The Legal 500 Country Comparative Guides

Canada: International Arbitration

This country-specific Q&A provides an overview of international arbitration laws and regulations applicable in Canada.

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1. **What legislation applies to arbitration in your country? Are there any mandatory laws?**

Every province and territory of Canada, except Quebec, has two arbitration statutes. One statute applies to domestic arbitrations, while the other applies to international commercial arbitrations. For example, in Alberta, the *Arbitration Act*, RSA 2000, c A-43 (***Alberta Arbitration Act***) applies to domestic arbitrations, while the *International Commercial Arbitration Act*, RSA 2000, c 1-5 (***Alberta International Commercial Arbitration Act***) applies to international commercial arbitrations.

In Quebec, the *Civil Code of Quebec* (**CCQ**) and the *Code of Civil Procedure* (**CCP**) apply to both domestic and international commercial arbitrations.

At the federal level, the *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp) (***Federal Commercial Arbitration Ac****t*) applies to both domestic and international commercial arbitrations when: (a) at least one of the parties is a federal department or Crown corporation; or (b) the arbitration involves an admiralty or maritime matter.

There are mandatory laws regarding arbitration. However, the mandatory laws depend on which statute applies. Common mandatory laws in domestic arbitration statutes provide that:

1. the parties shall be treated equally and given an opportunity to present a case;
2. the courts must stay court proceedings about matters that are subject to an arbitration agreement;
3. if an arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, the arbitral tribunal shall be composed of one arbitrator;
4. an arbitrator shall be independent of the parties and act impartially; and
5. subject to the arbitration agreement, a party may only appeal on questions of law with leave of the court. See, for example, ss. 7(1), 9, 11(1), 19, 44(2), and 44(2.1) of the *Alberta Arbitration Act* and ss. 7(1), 9, 11(1), 19, and 45(1) of the Ontario *Arbitration Act, 1991*, SO 1991, c 17 (***Ontario Arbitration Act***).

Common mandatory laws in international commercial arbitration statutes, including the *Federal Commercial Arbitration Act*, provide that:

1. arbitration agreements shall be in writing;
2. if an arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, the arbitral tribunal shall be composed of three arbitrators; and
3. the parties shall be treated equally and given a full opportunity to present a case. See, for example, ss. 7(2), 10, and 18 of Schedule 1 of the *Federal Commercial Arbitration Act* and ss. 7(2), 10, and 18 of Schedule 2 of the *Alberta International Commercial Arbitration Act*.

2. **Is your country a signatory to the New York Convention? Are there any reservations to the general obligations of the Convention?**

   Canada is a signatory to the New York Convention. The Convention entered into force in Canada on August 10, 1986.

   Canada has issued one reservation to the general obligations of the New York Convention. In every province and territory of Canada, except Quebec, the New York Convention only applies to differences arising out of legal relationships that are considered commercial pursuant to the laws of Canada.

3. **What other arbitration-related treaties and conventions is your country a party to?**

   In addition to the New York Convention, Canada is a party to:

   1. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965 (**ICSID**); and
   2. numerous bilateral and multilateral investment treaties and free trade agreements.

4. **Is the law governing international arbitration in your country based on the UNCITRAL Model Law? Are there significant differences between the two?**

   The law governing international arbitration in Canada is based on the UNCITRAL Model Law. Every international commercial arbitration statute, except those in British Columbia and Quebec, incorporate the UNCITRAL Model Law as a schedule. In British Columbia and Quebec, the statutes applicable to international commercial arbitrations are generally consistent with the UNCITRAL Model Law.

5. **Are there any impending plans to reform the arbitration laws in your country?**

   British Columbia brought into force a new domestic Arbitration Act, S.B.C 2020, c. 2 on September 1, 2020. We are not aware of any other impending plans to reform any of the other arbitration statutes in Canada.

6. **What arbitral institutions (if any) exist in your country? When were their rules last amended? Are any amendments being considered?**

   Numerous arbitral institutions exist in Canada, including the ADR Institute of Canada Inc. (**ADRIC**), Vancouver International Arbitration Centre (**VanIAC, formerly the BCICAC**), Canadian International Internet Dispute Resolution Centre (**CIIDRC, a division of VanIAC**), Canadian Arbitration Association (**CAA**), and International Centre for Dispute Resolution of Canada (**ICDR – Canada**).

   The ADRIC, VanIAC (international arbitration rules), and CAA rules were last amended in

2016, while the ICDR rules were last amended in 2015. VanIAC amended its domestic arbitration rules in 2020. VanIAC also plans to amend its international arbitration rules in 2021.

7. **Is there a specialist arbitration court in your country?**

   There is no "specialist arbitration court" in Canada. However, Canadian courts are very familiar with international arbitration law and practice, recognize and respect party autonomy, and recognize and enforce foreign arbitral awards.

8. **What are the validity requirements for an arbitration agreement under the laws of your country?**

   The validity requirements for an arbitration agreement depend on which statute applies. Some domestic arbitration statutes require that arbitration agreements be in writing, while other domestic arbitration statutes, such as those in Alberta and Ontario, do not expressly. Every international commercial arbitration statute, including the Federal Commercial Arbitration Act, require that arbitration agreements be in writing.

9. **Are arbitration clauses considered separable from the main contract?**

   Arbitration clauses are considered separable from the main contract. Some domestic arbitration statutes expressly provide that arbitration clauses are separable from the main contract. In the provinces and territories with domestic arbitration statutes that do not provide that arbitration clauses are separable from the main contract, the courts apply the common law doctrine of separability. Every international commercial arbitration statute, including the Federal Commercial Arbitration Act, incorporates Article 16 of the UNCITRAL Model Law, which provides that arbitration clauses are separable from the main contract.

