Written by leading practitioners in the field, this fifth edition of *Arbitration World* provides readers with a single reference guide to over 50 different arbitration regimes and institutions around the world.

Arbitration World provides an informative, comparative and balanced overview of the key issues and is an essential resource for parties and lawyers engaged in arbitration, or considering arbitration as an option.

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FIFTH EDITION

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General Editors: Karyl Nairn QC & Patrick Heneghan
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FOREWORD

Karyl Nairn QC & Patrick Heneghan | Skadden, Arps, Slate, Meagher & Flom (UK) LLP

We are delighted to have been invited once again by Thomson Reuters to edit this fifth edition of *Arbitration World*, published by its widely recognised legal arm, Sweet & Maxwell (and forming part of their new *International Series*).

Following the success of the previous publication, we are hoping that this revised and extended fifth edition will serve as an invaluable reference guide to the key arbitration jurisdictions, rules and institutions across the globe.

In the three years since the last edition was published, the arbitral landscape has continued to evolve, with important developments in both the law and practice of arbitration. For example, new arbitration centres have opened in New York, Seoul, Moscow and Mumbai; established institutions such as the LCIA, AAA, HKIAC, ICDR, SIAC, VIAC, UNCITRAL and WIPO have published revised arbitration rules; new arbitration legislation has been enacted in Hong Kong, Australia, Belgium and Austria; while other jurisdictions, such as India, have sought through case law to improve their "arbitration-friendly" credentials.

The global status and popularity of arbitration has also grown since the last edition of *Arbitration World*. From 2012 to 2014, ICSID saw the highest annual number of filings in its history, notwithstanding the criticisms in certain quarters about the legitimacy of the existing system of investment treaty arbitration. Arbitration is also extending its global reach – arbitral institutions are reporting that the parties to arbitration are more diversified than ever; 156 state parties have now adopted the New York Convention.

To reflect this trend of expansion, we have continued to broaden the scope of *Arbitration World*. This latest edition has 55 chapters, including 38 jurisdictions and 16 arbitration institutions. We feature 11 new chapters, comprising Belgium, Cayman Islands, Colombia, Egypt, Korea, Malta, Peru, Scotland and the arbitral institutions of CIETAC, SIAC and the SCC.

Arbitration World aims to provide a simple and practical guide to arbitration law and practice for parties and practitioners, enabling its readers to assess the comparative benefits and challenges of arbitrating in various jurisdictions and/or under the auspices of different institutions.

We should like to take this opportunity to express our gratitude to all the authors of *Arbitration World*, old and new. The popularity of this publication is testament to the quality and expertise of the leading law firms, practitioners and institutions who have committed their time to the project.

We should also like to thank Emily Kyriacou and her team at Thomson Reuters, including Katie Burrington, Nicola Pender and Chris Myers, for their superb management and coordination efforts. We also extend our gratitude to Michele O'Sullivan for commissioning the project all those years ago.

Finally, we wish to pay tribute to our hard-working colleagues at Skadden, Gulnaar Zafar, Ben Jacobs, Sabeen Sheikh, Bing Yan, Anna Grunseit, Judy Fu, Nicholas Lawn, Kam Nijar, Laura Feldman, David Edwards, Ekaterina Churanova, Calvin Chan, Ross Rymkiewicz, Catherine Kunz, Melis Acuner, Emma Farrow, Devika Khopkar, Sara

Nadeau-Seguin, Nicholas Adams, Ahmed Abdel-Hakam, Simon Mercouris, Anna Heimbichner, Joseph Landon-Ray, Simon Walsh, Alex van der Zwaan, Tom Southwell, Christopher Lillywhite and Eleanor Hughes, who have assisted with the review and editing of the chapters featured in this latest edition; *Arbitration World* has been a true Skadden team effort and we are most grateful for all the support received.

Patrick Heneghan and Karyl Nairn QC, July 2015

CANADA

David R Haigh QC, Louise Novinger Grant, Romeo A Rojas, Paul A Beke, Valérie E Quintal & Joanne Luu | Burnet, Duckworth & Palmer LLP

1. EXECUTIVE SUMMARY

1.1 What are the advantages and disadvantages relevant to arbitrating or bringing arbitration-related proceedings in your jurisdiction?

Canada has become an arbitration-friendly jurisdiction. Canadian courts are generally supportive of arbitration proceedings and deferential to arbitral awards. Since the enactment of the UNCITRAL Model Law on International Arbitration 1985 (Model Law) in virtually all Canadian provinces and territories in the mid-1980s, the courts have had a broad opportunity to comment on its provisions. There are over 200 reported cases in Canada reflecting judicial comment on the Model Law.

Given that Canada is a federal state with distinct provincial and territorial jurisdictions, it remains important for parties to understand clearly in which of these jurisdictions their proceedings must be brought and, as a result, the differing rules that may apply. For example, the limitation periods for recognising and enforcing awards may differ depending on the jurisdiction.

1.2 How would you rate the supportiveness of your jurisdiction to arbitration on a scale of 1 to 5, with the number 5 being highly supportive and 1 being unsupportive of arbitration? Where your jurisdiction is in the process of reform, please add a + sign after the number

Generally, support for arbitration from the judiciary and members of the Bar is uniformly high across Canada. We would therefore rank Canada and its provinces and territories as 5.

2. GENERAL OVERVIEW AND NEW DEVELOPMENTS

2.1 How popular is arbitration as a method of settling disputes? What are the general trends and recent developments in your jurisdiction?

Arbitration is an established and growing method of settling commercial disputes in Canada. In particular, arbitration is common in the energy sector, where disputes often involve parties of different nationalities, working on long-term, highly technical and expensive projects. Arbitration clauses have been increasingly negotiated into oil and gas agreements, standard construction contracts and insurance-related contracts.

