

## CANADA

### DELOS GUIDE TO ARBITRATION PLACES (GAP)

CHAPTER PREPARED BY

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#### JURISDICTION INDICATIVE TRAFFIC LIGHTS

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There have not been any material changes requiring an update to this chapter (including the traffic lights) since the date of the latest version. Nonetheless, please note that this chapter does not constitute legal advice and its authors, the contributing law firm and Delos Dispute Resolution decline all responsibility in this regard.

## IN-HOUSE AND CORPORATE COUNSEL SUMMARY

Canada is consistently recognised as an arbitration-friendly jurisdiction, and for good reason. First, the legislative framework governing international commercial arbitration and the enforcement of foreign arbitral awards closely mirrors the Model Law and New York Convention, and severely limits the ability of courts to intervene with decisions made by arbitrators. Secondly, Canadian courts are supportive of arbitration, and continue to uphold the integrity of the arbitral process by affording broad deference to tribunals on issues of jurisdiction, findings of fact and law, and with respect to relief granted in partial and final arbitral awards. The approach of the Canadian judiciary to complex issues in international commercial arbitration should instil confidence in practitioners that Canada will remain a leader in the field of international commercial arbitration policy and jurisprudence.

Key places of arbitration in the jurisdiction	From West to East: Vancouver, BC; Calgary, AB; Toronto, ON; Ottawa, ON; Montreal, QC.
Civil law / Common law environment?	Common law, except the Province of Quebec which is a civil law jurisdiction.
Confidentiality of arbitrations?	Confidentiality is not addressed in the legislation, other than in Quebec which does provide for confidentiality. On 17 May 2018, British Columbia enacted amendments to its international commercial arbitration legislation which explicitly provide for privacy and confidentiality. In the other Canadian jurisdictions, arbitral confidentiality is presumed through the “implied undertaking” rule from court practice. Moreover, confidentiality obligations flow from the arbitration rules adopted by the parties or express confidentiality agreements entered into by the parties. That said, the open-court principle applied in Canada means that the ability to maintain confidentiality if a party resorts to court to challenge an award or otherwise seek assistance is limited; the principle requires that court proceedings presumptively be open and accessible to the public and to the media. Parties may apply to maintain confidentiality but the jurisprudence limits the circumstances in which a court will grant such protection.
Requirement to retain (local) counsel?	No.
Ability to present party employee witness testimony?	There is no bar to evidence from parties or party officers in the legislation.
Ability to hold meetings and/or hearings outside of the seat?	Yes.
Availability of interest as a remedy?	Yes, generally.
Ability to claim for reasonable costs incurred for the arbitration?	Yes, which generally includes: <ul style="list-style-type: none"> <li>• The fees and expenses of the arbitration includes those of the arbitrator and any administering institution;</li> <li>• The parties’ reasonable legal fees and expenses, including witnesses and experts; and</li> </ul>

	<ul style="list-style-type: none"> <li>• More broadly, any other expenses incurred in connection with the proceedings.</li> </ul>
Restrictions regarding contingency fee arrangements and/or third-party funding?	Contingency fee arrangements have long been accepted in Canada. Third-party funding is widely used but the jurisprudence on its acceptability is limited.
Party to the New York Convention?	<p>Yes, the New York Convention entered into force in Canada on 10 August 1986.</p> <p>Canada declared that it would apply the convention only to differences arising out of legal relationships, whether contractual or not, which are considered commercial under the laws of Canada, except in the case of the province of Quebec, where the law did not provide for such limitation.</p>
Other key points to note	φ
WJP Civil Justice score (2018)	0.81

## ARBITRATION PRACTITIONER SUMMARY

Canada is a federal state with ten provinces and three territories. Legislative power for commercial arbitration falls primarily within provincial and territorial jurisdictions. Canada and its provinces and territories have adopted the *UNCITRAL Model Law* ("Model Law")<sup>1</sup> and the New York Convention,<sup>2</sup> although with slight variations in the manner in which they were adopted.<sup>3</sup>

A number of provinces and territories, namely, British Columbia, Yukon Territory and Saskatchewan, have adopted the New York Convention under separate legislation specifically addressing the enforcement of foreign arbitral awards.<sup>4</sup> Those provinces and territories have also adopted the Model Law in their *International Commercial Arbitration Acts* ("ICAA").<sup>5</sup> Quebec, the sole civil law jurisdiction in Canada, incorporated the New York Convention and key aspects of the Model Law through amendments to the Civil Code of Quebec and the Code of Civil Procedure. The remaining provinces and territories have adopted the Model Law and the New York Convention into their *ICAAs*.<sup>6</sup>

Date of arbitration law?	International arbitration legislation was first introduced by the provinces in 1985/86. Domestic arbitration legislation goes further back in time. The dates of the current legislation across the provinces vary with British Columbia having most recently amended its international arbitration legislation in May 2018 to adopt the work of the Uniform Law Conference of Canada, which Ontario did in March 2017. Other provinces are considering similar amendments.
UNCITRAL Model Law? If so, any key changes thereto?	Yes. Canada and its provinces were among the first jurisdictions in the world to enact legislation expressly implementing the Model Law. It is incorporated into provincial legislation governing arbitration, in some cases in modified form.
Availability of specialised courts or judges at the key seat(s) in the jurisdiction for handling arbitration-related matters?	No.
Availability of <i>ex parte</i> pre-arbitration interim measures?	Yes.

