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International Arbitration

Second Edition

Canada
Bay Street Chambers

chambers.com

2019

Law and Practice

Contributed by Bay Street Chambers

Contents

Bay Street Chambers is comprised of senior barristers practising as arbitrators and mediators in international and domestic disputes. There are currently three members of chambers, each with an independent practice within the chambers structure. Their international practice, in addition to general commercial and contract cases, includes specific expertise in construction and procurement disputes, technology and intellectual property disputes, product licensing, oil and gas and energy disputes. The members' experience consists of both ad hoc and institutional arbitrations as well as investor/state cases at ICSID. Chambers are situated at Arbitration Place in Toronto, providing state-of-the-art, neutral hearing facilities if required.

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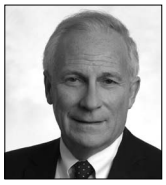

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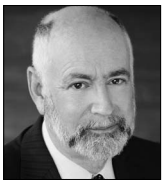

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1. General

1.1 Prevalence of Arbitration

In all of Canada's provinces and territories, with the exception of Québec, distinctions are made between domestic and international arbitrations. International arbitration is defined as per Article 1(3) of the UNCITRAL Model Law, and conducted under the auspices of the international arbitration statutes described in **2.1 Governing Law**, below. By contrast, domestic arbitrations are conducted under statutes enacted for that purpose. Generally speaking, the domestic arbitration acts of British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia are modelled on the UNCITRAL Model Law, but they allow for slightly more court involvement than does the Model Law, and the tests for stays of court actions and applications to set aside awards vary slightly. Most significantly, these domestic acts permit substantive appeals from awards to the courts where parties opt in to such rights, or where they fail to opt out. In some provinces, domestic arbitration legislation does not permit parties to opt out of a right to appeal to the courts on questions of legal error, where statutory tests for leave to appeal are satisfied. In Prince Edward Island, Newfoundland & Labrador and the territories, the domestic acts are modelled on the English Arbitration Act of 1889.

Unless stated otherwise, the balance of this chapter deals only with international arbitrations conducted in Canada.

Over the past 20 to 30 years, the use of arbitration as a means of determining commercial disputes has grown by a significant degree. This trend started in the early 1990s with the reform of domestic arbitration statutes in most of Canada's provinces, with the adoption of the UNCITRAL Model Law to govern international arbitrations in all of Canada's provinces and territories, and with the enactment of the Federal Government's Arbitration Code to deal with matters under federal jurisdiction. The use of arbitration has grown as contracting parties and their lawyers have become aware of and frustrated by the inefficiencies and expense associated with Canada's public courts.

Over the same time period, there has been a growth in the number of arbitration practitioners, including both counsel and arbitrators. Law firms have established arbitration practice groups and have been active in growing their arbitration practices. A number of high-profile lawyers have left their law firms to establish independent arbitration practices, and a number of arbitration hearing facilities have opened in Canada's larger cities, including Toronto and Vancouver.

The growth of arbitration in Canada has been accompanied by a concomitant acceptance by Canada's courts of arbitration as an integral part of its public policy and legal system. Consistent with arbitration statutes, courts enforce arbitration agreements, compel parties to abide by those agreements, support ongoing arbitrations and defer to arbitral decisions on appeals (which remain available in limited situations in domestic cases) and judicial review.

It is now common for arbitration agreements to be included in commercial agreements and, where no such agreements have been made, for parties to opt for arbitration after their disputes have arisen.

As a result of the foregoing, the number of international arbitrations seated in Canada has grown.

1.2 Trends

A review of Canadian court decisions in cases dealing with both domestic and international arbitrations suggests that issues that come before the courts relate, for the most part, to the following:

- Stay applications – Article 8 of the Model Law has full force and effect in Canada. The courts at all levels have made it clear that arbitration agreements are to be enforced, and that court actions brought in the face of arbitration agreements must be stayed unless it is clear that any of the conditions stated in Article 8(1) are met (ie, the arbitration agreement is null and void, inoperative or incapable of being performed).
- Jurisdiction – see **5.2 Challenges to Jurisdiction**, below.
- Applications to set aside awards or to refuse recognition and enforcement – see **11. Review of an Award** and **12. Enforcement of an Award**, below.