10. **Do the courts of your country apply a validation principle under which an arbitration agreement should be considered valid and enforceable if it would be so considered under at least one of the national laws potentially applicable to it?**

    The "validation principle" has not been widely applied by Canadian courts. Canadian courts instead generally take the position that the validity of any given arbitration clause is within the jurisdiction of the arbitrator and should be deferred to the arbitrator. (See *Morran v. Carbone*, [2005] O.J. No. 409 (Sup. Ct. J. [Commercial List])

    Canadian courts apply the *competence – competence* principle pursuant to which arbitrators have the jurisdiction to determine their jurisdiction, leaving the question as to which law is applicable to the arbitration agreement to be determined by arbitrator. This includes situations in which a party to an arbitration agreement argues that an arbitration clause is void, inoperative, or incapable of being performed; even in such situations Canadian courts have determined that their jurisdiction to make such a finding is limited, and that arbitrators

should be the first to consider challenges to their jurisdiction. (See *Seidel v. Telus Communications Inc.*, 2011 SCC 15; *Ciano Trading & Services C.T. & S.R.L. v. Skylink Aviation Inc.*, 2015 ONCA 89)

Canadian courts respect parties' express or implied choice of law, unless there is a strong cause to override that agreement. In determining that choice of law, the court will look to see if the intention of the parties as to the law governing the agreement is expressly stated, in which case, generally that law governs. If the intention of the parties as to the governing law is not expressly stated, but may properly be inferred from the terms and nature of the contract and the surrounding circumstances, then the intention so inferred, in general, governs. If the intention of the parties as to the applicable law cannot be ascertained from the express terms of the contract, or cannot be inferred from the terms of the contract in the light of surrounding circumstances, the intention of the parties may be inferred by referring to the system of law with which the contract has its closest and most real connection. (See *O'Brien v. Canadian Pacific Railway* (1972) 25 D.L.R. (3d) 230 (Sask C.A))

Where the arbitration agreement is silent on the law that governs it, and there is an absence of any other indication as to what law should govern arbitration agreement, the court will generally apply law of the commercial contract to the arbitration agreement.

11. **Is there anything particular to note in your jurisdiction with regard to multi-party or multi-contract arbitration?**

Most domestic arbitration statutes provide that both the courts and the parties can consolidate multi-party and multi-contract arbitrations with the consent of all the parties. See, for example, ss. 8(4) and 8(6) of the Ontario Arbitration Act.

12. **In what instances can third parties or non-signatories be bound by an arbitration agreement? Are there any recent court decisions on these issues?**

Canadian courts have held that non-signatories can be bound by an arbitration agreement in certain circumstances. Such circumstances include where there is an agency relationship between a signatory and a non-signatory; where the relationship between a parent company and a subsidiary company is sufficiently close to justify piercing the corporate veil; where a non-signatory is bound by estoppel; or where a signatory treats a non-signatory as a nominee of a signatory or true party to the arbitration agreement. (See *Northwestpharmacy.com Inc v. Yates*, 2017 BCSC 1572; *CE International Resources Holdings LLC v. Yeap*, 2013 BCSC 1804; *Yaworski v. Gowling Lafleur Henderson LLP*, 2013 ABCA 21)

British Columbia's *International Arbitration Act* defines "party" as including "a person claiming through or under a party" thus allowing for non-signatories to be involved in arbitral proceedings (s. 2(1)). Recent caselaw, however, has held that a non-party attempting to benefit from an arbitration agreement must first present some evidence to establish an arguable case that it should be considered a party to the arbitration clause (see *AtriCure, Inc.*

v. Meng, 2020 BCSC 341).

Canadian courts are also likely to enforce an award where a foreign arbitrator determined it had jurisdiction over the parties unless one of the enumerated grounds in Article 36 of the UNCITRAL Model Law for refusal of recognition or enforcement is met (see *CE International Resources Holdings LLC v. Yeap*, 2013 BCSC 1804).

13. **Are any types of dispute considered non-arbitrable? Has there been any evolution in this regard in recent years?**

In Canada, criminal matters are non-arbitrable. Otherwise, the arbitrability of a dispute depends on the laws of the relevant province or territory. In Quebec, for example, disputes about "the status and capacity of persons, family matters or other matters of public order" are non-arbitrable (art. 2639 of the CCQ). Further, in Ontario, disputes about certain consumer agreements are non-arbitrable. See s. 7(2) of the Consumer Protection Act, 2002, SO 2002 c 30, Sched A and TELUS Communications Inc v Wellman, 2019 SCC 19. This year, in Uber Technologies Inc. v. Heller, 2020 SCC 16, the Supreme Court of Canada held that the court can refuse to stay arbitral proceedings where, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction and a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator (due to, for example, cost).

14. **How is the law applicable to the substance determined? Is there a specific set of choice of law rules in your country?**

In general, the law applicable to the substance of the dispute is determined by the agreement of the parties. In the absence of an agreement of the parties, the arbitral tribunal may apply the law it considers appropriate in the circumstances. There is no specific set of choice of law rules. See, for example, s.32(1) of the Ontario Arbitration Act.

15. **Have the courts in your country applied the UNIDROIT or any other transnational principles as the substantive law? If so, in what circumstances have such principles been applied?**

In some cases, particularly cases involving Quebec civil law, Canadian courts have referenced the UNIDROIT principles, though not as substantive law. Canadian courts have in some cases referred to or used the UNIDROIT principles as analytical aides or comparative sources in the course of statutory or contractual interpretation. (See, for example, Churchill Falls (Labrador) Corp. v HydroQuébec, 2018 SCC 46.)

16. **In your country, are there any restrictions in the appointment of arbitrators?**

Although there are no restrictions on the parties' freedom to choose arbitrators, an arbitrator must be independent and impartial. This is provided for in the domestic and international arbitration acts of all the provinces either expressly or by implication. The international acts

also require arbitrators to disclose any circumstances that may give rise to a reasonable apprehension of bias. There is no requirement than an arbitrator be trained as a lawyer or be a member of the legal profession.

17. **Are there any default requirements as to the selection of a tribunal?**

The domestic and international acts of the provinces address appointment procedures. Typically, the parties are free to agree on a procedure for selecting arbitrators. If they do not provide for the procedure in their agreement, then the legislation will dictate the procedure.