<sup>1</sup> [UNCITRAL Model Law on International Commercial Arbitration](#), UN Doc. A/40/17 (1985) Annex 1.

<sup>2</sup> [Convention on the Recognition and Enforcement of Foreign Arbitral Awards](#), June 10, 1958, 330 UNTS 3, 21 UST 2517, TIA No. 6997. The Federal Government of Canada has also enacted federal legislation pertaining to arbitration, the [Commercial Arbitration Act](#), RSC 1985, c 17 (2nd Supp) [**Federal CAA**], but it does not deal with international commercial arbitration.

<sup>3</sup> The Uniform Law Conference of Canada has approved its working group's final report, which included a proposed new uniform International Commercial Arbitration Act for implementation throughout Canada. The proposed Act takes into account the 2006 revisions to the Model Law and aims to clarify inconsistencies in current legislation.

<sup>4</sup> [Foreign Arbitral Awards Act](#), RSBC 1996, c 154; [Foreign Arbitral Awards Act](#), RSY 2002, c 93; [Enforcement of Foreign Arbitral Awards Act](#), SS 1996, c E-9.12; [United Nations Foreign Arbitral Awards Convention Act](#), RSC 1985, c 16 (2nd Supp) [**UNFAACA**].

<sup>5</sup> [International Commercial Arbitration Act](#), RSBC 1996, c 233; [International Commercial Arbitration Act](#), RSA 2000, c 1-5; [International Commercial Arbitration Act](#), RSY 2002, c 123; [International Commercial Arbitration Act](#), SS 1988-198, c 1-10.2.

<sup>6</sup> [International Commercial Arbitration Act](#), RSA 2000, c 1-5; [International Commercial Arbitration Act](#), RSNL 1990, c 1-15; [International Commercial Arbitration Act](#), RSPEI 1988, c 1-5; [International Commercial Arbitration Act](#), RSNS 1989, c 234; [International Commercial Arbitration Act](#), 2017, SO 2017, c 2, Schedule 5, s 15; [International Commercial Arbitration Act](#), RSNB 2011, c 176; [International Commercial Arbitration Act](#), RSNWT (Nu) 1988, c 1-6; [International Commercial Arbitration Act](#), CCSM, c C151.

Courts' attitude towards the competence-competence principle?	Highly respected.
Grounds for annulment of awards additional to those based on the criteria for the recognition and enforcement of awards under the New York Convention?	None.
Courts' attitude towards the recognition and enforcement of foreign awards annulled at the seat of the arbitration?	Courts will approach this issue on a case-by-case basis. Courts in the past have recognised the permissive nature of this issue under the New York Convention and, in certain circumstances, may enforce an award that has been set aside at the seat. However, Canadian courts will certainly consider the status of an award at the seat, including whether a challenge to it has not yet been determined.
Other key points to note?	∅

## JURISDICTION DETAILED ANALYSIS

### 1. The Legal Framework of the Jurisdiction

Arbitration legislation exists in each of the provinces and territories of Canada, and at the federal level. British Columbia, Alberta, Manitoba, Saskatchewan, Ontario, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, the Yukon, the Northwest Territories and Nunavut have separate statutes for domestic arbitration (*Arbitration Act* or *Commercial Arbitration Act*) and international arbitration (*International Commercial Arbitration Act*). The *New York Convention* and *UNCITRAL Model Law* are incorporated into international legislation either wholesale or in modified forms as set out in the respective statutes. Domestic provincial legislation is also generally based on the Model Law. Federal legislation is also in place governing domestic arbitration but with limited scope (Federal Commercial Arbitration Act), also based on the Model Law. Federal legislation governs arbitrations involving a department of the federal government, a Crown corporation, and issues of maritime or admiralty law. In Quebec, Canada's only civil law jurisdiction, arbitration is governed by the Civil Code of Quebec (relevant sections in Books 5 and 10) and the Quebec Code of Civil Procedure (Book 7).

UNCITRAL adopted the Model Law in 1985, and Canada and its provinces were the first jurisdictions in the world to enact legislation expressly implementing the Model Law. At the time, there was broad acceptance of international commercial arbitration as a valid alternative to the judicial process and a high-level of predictability for parties to international arbitrations in Canada and those seeking to enforce international awards in Canada.

In late 2011, a working group of the Uniform Law Conference of Canada (the ULCC) commenced a review of the existing model International Commercial Arbitration Act, with a view to developing reform recommendations for a new model statute based on the 2006 Model Law amendments. The review process also sought to reflect changes to international arbitration law and practice in the past three decades and to enhance the uniformity and predictability with which international commercial arbitral awards may be enforced in Canada. In 2014, the ULCC approved the working group's final report, which included a proposed new uniform *International Commercial Arbitration Act*.

Among other things, the new statute establishes a 10-year limitation period to commence proceedings seeking recognition and enforcement in Canada of foreign international commercial arbitral awards. The new model statute would become law as it is enacted by the various Canadian federal, provincial and territorial legislatures. A number of provincial governments across Canada have begun consultations with a view, hopefully, to implementing legislation in the near future. In March 2017, the Province of Ontario was adopted a new International Commercial Arbitration Act, adopting most of the ULCC's recommendations in the proposed uniform act as did British Columbia in May 2018.