In a series of recent cases, the Supreme Court of Canada has expressed strong support for arbitration as an autonomous dispute resolution regime. These cases arose in the context of stay applications in class proceedings (see **13. Miscellaneous**, below). Apart from court cases, there is a trend of promoting the use of arbitration to resolve international commercial disputes, to promote Canada as a venue for international arbitrations involving parties from elsewhere, and to engage Canadian counsel and arbitrators in international institutions and markets.

1.3 Key Industries

The following industries are significant in international arbitrations seated in Canada: oil and gas, forestry, mining, construction, infrastructure, information technology and investment disputes.

1.4 Arbitral Institutions

Partly as the result of a paucity of true arbitration institutions in Canada, many international cases seated in Canada and involving a Canadian party have proceeded on an ad hoc basis, particularly where the parties are represented by Canadian counsel and where the arbitrators are Canadian. With the establishment of arbitration facilities in Vancouver, Toronto and Montréal, and with the growing exposure of

Canadian practitioners to international norms and practices, the number of international arbitrations seated in Canada and the use of international arbitration institutions for those arbitrations have grown. Canada's branch of the International Chamber of Commerce (ICC) actively promotes arbitration through a very active Arbitration Committee comprising practitioners from across the country. Similarly, the International Centre for Dispute Resolution (ICDR), which has established a set of rules specifically designed for domestic cases, is increasingly being used for international cases in Canada. Other institutions that are frequently used include JAMS and the International Institute for Conflict Prevention and Resolution (CPR). Finally, the British Columbia International Commercial Arbitration Centre (BCICAC), established in 1986, provides a venue and a set of rules for international commercial arbitrations.

2. Governing Legislation

2.1 Governing Law

Nine of Canada's ten provinces and all of its territories have enacted arbitration statutes that govern international arbitrations seated within their borders. The acts of Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland & Labrador, Nunavut, the Yukon and the Northwest Territories incorporate the UNCITRAL Model Law as appendices. Typically, these international acts make some revisions to the Model Law to reflect the fact that the provinces and territories are units within a federal state, and they add provisions that deal with such matters as designation of rules of law where parties have not done so on their own, the enforcement of consolidation agreements, powers of domestic courts, stays of court proceedings and limitation periods.

While most of the provinces have incorporated the 1985 version of the Model Law, Ontario in 2017 adopted the 2006 text of that instrument.

The British Columbia statute is substantially based on the Model Law and has recently been amended to reflect the 2006 amendments to that instrument.

Québec's arbitration legislation, which is set out in its Civil Code and Code of Civil Procedure, makes no distinction between domestic and international arbitration. Indeed, in that province, disputes between parties from different provinces within Canada are treated as international for arbitration purposes.

For matters of maritime law and those within specific federal jurisdiction or involving federal government entities as parties, the federal Arbitration Code adopts the 1985 version of the Model Law, with no distinction made between domestic and international arbitration.

2.2 Changes to National Law

In 2014, the Uniform Law Conference of Canada issued a Uniform International Commercial Arbitration Act for the purpose of making recommendations to provincial and territorial legislatures for changes to their international arbitration statutes. In 2017, Ontario enacted a new international arbitration statute, having as its major change adoption of the 2006 version of the UNCITRAL Model Law. In 2018 British Columbia amended its international arbitration legislation and it is expected that, over time, the legislatures of the other provinces and territories will follow suit.