Under the international acts, the default requirements are:

1. In an arbitration with three arbitrators, each party appoints one arbitrator and the two arbitrators appointed will select the third. If a party fails to appoint an arbitrator within 30 days of being asked, or if the two selected arbitrators fail to agree on a third within 30 days of their appointment, the appointment will be made by the court on request.
2. In an arbitration with a single arbitrator, if the parties are unable to agree on an arbitrator, the court will appoint one on request.

The domestic acts throughout the provinces vary on their default procedures but are generally similar to the international acts. Of note, however, is that most of the provincial domestic acts prescribe one arbitrator as the default of the parties have not agreed specifically in their arbitration agreement.

18. **Can the local courts intervene in the selection of arbitrators? If so, how?**

Yes, if the parties have not agreed on the procedure to appoint an arbitrator or if a party fails to follow the procedure agreed upon, a court may appoint the arbitral tribunal on a party's application. If the parties are unable to decide on an arbitrator based on their agreed procedure, then in most provinces courts may also interfere and appoint an arbitrator. There is no appeal from the court's appointment of the arbitral tribunal.

Under the international acts and in Quebec, a party has 30 days to appoint an arbitrator, failing which the courts will do so.

19. **Can the appointment of an arbitrator be challenged? What are the grounds for such challenge? What is the procedure for such challenge?**

The appointment of an arbitrator can be challenged across the provinces. The parties are free to agree on a procedure for challenging an arbitrator. If they have not reached an agreement on these terms, then a party wishing to challenge the appointment must follow the procedure in the governing legislation or institutional rules, if applicable.

All the acts provide for a party to challenge the appointment of an arbitrator for two reasons:

1. Circumstances exist that may give rise to a reasonable apprehension of bias.
2. The arbitrator does not possess qualifications that the parties have agreed are necessary.

Typically, the party seeking to challenge an arbitrator sends a written statement of the reasons for the challenge to the arbitral tribunal within 15 days of becoming aware of those reasons. Unless the arbitrator withdraws, or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. A party who has appointed an arbitrator may only challenge that arbitrator on grounds of which the party was unaware at the time of the appointment. Once the tribunal has made a decision on the challenge, that decision can be reviewed by the courts. In British Columbia, a court would hear the challenge directly instead of the tribunal at first instance. In Alberta, there is a further review available to the court of appeal of the lower court's decision.

20. **Have there been any recent developments concerning the duty of independence and impartiality of the arbitrators**

In a 2018 decision of the British Columbia Supreme Court on a petition for judicial review of an arbitrator's refusal to recuse himself in an international arbitration following a challenge to his impartiality, an issue arose as to whether the court was restricted to reviewing the challenge that was placed before the arbitrator or whether the court could consider the entire record. It was held that the Court should have access to the entire record, regardless of whether particular portions of the record were put to the arbitrator at the initial recusal application. This was on the basis that the apprehension of bias goes to the very core of a judicial or quasi-judicial process, and there is no deference owed by a reviewing court to an arbitrator deciding the question of continuing adjudication in the face of an application for recusal; the duty of a reviewing court is to ensure that the arbitrator is independent and impartial. (Tanzanian Goldfields Company Limited v. East Africa Metals Inc., 2018 BCSC 1511)

In a 2016 decision of the Ontario Superior Court on an application to set aside an arbitral award on the basis that the arbitrator should have known that his former law firm had acted in the past for entities involved in the project that was the subject of the dispute (one of whom was a witness, though not party to the arbitration), the court held that an arbitrator's disclosure duty does not require an arbitrator to search for unknown conflicts from a former law firm extending to witnesses, the employers of witnesses, or non-parties to the dispute. (Jacob Securities Inc. v. Typhoon Capital B.V., 2016 ONSC 604) There was no dispute in that case that the arbitrator had no knowledge of his former firm's relationship with the entities in question, however he did not undertake a conflict search with his former firm. The applicant became aware of the relationship between the entities and the former firm after the arbitrator released his reasons dismissing the applicant's claim, following which it challenged the final award.

The Ontario court held that it had jurisdiction to consider the challenge to the award or its enforcement pursuant to Articles 34 and 36 of the UNCITRAL Model Law (holding that Articles 12 and 13 address situations where an arbitration is extant and were thus inapplicable). The court reasoned that under Article 34 one of the grounds for setting aside an arbitral award is if the arbitral procedure was not in accordance with the Model Law, and that under Article 36 recognition or enforcement of an arbitral award may be refused where arbitral procedure was not in accordance with the agreement of the parties, or, if applicable, the Model Law. The court reasoned that challenges to an award based on reasonable apprehension of bias amount to claims of unequal treatment, which would be contrary to Article 18 of the Model Law, and, hence, properly brought under Articles 34 and 36. On the merits, however, the court ruled that the alleged connection between the arbitrator and the entities in question in this case was far too remote to establish a reasonable apprehension of bias. The applicant also argued that the arbitrator had a positive obligation to check any conflicts with his former firm. While the court agreed that an arbitrator who is a partner of or otherwise works for a law firm has a positive duty to investigate any potential conflicts of interest with his or her law firm in order to satisfy his or her disclosure obligations, it disagreed that this obligation extended to the arbitrator's former law firm and that such a search should include not only the names of the parties to the arbitration, but also to witnesses, the employers of witnesses, or non-parties to the dispute, who nevertheless feature in it. The court stated that "[t]he notion that a judge or arbitrator must make a concerted effort to search for hitherto unknown conflicts from a firm that he or she no longer works with would be a burdensome exercise and wholly disproportionate response to the duty to disclose."

21. **What happens in the case of a truncated tribunal? Is the tribunal able to continue with the proceedings?**

Generally, if there is a truncated tribunal, whatever procedure the parties have agreed upon will apply to the appointment of a new adjudicator. If the parties have not agreed, all the arbitration acts generally contain procedures for the court appointment of a new arbitrator in the event that an arbitrator is unable to continue for whatever reason. Parties may also apply to court to have an arbitrator discharged for various reasons.

22. **Are arbitrators immune from liability?**

The Supreme Court of Canada has established the following preconditions, the existence of which establish immunity from suit for arbitrators:

1. There must be an existing dispute which the parties have submitted to the arbitrator;
2. The arbitrator must be acting in a judicial or quasi-judicial manner; that is, he or she receives evidence and hears argument in coming to his or her decision; and
3. The arbitrator must be fulfilling his or her function as an independent party, in compliance with the mandatory provisions of the applicable legislation.