Whether domestic or international arbitration, the trend is toward streamlining and improving the efficiency of arbitration proceedings.

2.2 Are there any unique jurisdictional attributes or particular aspects of the approach to arbitration in your jurisdiction that bear special mention?

Canada is a federal jurisdiction made up of ten provinces and three territories. Canada's Constitution Act, 1867 determines the division of powers between the Parliament of Canada and the provincial legislatures. The regulation

of commercial arbitration is generally a matter of provincial jurisdiction. While there is no single unifying statute governing commercial arbitration in Canada, the legislation in each of the provinces is supportive of arbitration.

Canada's Federal Arbitration Act deals with matters involving the federal government as a party. It has no application in private commercial matters. Similarly, the federal court has no jurisdiction over private commercial arbitrations.

2.3 Principal laws and institutions

2.3.1 What are the principal sources of law and regulation relating to international and domestic arbitration in your jurisdiction?

With the exception of the province of Québec, all of Canada's provinces and territories are common law jurisdictions with two arbitration acts – one for domestic arbitration and one for international arbitration. They have all adopted the Model Law, except for British Columbia. Although British Columbia chose to enact its own international arbitration statute, it is functionally similar to the Model Law. The Uniform Law Conference of Canada is working on new uniform language that adopts UNCITRAL's 2006 amendments to the Model Law.

Canada is a signatory to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), with most provinces and territories (other than Ontario and Québec) having passed specific legislation adopting the Convention. Ontario considers its adoption of the Model Law sufficient to implement the substantive provisions of the New York Convention.

Québec maintains its civil law tradition and is a predominately French-speaking province. Commercial arbitration in Québec is governed by the Civil Code of Québec and the Code of Civil Procedure. Although it has not explicitly adopted the Model Law or passed legislation incorporating the New York Convention, its Civil Code requires courts to consider those instruments when dealing with international arbitrations in the province.

2.3.2 Which are the principal institutions that are commonly used and/or government agencies that assist in the administration or oversight of international and domestic arbitrations?

Although none of the major international arbitral institutions have a physical presence in Canada, they nonetheless administer a number of arbitrations in the country. This has been made easier by the establishment of Arbitration Place, a state-of-the-art arbitration facility in Toronto. It has formed partnerships with leading international institutions, such as the London Court of International Arbitration and the International Chamber of Commerce.

In addition, there are other providers of arbitration services in Canada, including:

- ADR Institute of Canada, Inc (ADRIC).
- ADR Chambers (Toronto).
- British Columbia International Arbitration Centre (Vancouver).
- Canadian Commercial Arbitration Centre (Montreal).
- JAMS Canada (Toronto).

2.3.3 Which courts or other bodies have judicial oversight or supervision of the arbitral process?

Canada's provincial and territorial superior courts have jurisdiction to oversee and supervise arbitral procedures under the applicable arbitration acts. The Federal Court has supervisory jurisdiction over all arbitrations involving the federal government.

3. ARBITRATION IN YOUR JURISDICTION – KEY FEATURES

3.1 The appointment of an arbitral tribunal

3.1.1 Are there any restrictions on the parties' freedom to choose arbitrators?

In Canada, although there are no restrictions on the parties' freedom to choose arbitrators, an arbitrator must be independent and impartial. There is no requirement that an arbitrator be trained as a lawyer or be a member of any provincial law society.

3.1.2 Are there specific provisions of law regulating the appointment of arbitrators?

The international and domestic acts address appointment procedures. Typically, the parties are free to agree on a procedure for appointing arbitrators.

3.1.3 Are there alternative procedures for appointing an arbitral tribunal in the absence of agreement by the parties?

In the absence of agreement by the parties, when a party fails to follow an appointment procedure agreed upon by the parties, the court may appoint the arbitral tribunal on a party's application.

3.1.4 Are there requirements (including disclosure) for "impartiality" and/or "independence", and do such requirements differ as between domestic and international arbitrations?

In domestic arbitrations, arbitrators must be impartial. Most of the domestic acts expressly require that an arbitrator be independent of the parties and impartial as between the parties. Most also apply a reasonable apprehension of bias standard. Before accepting an appointment, an arbitrator "shall disclose to all parties to the arbitration any circumstances of which that person is aware that may give rise to a reasonable apprehension of bias" (*section 11(2), Alberta Arbitration Act*). If, during the arbitration proceedings, an arbitrator becomes aware of circumstances that may give rise to a reasonable apprehension of bias, that arbitrator shall promptly disclose such circumstances to all of the parties.

Similarly, the Model Law provides that a contemplated arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to their impartiality or independence. That obligation continues from the time of appointment and throughout the arbitral proceedings.

3.1.5 Are there provisions of law governing the challenge or removal of arbitrators?

The parties are free to agree on a procedure for challenging an arbitrator. If the parties do not reach agreement on a procedure, then a party wishing to challenge the appointment must follow the procedure in the governing legislation or institutional rules, if applicable.

Typically, a party who intends to challenge an arbitrator shall send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws or the other party agrees to the challenge, under both the Model Law and domestic legislation, the arbitral tribunal shall decide on the challenge.

3.1.6 What role do national courts have in any such challenges?

In most jurisdictions, the provincial superior courts are empowered to review any decisions by arbitral tribunals on questions of challenge.

As of December 2014, amendments to the Alberta Arbitration Act provide a further right of appeal with leave from the lower court's decision on challenge. Either the affected arbitrator or a party may seek such leave.

3.1.7 What principles of law apply to determine the liability of arbitrators for acts related to their decision-making function?