3. The Arbitration Agreement

3.1 Enforceability

The formal requirements for international arbitration agreements to be enforceable in all provinces and territories in Canada other than Ontario and Québec are as set out in the 1985 version of the UNCITRAL Model Law. For Ontario, these requirements are as set out in the 2006 version of the Model Law. Accordingly, parties must, in a standalone written agreement or by virtue of provisions in a broader written commercial agreement, agree to submit to arbitration all or certain existing disputes or disputes which may arise between them in respect of a defined legal relationship (whether contractual or not). Arbitration agreements will be considered 'written' if signed by the parties or if contained in forms of communication such as letters, electronic communications or an exchange of written pleadings. In Ontario, the term 'electronic communication' is given a very broad meaning. While the Québec Civil Code and the British Columbia act do incorporate the provisions of the Model Law, the formal requirements in those provinces are substantially the same.

The common law of contract formation applies to arbitration agreements. There must be consensus ad idem between parties having the legal capacity to make contracts, and there must be an absence of factors that vitiate consent, such as fraud, undue influence and non est factum.

While the courts are loath to imply agreements to arbitrate into existing commercial agreements, they have enforced arbitration agreements that are incorporated by reference in other agreements and they have in certain instances bound non-signatories, associated parties and assignees.

3.2 Arbitrability

Generally speaking, all commercial disputes are arbitrable in Canada. The courts recognise that parties to commercial agreements are free to resort to arbitration to determine their disputes, even where such disputes touch on matters that traditionally may have been thought of as solely within the purview of the courts. In Desputeaux v Editions Chouette Inc., 2003 SCC 17, the Supreme Court of Canada ruled that public policy exceptions to party autonomy should be

very rare. On this basis, the courts have ruled that cases involving statutory remedies, such as competition matters and intellectual property rights, can be arbitrated.

The general operative principle on arbitrability is that commercial disputes are arbitrable, unless the subject matter of the dispute has been excluded from arbitration by statute. As an important example of this, some provinces have enacted legislation that precludes the arbitration of consumer disputes, unless consumers knowingly opt for arbitration after their disputes arise. It should be noted that there is some debate in Canada as to whether employment agreements are 'commercial'.

All of the provincial governments, as well as the federal government, have included a provision that the Crown is bound by their arbitration legislation.

3.3 National Courts' Approach

As noted in **1.2 Trends**, above, Canada's courts will, as a matter of public policy and consistent with adoption of the Model Law, enforce arbitration agreements unless they are found to be null and void, inoperative or incapable of being performed. Unless the question involves a question of law alone, or it can be determined on the basis of a cursory review of the facts, courts apply *Kompetenz-kompetenz* and defer the question of enforceability of arbitration agreements in first instance to the arbitrators.

3.4 Validity

Article 16(1) of the Model Law, which provides that an agreement to arbitrate is independent of other terms of an agreement, and which reflects the principle of contractual autonomy enunciated in Heyman v Darwins, Ltd. [1942] A.C. 356 (H.L.), is given full force and effect in Canada.

4. The Arbitral Tribunal

4.1 Limits on Selection

There are no limits on the parties' autonomy to select arbitrators, subject to any limitations or qualifications set out in the parties' arbitration agreements. It is noteworthy that, prior to the enactment of Ontario's new International Commercial Arbitration Act in 2017, parties in Ontario were not entitled to exclude a person from acting as an arbitrator based upon that person's nationality. Under Ontario's new act, such exclusions are permissible under Article 11(1) of the Model Law.

For commercial arbitrations, there are no statutory or regulatory requirements that apply to the appointment of arbitrators or that govern persons who may be appointed as arbitrators. Arbitrators need not be legally trained.

4.2 Default Procedures

The international arbitration acts of Canada's provinces and territories do not provide for any appointment procedure other than the procedure prescribed by Article 11 of the Model Law. The provisions of the Model law in this regard will apply unless procedures for arbitrator appointment are set out in institutional rules adopted by the parties.

4.3 Court Intervention

The courts cannot intervene in the selection of arbitrators unless called upon to do so by a party using the challenge procedures of the Model Law or institutional rules that have been adopted by the parties.

The courts can select arbitrators under Article 11(3) of the Model Law where no institutional rules have been adopted and where the parties have failed to appoint their arbitrators. Similarly, the courts can be called upon to make arbitrator appointments where the parties have failed to do so and where their chosen institutions have failed to do so, under Article 11(4) of the Model Law.