Generally, arbitrators are immune from liability for negligence. They must nevertheless act

honestly and fairly between the parties. If an arbitrator is found to be guilty of misconduct, including acting in bad faith or fraud, they could be sued for recovery of fees.

23. **Is the principle of competence-competence recognized in your country?**

Yes, the competence-competence principle has been recognised by the Supreme Court of Canada and it is found in most of the provincial statutes.

24. **What is the approach of local courts towards a party commencing litigation in apparent breach of an arbitration agreement?**

In international arbitrations, courts are required to stay or dismiss actions in favour of arbitration on the timely application of a party unless the arbitration agreement is void, inoperative or incapable of being performed. The test for whether an agreement exists is whether the party applying for the stay of the court action can show an arguable case that an arbitration agreement exists. The arbitrator will then get to determine their jurisdiction and the validity of the arbitration agreement, after the court has ordered a stay. However, as discussed above, in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, the Supreme Court of Canada held that the court can refuse to stay arbitral proceedings where, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction and a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator (due to, for example, cost).

In domestic arbitrations, most of the domestic acts provide legislative exceptions to the requirement to order a stay. These can include incapacity of a party when the agreement was entered, the agreement itself is invalid, the subject matter of the dispute is prohibited from being arbitrated, delay in seeking a stay or the matter can be dealt with by default or summary judgment. Otherwise, the courts will order a stay and allow the arbitrator to determine their own jurisdiction. Another issue that might arise is which party can seek a stay. In Ontario and Alberta, only the party that did not initiate the court proceedings may seek a stay. In British Columbia and Quebec, any party may seek a stay.

25. **How are arbitral proceedings commenced in your country? Are there any key provisions under the arbitration laws relating to limitation periods or time bars of which the parties should be aware?**

If the arbitration is to take place in Canada, then absent an agreement between the parties, the applicable domestic or international act will determine how proceedings are commenced. If the parties have agreed to the procedural rules then those rules will apply, subject to any mandatory procedural laws at the place of arbitration. The powers of the arbitral tribunal can only be exercised once each member has accepted the appointment of the arbitrator and the panel is complete, as provided in the domestic acts.

Under most domestic acts, the acts generally require a party to serve notice to the opposing

party to appoint an arbitrator pursuant to their agreement. Parties in Canada generally follow the New York Convention when it comes to the form of notice. In Canada, the rules for service under the domestic acts are similar to that of the rules governing civil procedure in each province.

In Canada, limitation periods are considered substantive law. For international arbitrations, arbitrators would need to interpret limitations issues according to the laws governing the contract. In domestic arbitrations, the provincial laws on limitations generally apply to arbitrations as if they were court proceedings. There is no such provision in the international acts. There may also be limitation periods within the arbitration agreements themselves which must also be abided by.

26. **In what circumstances is it possible for a state or state entity to invoke state immunity in connection with the commencement of arbitration proceedings?**

This is generally assessed on a case-by-case basis. Canadian courts have previously accepted and denied claims of sovereign immunity depending on the circumstances.

27. **What happens when a respondent fails to participate in the arbitration? Can the local courts compel participation?**

Canadian courts do not compel parties to arbitrate. Courts will only enforce arbitration agreements by denying access to courts. However, it has happened that courts have ordered fines for parties not arbitrating their disputes in a timely manner.

If a claimant wishes to continue the arbitration, the arbitrator has broad powers to do what they feel just in the circumstances under all the arbitration acts. They may continue the proceedings and make an award based on the evidence they have if they choose to.

28. **Can third parties voluntarily join arbitration proceedings? If all parties agree to the intervention, is the tribunal bound by this agreement? If all parties do not agree to the intervention, can the tribunal allow for it?**

Whether third parties can voluntarily join or intervene in arbitration proceedings depends on the language of the arbitration agreement (see *Star Tropical Import & Export. v. International Project Management Consortium*, 2011 ONSC 4005). If the parties in the arbitration agreement expressly contemplate voluntary third party intervention, the arbitral tribunal or court interpreting the arbitration agreement will generally honour that agreement. Where the language of the arbitration agreement is not conclusive on the issue, courts must then look to the relevant province or territory's arbitration statute and applicable common law.

The courts do not have jurisdiction to order a third party to submit to an arbitration to which the party did not agree (see *HMI v. Index Energy et al.***,** 2016 ONSC 5126; and court's

comments in *Yaworski v. Gowling Lafleur Henderson LLP*, 2013 ABCA 21), and conversely a third party who is not a party to an arbitration agreement cannot invoke it as a shield against litigation and attempt to take advantage of an arbitration agreement to which it is not privy (see *Graves v. Correactology Health Care Group Inc.*, 2018 ONSC 4263).

Canadian international arbitration statutes are silent as to whether third parties may voluntarily join or intervene in arbitration proceedings where all parties consent. However, many provinces have either expressly or impliedly incorporated the UNCITRAL Model Law into their legislation. Article 7 of the Model Law defines an arbitration agreement as a written agreement by parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, and this definition does not preclude third parties from joining if all of the parties consent.

29. **Can local courts order third parties to participate in arbitration proceedings in your country?**

There is no legislative regime in Canada to enable the joinder of third parties to arbitration. Courts will usually stay proceedings against third parties until the arbitration is resolved. Despite no legislative regime, courts across the country have ordered non-parties to the arbitration agreement to submit to arbitration. In certain circumstances, non-signatories can be parties to an arbitration agreement such as when the plaintiff treats the defendant as the true party to the contract or where there are multiple defendants and splitting between arbitration and court would lead to parallel proceedings.

Generally, arbitration awards are not binding on persons who were not parties to the arbitration. However, in certain circumstances, non-parties to the arbitration agreement can be bound by the arbitral award. This generally is through contract law doctrines such as agency, assignment or novation. Additionally, courts may also bind third parties in instances of piercing the corporate veil or by estoppel. As a general rule, the binding force of the arbitral decision is a matter of contract and so, there must be privity between the parties to the arbitration agreement. Local courts will, however, facilitate arbitration proceedings by requiring witnesses (who may be third parties) to attend and give evidence or produce evidence to the arbitral tribunal.