Arbitrators are generally immune from liability. They must nevertheless act honestly and fairly as between the parties. There have been incidents where arbitrators in Canada who have been guilty of misconduct have been sued for recovery of fees.

3.2 Confidentiality of arbitration proceedings

3.2.1 Is arbitration seated in your jurisdiction confidential? What are the relevant legal or institutional rules which apply?

In Canada, there is no legal duty of confidentiality implied or inherent in an arbitration agreement. Canadian courts have held that no implied duty of confidentiality arises from the general expectation of privacy in arbitrations. (*See Rheaume v Societe d'investissements l'Excellence Inc, 2010 QCCA 2269 (Rheaume)*.)

Domestic and international arbitration acts are silent on the subject of confidentiality. Therefore, confidentiality requires express provisions in the governing rules or arbitration agreement, or in a separate procedural order or confidentiality agreement.

ADRIC issued new Arbitration Rules effective from 1 December 2014. These new rules include provisions that address privacy and confidentiality in arbitration proceedings.

3.2.2 To what matters does any duty of confidentiality extend (for example, does it cover the existence of the arbitration, pleadings, documents produced, the hearing and/or the award)?

From the perspective of the lawyer–client relationship, a lawyer owes a duty of confidentiality to the client, which extends to all information about the business of a client acquired in the course of the professional relationship.

For the tribunal, confidentiality extends to the deliberations of the arbitrators, even vis-à-vis the parties, although an arbitrator may be able to disclose whether a decision was by majority or unanimous.

In *Rheaume*, the Québec Court of Appeal considered whether arbitrators are bound by an implied obligation of confidentiality. One arbitrator's disclosure to a party that the pending decision would be unanimous was found to be a procedural irregularity not rendering the award null. After reviewing Canadian and international case law and commentary, the Québec Court of Appeal found that there is no implied duty of confidentiality in arbitrations seated in that province. Leave to appeal to the Supreme Court of Canada was refused.

3.2.3 Can documents or evidence disclosed in arbitration be used in other proceedings or contexts?

In civil litigation, the Supreme Court of Canada has held that "the law imposes on the parties an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents were in their origin confidential ... in nature)" (*Juman v Doucette, 2008 SCC 8*). This implied undertaking rule restricts parties and their counsel from using documents and information received during discovery for a purpose unrelated to that litigation.

It remains an open issue whether these principles will be applied in arbitrations conducted in Canada. Unless there is a confidentiality agreement or an institutional rule addressing the protection of information disclosed in arbitration proceedings, parties risk information being discovered in one case used in other proceedings. However, it is expected that most arbitrators would follow the principle that use of documents or evidence in another proceeding or for an ulterior purpose would be an abuse of process. To avoid any such uncertainty, suitable protections could be included in a tribunal's procedural orders.

3.2.4 When is confidentiality not available or lost?

In general, confidentiality is unavailable or lost where disclosure is:

- Required by a court, for example, in the context of jurisdictional challenge or alleged procedural improprieties.
- Required for recognition and enforcement of an award.
- Otherwise required by law, for example, financial reporting of a material event.

3.3 Role of (and interference by) the national courts and/or other authorities

3.3.1 Will national courts stay or dismiss court actions in favour of arbitration?

Canadian arbitration legislation requires courts to stay or dismiss court actions in favour of arbitration except in limited circumstances.

In the case of international arbitrations, Canadian legislation typically follows the Model Law and requires courts 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.

In the case of domestic arbitrations, Canadian legislation typically requires courts to stay or dismiss all or part of an action in favour of arbitration unless:

- A party entered into the arbitration agreement while under legal incapacity.
- The arbitration agreement is invalid.
- The subject matter of the arbitration is not capable of being the subject of arbitration under provincial law.
- There was undue delay in bringing the stay application.
- The matter in dispute can properly be dealt with by way of default or summary judgment.

3.3.2 Are there any grounds on which the national courts will order a stay of arbitral proceedings?

In the domestic context, if a party to an arbitration agreement commences litigation and the court refuses to stay the court proceeding, the arbitration of the matter shall not be commenced or continued.

In international arbitrations, a court may refuse to stay a court action if the arbitration agreement is null and void, inoperative or incapable of being performed. The Model Law does not contain any provision requiring that the arbitration be stayed.

3.3.3 What is the approach of national courts to parties who commence court proceedings in your jurisdiction or elsewhere in breach of an agreement to arbitrate?

Canadian courts are generally pro-arbitration and will refer parties to arbitration unless the arbitration agreement is void, inoperable or incapable of being performed. Canadian courts do not compel parties to arbitrate. Rather, courts enforce arbitration agreements by denying access to Canada's courts for disputes that parties have agreed to arbitrate. For instance, in *BG International Ltd v Grynberg Production, 2009 ABQB 452*, the court ordered a recalcitrant party to abandon its actions in a number of American jurisdictions in favour of arbitration proceedings in Alberta dealing with the same matter. The court imposed a $1 million fine in addition to a $10,000 penalty for each day that the party failed to comply. See also *Dent Wizard International Corp v Brazeau, [1998] OJ No. 5336 (GenDiv)*, in which the Ontario Court (General Division) enjoined a party from commencing an arbitration in a foreign jurisdiction.

In arbitration subject to Canada's international arbitration acts, and on the request of a party, a Canadian court will typically stay the action and refer the matter to arbitration. Such a request must be made no later than that party's first submission on the substance of the dispute (typically its statement of defence). In circumstances in which a court is not required by law to stay proceedings in favour of arbitration, it may nevertheless choose to exercise its inherent jurisdiction to do so (*see, for example, Navionics v Flota Maritima Mexicana, (1989) 26 FTR 148 (TD)*).