4.4 Challenge and Removal of Arbitrators

There are no provisions governing the challenge or removal of arbitrators other than as provided in the Model Law and institutional rules that may have been adopted by the parties.

4.5 Arbitrator Requirements

Consistent with the Model Law, arbitrators are required to be neutral and impartial. Article 12 requires that potential arbitrators disclose circumstances likely to give rise to justifiable doubts as to their impartiality or independence, and this duty of disclosure continues throughout the arbitral process. Any additional requirements imposed by institutional rules adopted by the parties will also apply.

No Canadian jurisdiction has formally adopted the IBA Guidelines on Conflicts of Interest; however, the Guidelines are commonly used by Canadian arbitrators as a basis for disclosure, and at least one Canadian court has referred to the Guidelines in support of its dismissal of an application to set aside an award on the basis of alleged partiality (Jacobs Securities Inc. v Typhoon Capital B.V., 2016 ONSC 604).

5. Jurisdiction

5.1 Matters Excluded from Arbitration

See **3.2 Arbitrability**, above.

5.2 Challenges to Jurisdiction

The *Kompetenz-kompetenz* principle, as set out in Article 16 of the Model Law, is fully applicable in Canada and has the full support of its courts, including the Supreme Court of Canada. Indeed, it is expected that arbitrators will raise

jurisdictional issues where appropriate, even in the absence of party objections.

5.3 Circumstances for Court Intervention

Canadian courts can address issues of jurisdiction in the context of stay applications under Article 8 of the Model Law, on applications to set aside awards under Article 34 of the Model Law or on applications to have awards recognised and enforced under Article 36 of the Model Law.

On stay applications, the courts will refer questions of jurisdiction to arbitral tribunals unless the issue can be determined as a question of law alone, or where the question is one of mixed fact and law, but the questions of fact require only superficial consideration of the documentary evidence, and where the court is satisfied that the challenge is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding (Dell Computer Corp. v Union des Consommateurs et al 2007 SCC 34).

Furthermore, under Article 16(3) of the Model Law, where a tribunal makes a preliminary determination that it has jurisdiction, a party may, within 30 days, ask the court for its decision on the matter. In Ontario, under its recently enacted (2017) international act, a party may apply to a court even where a tribunal rules under Article 16(2) of the Model Law that it does not have jurisdiction. The same applies in British Columbia.

5.4 Timing of Challenge

Under Article 16 of the Model Law a challenge to jurisdiction under that article must be raised no later than the submission of a statement of defence. Any challenge to the authority of a tribunal based upon events that take place during the course of an arbitration must be raised as soon as the events take place. The Model Law does empower tribunals to extend the times for such challenges where the delay is considered justified.

5.5 Standard of Judicial Review for Jurisdiction/ Admissibility

By virtue of the language used in Article 16 of the Model Law ("decide the matter"), a court will determine jurisdictional issues on a legal standard of correctness and, in so doing, permit the introduction of new evidence (eg, Kitt v Voco Developments Inc., 2005 ABQB 743, and Mexico v Cargill, Incorporated, 2011 ONCA 622).

5.6 Breach of Arbitration Agreement

Article 8 of the Model Law is given full force and effect in Canada. For many years, courts have consistently ruled that parties to arbitration agreements are bound to proceed to arbitration unless any of the exceptions set out in Article 8 are met. Where a court orders that a matter be referred to arbitration, provincial and territorial arbitration statutes provide for the stay of court proceedings (eg, Section 9 of Ontario's International Commercial Arbitration Act).

5.7 Third Parties

While as a general rule arbitration agreements only bind the parties thereto, there are several instances where third parties and/or non-signatories may be brought within the jurisdiction of arbitral tribunals. These instances include:

- where an arbitration agreement may be incorporated by reference from one contract into another;
- where an arbitration agreement may be incorporated electronically by hyperlink (eg, Dell Computer Corp. v Union des Consommateurs et al. 2007 SCC 34);
- where parties are associated with signatories or are their successors in interest or the law of agency applies or a party is an assignee; or
- in rare circumstances, under the 'Group of Companies' doctrine (eg, Xerox Canada Ltd. v MPI Technologies Inc. 2006 CanLII 41006 (ONSC)).