Widespread support for international commercial arbitration in Canada has also led to the establishment of a number of arbitration groups and institutions, including the Western Canada Commercial Arbitration Society, the Toronto Commercial Arbitration Society, the Vancouver Centre for Dispute Resolution and Vancouver Arbitration Chambers, Arbitration Place, ICC Canada's Arbitration Committee, the British Columbia International Commercial Arbitration Centre ("BCICAC"), the ADR Institute of Canada ("ADRIC"), the International Centre for Dispute Resolution Canada ("ICDR Canada") and the Canadian Commercial Arbitration Centre ("CCAC"). These organisations provide parties with a variety of useful resources and services, including sets of procedural rules, contact information for qualified arbitrators and meeting facilities.

ADRIC (1 January 2014) and ICDR Canada (1 January 2015) have recently introduced arbitration rules in line with international best practices, with the ICDR Canada opening its doors at the same time.

## 2. The Arbitration Agreement

### 2.1 Governing law

Arbitral tribunals apply the law chosen by the parties. If the parties have not expressly selected an applicable law, then the proper law of the contract must be determined in light of their agreement, considered as a whole, and any surrounding circumstances. In general, the law with which the agreement appears to have the closest and most substantial connection ought to prevail.

In Canada, courts will generally respect parties' express choice of law as to what law should govern the enforceability of an arbitration agreement where there is a question of whether the scope of matters in dispute are arbitrable.

In *Schreter v Gasmac Inc*, the parties' arbitration agreement seated the arbitration in Atlanta in the state of Georgia in the United States. An award was issued and confirmed at the seat. However, Gasmac, the losing party, failed to make the required payments to Schreter, which led to Schreter applying to enforce the award in an Ontario court. The Ontario court looked at the question of arbitrability and respected the parties' agreement – by seating their arbitration in Atlanta the law of the state of Georgia applied:

Because it is Georgia law which governs, the respondent must provide to this court evidence of Georgia law if it wishes to demonstrate that the award dealt with matters not properly within the submission.<sup>7</sup>

### 2.2 Formal requirements for an enforceable agreement

In Canada, the arbitration agreement can be included in the main contract or set out in a separate document.

Formal requirements for arbitration agreements are found in provincial legislation, which differ slightly from province to province. In most provinces, the agreement must be in writing but in Ontario this is not required.<sup>8</sup> Like in the Model Law, it is possible for an arbitration agreement to be found in multiple written documents or through electronic communications. In Quebec and British Columbia, a written arbitration agreement may also be found if one party alleges such an agreement in writing and the alleged counterparty does not object.

Canadian courts take a broad approach to the enforceability of arbitration agreements and are deferential to parties' agreements to arbitrate. Unless it is clear that the arbitration agreement is void, inoperative or incapable of being performed, Canadian courts are likely to defer to the arbitrator the initial task of determining the existence and scope of the arbitration agreement, in accordance with the *competence-competence* principle.<sup>9</sup>

### 2.3 Ability to bind third parties

Generally, neither an arbitral tribunal nor a court can compel a third party who is not subject to the arbitration agreement to join in the arbitral proceedings. That said, Canadian courts have recognised a number of international principles with regard to the binding of non-signatories, including:

- where the contractual agreement between a party and the non-party incorporates the arbitration clause by reference;
- where there is an agency relationship between a party and a non-party;
- where the corporate veil is pierced as a result of a sufficiently close relationship between a parent and subsidiary to hold one corporation legally accountable for the other; or

<sup>7</sup> *Schreter v Gasmac Inc* (1992), 7 OR (3d) 608 at 623 (Ont Ct J (Gen Div)) [*Schreter*].

<sup>8</sup> *Arbitration Act, 1991*, SO 1991, c 17, s 5(3).

<sup>9</sup> *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801 [*Dell*].

- by estoppel.

The overriding principle of consent to arbitrate is often considered by courts, including findings of implied consent of a non-signatory to be bound to an arbitration agreement.

## 2.4 Restrictions to arbitrability

In Canada, arbitrability is generally considered a requirement for jurisdiction as opposed to a condition of validity of the arbitration agreement (with the possible exception of arbitration agreements in the consumer protection context where a lack of arbitrability of such disputes may lead to invalidity).

In considering arbitrability, Canadian courts tend to respect the *competence-competence* principle, leaving the initial determination to the arbitrator.<sup>10</sup> For example, in *Dell Computer Corp v Union des Consommateurs*,<sup>11</sup> the Supreme Court of Canada (“SCC”) held, consistently with Articles 8 and 16 of the Model Law, that a challenge to an arbitrator’s jurisdiction or the arbitrability of a dispute should first be addressed by the arbitrator before a court could consider the issue. In Canada, if a challenge to the arbitrator’s jurisdiction or the scope of the arbitration agreement is brought to court, the court “*is required to limit itself to a prima facie analysis and to refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable*”.<sup>12</sup>

In *Gulf Canada Resources v Arochem International*, a leading international arbitration-related case in Canada, the Court of Appeal for British Columbia addressed the *competence-competence* principle:

Considering s. 8(1) in relation to the provisions of s. 16 [of the Model Law] and the jurisdiction conferred on the arbitral tribunal, in my opinion, *it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement* because those are matters within the jurisdiction of the arbitral tribunal. *Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.*<sup>13</sup> [Emphasis added.]

Courts in Canada will also be wary of entertaining any challenge to an arbitrator’s jurisdiction where it appears merely to be a delaying tactic on the basis of it being a potential abuse of process that would “*unduly impair the conduct of the arbitration proceeding.*”<sup>14</sup>

In *Dell*, the SCC was clear that the *competence-competence* principle should not be undermined stating that “the fact that art. II(3) of the New York Convention provides that the court can rule on whether an agreement is null and void, inoperative or incapable of being performed does not mean that it is required to do so before the arbitrator does.”<sup>15</sup> The SCC noted that the “arbitrator first” approach is often referred to as the *prima facie* analysis test,<sup>16</sup> which as noted above was set out in *Gulf Canada*.