30. **What interim measures are available? Will local courts issue interim measures pending the constitution of the tribunal?**

Subject to the arbitration agreement, an arbitral tribunal's power to order interim relief is generally broad and discretionary, although binding only on the parties to the dispute. For international arbitrations, the tribunal will typically consider the following factors:

1. whether the tribunal has prima facie jurisdiction over the dispute;
2. whether the request for relief is urgent and cannot await a determination on the merits;

3. whether the relief sought is necessary to prevent imminent harm that is not compensable by money or that may prejudice the arbitral process before the merits of the dispute are resolved;
4. whether the balance of convenience favours the granting of the order; and
5. whether the applicant has established a reasonable possibility of success on the merits.

For domestic arbitrations, tribunals will typically follow the legal test for injunctive relief set out by the Supreme Court of Canada in *RJR Macdonald Inc. v. Canada (Attorney General)* ([1994] 1 S.C.R. 311). The factors considered are:

1. Is there a serious question to be tried?
2. Would the applicant suffer irreparable harm (meaning not compensable in money) if the application is refused?
3. Does the balance of convenience favour the granting of the interlocutory relief?

Local courts respect arbitration agreements and accordingly, are keen to facilitate the arbitral process, even before the constitution of the tribunal. As such, they will grant interim measures pending the constitution of the arbitral tribunal. Since arbitral tribunals lack the coercive power to enforce their own interim orders, courts will often assist as contemplated by the arbitration acts throughout Canada. The types of relief that can be obtained in court include detention, preservation and inspection of property, interim injunctions and receivers, security for costs and stays of court proceedings in favour of arbitration. Parties may also seek interim relief against third parties in court as the arbitral tribunal has no jurisdiction over third parties.

31. **Are anti-suit and/or anti-arbitration injunctions available and enforceable in your country?**

While anti-suit injunctions are available, broadly speaking a Canadian court will only entertain an application for an anti-suit injunction where a serious injustice will occur because of a failure of a foreign court to decline jurisdiction applying the *forum non conveniens* test. To grant an anti-suit injunction it must be first determined whether there is another forum that is "clearly more appropriate" than the domestic forum. If, applying the principles of *forum non conveniens*, the Canadian court finds that the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate, then the anti-suit injunction application should be dismissed. If, however, the Canadian court finds that the foreign court assumed jurisdiction on a basis that is inconsistent with the principles of *forum non conveniens*, then it will proceed to a second stage of the analysis in order to grant the application, and must also find that granting the application will not deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him. (See *Amchem Products Inc. v British Columbia (Workers' Compensation Board),* [1993] 1 SCR 897)

Where there is a mandatory arbitration agreement, courts are typically required to stay or dismiss all or part of an action in favour of arbitration unless there are reasons not to enforce

the arbitration agreement.

There is also some Canadian precedent for a court to order an anti-suit injunction against a foreign proceeding in furtherance of an agreement to arbitrate, though the Canadian case law on this point is less developed than in other jurisdictions.

There is also some precedent for the grant of an anti-arbitration injunction to enjoin foreign arbitration proceedings, though Canadian law appears to be still developing in this regard. In a recent decision, the British Columbia Court of Appeal upheld a decision allowing an application to enjoin foreign arbitral proceedings in order to enforce a forum selection agreement made in favour of a domestic court. The decision was upheld, among other reasons, on the basis that where parties are bound by a valid forum selection clause, it is to be enforced unless a party can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in all of the circumstances to require it to adhere to the terms of the forum selection clause. The Court of Appeal also upheld the decision on the basis that an injunction was available to enforce a contractual negative covenant (in a standstill agreement) not to proceed with arbitration. (See *Li v Rao*, 2019 BCCA 264)

32. **Are there particular rules governing evidentiary matters in arbitration? Will the local courts in your jurisdiction play any role in the obtaining of evidence? Can local courts compel witnesses to participate in arbitration proceedings?**

Subject to the agreement of the parties and procedural fairness, the arbitrator has discretion to determine the rules regarding the admissibility and weight of evidence. International arbitrations in Canada often refer to the IBA Rules on the Taking of Evidence in International Commercial Arbitration for guidance. Evidence is typically given under oath and is subject to cross-examination. Where expert evidence is needed, reports are typically exchanged prior to the hearing. Although the arbitral tribunal has the authority to appoint its own experts, that power is rarely exercised.

The arbitral tribunal can ask the local courts for assistance in the taking of evidence, and local courts can compel witnesses to appear for oral questioning in the arbitration or produce evidence. The court will generally assist so long as the evidence sought is consistent with the jurisdiction's evidentiary rules.

33. **What ethical codes and other professional standards, if any, apply to counsel and arbitrators conducting proceedings in your country?**

As a matter of procedural fairness, arbitrators are expected to be independent and impartial. Although for the most part there are no rules specifically governing the conduct of counsel, the rules of the law society of each province set out the ethical and professional obligations of Canadian counsel. British Columbia's domestic arbitration legislation imposes duties on parties themselves, including a requirement that the "to do all things necessary for the just, speedy and economical determination of the proceedings".

34. **In your country, are there any rules with respect to the confidentiality of arbitration proceedings?**

Although arbitration proceedings are private, there is no clear legal duty of confidentiality, except in the provinces of Quebec and British Columbia, or where the parties have adopted institutional or other rules that impose confidentiality obligations. Where there is a duty of confidentiality, if a party seeks court intervention, or if disclosure if otherwise required by law, confidentiality may be lost.

35. **How are the costs of arbitration proceedings estimated and allocated?**

Subject to the arbitration agreement, the arbitral tribunal generally has broad discretion with respect to the apportionment of costs. The general practice is that the successful party is entitled to its reasonable proven costs on a full indemnity basis.

