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DO YOU KNOW WHAT YOUR NEIGHBOUR IS DOING?

NAVIGATING INTERNATIONAL ARBITRATION IN CANADA

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Agenda

1. Overview: international arbitration landscape in Canada

2. The basics: standard clauses

3. Key issues for businesses:

    - Arbitrability
    - Role of the courts
    - Practical considerations (in times of COVID)

1. Overview:

International arbitration landscape in Canada

Overview

International arbitration landscape in Canada

Strong history of international arbitration

Institutions and rules

- ADR Institute of Canada (ADRIC)
- Vancouver International Arbitration Centre (VanIAC)
- International Centre for Dispute Resolution (ICDR)
- China International Economic and Trade Arbitration Commission (CIETAC)

Organizations

- Western Canada Commercial Arbitration Society (WCCAS)
- Toronto Commercial Arbitration Society (TCAS)

Overview

International arbitration landscape in Canada

Arbitration Chambers

- Arbitration Place

International rules / institutions

- International Chamber of Commerce (ICC)
- International Centre for Settlement of Investment Disputes (ICSID)
- London Court of International Arbitration (LCIA)
- Singapore International Arbitration Centre (SIAC)
- HK International Arbitration Centre (HKIAC)
- UNCITRAL Rules (*ad hoc*)

Overview

International arbitration landscape in Canada

What is the law on international arbitration?

- **Canada is a federal state:**
  - Federal, provincial and territorial law primarily based in common law
  - Quebec provincial law is civil law
  - Each jurisdiction has its own legislation governing international arbitration seated within that jurisdiction

- **Federal jurisdiction** → Commercial Arbitration Act, RSC 1985, c 17
  - Used for the following disputes:
  - Her Majesty the Queen in Right of Canada is a party
  - A departmental corporation or a federal Crown corporation is a party
  - Investor-state disputes

Overview

International arbitration landscape in Canada

- **Each province and territory has their own legislation for international arbitration**
  - Each province in some way has agreed to the NY Convention
  - While the law and procedures for international arbitration are generally the same between jurisdictions, there can be differences
- **Each province and territory also has their own legislation for domestic arbitration – whether a matter is "domestic" or "international" will be determined by the terms of those statutes**

Overview

Not all common law regimes are created equal

	British Columbia	Alberta	Ontario
Legislation	*International Commercial Arbitration Act*, RSBC 1996 c 232	*International Commercial Arbitration Act*, RSA 2000, c I-5	*International Commercial Arbitration Act, 2017*, SO 2017, c 2, Sch 5
Key Points	• Adopts and integrates the 2006 UNCITRAL Model Law • Integrated enumerated regime for interim relief • Provides that parties may be represented by foreign lawyers (s. 21.01). • Expressly states third-party funding is not contrary to public policy for purposes of award enforcement (s. 36(3)).	• Adopts the 1985 UNCITRAL Model Law • Provides for interim relief • No specific section regarding legal representatives. • No specific section regarding third-party funding.	• Adopts the 2006 UNCITRAL Model Law • Comprehensive enumerated regime for interim relief. • No specific section regarding legal representatives. • No specific section regarding third-party funding.

Overview
Québec civil law

- Quebec is a civil law jurisdiction – the province is not governed by the common law.
- International commercial arbitrations are governed by the Civil Code of Quebec and the Code of Civil Procedure.
- The Civil Code of Quebec at Article 649-651, Section 649 specifically states:

> *If international trade interests, including interprovincial trade interests, are involved in arbitration proceedings, consideration may be given, in interpreting this Title, to the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and its amendments. Recourse may also be had to documents related to that Model Law, including (1) the Report of the United Nations Commission on International Trade Law on its eighteenth session held in Vienna from 3 to 21 June 1985; and (2) the Analytical Commentary on the draft text of a model law on international commercial arbitration contained in the report of the Secretary-General to the eighteenth session of the United Nations Commission on International Trade Law.*

2. The basics:
Arbitration clauses

Overview of Standard Clauses

International Arbitration Clauses

- Frequently dubbed “midnight clauses”
- Can be critical to how a dispute proceeds
- Consider the purpose for the clause, the agreement and the entire project – this can impact key aspects for drafting
- There may be additional considerations for international projects or agreements with foreign companies
- You can tailor the dispute resolution clause to your advantage when negotiating the underlying agreement

Overview of Standard Clauses

International Arbitration Clauses

- Exercise caution when including negotiation and/or mediation as preconditions to arbitration
  - May include discussions at several levels of management over specified periods of time
  - Careful drafting required
  - Limitations periods
  - Consider tolling agreements
  - Clear articulation of timeframes and endpoints