3.3.4 Is there a presumption of arbitrability or policy in support of arbitration? Have national courts shown a willingness to interfere with arbitration proceedings on any other basis?

Canadian courts are generally supportive of arbitration and will not unduly interfere in arbitration proceedings.

In the case of international arbitrations, Canadian courts will generally only intervene to the extent the Model Law allows.

Generally, in domestic arbitrations, courts may only intervene to:

- Assist the arbitration process.
- Ensure that arbitration is carried out in accordance with the arbitration agreement.
- Prevent manifestly unfair or unequal treatment of a party.
- Enforce awards.

The applicable statutes seek to prevent use of court intervention as a delaying tactic. For example, Canadian courts will not entertain appeals from an arbitrator's interim or procedural orders during the course of an arbitration

(*Inforica Inc v CGI Information Systems Management Consultants, 2009 ONCA 642*). Similarly, an arbitration may usually be commenced or continued where a party has applied to stay parallel court proceedings or when an appeal on the tribunal's primary award on jurisdiction is pending.

While Canadian courts generally respect the principle of *competence-competence* (embodied in the governing statutes), they may intervene in limited circumstances to determine the jurisdiction of an arbitral tribunal. They will typically only do so when:

- The jurisdictional challenge is based solely on a question of law or the questions of fact are superficial.
- The lack of jurisdiction is clear and obvious.
- The court is satisfied that the challenge is not a delaying tactic.

(*See Dell Computer Corp v Union des consommateurs, 2007 SCC 34 (Dell).*)

3.3.5 Are there any other legal requirements for arbitral proceedings to be recognisable and enforceable?

Except as provided in the New York Convention and the Model Law, there are no special requirements or formalities for arbitral proceedings to be recognised and enforced in Canada. As *Section 6.2* below explains, the standard limitation periods apply in most cases.

3.4 Procedural flexibility and control

3.4.1 Are specific procedures mandated in particular cases, or in general, which govern the procedure of arbitrations or the conduct of an arbitration hearing? To what extent can the parties determine the applicable procedures?

Other than the fundamental requirements that arbitrators be independent and impartial, and treat the parties fairly and equally, Canadian arbitration legislation does not typically mandate specific procedures for arbitrations or the conduct of arbitration hearings. Such matters are typically left to the agreement of the parties or the discretion of the arbitrators.

A notable exception is for domestic arbitrations seated in British Columbia. British Columbia's domestic arbitration legislation provides that the rules of the British Columbia International Commercial Arbitration Centre apply by default if the parties do not otherwise agree.

Canadian arbitration legislation does, however, contain default provisions for the appointment of arbitral tribunals so that the formation of the arbitral tribunal will not be hindered by the parties' failure to agree on such procedures. It also contains certain deadlines for taking procedural steps (such as challenging an arbitrator) that apply unless the parties agree otherwise.

3.4.2 Are there any requirements governing the place or seat of arbitration, or any requirement for arbitral hearings to be held at the seat?

Canadian legislation governing arbitration is enacted at the provincial level. The procedural provisions of a particular province's legislation (as opposed to enforcement provisions, which are discussed below) will only apply to an arbitration that has its legal seat in that province.

Both domestic and international arbitration statutes generally allow for hearings to be held in a location other than the formal seat.

3.4.3 What procedural powers and obligations does national law give or impose on an arbitral tribunal?

Subject to the limited exceptions arising from the *Dell* case mentioned above, arbitral tribunals seated in Canada have the power to determine their own jurisdiction (subject to review by the courts).

Canadian arbitration legislation requires that arbitrators be independent and impartial, and treat the parties fairly and equally. Other than those fundamental requirements, and absent the parties' agreement on specific arbitration procedures, the arbitral tribunal holds broad discretion to determine the arbitration procedure.

3.4.4 Evidence

3.4.4.1 What is the general approach to the gathering and tendering of written evidence at the pleading stage and at the hearing stage?

The general approach differs between domestic and international arbitration.

Evidence gathering in domestic arbitration commonly follows the local court practice. Pleadings typically contain assertions of fact, but do not attach documents on which the party intends to rely, nor written evidence. All relevant and material documents are often disclosed, and the tribunal may permit parties to be questioned under oath prior to the hearing. Written expert reports will be exchanged prior to the hearing, but are not typically exchanged with the pleadings. Lay witnesses will not typically provide witness statements in advance of the hearing, but rather provide their evidence orally at the hearing.

Evidence gathering in international arbitration tends to be more restricted and is often guided by the International Bar Association Rules on the Taking of Evidence in International Arbitration (revised in 2010). Pleadings attach documents on which the party intends to rely, witness statements and expert reports. This is followed by a stage in which relevant and material documents can be requested from the other party, often using the Redfern Schedule. There is typically no pre-hearing questioning of witnesses. The witnesses' statements are adopted under oath at the hearing and the witness is turned over for cross-examination.

These are general approaches, but they are not universal. There is an emerging trend in domestic arbitration, particularly among sophisticated parties, to agree to international rules and approaches to gathering and tendering evidence. Conversely, parties to international arbitrations may occasionally adopt a domestic approach to gathering and tendering evidence, particularly if counsel or the arbitrators are not familiar with international practice.

3.4.4.2 Can parties agree the rules on disclosure? How does the disclosure in arbitration typically differ to that in litigation?

Parties are free to agree on the rules of disclosure. Absent agreement, both domestic and international arbitration statutes give broad discretion to the arbitrators to establish the applicable rules on disclosure.

The extent to which disclosure in arbitration differs from that in litigation is largely in the hands of the parties and the arbitrators.