Generally, in Canada, the analysis of whether a particular issue or dispute is arbitrable – in the sense that it is within the scope of the applicable arbitration agreement – involves a broad approach.<sup>17</sup> For example, in

<sup>10</sup> John AE POTTOW, Jacob BERGE & Tara J HAWLEY, “Presumptively Better Approach to Arbitrability” (2013) 53:3 Can Bus LJ 323 at 341.

<sup>11</sup> *Dell*, *supra* note 8.

<sup>12</sup> *Seidel v TELUS Communications Inc*, [2011] 1 SCR 531 at para 29 [**Seidel**].

<sup>13</sup> *Gulf Canada Resources v Arochem International*, [1992] BCJ No 500, para 43 (CA) [**Gulf Canada**].

<sup>14</sup> *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801, para. 86.

<sup>15</sup> *Dell*, *ibid*, para. 73.

<sup>16</sup> *Dell*, *ibid*, para. 75.

<sup>17</sup> Henri C ALAREZ, QC, “The Implementation of the New York Convention in Canada” (2008) 25:6 J Intl Arb 669 at 674.

*Quintette Coal Ltd v Nippon Steel Corp*, the Supreme Court for British Columbia considered whether an arbitral award, which included calculations that were not explicitly contemplated in the arbitration agreement, was enforceable in light of the Respondent's objection that the issue was not arbitrable.<sup>18</sup> The court took a broad approach, supporting the arbitrator's interpretation of the scope of the arbitration agreement. This broad approach was consistent with that taken by other judicial authorities, which, together, has been referred to as indicative of a "powerful presumption" in favour of a broad approach in light of international comity and a global marketplace.<sup>19</sup>

Thus, there are very few matters that cannot be arbitrated under the laws applicable in the Provinces of Canada. Applicable provincial legislation provides guidance on whether particular matters are arbitrable. For example, criminal matters cannot be resolved by arbitration. In certain areas, such as patent rights, copyrights, trademarks, bankruptcy, employment and consumer contracts, and competition law matters, some jurisdictions have statutory restrictions with respect to arbitration. In Quebec, for instance, any stipulation that obliges the consumer to refer a dispute to arbitration that restricts the consumer's right to go before a court, in particular by prohibiting the consumer from bringing a class action, or that deprives the consumer of the right to be a member of a group bringing a class action is prohibited.<sup>20</sup> The status and capacity of persons, family matters, and other matters of public order are also non-arbitrable.

In the context of a consumer protection related case, the SCC, however, has suggested that recourse to the court may be had in the first instance where the jurisdiction issue is solely a question of law.<sup>21</sup>

However, this exception should not be applied if the issue involves questions of fact, or mixed fact and law.<sup>22</sup>

### 3. Intervention of Domestic Courts

The Model Law and the New York Convention provide narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements. As outlined above, Canadian courts have consistently expressed their approval of these principles and frequently defer to arbitral tribunals for determinations regarding the tribunal's own jurisdiction and complex issues of fact and law. For example, in discussing the governing principles of the Model Law, one Canadian court stated that:

[T]he purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale.<sup>23</sup>

Courts across Canada have echoed these views; Canadian legislation provides for, and courts respect, the *competence-competence* principle, which leaves initial determinations of jurisdiction and arbitrability to the arbitrator. Indeed, the fact that the New York Convention provides that the court may rule on whether an agreement is null and void, inoperative or incapable of being performed does not mean that it is required to do so before the arbitrator does.

From above, the SCC has held, consistent with Articles 8 and 16 of the Model Law, that a challenge to an arbitrator's jurisdiction or the arbitrability of a dispute should first be addressed by the arbitrator before a

<sup>18</sup> *Quintette Coal Ltd v Nippon Steel Corp*, [1990] BCJ No. 2241 (CA).

<sup>19</sup> *Mexico v Cargill, Incorporated*, 2011 ONCA 622, para. 19.

<sup>20</sup> *Consumer Protection Act*, RSQ, c P-40.1, Art 11.1.

<sup>21</sup> *Dell*, *supra* note 13, para. 84.

<sup>22</sup> *Dell*, *ibid*, para. 85.

<sup>23</sup> *Automatic Systems Inc v Bracknell Corp* (1994), 18 OR (3d) 257 at 264 (CA), cited with approval in *Seidel*, *supra* note 12 and *Desputeaux v Editions Chouette (1987) Inc*, 2003 SCC 17.

court can consider the issue.<sup>24</sup> Only where it is clear that the dispute is outside the terms of the arbitration agreement, a party is not a party to the arbitration agreement, or the application is out of time can a court reach any final determination in respect of such matters.

Canadian courts can, and do, issue anti-suit injunctions to restrain parties from proceeding with litigation in court. To enjoin a court proceeding, the parties seeking the injunction must demonstrate that:

- A valid arbitration agreement exists;
- The arbitral forum acquired by the agreement is more appropriate than the judicial forum that is the subject of the injunction based on the principles of *forum non conveniens*; and
- Granting the injunction would not unjustly cause a party to lose a legal right or advantage in the judicial forum.