36. **Can pre- and post-award interest be included on the principal claim and costs incurred?**

The arbitral tribunal's authority to award interest may arise from the substantive contract in dispute, the applicable law, or the arbitration agreement. If the applicable law is Canadian law, the award of pre-judgement interest is an issue of substantive law; accordingly, the arbitral tribunal may make an award for interest. In some jurisdictions, such as in the province of British Columbia, the applicable arbitration legislation explicitly provides for an award of interest.

37. **What legal requirements are there in your country for the recognition and enforcement of an award? Is there a requirement that the award be reasoned, i.e. substantiated and motivated?**

In order to enforce an award, the party seeking enforcement may apply to the court pursuant to a summary procedure. The application generally requires the applicant to file affidavit evidence including a) the authenticated original or a certified copy of the award; b) the original or certified copy of the arbitration agreement; and c) translations, if necessary. The specific procedure varies depending on the rules of court of the jurisdiction. The application must be brought within the relevant limitation period, which varies by jurisdiction.

An arbitral award must be made in writing, must state its date and the place of arbitration and must be signed by the arbitrators. Unless the parties agree otherwise, the award must contain reasons. A copy of the award must be delivered to each party.

38. **What is the estimated timeframe for the recognition and enforcement of an award? May a party bring a motion for the recognition and enforcement of an award on an ex parte basis?**

Each province and territory has enacted legislation providing for the recognition and enforcement of foreign commercial arbitral awards. Federal legislation also governs enforcement in limited circumstances. The recognition and enforcement provisions either adopt, or are based on, the Model Law and the New York Convention. The timeframe for the recognition and enforcement of an award is difficult to estimate as the procedural and practical variables differ in each jurisdiction, and there will also be variation depending on the complexity of the issues being argued.

Although an application to enforce an award is typically done on notice, a motion might be brought *ex parte* in certain limited circumstances, such as where there is reason to believe that the other party would use notice primarily to frustrate the process or where it is not practical to provide notice.

39. **Does the arbitration law of your country provide a different standard of review for recognition and enforcement of a foreign award compared with a domestic award?**

Different legislation governs international and domestic arbitrations and awards and the requirements vary in each Canadian jurisdiction.

40. **Does the law impose limits on the available remedies? Are some remedies not enforceable by the local courts**

The legislation does not impose limitations on remedies. Canadian courts have held that all remedies are enforceable by local courts, though there is a limitation on certain forms of injunctive relief in the province of Quebec.

41. **Can arbitration awards be appealed or challenged in local courts? What are the grounds and procedure?**

In some Canadian jurisdictions, there is no right of appeal without consent. In other jurisdictions, parties can seek leave to appeal from a judge in limited circumstances that are based on the Model Law. The rules of procedure vary between provinces and territories.

42. **Can the parties waive any rights of appeal or challenge to an award by agreement before the dispute arises (such as in the arbitration clause)?**

Parties cannot waive the right to appeal or challenge an international commercial arbitral award before the dispute arises.

43. **To what extent might a state or state entity successfully raise a defence of state or sovereign immunity at the enforcement stage?**

Canadian courts have accepted a defense of state immunity in certain circumstances. The court will generally rely on an express or implied waiver of immunity or, alternatively, the

"commercial activity exception" where the state engages in commercial activity in Canada.

44. **In what instances can third parties or non-signatories be bound by an award? To what extent might a third party challenge the recognition of an award?**

An arbitral tribunal does not have jurisdiction over third parties unless, as between a party and non-party: a) the corporate relationship is sufficiently close to justify lifting the corporate veil; b) there is an agency relationship; c) a contract incorporates the arbitration agreement; or d) the non-party is bound by equitable estoppel. If a third party is bound by an award, it may take steps to challenge recognition and enforcement.

45. **Have courts in your jurisdiction considered third party funding in connection with arbitration proceedings recently?**

There has not been consideration of third party funding in connection with arbitration proceedings by Canadian courts in recent years.

46. **Is emergency arbitrator relief available in your country? Is this frequently used?**

Most of the provincial arbitration statutes, and the federal Commercial Arbitration Code, in Canada do not expressly provide for emergency arbitrator relief. British Columbia is an exception. Parties may agree to emergency arbitrator relief through rules of various institutions operating in Canada. Statistics are not available for how frequently this relief is used but courts in Canada are supportive of this relief.

47. **Are there arbitral laws or arbitration institutional rules in your country providing for simplified or expedited procedures for claims under a certain value? Are they often used?**

Yes, some of the arbitration institutional rules provide for simplified or expedited procedures that are not mandatory and do not apply automatically but parties can agree to those procedures (for example, see ADR Institute of Canada's Arbitration Rules). Other arbitration institutional rules provide for simplified or expedited procedures for claims under a certain value. For example, under International Centre for Dispute Resolution Canada's Arbitration Rules, expedited procedure applies if no party's claim exceeds US$250,000 and a dispute is to be resolved by written submissions if no party's claim exceeds US$100,000. VanIAC has a similar procedure, and provides flat-fee arrangements for the arbitrator's time for disputes that are less than CAD$250,000.

48. **Have measures been taken by arbitral institutions in your country to promote transparency in arbitration?**

Yes, some measures have been taken by some of the arbitration institutions to promote transparency in arbitration. For example, under International Centre for Dispute Resolution

Canada's Arbitration Rules, the Administrator, unless the parties agree otherwise, may publish selected awards, orders, decisions and rulings that have been edited to conceal the names of the parties and other identifying details.

49. **Is diversity in the choice of arbitrators and counsel (e.g. gender, age, origin) actively promoted in your country? If so, how?**

Efforts are being undertaken at various levels to promote diversity in the choice of arbitrators and counsel. Examples of such efforts include diversity and unconscious bias training facilitated by arbitration organizations, proactive discussion about diversity issues in conferences and panel discussions organized by different stakeholders, and individuals and organizations signing on to the Equal Representation in Arbitration Pledge.

