

## Arbitration: A Canadian Primer

By Timothy M. Lowman\*

### 1. Overview

Arbitrations of both domestic and international commercial disputes are frequently conducted in Canada. The development of Canada's reputation in international arbitrations arises from its significant talent pool of arbitration counsel and other advantages as a venue for arbitration, including the favourable attitude of Canadian Courts, large selection of qualified arbitrators, and its status as an advanced common law jurisdiction. In 2006, Canada hosted two major conferences on international arbitration: the 17th Congress of the International Council for Commercial Arbitration (ICCA) and the 72nd Biennial Conference of the International Law Association.

Generally, parties to Canadian arbitrations enjoy similar advantages to those in other advanced jurisdictions. These include:

1. The parties' right to select the adjudicator(s) for the dispute;
2. The parties' right to select the governing law for the dispute;
3. The parties' right to select the forum for the dispute and avoid subjection to litigation in the courts of the other party's jurisdiction;
4. Ease of enforcement of the arbitral award in multiple jurisdictions;
5. Potential reduced cost compared to litigation; and
6. Confidentiality of the arbitration proceedings.

### 2. The Canadian Legislative Framework for Arbitration

Canada is a constitutional monarchy and a federation of ten provinces and three territories. Nine of the provinces are common law jurisdictions while the commercial law of the tenth province (Quebec) is civil.

Canada acceded to the New York Convention in 1986.<sup>1</sup> While it has not yet adopted the Inter-American Convention on International Commercial Arbitration, Canada has moved toward implementing the Washington Convention (the Convention on the

settlement of investment disputes) between states and nationals of other states.

Canadian law governing international, as well as domestic, arbitrations in Canada is largely based on provincial/territorial law. Subsequent to the federal government assenting to the New York Convention in 1986, all Canadian provinces and territories, except Quebec, passed legislation adopting the 1985 Model Law of the United Nations Commission on International Trade Law (UNCITRAL) for international commercial arbitration. The provincial international commercial arbitration legislation in Ontario, for example, is the Arbitration Act, S.O. 1991, c. 17. This legislation implements the UNCITRAL Model Law for international commercial arbitration in that province. In contrast, the conduct of international commercial arbitration in Quebec is governed by the provisions of the Civil Code of Quebec and the Quebec Code of Civil Procedure, although the UNCITRAL Model Law is taken into account in interpreting Quebec's own arbitration procedures.

The federal government also has legislation on arbitration, including commercial arbitration, whether domestic or international. This legislation applies when one of the parties to the arbitration is Her Majesty in Right of Canada, a department of the federal government or where the subject matter of the arbitration relates to issues of maritime and admiralty. These issues fall within the exclusive legislative domain of the federal government.

### 3. Arbitration Agreements in Canada: The Legal Context

Under both the federal and provincial/territorial legislation in Canada, an arbitration agreement is one where the parties submit to arbitration of all or certain disputes which have arisen, or which may arise, in respect of a defined legal relationship, whether or not that relationship is contractual. The agreement must be in writing, but may either be a separate agreement or embedded in an arbitration clause of a contract.

As a general rule, Canada Courts will give effect to arbitration agreements. The parties' intention to employ dispute resolution mechanisms is a paramount factor in the Canadian authorities. In *The Stokes-Stephens Oil Co. v. McNaught*,<sup>2</sup> the Supreme Court of Canada determined that:

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1. United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, C-16.

*“Once the conclusion is reached that the agreement for arbitration is wide enough to embrace the claims presented in the action, it is the prima facie duty of the court to allow the agreement to govern...and the onus of showing that the case is not a fit one for arbitration is thrown on the person opposing the stay of proceeding.”*

Canadian Provincial Courts have followed the reasoning in *The Stokes* decision. In Ontario, for example, Blair, J. held in *Ontario Hydro v. Dennison Mines Ltd.*:<sup>3</sup>

*The Legislative Framework:*

*The Arbitration Act, 1991 came into effect on January 1, 1992. It repealed the former Arbitration Act, R.S.O. 1980, c. 25 and enacted a new regime for the conduct of arbitrations in Ontario. This new regime is more sophisticated than that of the former Act and more consistent with international commercial arbitration practices. It is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters, and to require them to hold to that course once they have agreed to do so.*

*In this latter respect, the new Act entrenches the primacy of arbitration proceedings over judicial proceedings, once the parties have entered into an arbitration agreement, by directing the court, generally, not to intervene and by establishing a “presumptive stay” of court proceedings in favour of arbitration.*<sup>4</sup>