#### **4. The Conduct of the Proceedings**

##### **4.1 View on outside counsel or self-representation**

Although all provinces in Canada have rules restricting the appearance of lawyers from other jurisdictions in legal matters, these restrictions do not apply to arbitration proceedings seated in Canada.

##### **4.2 Arbitrators' independence and impartiality**

The usual requirements of independence and impartiality apply. Otherwise, arbitrators are not required to be certified in any way and parties are free to agree to the appointment of non-lawyers as arbitrators if they so wish. Parties sometimes specify required qualifications in their arbitration agreements.

In accordance with the Model Law, an arbitrator may be replaced where:

- his or her qualifications are not satisfactory to the parties;
- there are justifiable doubts as to his or her impartiality or independence;
- he or she becomes unable to perform his or her functions; or
- he or she fails to act without undue delay.

Different and additional default rules apply to domestic arbitration under the relevant provincial legislation. By way of illustration, under the domestic legislation of Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan, the court may remove an arbitrator on a party's application where the arbitrator becomes unable to perform his or her functions, or delays unduly in conducting the arbitration, but also if they commit a corrupt or fraudulent act, or do not conduct the arbitration in accordance with the legislation. Under British Columbia's *Arbitration Act*, the court may remove an arbitrator who commits an "arbitral error" (which includes bias) or unduly delays in proceeding with the arbitration or in making an award. In Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, the Yukon and Nunavut, the court may remove an arbitrator where he or she has misconducted himself or herself, which is rare.

##### **4.3 Court intervention to assist in the constitution of the arbitral tribunal**

Under the Model Law (so in the international legislation in the provinces and territories of Canada), if a party fails to appoint an arbitrator or co-arbitrators fail to appoint a chair within the required time periods, a party may request that the court make the appointment. In the case of a single arbitrator, if the parties cannot agree, a party may request that the court make the appointment.

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<sup>24</sup> *Dell Computer Corp v Union des Consommateurs*, [2007] 2 SCR 801.

Under domestic arbitration legislation, the court may appoint the arbitral tribunal on a party's application, if the arbitration agreement is silent on the appointment procedure or if the person with the power to appoint the arbitral tribunal has not done so within the time provided for in the agreement or after a party has given the person seven days' notice to do so.

#### **4.4 Ability of courts to issue interim measures in connection with arbitrations**

In Canada, as with other Model Law jurisdictions, it is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure. Typically, this is done for the preservation of property and evidence, to bind others who are not party to the arbitration, or to enforce an order made by the arbitral tribunal.

If a party makes an *ex parte* application in Canada, it has a duty to disclose all the relevant facts and circumstances to the court. In hearing an *ex parte* motion, the court's first question is whether the circumstances justify granting the order without hearing the other party. To that end, the moving party needs to satisfy the court that there is some urgent need, and failing to act immediately will result in irreparable harm. The relief sought must be proportional to the prejudice suffered if the relief is not granted. Also, a party must be prepared to compensate the other parties in case the *ex parte* order is obtained improperly or results in unjustified prejudice or loss to the other parties.

#### **4.5 Legal regulation of the conduct of the arbitration**

Arbitration legislation in Canada is not overly prescriptive as to procedure, other than general provisions relating to the availability of particular procedures and the court's ability to assist arbitration proceedings. Generally, the legislation provides the parties and the tribunal with the power and flexibility to shape their own procedure; tribunals are required to conduct the arbitration in the manner they consider appropriate, subject to the parties' rights of procedural fairness and goals of efficiency and reduced costs. Institutional rules are often more prescriptive and will be respected by the courts.

Where parties have not agreed on the number of arbitrators, the Model Law, as adopted in the relevant province's international legislation, defaults to a panel of three arbitrators. Beyond the arbitrators' independence and impartiality, the default provisions do not require any default qualifications or characteristics.

Domestic legislation across all provinces and territories – with the exception of Quebec – indicates that where an arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of a single arbitrator. Under the Quebec Code of Civil Procedure, three arbitrators is the default.

#### **4.6 Confidentiality of arbitration proceedings**

Confidentiality is not addressed in the legislation, other than in Quebec which does provide for confidentiality. However, the British Columbia *ICAA* also explicitly provides for confidentiality now that the amendments have come into force as of 17 May 2018. In the other Canadian jurisdictions, arbitral confidentiality is presumed through the "implied undertaking" rule from court practice. Moreover, confidentiality obligations flow from the arbitration rules adopted by the parties or express confidentiality agreements entered into by the parties. That said, the open-court principle applied in Canada means that the ability to maintain confidentiality if a party resorts to court to challenge an award or otherwise seek assistance is limited; the principle requires that court proceedings presumptively be open and accessible to the public and to the media. Parties may apply to maintain confidentiality but the jurisprudence limits the circumstances in which a court will grant such protection.

As a practical matter, information regarding the existence of the arbitration may also be inadvertently disclosed by persons involved in the proceedings but who would not normally be bound by any confidentiality agreement, including couriers and third-party witnesses.

#### **4.7 Length of arbitration proceedings**

International arbitration legislation of the provinces and territories is silent on time limits for delivery of an award, although limits are set on corrections, interpretations, and additions to the award. This legislation does contemplate (by providing for extensions of time) that parties may stipulate a time limit in their arbitration agreement.

Domestic arbitration legislation limits the time allowed to render an award in one of two ways. First, a time limit may be provided for the duration of the arbitration process, where an award must be rendered within X months from the commencement of the arbitration. Alternatively, an award may be required within X months of the conclusion of the arbitration hearing.

