consuming process that causes delay.

The parties may name a third party to select an arbitrator, such as an arbitral institution. An arbitral institution is generally preferable to naming a court as an appointing authority, as the latter can be a time-consuming process that causes further delay and potentially a loss of confidentiality. Arbitral institutions can select an arbitrator from lists of arbitrators proposed by the parties and have specific rules that specify how the arbitrator is to be selected.

C

Procedure of the arbitration

Parties may adopt an existing model or institutional rules to govern the procedure of the arbitration. When doing so, it is important to carefully consider these rules, as there may be omissions or unwanted provisions that are not applicable. For example, the UNCITRAL Rules have no appointing authority, which would cause problems if parties cannot agree on an arbitrator. In some instances, parties may need to include additional provisions in the arbitration agreement based on the jurisdiction of the arbitrator. Ontario and British Columbia have adopted the 2006 amendments to the Model Law, which provide jurisdiction for an arbitrator to award interim relief. However, greater certainty is offered when the arbitrator's powers are set out up front in the arbitration agreement.

Having an arbitrator hear procedural disputes may encourage good behaviour by the parties as the same arbitrator will also make the final decision. Using the same arbitrator throughout also promotes efficiency as the parties do not need to re-educate the decision-maker at each step of the process.

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D

Seat of the arbitration

The "seat" of the arbitration governs the procedure of the arbitration. For example, if the seat of the arbitration is Ontario and the arbitration is domestic, Ontario's *Arbitration Act* applies to the proceeding. Similarly, if an arbitration is international and the seat is Ontario, the Ontario *International Commercial Arbitration Act* applies. While the arbitrator may be applying a different substantive law, issues about procedure (e.g., who appoints an arbitrator if the parties disagree, and where to obtain an interim remedy) are governed by the applicable legislation in the seat of the arbitration. The parties will have recourse to the courts of the seat regarding procedural issues, as permitted by law.

The seat is often, but does not necessarily have to be, the jurisdiction where the hearing takes place. The seat also may be, but does not necessarily have be, in the same legal jurisdiction as the governing law of the arbitration agreement.

E

Confidentiality

As discussed above, confidentiality is a major advantage of arbitration. The dispute, the arguments, the documents and the results can be kept confidential between the parties, subject to other legal disclosure obligations (e.g., securities law reporting requirements).

Parties seeking confidentiality should include confidentiality clauses in the arbitration agreement to establish clear rules and procedures, either by providing that the arbitration is confidential or by selecting institutional rules that provide for confidentiality.

F

Maintaining the status quo

If there is an ongoing relationship between the parties, it may be prudent to add a "status quo" clause that governs how the parties will act while the dispute is ongoing. It may be important that the parties continue to co-operate and perform their contractual obligations to the extent possible. Such clauses may include notions of good faith performance despite the existence of an ongoing dispute.

G

Appeal rights

It is obviously difficult to know whether an appeal will be desirable in advance of a dispute or the receipt of an arbitral award. In drafting an arbitration clause, parties should consider the importance of finality and in having a decision as soon as possible – irrespective of any possible outcome.

If appeal rights are built into the arbitration agreement, it is important to specify whether they include the right to appeal to either a court or to an arbitration panel, or both, and whether that appeal right, once exercised, is final with no further recourse. Further, for the sake of finality, the clause should specify if avenues are exclusive; for example, once a party has chosen to exercise an appeal right to a private arbitration panel, it cannot then choose to go to court if it disagrees with the result.

If the parties do not address appeal rights in Canada, there is no right of appeal in an international arbitration. Domestic arbitrations can be appealed on questions of pure law, but only with leave of the court.