As expressed in *Ontario Hydro*, Canadian federal and provincial/territorial statutes governing international arbitration give no broad discretion to Courts to interfere in arbitrations but rather, require a presumptive stay of court proceedings in favour of arbitration, *unless* the arbitration agreement is determined to be null and void, inoperative or incapable of being performed.<sup>5</sup> In circumstances where it is alleged there are matters in dispute between the parties which can be arbitrated and others which are allegedly beyond the scope of a valid arbitration clause, Canadian Courts generally defer to the arbitral process and court proceedings are stayed at least pending the outcome of the arbitration.<sup>6</sup>

#### 4. Commencement of the Arbitration

Generally, arbitrations are commenced in any way

2. 57 S.C.R. 1918 (549.)

3. (1992) O.J. No. 2948 (Ont. Gen. Div.) at pp. 2-3.

4. *Supra*, at p. 559.

5. *See*, for example, Arbitration Act, S.O. 1991, c. C-17, s. 7.

recognized by law, including the service by one party on the other of a notice to appoint or participate in the appointment of an arbitrator under the arbitration agreement, or by service by one party on others of a notice demanding arbitration under the agreement.<sup>7</sup>

Where court proceedings are extant at the time the arbitration is commenced, or such proceedings are commenced subsequently in an effort to displace the arbitration, Canadian Courts will first consider the nature of the dispute which has arisen and determine whether it is one that falls within the scope of the arbitration agreement.<sup>8</sup> A stay of court proceedings will only be refused in limited circumstances enumerated in the applicable arbitration legislation - the onus being on the party opposing the arbitration proceedings. In the case of international arbitration, as indicated above, unless the arbitration agreement is null and void, inoperative or incapable of being performed, Canadian Courts will generally, refer the matter to arbitration.

#### 5. Process of Appointment of the Arbitral Tribunal

In Canada, subject only to the requirements of the arbitration agreement and provincial/territorial legislation regarding age of majority, parties to arbitrations are unrestricted in their selection of arbitrators. An arbitrator need not, for instance, be a lawyer or a Canadian national.

Canadian arbitrators are obliged to disclose, from the time of their appointment to the conclusion of the arbitral proceeding, any circumstance which may bring into question their independence or impartiality.

Courts will intervene in the selection of arbitrators only where:

6. International Commercial Arbitration Act, S.O. 1991, c. 1.9, Article 8(1).

7. “...to conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in court, thus defeating the policy of deference to the arbitrators.” *Boart Sweden A.D. v. Nya Stromnes A.B.* (1988) B.L.R. 295 at para. 15 (Ont. H.C.).

8. Arbitration Act, S.O. 1991, c. C-17, s. 23.

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1. There is a challenge to the qualifications, independence or impartiality of a selected arbitrator;
2. The parties cannot agree on an arbitrator *and* the arbitration agreement is silent on the issue of default appointment; or
3. The arbitration agreement provides for court intervention in the default appointment process.

## 6. Jurisdiction of the Arbitrator

Arbitral tribunals in Canada have sufficiently broad powers under federal and provincial legislation to enable them to deal with preliminary issues, including on their own jurisdiction, and questions of law arising during the arbitration. Canadian arbitrators can also apply both legal and equitable remedies to the parties' dispute—the latter including specific performance and injunctions.<sup>9</sup>

## 7. Canadian Arbitration Procedure

Where the arbitration agreement does *not* provide for the procedural rules to be used, the parties to a Canadian arbitration may agree on procedure, failing which the arbitral tribunal is empowered to decide the specific procedural rules to be applied to the arbitration, provided the rules adopted treat the parties equitably and give each a reasonable opportunity to present or respond to a claim.

Canadian federal and provincial legislation governing arbitrations confers discretionary powers on the arbitral tribunal to determine, consistent with the terms of the arbitration agreement and the UNCITRAL Model Law:

1. Timelines for the arbitration;
2. Discovery;
3. Place of hearing and language of the arbitration;
4. Presentation of oral and documentary evidence;
5. Use of expert witnesses; and
6. Applicable law.

Subject to the terms of the arbitration agreement, Canadian pre-arbitration discovery of documents and witnesses tends to reflect discovery practices in Canadian judicial proceedings. These practices are different from those, for example, in other common law jurisdictions like the United States and the United Kingdom.

