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The International Comparative Legal Guide to:

International Arbitration 2016

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A practical cross-border insight into international arbitration work

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Preface:

General Chapters:

Asia Pacific:

Central and Eastern Europe and CIS:

Western Europe:

Continued Overleaf →

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1 Arbitration Agreements

1.1 What, if any, are the legal requirements of an arbitration agreement under the laws of your jurisdiction?

Canada is a federal country in which each of the provinces and territories has jurisdiction over arbitration-related matters in its territory. Generally, each province has separate domestic and international commercial arbitration acts.

Typically, the international arbitration acts adopt the UNCITRAL Model Law ("Model Law"), which requires that an agreement to arbitrate be in writing (Model Law, Article 7).

1.2 What other elements ought to be incorporated in an arbitration agreement?

In drafting an arbitration agreement, the parties should address whether the arbitration will be *ad hoc* or institutional, which set of *ad hoc* or institutional rules applies, the number of arbitrators and method of appointment, the seat of the arbitration, the applicable law, and the language of the arbitration.

1.3 What has been the approach of the national courts to the enforcement of arbitration agreements?

Generally, Canada's courts are pro-arbitration and will enforce arbitration agreements. Unless the court finds that the arbitration agreement is void, inoperative, or incapable of being performed, the court will refer the parties to arbitration and stay court proceedings that relate to matters that are the subject of arbitration (Model Law, Article 8).

2 Governing Legislation

2.1 What legislation governs the enforcement of arbitration proceedings in your jurisdiction?

The enforcement of arbitration proceedings is governed by each province's legislation, as applicable. In most provinces, the legislation takes the form of an international commercial arbitration act. In Québec, enforcement of arbitration proceedings is governed by the Civil Code of Québec and the Code of Civil Procedure.

Canada also has a federal *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp). It applies only in relation to arbitrations where at least one of the parties is the Crown, a departmental corporation, or a Crown corporation, or in relation to maritime or admiralty matters.

2.2 Does the same arbitration law govern both domestic and international arbitration proceedings? If not, how do they differ?

Generally, each province has separate domestic and international commercial arbitration acts.

While differences vary between provinces, the main difference between domestic and international arbitration legislation is the degree of court intervention in the arbitral process. Typically, domestic statutes (a) contain a broader list of grounds on which a court can refuse to stay court proceedings, (b) permit the arbitral tribunal or a party (with the consent of the other parties or the arbitral tribunal) to ask a court to determine pure questions of law, and (c) allow a party to appeal an award on a question of law with leave.

2.3 Is the law governing international arbitration based on the UNCITRAL Model Law? Are there significant differences between the two?

Each province's international commercial arbitration legislation is based on the Model Law. Generally, the Model Law is simply attached as a schedule to the act.

In Québec, international commercial arbitration is governed by Québec's Civil Code and Code of Civil Procedure; however, interpretation of those codes is required to take into consideration the Model Law.

2.4 To what extent are there mandatory rules governing international arbitration proceedings sited in your jurisdiction?

Mandatory rules governing international arbitration proceedings are limited to those set out in the Model Law.

3 Jurisdiction

3.1 Are there any subject matters that may not be referred to arbitration under the governing law of your jurisdiction? What is the general approach used in determining whether or not a dispute is "arbitrable"?

Canadian courts will look at the subject matter of the dispute to determine whether a dispute is arbitrable. Courts may determine that a matter should not be arbitrated as a matter of public policy. For example, divorce proceedings and certain consumer protection disputes may not be arbitrable.

In addition, when the Crown is acting in its sovereign capacity (and not as a commercial party) any resulting dispute based on Canada's domestic laws must be brought to the courts. If the dispute arises from an alleged breach of an investment treaty, the dispute may be resolved in accordance with the dispute resolution provisions of the applicable investment treaty.

3.2 Is an arbitrator permitted to rule on the question of his or her own jurisdiction?

Under the international arbitration acts, the arbitral tribunal may rule on its own jurisdiction. The arbitral tribunal's finding on jurisdiction is subject to review by the courts (Model Law, Article 16(3), 34).

Courts will generally defer to the arbitral tribunal and allow it to determine its own jurisdiction. However, Canadian courts may, in limited circumstances, determine an arbitral tribunal's jurisdiction in the first instance. Typically, a court will only do so when the jurisdictional challenge is based solely on questions of law (or when any questions of fact are superficial), the lack of jurisdiction is clear and obvious, and the court is satisfied that the challenge is not a delaying tactic (*Dell Computer Corp v Union des consommateurs*, 2007 SCC 34).

3.3 What is the approach of the national courts in your jurisdiction towards a party who commences court proceedings in apparent breach of an arbitration agreement?