- Important to distinguish arbitration from expert determination
  - Best for scientific, technical, accounting or other discreet matters based more in fact or the application of technical expertise than in law
  - Arbitration governed by statute in Canada: recourse to Courts, appeal and set aside rights, can be enforced on its own right in other jurisdictions
    - Expert Determination governed by common law
    - Limited Canadian case law
    - Can potentially be challenged only if expert materially departed from instructions, failed to disclose a relationship with a party, or demonstrated bias, fraud or the like
    - Decision becomes a part of the contract – may need further processes to enforce

Overview of Standard Clauses

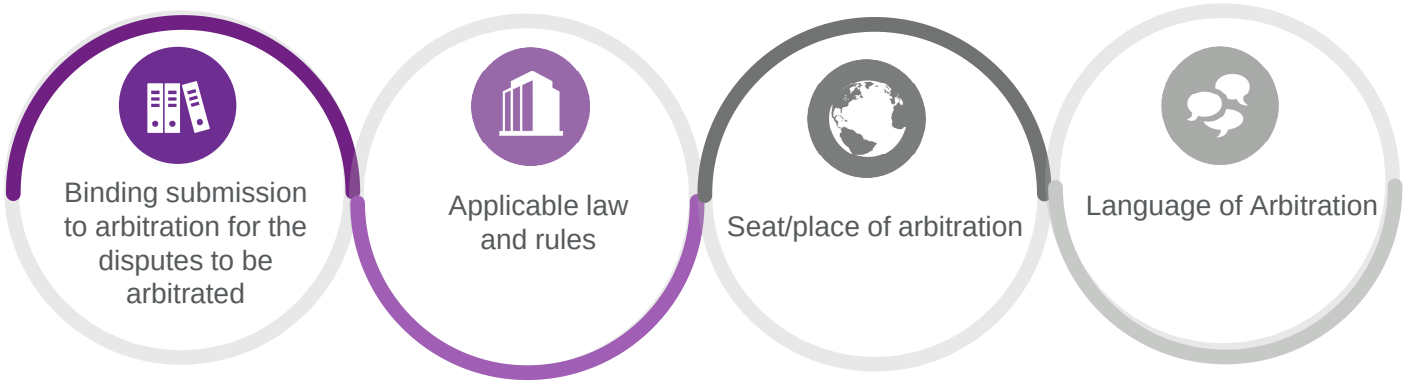
International Arbitration Clauses

- Both arbitration and expert determination are procedures for alternative dispute resolution of long standing in Canadian and English law (*Cummings v Solutia SDO Ltd*, 49 BLR (4th) 307 (ON SC), app dism 2009 ONCA 510)
- The choice between expert determination and arbitration can lead to drastically different consequences. Unless agreed otherwise by contract (express or implied), in an expert determination there are no fixed or default procedures for the determination; no jurisdiction in the decision maker to determine his or her jurisdiction; the potential for greater limitations on jurisdiction to decide questions of law or mixed law and fact; no requirement on the expert to give reasons; and no rights of appeal or judicial review of the decision. Also, Alberta law provides that parties can compel witnesses to testify in an arbitration, whereas there is no similar compulsion in an expert determination (*Applied Industrial Technologies, LP v Sirois*, 2018 ABQB 818 at para 112)
- In determining whether the parties agreed to arbitration or expert determination, the Courts look to the words of the contract, the context and the surrounding circumstances, typically including the subject matter of the ADR clause, the "qualifications of the person charged with making the decisions", and the contemplated formality (or judicial nature) of the process (*Sport Maska Inc. v Zittrer*, [1988] 1 SCR 564 at paras 61-62)

Overview of Standard Clauses

Drafting International Arbitration Clauses

- All clauses should include:



- Avoid pathological clauses – uncertain jurisdiction, equivocation as to binding nature, too much specificity for arbitrator qualifications etc.
- Example of a poorly drafted clause:
- “If no agreement is reached as a result of the informal dispute resolution process required by Section [_], then the dispute may be submitted to arbitration in accordance with the provisions of the commercial arbitration legislation of [province].”

Overview of Standard Clauses

Sometimes less is more!

Standard ICC Arbitration Clause:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

ADRIC Model Clause:

"All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, will be finally resolved by arbitration under the Arbitration Rules of the ADR Institute of Canada, Inc. The Seat of Arbitration will be [specify]. The language of the arbitration will be [specify]."