Summary

Set the appropriate scope	• Explicitly exclude disputes you prefer to litigate. • Arbitration clauses can be problematic if too narrow or too broad. • Narrow arbitration clauses are a major ground for challenging the making or enforcing of an award.
Select the decision-maker	• Select an arbitrator with appropriate expertise. • Ensure there is sufficient certainty in the process of selecting the decision-maker in the event the parties cannot agree.
Select the procedure	• Ensure the procedure is tailored to the dispute. • Be informed about institutional rules before naming them in an arbitration clause.
Protect confidentiality	• Avoid court intervention. • Specify what is to be kept confidential (i.e., fact of arbitration, result, documents, submissions, etc.).
Maintain status quo	• Ensure parties proceed diligently and continue to perform underlying agreement pending settlement/final decision.
Control appeal rights	• Eliminate appeal rights altogether or provide for limited rights. • Dictate whether appeals go to court or private arbitration panel.

3

Getting the most out of the arbitration procedure

Strategically tailoring the procedure to the dispute

The flexibility of arbitration allows parties to tailor the procedure to match their commercial objectives.

Requirements	Solutions
Dispute needs to be resolved quickly	• Specify arbitrator appointment procedures • Limit or eliminate documentary production and/or examinations for discovery • Limit or eliminate live witness testimony • Conduct the hearing in writing or virtually • Eliminate appeal rights • Agree on all aspects of procedure beforehand
Dispute is about technical subject matter	• Appoint an arbitrator with technical expertise, including possibly a non-lawyer (and possibly select a standing panel of such individuals in advance) • Limit expert witnesses to avoid a "contest of experts" • Provide for "hot-tubbing" of experts, where the experts testify and are cross-examined at the same time
There is an ongoing relationship that needs to be preserved	• Ensure confidentiality and privacy are stipulated in the arbitration agreement • Eliminate appeal rights • Include "status quo" clause requiring parties to continue to perform their obligations in the event of a dispute

Institutional arbitration and ad hoc arbitration

Parties should choose if they wish to proceed by way of an institutional arbitration or an ad hoc arbitration. An institutional arbitration may offer a roster of arbitrators and a pre-packaged set of rules as well as administrative and other support in appointing an arbitrator and conducting the arbitration. In contrast, an ad hoc arbitration has no default rules and operates by choice of the parties. Ad hoc arbitrations are more common in Canada.

Each has their own strengths and weaknesses:

Institutional arbitration	Ad hoc arbitration
Strengths	
• Predictable procedure with no need to negotiate procedural rules • May be easier to enforce, as there may be greater deference to decisions of arbitrators at arbitral institutions (though an institution is not necessary to assure enforcement) • Can minimize disagreement on procedure in international transactions or disputes	• Parties can tailor the process to their specific needs and the requirements of the circumstances • Can be cheaper (no administrative payments to an institution) and more efficient • Maximum flexibility throughout the process
Weaknesses	
• Can be expensive due to significant administration fees • Some institutions are viewed as bureaucratic • Parties may want to craft their own procedures/rules	• Can be expensive and less efficient if the terms of the agreement are not clear

If the parties select institutional arbitration, they should consider the institution most suitable for the jurisdiction:

- The ADR Institute of Canada may be appropriate where both parties are Canadian.
- The American Arbitration Association through the International Centre for Dispute Resolution may be appropriate where one party is Canadian and the other is American.
- The London Court of International Arbitration or the International Chamber of Commerce may be appropriate where one party is Canadian and the other is outside of Canada and the United States.

If the parties select ad hoc arbitration, the parties should ensure that the terms of the arbitration agreement clearly set out key elements to avoid dispute over the terms of the agreement. At minimum, the arbitration agreement should include a process to select an arbitrator quickly. Such a provision can then facilitate subsequent negotiations on more detailed procedural terms, under the guidance of an arbitrator.

Interim relief

The interim relief that either a court or arbitrator/arbitral tribunal can grant will depend on the legislation in the seat of the arbitration. In general, there has been a trend towards greater interim relief, from both an arbitral tribunal and the court.