The time given for delivery of an award varies between provinces. In Nova Scotia, domestic legislation provides that the arbitrator must render a decision within 10 days of the completion of the arbitration. In British Columbia, the short rules provide for a decision to be rendered within 30 days of the closing of the hearings, whereas the standard rules allow for 60 days after the close of the hearings. Domestic legislation in Newfoundland and Labrador, the Northwest Territories, Prince Edward Island and the Yukon allow three months after entering on the reference to have the award rendered.

#### **4.8 Place where hearings and/or meetings held**

Consistent with the freedom accorded to the parties and, in the absence of agreement between them, to the arbitral tribunal to determine the procedure in the arbitration, there are no rules that govern the conduct of an international arbitration hearing aside from those set out in the Model Law.

Ordinarily, the hearing will be held in the seat of the arbitration, although the parties can agree otherwise. Where an arbitration agreement provides that the arbitration be seated in Toronto, Ontario (for example), the parties could nevertheless agree for hearings to be held in Vancouver, British Columbia and be deemed to be taking place in Toronto. In this case, the Ontario statute would still govern the procedure of the arbitration and, if the parties require court assistance, they would apply to the Ontario courts.

#### **4.9 Ability of arbitrators to issue interim measures**

Arbitrators in Canada are granted broad powers. Once appointed, arbitrators may award interim relief without prior authorisation from a court. Under international arbitration legislation, arbitral tribunals are granted broad powers to issue interim measures. Unless otherwise agreed, the arbitral tribunal may, at the request of a party, order any party to take such interim protection measures that the tribunal considers necessary in respect of the subject matter of the dispute. The arbitral tribunal may also require any party to provide appropriate security in connection with such interim measures.

Domestic legislation in Ontario, Alberta, Manitoba, New Brunswick, Nova Scotia and Saskatchewan also provides broad powers to arbitral tribunals to make an order on a party's request for the detention, preservation or inspection of property and documents which are the subject of the arbitration and may order a party to provide security in that connection. In British Columbia, unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection that the arbitral tribunal deems necessary with respect to the subject matter of the dispute and may order a party to provide security in connection with such a measure.

#### **4.10 Arbitrators' right to admit/exclude evidence**

Arbitration legislation across the provinces and territories generally affords arbitrators more flexible rules of evidence than those afforded to the courts; they are not required to apply strictly the rules of evidence. Arbitral tribunals have broad discretion to conduct the arbitration in a manner that they consider appropriate to avoid unnecessary delay or expense and to provide a fair and efficient means for the final resolution of the parties' dispute. Flowing from that discretion is the power to:

- determine the admissibility, relevance, materiality and weight of any evidence;
- exclude cumulative or irrelevant evidence; and
- direct the parties to focus their evidence or argument on specific issues which may assist in the disposal of all or part of the dispute.

Generally, in lieu of direct examination, witness evidence is provided in the form of written statements and cross-examined under oath before the tribunal. Expert evidence may be adduced by the parties or in certain circumstances tribunals may retain experts. In common practice, the evidence is provided in a written report followed by oral examinations in a hearing.

#### **4.11 Prescription of principles governing the awarding of interest**

International arbitration legislation in Canada does not provide explicitly for the award of interest, except in British Columbia. As a result, the tribunal's power to award interest is determined by the arbitration agreement or by the procedural rules adopted for the arbitration, which may contain specific provisions as to costs. Domestic legislation in some provinces provides that the arbitral tribunal has the same power with respect to interest as the court has under provincial court order interest legislation.

Parties may expressly provide for the power to award interest in their agreement or the necessity to do so may arise as part of an arbitrator's obligation to apply the general law. Where an arbitration agreement is broad enough to encompass all claims and disputes between parties, it has been recognised that arbitrators have the power to award interest.

Generally, if there is no contractually agreed rate, the rate of the governing substantive law of the parties' agreement is most likely to prevail, although in some circumstances, it may be argued that the law of the seat or the place of enforcement should apply.

#### **4.12 Principles governing the allocation of arbitration costs**

The general principle applied in Canada is that costs follow the event and can be full indemnity for reasonable legal fees, disbursements, and arbitration costs. Tribunals generally have discretion to allocate costs, which is explicitly provided for in Canadian domestic arbitration legislation. The British Columbia international arbitration legislation also provides such discretion, although the international legislation of other provinces is less explicit.

With respect to costs claims, parties are generally invited by the tribunal to provide statements of costs (and sometimes to make submissions on costs).

#### **4.13 Liability**

Arbitrators are generally immune from civil liability, except in instances of fraud or bad faith. Except in the recent amendments to British Columbia's *ICAA*, legislation in Canada provides no express immunity, but most arbitral institutions' rules do. For example, the CCAC's International Arbitration Rules provide that none of the CCAC, its staff or the members of the arbitral tribunal is liable to any party for any act or omission in relation to arbitration under these rules. In the case of *ad hoc* arbitrations, jurisprudence establishes that arbitrators who are acting in a "judicial or quasi-judicial capacity" are generally immune from civil liability in Canada, except in instances of fraud or bad faith.<sup>25</sup>

### **5. The Award**

As previously noted, courts across Canada have consistently given substantial deference to arbitrators' decisions, and have narrowly interpreted the grounds for setting aside arbitral awards. In addition, some

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<sup>25</sup> See, for instance, *Flock v Beattie*, 2010 ABQB 193 (although this case was an Alberta case regarding the Alberta domestic Act, it also canvasses the applicable Canadian and international law).

provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their award.<sup>26</sup>

The integrity of the international commercial arbitration process has further been endorsed in recognition and enforcement proceedings. When faced with challenges to the recognition of foreign awards, Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law and Article V of the New York Convention. Based on these limited grounds on which enforcement may be refused, courts apply a high burden on arbitral award debtors to prove any allegation of injustice or impropriety that could render an award unenforceable.