3. Key issue for businesses

3. Impact on Business - Arbitrability

Competence-competence

- Under international arbitration legislation and case law in Canada, it is generally well-accepted that the arbitrator has jurisdiction to determine their own jurisdiction.

- UNCITRAL Model Law, Article 16(1):

The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

Alberta*: International Commercial Arbitration Act*, RSA 2000 c I-5

Ontario*: International Commercial Arbitration Act*, SO 2017, c 2, s. 5

3. Impact on Business - Arbitrability

Competence-competence

> It is relatively well accepted that the competence-competence principle applies to the jurisdictional challenges regarding the applicability of the arbitration agreement […]. In any challenge to arbitral jurisdiction alleging that the dispute does not fall within the scope of the arbitration clause, it has been established that courts ought to send the matter to arbitration and allow the arbitrator to decide the question, unless it is obvious that the dispute is not within the arbitrator's jurisdiction. […]
>
> *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34, at 165

- Three-part test for deciding whether arbitrability should be decided by the court or the arbitral tribunal:
  1. General rule: a challenge to arbitral jurisdiction should be resolved by the arbitrator;
  2. A court should only depart from this rule 'if the challenge to the arbitrator's jurisdiction is based solely on a question of law;' except that,
  3. If the question for review by the court is one of mixed fact and law, then the matter should be referred to the arbitrator 'unless the questions of fact require only superficial consideration of the documentary evidence in the record.

Seidel v TELUS Communications Inc., 2011 SCC 15

3. Impact on Business - Arbitrability

Competence-competence

- It may be possible to depart from the general rule if the arbitrator might not actually hear the matter (for example, if the claimant is impecunious and unable to pay the costs of the arbitration).

- There are also statutory limitations on arbitrability:
  - Consumer protection legislation
  - Employment legislation
  - Class actions / class proceedings legislation

3. Impact on Business – Role of the Courts

Court assistance in arbitration

- Courts of inherent jurisdiction in Canada maintain their overall supervisory jurisdiction for international arbitration disputes

- Ability of courts to assist is specifically set out in international arbitration legislation

Example: Courts empowered to stay proceedings that ought to proceed to arbitration:

Where, pursuant to article II(3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

Alberta: *International Commercial Arbitration Act*, RSA 2000, c I-5, at s 10

3. Impact on Business – Role of the Courts

Court assistance in arbitration

- Example: Courts also empowered to provide interim / injunctive relief

  It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

  - Alberta*: International Commercial Arbitration Act*, RSA 2000 c I-5, at Schedule 2, article 9
  - Ontario*: International Commercial Arbitration Act*, SO 2017, c 2, s. 5, at Schedule 2, article 9

- Court intervention may also be supported by arbitral rules agreed to by the parties

- Consider differences between court and arbitration in terms of speed, cost and enforcement

3. Impact on Business – Injunctive Relief

- The Courts in Canada maintain jurisdiction to award injunctive relief:
  - This may cause significant delays
  - This would compromise the confidentiality of the proceeding

- **Solution:**
  - Ensure that there are emergency provisions that allows for parties to seek injunctive relief outside the court system
    - Article 17 of the 1985 Model Law → "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure."
    - Article 27(1) of the ICDR Rules (2021) → "At the request of any party, the arbitral tribunal may order or award interim or conservatory measures it deems necessary, including injunctive relief and measures for the protection or conservation of property."

3. Impact on Business – Practical Considerations (in times of COVID)

Practical Considerations

- **Can be difficult to secure court dates for assistance in the arbitration process (arbitrator appointment, interim/injunctive relief, enforcement)**

- **Virtual hearings**:
  - **Security** considerations
  - **Compatibility** of the technology used by each party and their witnesses
  - **Reliability** of wifi – consider using an ethernet cable
  - **Practice** with witnesses to ensure that their technology is properly set up for a virtual hearing
- Canadian case law and practice strongly endorses virtual hearings: *Miller v FSD Pharma, Inc.*, 2020 ONSC 3291; *Arconti v Smith*, 2020 ONSC 2782.

3. Impact on Business – Practical Considerations (in times of COVID)

Where virtual hearings are in dispute:

- **Key considerations**:
  - **Time zones – can sufficient hearing time, whether for argument or cross-examination, be assigned if individuals are in vastly different time zones?**
  - **Credibility – are there genuine issues of credibility that might be difficult to ascertain in a virtual hearing?**
  - **Reliability** of wifi / technology – technological issues, whether it means separation of the counsel or a client team, or unreliable technology that could impact perceptions of one's evidence or argument

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Thank you!

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