3.4.4.3 What are the rules on oral (factual or expert witness) evidence? Is cross-examination used?

Canadian arbitration legislation does not contain specific rules on oral evidence. Arbitral tribunals are not bound by rules of evidence applicable in Canadian domestic courts and have discretion to determine the manner for tendering evidence.

Canadian domestic arbitration legislation generally requires witnesses to testify under oath, affirmation or declaration.

As a matter of practice, it is more common to see oral direct evidence and cross-examination in domestic arbitrations, while international arbitrations are more likely to follow the international practice of written direct evidence and oral cross-examination.

3.4.4.4 If there is no express agreement, what powers of compulsion are there for arbitrators to require attendance of witnesses (factual or expert) or production of documents, either prior to or at the substantive hearing? To what extent are national courts willing or able to assist? Are there differences between domestic and international arbitrations, or between orders sought as against parties and non-parties?

Under domestic arbitration legislation, arbitrators may generally order the detention, preservation or inspection of property and documents that are the subject of the arbitration. They may order the parties to submit to examination under oath and to produce records in their custody and control. Such orders may be enforced by courts as if they were orders of the court. However, arbitrators may only compel witnesses to the extent that courts can.

A party to a domestic arbitration may serve a person with a notice requiring the person to attend and give evidence at the arbitration hearing. Such notices have the same effect as a notice in a court proceeding. On the application of a party or the arbitral tribunal, the court may make orders and give directions on the taking of evidence in the arbitration.

In international arbitrations, the tribunal, or a party with the approval of the tribunal, can request court assistance in taking evidence "within [the Court's] competence and according to its rules of evidence" (*Article 27, Model Law*). This includes the power to request the assistance of foreign courts in obtaining evidence from witnesses located outside of the jurisdiction of the court of the seat of the arbitration. The courts of Alberta have found that the Model Law applies not only to the taking of evidence at the hearing, but is also broad enough to give the court power to compel a witness (whether or not a party) to submit to questioning or produce documents prior to the hearing. For instance, in *Jardine Lloyd Thompson Canada Inc v SJO Catlin, 2006 ABCA 18*, the court assisted in the taking of evidence by compelling a third party witness to appear for oral questioning in the arbitration.

3.4.4.5 Do special provisions exist for arbitrators appointed pursuant to international treaties (that is, bilateral or multilateral investment treaties)?

Canada's international arbitration statutes do not contain any special provisions applicable to arbitrators appointed pursuant to international treaties. To the extent that the international treaties themselves contain special provisions applicable to arbitrators hearing disputes, the arbitrators' compliance with those treaty provisions may be a factor in set-aside or enforcement proceedings in Canada.

3.4.5 Are there particular qualification requirements for representatives appearing on behalf of the parties in your jurisdiction?

Canada's domestic and international arbitration statutes are generally silent on the issue of qualification requirements for party representatives. It would therefore be a matter for Canada's provincial law societies, which govern the legal profession in Canada, to determine whether representing a party in an arbitration constituted the "practice of law" and fell within their purview. We are not aware of any provincial law society taking the position that representing a party in an arbitration constitutes the practice of law.

3.5 The award

3.5.1 Are there provisions governing an arbitral tribunal's ability to determine the controversy in the absence of a party who, on appropriate notice, fails to appear at the arbitral proceedings?

In both the domestic and international contexts, the arbitration acts provide that the arbitral tribunal may continue the proceedings and make an award on the evidence before it even if one of the parties fails to attend the proceedings.

The arbitral tribunal has the general power to determine the procedure to be followed in the arbitration under both the domestic and international arbitration legislations. In making a determination on procedural issues, the arbitral tribunal is guided by the overarching principles of fairness and equality. Thus, if a party seeks a last minute adjournment of the hearing by showing sufficient cause yet the other parties to the arbitration do not consent to an adjournment, the tribunal has the power to postpone the hearing.

3.5.2 Are there limits on arbitrators' powers to fashion appropriate remedies, for example, punitive or exemplary damages, specific performance, rectification, injunctions, interest and costs?

The arbitrators' powers to award remedies may be limited by the agreement of the parties. Otherwise, the arbitrators can award any remedies the substantive law allows. The domestic acts provide the arbitral tribunal with broad powers to fashion remedies, noting in particular that matters in dispute must be decided in accordance with the law, including equity, and that the tribunal has the power to order specific performance, injunctions and other equitable remedies.

It is advisable to review the rules which apply to an arbitration, for example institutional rules, to confirm the scope of the arbitral tribunal's power to award certain remedies.

3.5.3 Must an award take a particular form? Are there any other legal requirements, for example, in writing, signed, dated, place stipulated, the need for reasons, method of delivery?

The form and requirement of an award are the same under both the domestic and international arbitration acts. The award must be made in writing, must state its date and the place of arbitration, and must be signed by the arbitrators. Further, unless the parties agree otherwise, the award must contain the reasons for the tribunal's determination. A copy of the award must be delivered to each party.

3.5.4 Can an arbitral tribunal order the unsuccessful party to pay some or all of the costs of the dispute? Is an arbitral tribunal bound by any prior agreement by the parties as to costs?

The arbitral tribunal is bound by the agreement of the parties regarding the allocation of costs. In general, the tribunal has broad discretion to allocate costs as it sees fit. It may allocate all or part of the costs to a party, depending on a number of factors it considers relevant. For example, the arbitral tribunal may determine the allocation of costs based on the complexity of the case, the relative success of each party in their claims or defences, or the conduct of the parties during the arbitration.

In international arbitrations, the general principle is that costs follow the event.