In Canadian judicial proceedings all relevant documents which are not the subject of privilege must be

produced. The concept of “privilege” is applicable to documentary and oral communications, but is restricted to those communications between solicitor and client, settlement documents and documents created for the dominant purpose of the contemplated litigation. Absent waiver of the privilege, communications falling into those three categories would *not* be required to be disclosed in arbitration. Further, in Canadian judicial proceedings, pretrial examination for discovery of an individual party or a single representative of a corporate party is routine. Pretrial examination of non-parties is also permitted, although on a restricted basis.

Subject to the express provisions of the arbitration agreement, the majority of Canadian arbitrators permit reasonably extensive discovery of non-privileged documents on which a party relies to prove its case or to meet the case against it, and either no, or limited, oral examination of parties.

At the arbitration hearing, again subject to the express provisions of the arbitration agreement, Canadian arbitrators have frequently permitted the introduction of evidence in chief, also known as ‘direct evidence,’ in writing. This practice is also permitted in judicial proceedings in the Federal Court of Canada and, to a lesser extent, in the Provincial Courts where expert evidence is adduced. Permitted cross-examination of adverse witnesses is usually extensive: Canadian arbitrators recognize the adversarial tradition of Canadian litigation, and the resulting procedural expectations of parties. In adducing evidence, live video feed, videotape and/or telephonic means have become commonplace in Canadian arbitrations, as in Canadian judicial proceedings.

## 8. The Arbitral Award

Canadian international arbitration awards are made in writing, signed by the arbitrator(s), and a copy is delivered to each party. The award must state the basis upon which it is made, unless the parties agree otherwise.

## 9. Damage and Cost Awards

Damage and cost awards in Canadian arbitrations can be limited by the terms of the arbitration agreement and the substantive law which governs the arbitration.

In relation to punitive damages, it is unlikely they can be awarded in the absence of such jurisdiction being specifically conferred in the arbitration agreement.

Notwithstanding, the federal and provincial Canadian international arbitration legislation does not include provisions regarding the awarding of interest,

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9. *O.F.L. v. Ontario* (Minister of Economic Development, Trade and Tourism) 1996 31 O.R. (3d) 302 at 311: leave to appeal refused (March 7, 1997) Doc. C.A. 19569 (Ont. C.A.).

absent a prohibition in the arbitration agreement a Canadian arbitrator has the discretion to determine an award of interest on an arbitral award and costs of the arbitration. Costs are usually awarded to the successful party, but may be apportioned between the parties in appropriate circumstances.

## 10. Appeal

In the Canadian provinces and territories other than Quebec, different legislation governs international and domestic commercial arbitration. The most significant distinction between the international and domestic legislation relates to the appeal of arbitral awards. In the case of international arbitral awards, no appeal right exists apart from the right to apply to have the award set aside on the bases permitted under the Model Law. These bases are:

1. Where an appeal right is expressly provided in the arbitration agreement; and
2. On the limited grounds in Article 34 of the Model Law.

By contrast, in the case of domestic commercial arbitration, subject to the terms of the agreement, the parties may appeal an arbitral award on a point of fact, law or mixed fact and law.

A final decision of an arbitrator in Canada is also, generally speaking, *res judicata* and the underlying dispute cannot be the subject of further arbitration or litigation.

## 11. Enforcement of Arbitral Award

Enforcement of an arbitral award, given Canada's ratification of the New York Convention and the federal and provincial legislative implementation of the Convention, is done on notice by application to

a court in the jurisdiction where the arbitral award is sought to be enforced, supported by an original or certified copy of the arbitration award. Canadian Courts have generally limited the scope of judicial review of foreign arbitral awards, enforcing them in Canada unless there is clear contravention of a fundamental principle of Canadian law.

## 12. Practical Provisions: What Should be Incorporated in an Arbitration Agreement

Provisions dealing with the following issues should be included in a Canadian arbitration agreement:

1. A specific description of disputes which the parties agree to refer to arbitration;
2. A tiered and timed dispute resolution procedure or other condition precedent to arbitration (i.e. negotiation followed by, if necessary, arbitration);
3. The jurisdiction of the arbitrators;
4. The process for appointment of arbitrators, including default provisions;
5. The number of arbitrators;
6. The place where the arbitration proceeding will be held;
7. The language of the arbitration proceeding;
8. The substantive and procedural law which will govern the arbitration;
9. Cost and interest award mechanisms;
10. Confidentiality;
11. Right of appeal (if any); and
12. Circumstances permitting intervention by the Courts (i.e. injunctive relief). ■