From the tribunal

In all provinces, arbitral tribunals may grant interim measures at the request of a party, unless the parties agreed otherwise in the arbitration agreement. In Ontario and British Columbia, due to the adoption of the 2006 Amendments to the Model Law, arbitral tribunals have the power to order interim and preliminary measures, unless otherwise agreed by the parties. However, interim measures are only binding between the parties to the arbitration and an interim award cannot bind third parties.

When necessary, most jurisdictions allow parties to apply to a domestic court for help in having interim measures enforced. For example, the Model Law provides that interim measures issued by arbitral tribunals shall be recognized as binding and enforced upon application to the competent court.

From the court

In Canada, courts have broad discretion to grant interim relief in arbitration proceedings; for example, article 17J of the Model Law provides that "A court shall have the same power of issuing an interim measure in relation to arbitration proceedings...as it has in relation to proceedings in courts."

In certain situations, parties cannot, as a practical matter, obtain relief from a tribunal with the same speed as it can from a court. For instance, relief may be needed before the arbitrators are even appointed.

Unless parties voluntarily comply with any interim or provisional relief granted by an arbitral tribunal, the award must be entered in the court system to have judicial force. While enforcement is straightforward, in most cases it is more expedient to get relief from the court directly.

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4

Choosing your decision-maker

Qualifications to consider

Expertise

Both the arbitrator's technical and legal expertise should be considered. Legal expertise can mean both procedural and substantive familiarity.

Procedural considerations

Civil law	Common law
• Inquisitorial, meaning decision-makers take an active role conducting the proceedings, suggesting evidence and questioning witnesses • Parties to proceedings have little to no discovery rights	• Adversarial, meaning the judge allows both parties to present their side with relatively minimal interference • Parties have extensive discovery rights, especially in the United States

Substantive law

Parties can select an arbitrator experienced in the area of law engaged by the dispute. For example, an arbitration agreement in a construction contract may specify that the arbitrator needs experience either practising in construction law or as an arbitrator in construction disputes.

Industry-specific or technical expertise

Arbitration agreements can, and often do, specify that an arbitrator must have certain technical expertise. Such expertise can help expedite the arbitration and can help the arbitrator make a fair decision based on the merits of the dispute.

Common examples of technical expertise include the following:

- Construction
- Accounting
- Energy
- International shipping
- Maritime law

Conflicts

All Canadian arbitration legislation requires the arbitrator to be "impartial and independent." A failure of either impartiality or independence can lead to either the removal of the arbitrator or the arbitral award being set aside. As such, it is important to do a thorough conflict search of any potential arbitrators. Arbitrators should be asked for broad disclosure of all affiliations with the parties and even counsel when they are approached for a possible appointment.

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Cost

Highly sought-after arbitrators are expensive. However, procedures can be tailored (such as minimizing oral argument and limiting the number of witnesses each side may call) to reduce the amount of hearing time required and to control costs. An arbitration agreement that provides for one arbitrator rather than a panel of three also reduces costs.

5

After the award

Enforcing the award

In Canada

In Canada, arbitral awards can be enforced in the same way as judgments, by applying to a court for recognition and enforcement. A court can only refuse recognition and enforcement on very narrow grounds, including if the agreement was not valid, a party was not able to participate in the arbitration or the subject matter of the dispute is not capable of settlement by arbitration.

Outside of Canada

Nearly every commercially significant country is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). This convention creates an obligation for states to recognize and enforce arbitral awards. The state must treat the arbitral award as if it was a domestic court judgment.

States can only refuse enforcement on narrow procedural or due process grounds; the foreign court may not scrutinize the merits of the arbitral tribunal's decision.

In Canada, arbitral awards can be enforced in the same way as judgments, by applying to a court for recognition and enforcement.

Resisting the award

A party seeking to resist an arbitral award against it typically has only two ways to do so: it can apply to the courts of the arbitral seat to have the award set aside, or it can challenge enforcement if the opposing party tries to have the award enforced in a foreign jurisdiction.

Setting aside the award (distinct from an appeal)

Applying to set aside an award is not the same as appealing a decision.