Generally, Canadian courts will stay court proceedings in apparent breach of an arbitration agreement, provided that the party seeking the stay does so no later than that party's first submission on the substance of the dispute (usually, its statement of defence).

3.4 Under what circumstances can a court address the issue of the jurisdiction and competence of the national arbitral tribunal? What is the standard of review in respect of a tribunal's decision as to its own jurisdiction?

On request, Canadian courts can address the issue of jurisdiction and competence of the arbitral tribunal (Model Law, Article 16(3), 34). In limited circumstances, a court may deal with jurisdiction in the first instance (Model Law, Article 8(1)); however, Canadian courts are generally pro-arbitration and will not unduly interfere in arbitration proceedings.

The standard of review with respect to an arbitral tribunal's decision as to its own jurisdiction is one of reasonableness, deference, and respect (*ACE Bermuda Insurance Ltd. v Allianz Insurance Co. of Canada*, 2005 ABQB 975).

3.5 Under what, if any, circumstances does the national law of your jurisdiction allow an arbitral tribunal to assume jurisdiction over individuals or entities which are not themselves party to an agreement to arbitrate?

Generally, the arbitral tribunal does not have jurisdiction over individuals or entities who are not parties to the arbitration agreement. A non-party may be bound by the arbitration agreement where, 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 by reference, assumption or assignment, or (d) the non-party is bound by equitable estoppel (McEwan & Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, Canada Law Book, at 2:110).

3.6 What laws or rules prescribe limitation periods for the commencement of arbitrations in your jurisdiction and what is the typical length of such periods? Do the national courts of your jurisdiction consider such rules procedural or substantive, i.e., what choice of law rules govern the application of limitation periods?

The international arbitration acts do not address limitation periods. They are matters of substantive law. The limitation period depends on which province's laws govern the contract. Typically, limitation periods are two years, but may vary from province to province.

3.7 What is the effect in your jurisdiction of pending insolvency proceedings affecting one or more of the parties to ongoing arbitration proceedings?

When the seat of arbitration is Canada, the arbitration proceedings are subject to Canadian law. Where a party is insolvent, the *Bankruptcy and Insolvency Act*, RSC 1985 c B-3 stays all "proceedings", which Canadian courts have interpreted as including arbitration proceedings.

4 Choice of Law Rules

4.1 How is the law applicable to the substance of a dispute determined?

Where parties have agreed on the substantive law applicable to the substance of the dispute, arbitral tribunals will apply that law.

Where parties have not agreed on the applicable law, the arbitral tribunal will determine it by applying appropriate conflict of laws rules (Model Law, Article 28).

4.2 In what circumstances will mandatory laws (of the seat or of another jurisdiction) prevail over the law chosen by the parties?

Generally, the law chosen by the parties will apply to the arbitration proceeding unless it violates public policy in Canada.

4.3 What choice of law rules govern the formation, validity, and legality of arbitration agreements?

The question of which law applies to the formation, validity, and legality of the arbitration agreement is determined by general choice

of law rules. Generally, consideration will be given to the express choice of law in the substantive contract, the implied choice of law, or the law which has the closest and most real connection to the arbitration agreement.

5 Selection of Arbitral Tribunal

5.1 Are there any limits to the parties' autonomy to select arbitrators?

Although there are no restrictions on the parties' freedom to choose arbitrators, an arbitrator must be independent and impartial.

5.2 If the parties' chosen method for selecting arbitrators fails, is there a default procedure?

For an institutionally administered arbitration, the institution's rules will typically provide a default procedure for appointing arbitrators.

In the case of *ad hoc* arbitrations, if the parties have not agreed on a default procedure, the parties can apply to the court for assistance (Model Law, Article 11).

5.3 Can a court intervene in the selection of arbitrators? If so, how?

A court can only intervene to assist the parties in appointing the arbitral tribunal where the parties are unable to do so (Model Law, Article 11).

5.4 What are the requirements (if any) as to arbitrator independence, neutrality and/or impartiality and for disclosure of potential conflicts of interest for arbitrators imposed by law or issued by arbitration institutions within your jurisdiction?

The Model Law requires that arbitrators disclose "any circumstances likely to give rise to justifiable doubts as to their impartiality or independence" on an ongoing basis for the duration of the arbitration (Model Law, Article 12).

6 Procedural Rules

6.1 Are there laws or rules governing the procedure of arbitration in your jurisdiction? If so, do those laws or rules apply to all arbitral proceedings sited in your jurisdiction?

Generally, the international and domestic arbitration acts do not mandate specific procedures for arbitration proceedings. Typically, procedural matters are addressed by the parties, and, absent agreement, the arbitral tribunal.

6.2 In arbitration proceedings conducted in your jurisdiction, are there any particular procedural steps that are required by law?