50. **Have there been any recent court decisions in your country considering the setting aside of an award that has been enforced in another jurisdiction or vice versa?**

There have not been any recent court decisions in Canada considering the setting aside of an award that has been enforced in a jurisdiction outside of Canada or vice versa. Domestically, in Shoppers Drug Mart Inc. v. Retirement Home Specialists Inc., (2019 NLSC 44), the Newfoundland and Labrador Supreme Court recently considered an application to set aside an award enforced by an Ontario court. The application was rejected on the grounds that the parties had voluntarily submitted to the laws of Ontario for the purposes of the arbitration, that there was no breach of Newfoundland's Reciprocal Enforcement of Judgments Act, and that the conduct of the parties and terms of the agreement were not contrary to public policy.

51. **Have there been any recent court decisions in your country considering the issue of corruption? What standard do local courts apply for proving of corruption? Which party bears the burden of proving corruption?**

Yes, the issue of corruption was most recently considered by the Superior Court of Quebec in *R v. Bebawi* (2020 QCCS 22). In that case, Bebawi, a former senior officer of SNC-Lavalin, participated in the distribution of tens of millions of dollars to government officials in Libya in order to secure deals for the company. Bebawi also received around $30 million for himself through the corruption. Bebawi was found guilty of five fraud and corruption charges and was sentenced to 8.5 years in prison. The Court listed the sophisticated nature of the fraud, the level of premeditation required to execute it, as well as attempts to cover up sums of money from the RCMP as aggravating factors in ordering this sentence.

The issue of corruption was also recently considered by the Ontario Superior Court of Justice in *R v. Barra and Govindia* (2019 ONSC 1786). In that case, Cryptometrics Canada Limited, the Canadian subsidiary of Cryptometrics US, submitted a bid on a contract to supply facial recognition software to Air India. In order to get the Indian Minister of Civil Aviation's approval to award the contract to Cryptometrics Canada, Barra, the CEO

of Cryptometrics US, retained Govindia as Cryptometrics' agent and they both agreed to pay a bribe of $500,000 to the Minister. Subsequently, Barra sent the money to Govindia but Govindia did not pay the $500,000 bribe to the Minister and instead used the funds within his own companies. Although the bribe was not ultimately paid and the contract was never awarded to Cryptometrics Canada, the Court sentenced Barra and Govindia to 2.5 years in prison. In making this decision, the Court took several factors into consideration such as the seriousness of the charges, the amount of the bribes they agreed to pay, the fact that the bribery scheme was a failure, the maximum sentence for the offence, the adverse effect that the charges had on the ability of Barra and Govindia to earn income, as well as Barra's health issues.

The *Corruption of Foreign Public Officials Act*, SC 1998, c. 34 ("CFPOA") and Canada's *Criminal Code*, RSC 1985, c. C-46, are the main statutes prohibiting corruption and bribery in Canada. The CFPOA has been in force since 1999. The main offence under the CFPOA is the offence of bribing a foreign public official under section 3. The CFPOA essentially prohibits giving, offering or agreeing to give or offer any benefit, directly or indirectly, to a foreign public official for the purpose of obtaining or retaining an advantage in the course of business.

Section 22.2 of the *Criminal Code* sets out the test for corporate criminal liability. The prosecution must prove beyond a reasonable doubt that an organization failed to take reasonable measures to ensure compliance with rules and regulations applicable to a particular case. Section 22.2 enlarges the concept of corporate liability to require that senior officers take all reasonable steps to prevent corruption that they become aware of.

52. **Have there been any recent court decisions in your country considering the definition and application of "public policy" in the context of enforcing or setting aside an arbitral award?**

Over the last few years, a number of decisions from Canadian courts have considered the definition and application of "public policy" in the context of enforcing or setting aside arbitral awards.

In *1552955 Ontario Inc. v. Lakeside Produce Inc.* (2017 ONSC 4933), one of the parties (JAG) sought to set aside an arbitral award pursuant to Article 34(2) of the *Model Law on International Commercial Arbitration*, which provides that "An arbitral award may be set aside by the court specified in article 6 only if . . . the court finds that . . . the award is in conflict with the public policy of this State." According to JAG, numerous errors in the arbitrator's decision undermined the integrity of the arbitration process such that its enforcement would be contrary to the public policy of Ontario (para 76). The Court rejected this submission, emphasizing that the public policy defence is intended to have narrow application to "guard against enforcement of an award which offends our local principles of justice and fairness in a fundamental way… or where there was ignorance or corruption on the part of the tribunal which could not be seen to be tolerated or condoned by our courts"

(para 82). This will be the case where "enforcement would violate our 'most basic notions of morality and justice' (para 84). However, the public policy defence should not be employed to re-determine the merits of the claim or where the court believes that the tribunal wrongly decided a point of fact or law (para 83 and 84). Applying these principles, the Court found that the alleged errors did not meet the threshold of a conflict with public policy, and that JAG was instead attempting to re-open the merits of the parties' dispute on factual and legal issues within the arbitrator's jurisdiction (para 87).

In *Consolidated Contractors Group S.A.L. (Offshore) v. Ambatovy Minerals S.A.* (2017 ONCA 939), the ONCA considered another application to set aside an arbitral award pursuant to Article 34 of the Model Law. In that case, the appellant argued that the arbitration award amounted to double recovery for the respondent and was therefore a penalty that offended Ontario public policy. The Court rejected the appellant's submissions, citing the same leading cases as *Lakeside* and emphasizing that public policy is only engaged when enforcement of an award "offends our local principles of justice and fairness in a fundamental way" (para 99). According to the Court, the alleged double recovery "does not come close" to meeting that test (para 101).

The British Columbia Supreme Court (BCSC) also recently considered the public policy defence to the enforcement of a foreign arbitration award in *Ning v. Yang* (2018 BCSC 943). In its brief decision, the BCSC declined to set aside an award made by the Hainan Arbitration Commission in connection with the respondent's failure to repay a loan. While the respondent claimed the loan's interest rates and default penalty were excessive, the Court held that since the tribunal's procedural and substantive rules did not diverge markedly from the rules of the BC court, and there was no evidence of ignorance or corruption, enforcement of the award was not against public policy (para 17).