In an appeal, an appellate court considers the merits of the findings of the lower decision, both legal and factual.

An arbitral award without appeal rights may only be set aside on the grounds set out in the arbitration legislation of the seat of arbitration. The grounds for setting aside an award are generally the same as those for refusing recognition and enforcement, mainly procedural and due process arguments:

- The arbitration agreement was invalid.
- A party did not have proper notice or was otherwise unable to present its case.
- The award dealt with issues outside the scope of the arbitration agreement.
- The composition of the tribunal or the arbitral tribunal was not in accordance with the parties' agreement.
- The dispute is not capable of being settled by arbitration.
- The award is against the public policy of the state (this principle has been interpreted very narrowly).

Challenging enforcement

Under the New York Convention, courts in recognition and enforcement actions cannot re-hear the merits of the dispute. They can only deny recognition or enforcement on the grounds above or if the award has already been set aside in the seat of the arbitration.

6

Ethics and international arbitration

Even though arbitration occurs outside of court, lawyers are still governed by the applicable ethical rules. In Canada, these include the following:

- The duty to be civil and courteous.
- The duty to avoid unilateral communication with the arbitrator.
- The duty to produce relevant documents and not attempt to deceive a decision-maker by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct.
- The duty to be candid.
- The duty of confidentiality.

However, for international arbitration, there is no single international code of conduct, and many countries have distinct ethical codes. Therefore, there may be a number of different ethical codes at play; for example, each party and its respective counsel may be from different countries, and either party or both may be from a different country than that relating to the governing law and the seat of the arbitration. Many have called for a single code to avoid an ethical "no man's land," to give counsel clarity and to avoid counsel being subject to two or more possibly conflicting codes of conduct. To date, no such code has been adopted globally.

While most legal regimes affirm five universal principals (fairness, truthfulness, independence, loyalty and confidentiality), domestic ethical codes diverge on a number of key issues. These divergences can be broadly categorized by comparing the trends of civil law jurisdictions against common law jurisdictions.

Even though arbitration occurs outside of court, lawyers are still governed by the applicable ethical rules... However, for international arbitration, there is no single international code of conduct, and many countries have distinct ethical codes.

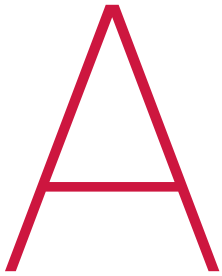
Activity	Civil law	Common law
Duty of candour		
Duty to disclose adverse legal authority	No in most jurisdictions.	Yes in most jurisdictions.
Propriety of creative arguments	In most jurisdictions, creative arguments that are not likely to prevail would be considered professionally irresponsible, if not sanctionable.	In the United States and Canada, lawyers can advocate a creative interpretation in favour of their client.
Communication with arbitrator		
Can counsel communicate with the arbitrator in the absence of the other party?	In most jurisdictions, a lawyer's role is to act as a "guide" to the court, so there is less concern that communications in the absence of the other party will unfairly influence the outcome.	In the United States and Canada, prohibitions on communications in the absence of the other party are relatively strict. The court is expected to act as a "blank slate," and all communications must be in the presence of both parties.
Are communications between lawyers confidential from the client?	If a lawyer receives a communication marked confidential, the rules may forbid the lawyer from sending a copy to the client.	In the United States, United Kingdom and Canada, ethical rules do not recognize such an obligation, which would conflict with the duty to keep the client informed.
Confidentiality		
Are lawyers and their clients restricted from using documents and information disclosed in an arbitration for another purpose?	The civil law is uncertain on this point. The prohibition against using documents produced in an arbitration for another purpose (i.e., the "implied undertaking rule") is a product of the common law system.	The common law is uncertain on this point.

Given the level of uncertainty with respect to the ethical rules binding counsel, parties should take the initiative and broach the subject as early as possible. Silence invites misunderstandings.