Most domestic acts provide that if a tribunal awards costs but does not specify the basis, costs are to be awarded on a party–party basis. The terms "solicitor–client" or "party–party" refer to the meaning given to tariff costs under the laws of each province, which are usually set out in the rules of court (*Ridley Terminals Inc v Minette Bay Ship Docking Ltd, [1990] B.C.W.L.D. 1060 (BCCA)*). If, on the other hand, a tribunal does not make an award as to costs, each party bears its own legal expenses and half of the fees and expenses of the arbitral tribunal.

3.5.5 What matters are included in the costs of the arbitration?

Under domestic legislation, the costs of arbitration include the parties' legal expenses, the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration. Expert fees are also included in the arbitration costs. There are no provisions that include in-house counsel's fees.

For international arbitrations, there are no specific rules governing the determination of costs and what is to be included in the costs of the arbitration. However, if the arbitration is conducted under the auspices of an institution, the rules will generally provide what is to be included in the costs. In such cases, the institution fees are included as arbitration costs. It would be extremely rare in international arbitration to include in-house counsel fees as part of the recoverable costs.

3.5.6 Are there any practical or legal limitations on the recovery of costs in arbitration?

There are a few practical limitations on the recovery of costs in arbitration. The parties typically ask for costs and must itemise the costs incurred in some detail. Generally, the arbitrators will ask for a statement of costs, showing the legal fees incurred and disbursements. The arbitrators' discretion to award costs is guided by the principle of reasonableness.

3.5.7 Are there any rules relating to the payment of taxes (including VAT) by foreign and domestic arbitrators? If taxes are payable, can these be included in the costs of arbitration?

The rules on Canadian income tax and value-added taxes are complex and lengthy. Arbitrators delivering services from or in Canada, or outside Canada to Canadian clients, should contact qualified tax advisors in assessing their own situations.

Parties should be aware that arbitrators who are resident in Canada and deliver services in Canada must collect and remit Canadian value-added taxes. These taxes will generally be included in the cost of arbitration. However, a foreign or non-resident arbitrator providing services in Canada on an infrequent basis will not generally be required to collect and remit Canadian value-added taxes on those services.

3.6 Arbitration agreements and jurisdiction

3.6.1 Are there form, content or other legal requirements for an enforceable agreement to arbitrate? How may they be satisfied? What additional elements is it advisable to include in an arbitration agreement?

For international arbitrations, the Model Law provides that the agreement to arbitrate must be in writing. Further, the reference in a contract to a document containing an arbitration clause constitutes a valid agreement to arbitrate.

For domestic arbitrations, there is no requirement that the arbitration agreement be in writing. It is, however, advisable.

It is desirable to include certain elements in any submissions to arbitration, as follows (*see also the 2010 IBA Guidelines for Drafting International Arbitration Clauses*):

- Whether the arbitration will be institutional or *ad hoc*.
- The seat of the arbitration.
- The rules to apply to the arbitration.
- The applicable law.
- The language of the arbitration.

3.6.2 Can an arbitral clause be considered valid even if the rest of the contract in which it is included is determined to be invalid?

An arbitration clause is considered to be a separate agreement from the contract and can be found valid even if the rest of the contract is found to be invalid.

3.6.3 Can an arbitral tribunal determine its own jurisdiction ("competence-competence")? When will the national courts deal with the issue of jurisdiction of an arbitral tribunal? Need an arbitral tribunal suspend its proceedings if a party seeks to resolve the issue of jurisdiction before the national courts?

Under both the domestic and international arbitration acts, the arbitral tribunal can rule on its own jurisdiction.

Under the Model Law, Canadian courts will intervene, on application by a party, in two possible cases when the tribunal rules on its own jurisdiction:

- As a preliminary issue.
- In a final award.

Such an application is limited to a court of first instance.

Generally, both the domestic and international arbitration acts permit the arbitral tribunal to continue the arbitral proceedings while a party seeks to resolve the issue of jurisdiction before a Canadian court.

While not addressed in the Model Law, a court may be persuaded to determine whether a matter is subject to arbitration even before an arbitral tribunal determines its own competence.

3.6.4 Is arbitration mandated for certain types of dispute? Is arbitration prohibited for certain types of dispute?

Some provincial and federal statutes mandate arbitration for certain disputes. The domestic arbitration acts may not apply to arbitrations instituted under those statutes. For example, in Alberta, the Labour Relations Code and the Public Service Employee Relations Act mandate arbitration for disputes arising under those statutes. In Nova Scotia, the domestic arbitration act does not apply to disputes arising under the Trade Union Act. Further, the courts may determine that a matter should not be arbitrated based on public policy, for example, divorce proceedings or certain consumer protection disputes.

In addition, when the Crown is acting in its sovereign capacity (and not as a commercial party), any resulting dispute must be brought to the courts.

3.6.5 What, if any, are the rules which prescribe the limitation periods for the commencement of arbitration proceedings and what are such periods?

In Canada, limitation periods are matters of substantive law. For international arbitrations, arbitrators would need to interpret limitations issues according to the governing law of the contract.

Domestic arbitration acts generally provide that the provincial law on limitation periods applies.

Many provinces restrict or even prohibit agreements to alter statutory limitation periods. For that reason, careful review of the law of the contract is essential when drafting clauses to customise the timing for commencing arbitrations.

3.6.6 Does national law enable an arbitral tribunal to assume jurisdiction over persons who are not party to the arbitration agreement?

The arbitral tribunal generally does not have jurisdiction to bind non-signatories to the arbitration agreement. However, Canadian law recognises five theories pursuant to which an arbitral tribunal may potentially assume jurisdiction over persons who are not parties to the arbitration agreement (*see JK McEwan and LB Herbst, Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations, loose leaf*):

- Lifting the corporate veil or alter ego.