6. Preliminary and Interim Relief

6.1 Types of Relief

Subject to the provisions of institutional rules that may be adopted by the parties, in all provinces and territories other than Québec, British Columbia and Ontario, Article 17 of the 1985 version of the Model Law applies, such that tribunals may order parties to take such interim measures of protection as the tribunals consider necessary and may require parties to post appropriate security in connection with such measures. In Ontario and British Columbia, with the adoption of the 2006 version of the Model Law, Article 17 has been made more robust, such that parties can obtain interim orders to:

- maintain or restore the status quo pending determination of the dispute;
- take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- provide a means of preserving assets out of which a subsequent award may be satisfied; or
- preserve evidence that may be relevant and material to the resolution of the dispute.

In Québec, the jurisdiction to grant interim measures is now codified in Article 638 of that province's Code of Civil Procedure.

In addition, of late, several arbitral institutions, including the ICC and the ICDR, have adopted rules for the appointment of emergency arbitrators to deal with applications for interim relief prior to the appointment of tribunals.

6.2 Role of Courts

Article 5 of the Model Law applies throughout Canada, such that as a matter of principle court intervention is limited. Article 9 of the Model Law provides that it is not incompatible with an arbitration agreement to seek interim relief from the courts. Canadian courts have jurisdiction to grant equitable relief, including injunctions and preservation orders in a wide variety of circumstances, generally to protect the interests of parties that can show that the balance of convenience favours the granting of such relief.

6.3 Security for Costs

The Model Law and the provincial and territorial acts that adopt that instrument are silent as to security for costs. Accordingly, such relief must be found expressly or impliedly in the agreement to arbitrate. The Ontario courts have held the power to order security for costs is procedural and within the arbitrator's jurisdiction (see Jaffasweet Juices Ltd. v Michael Firestone & Associates (1997), 17 C.P.C. (4th) 113).

7. Procedure

7.1 Governing Rules

Apart from the international arbitration statutes enacted by the provinces and territories, all of which incorporate the Model Law in substance or by way of incorporation by reference, there are no laws that govern the procedure of international arbitration in Canada.

The sole exception to the foregoing is that, for international arbitrations seated in New Brunswick, the Rules of Court under that province's Judicature Act will apply to the extent that those procedural rules do not conflict with New Brunswick's international arbitration act.

7.2 Procedural Steps

There are no procedural steps that are mandated by the Model Law or by any of the provincial and territorial acts that adopt that instrument. However, mandatory procedural steps are frequently set out in institutional rules. Where procedures are set out in mandatory terms, they must be followed. For example, in Bell Canada v The Plan Group et al (2009), 96 O.R. (3d) 81 (C.A.), the claimant failed to file a copy of its notice of arbitration with the institution. The court ruled that the right to arbitrate was lost by virtue of the application of a contractual limitation period that had lapsed before the arbitration could be properly commenced.

7.3 Powers and Duties of Arbitrators

There are no express powers and duties of arbitrators, other than as set out in the Model Law or in any applicable institutional rules. It is implicit that arbitrators are bound by their contracts of appointment to act independently and impartially to ensure that awards are made that will withstand the scrutiny of the courts on any application to set aside or enforce awards.

7.4 Legal Representatives

The legal profession is self-regulated in each of Canada's provinces, and reference should be made to the regulations of those bodies to ensure that legal representatives from other jurisdictions can act in international arbitrations seated in Canada. At present, there are no limitations.