### 5.1 Provision of reasons

The arbitral award must state the reasons on which it is based, unless the parties have agreed that no reasons are required.

### 5.2 Appealing an award

There are no appeals for international awards, and only the limited grounds for set aside or refusal of enforcement under the Model Law and New York Convention apply.

Provincial legislation dealing with domestic arbitration provides limited rights to appeal an award. Generally, an appeal can be brought only on a question of law, not a question of fact. In some provinces, there is no right of appeal unless all parties have agreed to such a right or consented to an appeal. In other provinces, a right of appeal may be subject to obtaining leave to appeal from a judge or superior court of the province.

### 5.3 Enforcement procedures and limitation periods

The international legislation provides for Model Law and New York Convention recognition and enforcement rights. Creditors of international arbitral awards generally have access to the same enforcement remedies available to domestic litigants. Awards can be enforced in local courts; the applicable legislation identifies which level of court – usually the superior court in the province – has jurisdiction. Thus, an application for recognition and enforcement of awards will be made to the Federal Court if the subject matter of the arbitration is governed by federal law. If the subject matter of the arbitration is governed by provincial or territorial law, the application must be made to the court of inherent jurisdiction (the superior court). Typically, the party seeking to enforce the award must file it, together with evidence of the arbitration agreement on which it is founded, as part of a summary procedure.

Domestic commercial arbitral awards are enforceable once they are converted into a court judgment of the superior courts of the provinces, also through a procedure that is intended to be summary in nature. Once an award is converted into a court judgment, all usual remedies available to the holder of a court judgment are available.

A party with a foreign arbitral award should expect its award to be enforced, unless the extremely limited grounds to refuse enforcement apply. Canadian courts are highly deferential to arbitration and uphold the principles set out in the New York Convention. The grounds on which enforcement can be denied are limited to those set out in the New York Convention and the Model Law. Canadian courts construe these grounds very narrowly, and generally enforce international awards.

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<sup>26</sup> For example, the definition of “local judgment” in British Columbia’s *Limitations Act*, SBC 2012, c 13, s 1 [**BC Limitations Act**] specifically includes arbitral awards to which the *Foreign Arbitral Awards Act* or the *International Commercial Arbitration Act* apply, providing arbitral creditors with a 10-year limitation period for enforcement proceedings. Similarly, the British Columbia *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28 [**Proceedings Transfer Act**] presumes a “real and substantial connection” (the standard for Canadian courts to assume jurisdiction over a dispute) in any proceeding to enforce a foreign arbitral award.

This was evident in the BC Court of Appeal decision in *Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation (Private) Limited*,<sup>27</sup> which held that a party's claim to enforce a foreign arbitration award was "very strong, approaching certainty given the limited grounds upon which the claim could be defended", and reinforcing that an award creditor is entitled to the full panoply of enforcement remedies available to any creditor of a court judgment.<sup>28</sup>

The limitation period for recognition and enforcement of foreign awards in the Federal Court is six years.<sup>29</sup> The limitation periods applicable in each province varies, as discussed below.

In Alberta, legislation does not expressly provide for a limitation period applicable to recognition and enforcement of foreign awards, but recent jurisprudence addresses the issue directly. The Alberta Court of Appeal held that the applicable limitation period for foreign judgments is two years, and that the same principles apply with respect to a foreign arbitral award. The SCC has upheld this decision. It is also worth noting, that in making its determination, the SCC found that an arbitral award is not "*a judgment or a court order for the payment of money*", and is instead subject to the general two year limitation period applicable to most causes of action, per section 3 of the *Alberta Limitations Act*.<sup>30</sup>

In British Columbia, an action for recognition and enforcement of an arbitral award for the payment of money or the return of personal property and to which either the FAAA or the ICAA applies, is subject to a 10-year limitation period. An action consequent upon an arbitral award for the possession of land to which either the FAAA or the ICAA applies is not governed by a limitation period and may be brought at any time. Judicial interpretations of the BC *Limitations Act* hold that limitation periods established under that Act (which would apply to arbitral awards under the FAAA or the ICAA) only begin to run on the date on which the right to bring an action on the award or judgment in British Columbia arises. In the absence of judicial interpretation of the new BC legislation on court jurisdiction, it would be prudent to assume that the limitation period for the enforcement of arbitral awards to which the FAAA or the ICAA apply begins to run when the arbitral award is rendered.<sup>31</sup>

Ontario's recent enactment of the new uniform *International Commercial Arbitration Act* means that it has now adopted the 10-year limitation period applicable to the recognition and enforcement of a foreign arbitral award under the Model Law.<sup>32</sup>

Quebec legislation does not expressly provide for a limitation period applicable to recognition and enforcement of foreign awards and there is no jurisprudence addressing the issue directly. However, Quebec courts have held that the applicable period for domestic awards is 10 years from the date the award is rendered and it is likely that the same 10-year period would apply to a foreign award. The question has yet to be put to the Quebec courts.<sup>33</sup>

<sup>27</sup> [Sociedade-de-fomento Industrial Private Limited v Pakistan Steel Mills Corporation \(Private\) Limited](#), 2014 BCCA 205 [**Sociedade-de-fomento**].