- Incorporation by reference.
- Assumption or assignment.
- Agency.
- Equitable estoppels.

3.7 Applicable law

3.7.1 How is the substantive law governing the issues in dispute determined?

In the event the contract fails to specify the substantive law governing the issues in dispute, then the parties may make submissions as to what substantive law should apply.

For domestic arbitrations, the provincial arbitration acts provide that the arbitral tribunal shall apply the law of a jurisdiction appropriate in the circumstances. What is appropriate will be guided by the specific facts of each arbitration, usually depending on which jurisdiction has the greatest connection to the agreement.

For international arbitrations, the Model Law provides that the arbitral tribunal may determine the substantive law based on the applicable conflict of laws rules. Some international arbitration statutes authorise the tribunal to ignore conflict of laws rules entirely and exercise their own discretion regarding applicable law.

3.7.2 Are there any mandatory laws (of the seat or elsewhere) which will apply?

In addition to the substantive laws applicable to the dispute between the parties, if the parties choose a particular Canadian province as their seat, the domestic or international arbitration laws of that seat apply to the dispute.

With the exception of certain mandatory provisions in the international and domestic arbitration legislation, parties can agree to vary or exclude the provisions of the arbitration acts. Under some statutes, provisions relating to procedural fairness, appeal rights or set-aside rights (*see specific discussion in Sections 3.4.1 above and 5.1 below*) cannot be excluded or varied by agreement between the parties.

4. SEEKING INTERIM MEASURES IN SUPPORT OF ARBITRATION CLAIMS

4.1 Can an arbitral tribunal order interim relief? If so, in what circumstances? What forms of interim relief are available and what are the legal tests for qualifying for such relief?

Subject to the parties' 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 arbitration, the tribunal, in the exercise of its discretion, will typically consider a combination of the following factors:

- The tribunal has *prima facie* jurisdiction over the dispute.
- The request for relief is urgent in that it cannot await a decision on the merits.
- The relief being sought is necessary to prevent imminent harm that is not reasonably compensable by money.

- The balance of convenience favours the granting of the order.
- The applicant has established a reasonable possibility of success on the merits.

In the domestic realm, tribunals will typically follow the legal test for injunctive relief set out in *RJR McDonald Inc v Attorney General of Canada, [1994] 1 SCR 311* (which is similar to the international test):

- There is a serious question to be tried.
- The applicant would suffer irreparable harm if the application were refused.
- The balance of convenience favours the granting of an interlocutory injunction.

4.2 Have national courts recognised and/or limited any power of an arbitral tribunal to grant interim relief?

With the exception of Québec, courts across Canada have not attempted to limit the power of arbitral tribunals to grant interim relief. In Québec, Article 940.4 of the Civil Code permits the courts to grant interlocutory injunctions before or during arbitration proceedings. Courts have construed this provision to mean that the authority to grant injunctions is reserved solely for judges (and not arbitrators) (*Placements Raoul Grenier Inc v Coopérative forestière Laterrière, [2002] JE 2002-1183 (CS)*). While the Québec Court of Appeal acknowledged this limitation, it also cautioned that the question of whether a particular arbitral order constitutes an injunction must be carefully considered: *Nearctic Nickel Mines Inc v Canadian Royalties, 2012 QCCA 385*.

4.3 Will national courts grant interim relief in support of arbitration proceedings and, if so, in what circumstances?

Canadian courts respect parties' agreements to arbitrate and, accordingly, are keen to facilitate the arbitral process. Since arbitral tribunals lack the coercive power to enforce their own interim orders, courts will often lend a helping hand – a notion expressly contemplated in the arbitration statutes. For instance, in Alberta, Saskatchewan, Manitoba, Ontario and New Brunswick, the domestic arbitration acts provide the courts with powers of "detention, preservation and inspection of property, interim injunctions and receivers" in respect of arbitrations. In British Columbia and Ontario, courts are required, on application, to enforce interim awards in international arbitrations (with limited exceptions).

Parties can also apply independently to the courts for interim relief. Such a strategy is particularly apt where:

- The relief sought is against third parties (over which the tribunal has no jurisdiction).
- Urgent relief is required before the tribunal has been constituted.
- Judicial intervention is necessary for the conduct of the arbitral proceedings.

4.4 Are national courts willing to grant interim relief in support of arbitration proceedings seated elsewhere?

Canadian courts are generally willing to grant interim relief in support of foreign arbitrations, so long as the legal test for such relief is met. There is no requirement that the arbitration be seated domestically. For instance, in *TLC*

Multimedia Inc v Core Curriculum Technologies Inc., [1998] BCJ No 1656 (BCSC), the court confirmed its inherent authority to grant interim relief regardless of the forum in which the final relief will ultimately be granted. In that case, a British Columbia court held that it had the jurisdiction to grant interim relief on an *in personam* basis, even though the dispute had been submitted to arbitration in Boston.

5. CHALLENGING ARBITRATION AWARDS

5.1 Can an award be appealed to, challenged in or set aside by the national courts? If so, on what grounds?

Across Canada, the Model Law is either an adopted part of international commercial arbitration legislation (with minor variations) or a guide to international arbitration legislation (in Québec). The Model Law does not allow rights of appeal for errors of fact, of law, or of mixed fact and law. Under the Model Law, a party may appeal to a court of first instance at the place of arbitration over a tribunal's ruling on its own jurisdiction. The arbitration can continue in the meantime.