Finally, in *Canada (Attorney General) v. Clayton*, (2018 FC 436), the Federal Court (FC) considered the application of Article 34 of the Model Code in the context of a NAFTA tribunal's finding that Canada had violated its obligations by refusing to approve a quarry and marine terminal project. Intervenors in the case argued that enforcement of the tribunal's decision was contrary to Canada's public policy because of its "flagrant" errors of law. In rejecting this public policy argument, the FC pointed out that setting aside the decision on this basis would frustrate the narrow application of Article 34, and would open the door for a review on the merits (para 195). Moreover, the FC noted that the threshold for violation of public policy was "extremely high". While this threshold was met in instances of bribery, illegality and denial of due process, the issues raised by the intervenors did not rise to this level (para 196).

53. **Have there been any recent court decisions in your country considering the judgment of the Court of Justice of the European Union in Slovak Republic v Achmea BV (Case C-284/16) with respect to intra-European Union bilateral investment treaties or the Energy Charter Treaty? Are there any pending decisions?**

No, there are no reported decisions.

54. **Have there are been any recent decisions in your country considering the General Court of the European Union's decision Micula & Ors (Joined Cases T-624/15, T-694/15 and T-694.15), ECLI:EU:T:2019:423, dated 18 June 2019? Are there any pending decisions?**

No, there are no reported decisions.

55. **What measures, if any, have arbitral institutions in your country taken in response to the COVID-19 pandemic?**

A number of measures have been taken in response to the COVID-19 pandemic by arbitration institutions and organizations that are based in Canada or that are actively used by Canadian parties.

For example, **Arbitration Place** has introduced an expanded service called Arbitration Place Virtual (APV) to facilitate domestic and international arbitrations and other proceedings remotely. APV is a secure eHearing service.

International Center for Dispute Resolution (ICDR) Canada has signed a Memorandum of Understanding with Arbitration Place in Toronto and Ottawa, Ontario to facilitate the scheduling of ICDR Canada hearings in that Province. ICDR also has access to other hearing locations across Canada.

International Chamber of Commerce (ICC) has provided guidance to parties, counsel and tribunals on possible measures that may be considered to mitigate the adverse effects of the COVID-19 pandemic on ICC arbitrations. Such measures, taken after consulting the parties, may include the following:

- Using either audioconference or videoconference for conferences and hearings where possible and appropriate;
- Considering whether site visits or inspections by experts can be replaced by video presentations or joint reports of experts; and,
- Considering whether and how the number and size of submissions can be limited.

The Secretariat of the Court has also taken steps to streamline its processes to promote efficiency and avoid COVID-19 related delays.

ADR Chambers, which provides conflict resolution services across Canada, has closed its office in Toronto to the public but they are available to assist with video conference mediations and arbitrations, and scheduled, in-person mediations and arbitrations.

The **Vancouver International Arbitration Centre (VanIAC)** has taken steps to facilitate the transfer of Chambers applications to arbitration in the interest of avoiding court backlog and delays.

56. **In your country, does the insolvency of a party affect the enforceability of an arbitration agreement?**

Yes, in Canada, if a party is bankrupt or insolvent and under court protection then the arbitration agreement, just like any other commercial contract, is affected. The *Bankruptcy and Insolvency Act*, RSC 1985, c. C-36 provides that on bankruptcy no creditor has any remedy against the debtor and all proceedings are stayed. Further, the bankrupt ceases to have any capacity to deal with its property, which passes to and vests in the trustee.

In the context of a domestic Canadian arbitration, a claim provable in bankruptcy must be submitted for adjudication by the bankruptcy court. This is not to say that an arbitration may never continue in the bankruptcy context. An interested party can always seek leave of the court to continue the proceedings.

If a trustee in bankruptcy adopts a contract with an arbitration agreement and a dispute later arises, the arbitration agreement is enforceable by or against the trustee in the same manner as any other commercial contract adopted by the trustee.

If the arbitration is international, different considerations may apply. The courts and the law at the place or seat of arbitration will impact the issue.

57. **Is your country a Contracting Party to the Energy Charter Treaty? If so, has it expressed any specific views as to the current negotiations on the modernization of the Treaty?**

Canada is not a Contracting Party to the Energy Charter Treaty.

58. **Have there been any recent developments in your jurisdiction with regard to disputes on climate change and/or human rights?**

La Rose v. Her Majesty the Queen is an action that was commenced at the Federal Court in October 2019. In this action, fifteen young Canadians are suing the Crown in right of Canada for its actions and inactions contributing to climate change. They argue that they and other young Canadians are being harmed by climate change and that the federal government is violating their rights to life, liberty, and security of the person contrary to section 7 of the *Canadian Charter of Rights and Freedoms* as well as their rights as beneficiaries under the Public Trust Doctrine. The plaintiffs also allege that their government's conduct violates their right to equality contrary to section 15 of the *Charter*, since younger people are disproportionately affected by the effects of climate change.

The plaintiffs are seeking various orders from the Federal Court including an order compelling the federal government to prepare and implement a climate action plan that reduces Canada's greenhouse gas emissions in a manner consistent with what best available science indicates is needed for the federal government to protect young Canadians, do its fair share to stabilize the climate system, and avert the catastrophic consequences of climate change.

On February 7, 2020, the government filed its statement of defence acknowledging that climate change is real, that it has significant negative impact on Canadians and that addressing climate change is of central importance to the Canadian government. However, the government argued that the plaintiffs lack public interest standing and that the courts are not the appropriate forum to address the climate crisis. The hearings are scheduled to begin in Vancouver, British Columbia on September 30 and are expected to go for two days.

In another recent development, on September 22 and 23, 2020 the Supreme Court of Canada heard appeals in three cases to determine whether the *Greenhouse Gas Pollution Pricing Act*, SC 2018, c. 12, s. 186 is constitutional. The legislation was passed in June 2018 and regulates provincial greenhouse gas emission sources by setting minimum national thresholds for a price on carbon pollution. The governments of Alberta, Ontario and Saskatchewan each argued that the law encroaches on their jurisdiction over natural resources and provincial taxation, while the federal government's position is that carbon emissions are an issue of national concern and require a national approach to address. The decision of the Supreme Court of Canada will impact fuel producers, fuel wholesalers, fuel distributors, emitters, air, marine, rail and road carriers, amongst other businesses.