8. Evidence

8.1 Collection and Submission of Evidence

Consistent with Article 19 of the Model Law, party autonomy applies to pre-hearing and hearing procedures for the adducing of evidence. Typically, such procedures will form part of arbitration agreements, or they will be reviewed at early pre-hearing conferences and then adopted formally in the form of procedural orders, with the proactive assistance of the tribunal. Early disclosure is favoured as a means of ensuring that arbitral proceedings are time- and cost-effective. The precise procedures adopted will depend upon the nature of the case, the experience of counsel and the experience of the arbitrators. Increasingly, with the growing experience of counsel and arbitrators, the use of detailed written statements, early exchange of documents and witness statements is becoming more common. Equally, oral discovery is becoming less common. At the hearing stage, parties are generally entitled to cross-examine witnesses, and questioning by arbitrators is permitted. Arbitrators will respect the legal privileges that may apply to exclude evidence, subject to determination of the precise privileges that should be invoked.

8.2 Rules of Evidence

In international arbitrations seated in Canada, the arbitrators determine the rules for the introduction of evidence, as provided for by Article 19(2) of the Model Law. Arbitrators are empowered to make determinations of admissibility, materiality and relevance of evidence sought to be adduced. The formal rules of evidence that characterise court proceedings do not apply. This said, arbitrators will make appropriate determinations of weight to be attributed to evidence that might not be reliable, typically hearsay and uncorroborated oral testimony.

8.3 Powers of Compulsion

As to parties, by establishing arbitral procedures, tribunals are empowered to order the production of documents and the attendance of witnesses. Failure to comply with procedural orders will empower tribunals to invoke default procedures, subject to the overriding requirement that parties be treated fairly and be given the right to present their cases and defences.

As to non-parties, while the Model Law does not empower tribunals to issue summons to witnesses, Article 27 empowers a tribunal, or a party with the consent of the tribunal, to apply to the court at the seat of the arbitration for assistance in the taking of evidence. Where such an application is made, the court will look to its own competence in deciding whether such assistance will be granted, and the form of that assistance. The courts may issue summons to witnesses located within Canada, or they may issue letters of request asking for the assistance of foreign courts. In addition to this, provincial evidence acts, by defining 'courts' to include 'arbitrators', empower arbitrators to issue summons to witnesses within their jurisdiction (ie, within the province or territory that is the seat of the arbitration).

9. Confidentiality

9.1 Extent of Confidentiality

A distinction has to be made between privacy and confidentiality. Generally, arbitrations in Canada are held in private, consistent with the presumed intentions of the parties. This, however, is not invariable; in a matter that was held to invoke a public interest, an arbitrator ruled that the process was not private, and he allowed non-parties to attend the hearing (Association of Municipalities of Ontario et al. v Stewardship Ontario 2014).

As to confidentiality, the case law in Canada is mixed; some courts have held that confidentiality is implicit in an agreement to arbitrate, and others have ruled to the contrary. As a result, as a matter of prudence and best practice, parties should come to terms on the confidentiality provisions that will apply, including the persons to be bound by confidentiality covenants, and the items to which the covenants will apply (documents, witness statements, submissions, transcripts, the existence of the arbitration, the identity of the arbitrators, and the award).

Confidentiality may also be provided for in institutional rules. As examples, the LCIA and the ICDR have rules that impose confidentiality requirements on arbitrators, and the BCICAC provides for confidentiality over awards, evidence and materials not otherwise in the public domain.

As a general rule, confidentiality will be lost where any court proceeding is brought in connection with an arbitration, as Canadian courts are loath to seal court documents on the basis of the inherent public interest in all court proceedings (eg, 887574 Ontario Inc. v Pizza Pizza Ltd., [1995] OJ No 1645 (CA)).

10. The Award

10.1 Legal Requirements

Awards made in international arbitrations seated in Canada must, as a minimum, be in writing, contain reasons (unless waived by the parties or on consent), state the date and place the award is made, be signed by the arbitrators or a majority of the arbitrators, and be delivered to each of the parties (Model Law, Article 31).

Additional requirements may be set out in arbitration agreements or in institutional rules adopted by the parties.