Parties may also apply to the court to challenge international awards on the limited grounds set out in Article 34 of the Model Law or for egregious procedural unfairness. When one of those grounds applies, the court has discretion to set aside the award. Canadian courts narrowly interpret those grounds.

In domestic arbitration, most provinces allow a party to apply to set aside an award on similar grounds to those in the Model Law, or in the case of reasonable apprehension of bias or fraud.

For appeals in domestic arbitration, most Canadian jurisdictions allow a party to appeal an award on a question of law, with leave of the court (provided that parties have not expressly referred that question of law to the tribunal). Nova Scotia and the territories allow appeals only by agreement. Québec and Newfoundland and Labrador do not provide for appeals.

In many jurisdictions (Ontario, Alberta, Manitoba, Saskatchewan, New Brunswick, Nova Scotia and the territories), the domestic arbitration statutes also allow parties to agree upon rights to appeal on questions of fact or law, or mixed fact and law (covering whether facts satisfy legal tests). For the three types of appeal questions, the court's standard of review is generally whether the award is reasonable, rather than correct (*see Creston Moly Corp v Sattva Capital Corp, 2014 SCC 53 (Sattva)*).

Canadian law has recently evolved to make contractual interpretation generally a question of mixed fact and law, not one of law alone (see *Sattva*). Rare exceptions would be when the court could find a pure question of law separate from the factual context of the contract's formation, for example, an error in the principles of interpretation or a legal test. Therefore, unless otherwise agreed, the right to appeal questions of contractual interpretation in domestic arbitrations has become very restrictive.

An Ontario court has interpreted the challenge provisions of the Model Law (*Article 34*) as non-mandatory (*Noble China Inc v Lei, [1998] 42 OR (3d) 69 (ONSC)*). That court also interpreted the freedom "to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings" (*Article 19(1)*) as applying also to procedures in the courts. The court held that parties can agree to exclude the right to challenge an award under the Model Law. Though non-binding, this interpretation might be persuasive with courts throughout Canada.

In domestic arbitration, in most provinces parties cannot contract out of statutory rights of appeal and challenge. Exceptions are Ontario, Saskatchewan and Nova Scotia, where parties may exclude statutory rights of appeal but not rights of challenge. British Columbia allows parties to agree to exclude appeals, but possibly only after an arbitration has started.

5.2 What are the provisions governing modification, clarification or correction of an award (if any)?

In both international and domestic arbitrations, tribunals may correct awards in the limited ways set out in the provisions of the Model Law or under similar provisions in applicable rules.

6. ENFORCEMENT

6.1 Has your jurisdiction ratified the New York Convention or any other regional conventions concerning the enforcement of arbitration awards? Has it made any reservations?

In 1985, Canada ratified the New York Convention. The provinces and territories followed by incorporating the Convention into their international arbitration legislation. Exceptionally, Ontario removed the Convention from the Ontario act to avoid duplication of award enforcement as between the Convention and the Model Law. Thus, the Convention is not an express part of the law covering Ontario's jurisdiction. In Québec, the incorporation of the Convention is not in the form of adoption; instead, Québec's Civil Code generally tracks the terms of the Model Law and provides that Québec courts are to take the Convention and the Model Law into consideration.

When it ratified the New York Convention, Canada elected to declare that the Convention would apply only to commercial differences or disputes, except in Québec, where that reservation does not apply. Canada did not adopt the reciprocity reservation, so Canadian courts must recognise and enforce awards made even in states that have failed to ratify the New York Convention.

On 1 December 2013, Canada ratified the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (ICSID Convention). About half of the provinces and territories have so far implemented the ICSID Convention through legislation.

6.2 What are the procedures and standards for enforcing an award in your jurisdiction?

Both the New York Convention and the Model Law provide for the recognition and enforcement of international final awards. The Convention and the Model Law require courts to recognise and enforce arbitral awards, subject to judicial discretion to refuse when specified grounds apply. Those grounds are generally the same as those for challenges to an award. An additional ground applies when the award is not yet binding or when the court at the place of arbitration has set aside or suspended the award. Canadian courts interpret the grounds for refusal narrowly, and view the list of specified grounds as exhaustive.

The procedure for recognition and enforcement is a summary one. An enforcing party may apply to the court with an affidavit exhibiting (i) the authenticated original or a certified copy of the award, (ii) the original or certified copy of the arbitration agreement and (iii) any necessary translations. When the disputed issues are not complicated, the

enforcing party may obtain the court's judgment within a number of months. One possible complication arises in the case of enforcement proceedings against a state or its agency (*see the State Immunity Act, RSC 1985, c S-18*).

Generally, the standard limitation periods (often two years) for enforcement in the various Canadian jurisdictions apply, running from the time that the award was no longer at risk of being set aside at the place of arbitration (*see Yugraneft Corp v Rexx Management Corp, 2010 SCC 19*). Longer limitation periods for enforcement of judgments might apply when, as in British Columbia, the limitation act defines "judgment" as including arbitral awards. The *Yugraneft* decision relied upon the reference in Article III of the New York Convention to "local rules of procedure", which included local time limits for purposes of the article. Thus, local limitation periods might not apply in Ontario, as it did not adopt the New York Convention.

6.3 Is there a difference between the rules for enforcement of "domestic" awards and those for "non-domestic" awards?

Generally, the grounds for refusing to recognise or enforce domestic arbitral awards do not track the grounds of Article 36(1)(a)(i)–(iv) of the Model Law. For most provinces, the grounds for discretion to refuse or stay enforcement arise from potential or pending appeals, or applications to set aside the award (or, in the case of an award made outside the province, non-arbitrability). A few provinces and territories do not specify the grounds, but the case law establishes that the court should summarily enforce, unless the validity of the award is truly in doubt.

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