Where parties cannot agree on the appropriate ethical rules, they may seek guidance from the arbitrator. To resolve such disputes over ethics, the parties can adopt the *International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration* (2010), which address some ethical issues, such as including a requirement that documents produced in an arbitration are to be kept confidential and expressly permitting communication with fact witnesses to discuss their prospective testimony. Parties can also proactively address some of these issues by specifying the rules of confidentiality over documents.

However, it may be difficult to enforce ethical obligations in international arbitrations. Generally, international arbitration is not subject to a disciplinary system, and intervention in the jurisdiction where the lawyer is licensed is rare. If lawyer misconduct or a breach of an ethical code occurs, there may be no enforcement. Sanction is typically in the discretion of the arbitrator. If the parties discover misconduct after the final award, it may be too late, as the arbitrator no longer has jurisdiction.

Appendices



List of federal, provincial and territorial statutes dealing with the enforcement or administration of international arbitral proceedings in Canada

Jurisdiction	Legislation
Canada	*Commercial Arbitral Act* (R.S.C. 1985, c. 17 (2nd Supp.)) (Canada)
Alberta	*International Commercial Arbitration Act* (R.S.A. 2000, c. I-5)
British Columbia	*International Commercial Arbitration Act* (R.S.B.C. 1996, c. 233)
Manitoba	*International Commercial Arbitration Act* (C.C.S.M., c. C-151)
New Brunswick	*International Commercial Arbitration Act* (R.S.N.B. 2011, c. 176)
Newfoundland and Labrador	*International Commercial Arbitration Act* (R.S.N.L. 1990, c. I-15)
Northwest Territories	*International Commercial Arbitration Act* (R.S.N.W.T. 1988, c. I-6)
Nova Scotia	*International Commercial Arbitration Act* (R.S.N.S. 1989, c. 234)
Nunavut	*International Commercial Arbitration Act* (R.S.N.W.T. 1988, c. I-6)
Ontario	*International Commercial Arbitration Act* (S.O. 2017, c. 2, Sched. 5)
Prince Edward Island	*International Commercial Arbitration Act* (R.S.P.E.I. 1988, c. I-5)
Québec	*Civil Code of Procedure* (R.S.Q., c. C-25 (as am.)) *Québec Civil Code* (S.Q. 1991, c. 64)
Saskatchewan	*International Commercial Arbitration Act* (S.S. 1988-1989, c. I-10.2)
Yukon	*International Commercial Arbitration Act* (R.S.Y. 2002, c. 123)

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List of federal, provincial and territorial statutes dealing with the enforcement or administration of domestic arbitral proceedings in Canada

Jurisdiction	Legislation
Canada	*Commercial Arbitral Act* (R.S.C. 1985, c. 17 (2nd Supp.)) (Canada)
Alberta	*Arbitration Act* (R.S.A. 2000, c. A-43)
British Columbia	*Arbitration Act* (R.S.B.C. 1996, c. 55)
Manitoba	*The Arbitration Act* (C.C.S.M., c. A-120)
New Brunswick	*Arbitration Act* (R.S.N.B. 2014, c. 100)
Newfoundland and Labrador	*Arbitration Act* (R.S.N.L. 1990, c. A-14)
Northwest Territories	*Arbitration Act* (R.S.N.W.T. 1988, c. A-5)
Nova Scotia	*Arbitration Act* (R.S.N.S. 1989, c. 19) *Commercial Arbitration Act* (1999, c. 5)
Nunavut	*Arbitration Act* (R.S.N.W.T. 1988, c. A-5)
Ontario	*Arbitration Act, 1991* (S.O. 1991, c. 17)
Prince Edward Island	*Arbitration Act* (R.S.P.E.I. 1988, c. A-16)
Québec	*Civil Code of Procedure* (R.S.Q., c. C-25 (as am.)) *Québec Civil Code* (S.Q. 1991, c. 64)
Saskatchewan	*Arbitration Act, 1992* (S.S. 1992, c. A-24.1)
Yukon	*Arbitration Act* (R.S.Y. 2002, c. 8)

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