10.2 Types of Remedies

Subject to any limitations set out in arbitration agreements or in institutional rules, Canadian international arbitration legislation places no limits on the types of remedies that may be granted. This is subject to the overriding principle that an award can only bind parties to the arbitration agreement. As an example of an institutional limitation, the ICDR Rules provide that unless parties otherwise agree or unless an applicable statute provides otherwise, ICDR tribunals may not award punitive, exemplary or similar damages.

10.3 Recovering Interest and Legal Costs

In Canada, awards of pre-award and post-award interest are generally viewed as matters of substantive law, and it is implied that arbitrators have the power to award interest as an assumed part of their mandate to resolve the parties' disputes much as a court would. While the Model Law is silent on this, British Columbia's international arbitration statute expressly empowers arbitrators to award interest (Section 31(7)). Parties may expressly provide for interest by the terms of their arbitration agreements or by adoption of institutional rules that provide for interest awards. As a general rule, simple interest (as opposed to compound interest) will be awarded, subject to contrary contractual intent.

As to costs, the Model Law is silent, leaving entitlement to costs to the arbitration agreement or institutional rules that may be adopted by the parties. The awarding of costs has been held to be procedural in Ontario (see Jaffasweet Juices Ltd. v Michael Firestone & Associates (1997), 17 C.P.C. (4th) 113).

The British Columbia international statute does provide for costs, in a manner that reflects typical costs provisions of institutional rules. Section 31(8) of that act provides that costs are in the discretion of the tribunal. Costs may include the fees and expenses of the arbitrators and expert witnesses, legal fees and expenses, institutional administration fees and other expenses related to the arbitration.

Where there is an express or implied contractual entitlement to costs, tribunals will typically ask for costs submissions as part of closing submissions or shortly after a substantive

award is issued. Tribunals will determine who should pay the costs, the method of quantifying costs, a final quantification and a payment date. While the overriding principle is that a 'winner' is entitled to costs, tribunals will often cost-shift based upon discrete issues in the arbitration, and they will moderate costs claims on a standard of reasonableness.

11. Review of an Award

11.1 Grounds for Appeal

A distinction has to be made between appeals per se and applications to have awards set aside.

For international arbitrations seated in Canada, no appeals to the courts are permitted. Parties are, however, permitted to provide for appeals to arbitral appeal tribunals. In that event, the procedures, grounds of appeal and standards of review will have to be specified in the arbitration agreement and/or institutional appeal rules that may be adopted.

As to set-aside applications, Article 34 of the Model Law applies. There is a limited set of grounds that may apply, and these are restricted to matters of contractual capacity, jurisdiction, natural justice, composition of the arbitral tribunal and fair process. The permitted grounds also include questions of arbitrability and public policy. The grounds do not deal with the legal correctness of the award. There are cases that confirm the principle that Article 34 of the Model Law cannot be used as a means of appealing an award based upon a challenge to the legal correctness of a decision (eg, Alectra Utilities Corporation v Solar Power Network Inc., 2019 ONCA 254). A very significant feature of Article 34 is that even where any of the listed grounds are satisfied, the courts have residual discretion not to set aside an impugned award.

11.2 Excluding/Expanding the Scope of Appeal

Parties cannot agree to exclude or expand the scope of appeal or challenge.

11.3 Standard of Judicial Review

On an application to set aside an award under Article 34 of the Model Law, the courts will strive to uphold the impugned award (see Mungo v Saverino, [1995] O.J. No 3021).

Where the basis of attack on an award is absence of jurisdiction, the standard of review will be correctness. Where the basis of attack is excess of jurisdiction, the standard will also be correctness, but with latitude given to the arbitrators to decide issues expressly stated in the arbitration agreement as well as issues that are closely connected thereto (eg, Desputeaux v Editions Chouette Inc., 2003 SCC 17). Where the issues relate to proper conduct of the arbitration, the courts will give substantial deference to arbitrators (United Mexican States v Feldman Karpa (2005), 74 O.R. 3d 180 (C.A.).