<sup>28</sup> *Ibid* at para 47.

<sup>29</sup> *Federal Courts Act, RSC 1985, c F-7, s 39(2)* [**Federal Courts Act**]; *Compania Maritima Villa Nova SA v Northern Sales Co*, [1992] 1 FC 550 (CA).

<sup>30</sup> *Yugraneft Corp v Rexx Management Corp*, 2007 ABQB 450; 2008 ABCA 274; 2010 SCC 19.

<sup>31</sup> *BC Limitation Act*, *supra* note 25, ss 2(1)(e), 7(a)&(b), 30; *Proceedings Transfer Act*, *supra* note 25, ss 3 & 10(k).

<sup>32</sup> *Arbitration Act, 1991, SO 1991, c 17, s 10*: "No application under the Convention or the Model Law for recognition or enforcement (or both) of an arbitral award shall be made after the later of December 31, 2018 and the tenth anniversary of, (a) the date on which the award was made; or (b) if proceedings at the place of arbitration to set aside the award were commenced, the date on which the proceedings concluded".

<sup>33</sup> *Civil Code of Quebec*, art. 2924; *Transport Michel Vaillancourt Inc v Cormier*, 2006 QCCS 803.

#### 5.4 Effect of annulment or appeal proceedings

Although procedural rules in each Canadian jurisdiction permit discretionary suspension of the right to enforce an award, the introduction of annulment or appeal proceedings does not automatically suspend the exercise of the right to enforce an award.<sup>34</sup>

When a foreign award has been annulled at its seat, Canadian courts will approach the issue of domestic enforcement on a case-by-case basis. Courts in the past have recognised the permissive nature of this issue under the New York Convention and, in certain circumstances, may enforce an award that has been set aside at the seat. However, Canadian courts will certainly consider the status of an award at the seat, including whether a challenge to it has not yet been determined.

Canadian federal legislation adopts the language of the New York Convention, which gives Canadian courts discretion to refuse to recognise or enforce a foreign award that has been set aside by the competent authority. Neither legislation nor case law interpreting it describes the circumstances under which the court can or should exercise that discretion and refuse to recognise or enforce an award that has been set aside by the competent authority.<sup>35</sup>

An Ontario court has acknowledged, in an *obiter dictum*, the discretion granted by legislation to recognise or enforce an award that has been set aside, but no court has exercised its discretion to do so.<sup>36</sup>

#### 6. Funding Arrangements

In Canada, many cases are funded. While the common law doctrine of champerty and maintenance remains in effect, there have been several court decisions approving litigation funding agreements in the class actions and commercial context, and one court decision determining that such agreements do not require approval by the court hearing the underlying dispute. In the context of consumer protection class action cases, an Ontario court has suggested that the existence of funding may need to be disclosed and subject to certain conditions. If asked to determine the legality of a third party funding agreement, a Canadian court would look at the terms of the agreement to confirm that it is not champertous in nature.

Recently, in *Re 9354-9186 (formerly Bluberi Gaming Technologies Inc) and 9354-9178 (formerly Bluberi Group Inc)*,<sup>37</sup> the Quebec Superior Court reviewed the terms of a third-party funding agreement between Bentham IMF and the debtors. Overall, the judgment can best be described as consolidating the growing case law in Canada regarding third-party funding and contributing to the conceptual division between litigation funding in the context of class actions, on the one hand, and other forms of commercial litigation, on the other. The court also highlighted the fact that these principles arise in common law provinces which apply the doctrine of champerty, whereas in Quebec – Canada’s only civil law jurisdiction – “litigation funding by a third party has been accepted”.

The recent amendments to British Columbia’s *JCAA* specifically state that third-party funding is not to be considered contrary to public policy in British Columbia (a common law province) for the purposes of subsection 36(1)(b)(ii); the effect of which is to ensure that the presence of third-party funding will not be a legitimate reason to refuse recognition or enforcement of an arbitral award.

<sup>34</sup> *Federal Courts Act*, *supra* note 29, s 50(1); Alberta Rules of Court, r 1.4(2)(h); Supreme Court Civil Rules, rr 19-3(8) and (9); *Law and Equity Act*, *RSBC 1996*, c 253, s 8(3); *Courts of Justice Act*, *RSO 1990*, c C-43, s 106; *Quebec Code of Civil Procedure*, c C-25.01, art 654.

<sup>35</sup> UNFAACA, *supra* note 4, Art. V 1(e); Federal CAA, *supra* note 2, art 36(1)(a)(v).

<sup>36</sup> *Arbitration Act, 1991*, *SO 1991*, c 17, art 36(1)(a)(v); *Schreter*, *supra* note 7.

<sup>37</sup> *Re 9354-9186 (formerly Bluberi Gaming Technologies Inc) and 9354-9178 (formerly Bluberi Group Inc)*, 2018 QCCS 1040, March 16 2018.

## 7. Prospects for Reform

The limits of third-party funding is an emerging issue in Canada, although the above-mentioned statement approving of it in British Columbia is a sign that it is in Canada to stay. In addition, it remains to be seen whether the provinces and territories other than Ontario and British Columbia will adopt the proposed ULCC uniform *International Commercial Arbitration Act*, and in so doing whether the distinctions between legislation among the provinces and territories will be reduced. Also, the ULCC has almost completed its work on a uniform Domestic Arbitration Act for the provinces to consider.