12. Enforcement of an Award

12.1 New York Convention

With the exception of Québec, Canada and its provinces and territories have specifically adopted the New York Convention. Québec references all of the Convention's major provisions in its Code of Civil Procedure. Provinces other than Québec have adopted the qualification that the Convention will apply only to differences arising out of legal relationships, whether contractual or not, that were considered 'commercial' under Canada's domestic laws. Canada and its provinces did not adopt the reservation with respect to reciprocal treatment.

Canada ratified the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States in December 2013.

12.2 Enforcement Procedure

Article 36 of the Model Law applies throughout Canada either by way of adoption of the Model Law or by analogy (in Québec).

12.3 Approach of the Courts

The standards and grounds for refusing enforcement are, by virtue of Article 36 of the Model Law, mirror images of the set-aside grounds set out in Article 34 of that instrument.

13. Miscellaneous

13.1 Class-action or Group Arbitration

Canada's arbitration legislation makes no provision for class or group arbitration. Over the last 20 years the courts have, however, dealt with situations where corporate defendants have sought to stay class proceedings on the basis that contracts of adhesion between themselves and customers contained mandatory arbitration clauses. The precise issue is whether or not arbitration clauses in such types of agreements can be used to override the policy objectives of class action legislation. The Supreme Court of Canada, in Dell Computer Corp. v Union des Consommateurs, 2007 SCC 34, stayed a class proceedings and deferred the jurisdictional question to the arbitral tribunal. This was followed by consumer protection in British Columbia and Ontario, which preserved consumers' rights to proceed with class actions. In two subsequent cases (Seidel v TELUS Communications Inc., 2011 SCC 155 and TELUS Communications Inc. v Wellman, 2019 SCC 19) the Supreme Court of Canada applied consumer protection legislation to exempt consumer claims from mandatory arbitration clauses and stayed class proceedings that would otherwise have determined non-consumer claims. Most recently, in Heller v Uber Technologies Inc., 2019 ONCA 1, Ontario's Court of Appeal stayed a class action brought by putative employees on the basis that the mandatory arbitration agreement that compelled ICC

mediation and arbitration in the Netherlands was unconscionable.

13.2 Ethical Codes

There is no overriding set of ethical codes or standards that apply to arbitrations conducted in Canada. Canadian lawyers acting as arbitrators or as counsel in arbitrations seated in Canada are bound by the codes of professional conduct promulgated by the provincial law societies that govern those lawyers' professional conduct. Similarly, other professionals acting as arbitrators (eg, engineers, property or business valuators and chartered accountants) may be governed by ethical standards issued by bodies that govern their professional conduct. Also, arbitral institutions (eg, the ICDR and the ADR Institute of Canada) require compliance with ethical standards that they have issued.

13.3 Third-party Funding

There are no rules or restrictions in respect of third-party funding in commercial arbitrations seated in Canada.

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13.4 Consolidation

While the Model Law is silent on this subject, Canada's international commercial arbitration statutes typically provide for consolidation by court order on the consent of all parties. Moreover, if all parties consent, a court order is not required. The statutes require that the parties agree on a common seat (or on a mechanism to choose the seat), on procedural rules (or on a means to choose procedural rules) and, where there are separate arbitration agreements, on a common arbitral institution (or to proceed ad hoc).

13.5 Third Parties

As noted in **5.7 Third Parties**, above, as a general rule arbitration agreements only bind the parties thereto. There are several instances where third parties and/or non-signatories may be brought within the jurisdiction of arbitral tribunals. These instances include:

- where an arbitration agreement may be incorporated by reference from one contract into another;
- where an arbitration agreement may be incorporated electronically by hyperlink (eg, Dell Computer Corp. v Union des Consommateurs et al. 2007 SCC 34);
- where parties are associated with signatories or are their successors in interest or the law of agency applies or a party is an assignee; or
- in rare circumstances, under the 'Group of Companies' doctrine (eg, Xerox Canada Ltd. v MPI Technologies Inc. 2006 CanLII 41006 (ONSC)).

Canada's national courts have jurisdiction to bind third parties who have attorned to the jurisdiction of Canada's courts.