The arbitral tribunal is required to treat the parties equally and fairly. Each party must be given an opportunity to present its case and respond to the other parties' cases.

6.3 Are there any particular rules that govern the conduct of counsel from your jurisdiction in arbitral proceedings sited in your jurisdiction? If so: (i) do those same rules also govern the conduct of counsel from your jurisdiction in arbitral proceedings sited elsewhere; and (ii) do those same rules also govern the conduct of counsel from countries other than your jurisdiction in arbitral proceedings sited in your jurisdiction?

There are no particular rules governing the conduct of counsel in international arbitration proceedings sited in Canada. The rules of the law society of each province govern the conduct of Canadian counsel in terms of ethical and professional obligations whether in arbitration proceedings sited in Canada or elsewhere. Such rules do not apply to the conduct of counsel from other countries in arbitration proceedings sited in Canada.

6.4 What powers and duties does the national law of your jurisdiction impose upon arbitrators?

The Model Law addresses the powers and duties of arbitrators. Arbitrators must be independent and impartial and treat the parties equally and fairly. Absent the parties' agreement on specific arbitration procedures, the arbitral tribunal holds broad discretion to determine the arbitration procedure.

6.5 Are there rules restricting the appearance of lawyers from other jurisdictions in legal matters in your jurisdiction and, if so, is it clear that such restrictions do not apply to arbitration proceedings sited in your jurisdiction?

Legislation is silent on the issue of qualification requirements for party representatives. Therefore, it would 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 issue with lawyers from other jurisdictions appearing in international arbitrations in its territory.

6.6 To what extent are there laws or rules in your jurisdiction providing for arbitrator immunity?

Arbitrators are generally immune from liability. Still, they must act honestly and fairly as between the parties.

6.7 Do the national courts have jurisdiction to deal with procedural issues arising during an arbitration?

Courts in Canada may only intervene in arbitrations as permitted under the Model Law. Generally, they do not have jurisdiction to deal with procedural issues arising in arbitration proceedings and will not entertain appeals from an arbitrator's interim or procedural orders made in the course of the proceeding (*Inforica Inc v CGI Information Systems Management Consultants*, 2009 ONCA 642).

7 Preliminary Relief and Interim Measures

7.1 Is an arbitrator in your jurisdiction permitted to award preliminary or interim relief? If so, what types of relief? Must an arbitrator seek the assistance of a court to do so?

Generally, an arbitral tribunal has broad discretion to order the interim relief that it considers appropriate (and the applicable rules allow), although such relief is binding only on the parties to the dispute.

An arbitral tribunal may grant interim measures of protection (including preservation of property that is the subject of the dispute, or posting of security for the amount claimed), injunctions, and specific performance. Except in Québec, an arbitral tribunal does not require court assistance to do so.

7.2 Is a court entitled to grant preliminary or interim relief in proceedings subject to arbitration? In what circumstances? Can a party's request to a court for relief have any effect on the jurisdiction of the arbitration tribunal?

A party to an arbitration agreement may seek interim relief directly from the court if it so chooses. The request can be made before or after the appointment of the arbitral tribunal and it does not have any effect on the jurisdiction of the arbitral tribunal.

Courts will decide such applications in accordance with the legal test for injunctive relief set out in *RJR McDonald Inc v Attorney General of Canada*, [1994] 1 SCR 311:

(a) there is a serious question to be tried;

(b) the applicant would suffer irreparable harm if the application were refused; and

(c) the balance of convenience favours the granting of an interlocutory injunction.

7.3 In practice, what is the approach of the national courts to requests for interim relief by parties to arbitration agreements?

Canadian courts will determine whether to grant requests for interim relief based on the legal tests for such relief in their respective jurisdiction. In practice, some provincial courts have considered specific factors when determining whether they should exercise their jurisdiction to grant interim relief to a party to an arbitration agreement or defer to the arbitral tribunal. These factors include whether the party seeking the interim relief from the court is attempting to get the court to settle the substance of the dispute (*African Mixing Technologies (PTY) Limited v Canamix Processing Systems Ltd*, 2014 BCSC 2130).

7.4 Under what circumstances will a national court of your jurisdiction issue an anti-suit injunction in aid of an arbitration?

A supervising Canadian court will likely grant an anti-suit injunction when a foreign court improperly accepts jurisdiction, contrary to the arbitration agreement. This would be the case when the agreement says that the parties must resolve disputes only by arbitration in Canada. Canadian courts will evaluate whether the foreign court's acceptance of jurisdiction has been inconsistent with the principles of the New York Convention and Canadian law.

A Canadian court may grant an anti-suit injunction even before the party has started a foreign action. The court can do so to support an arbitral tribunal's own anti-suit injunction, granted on the grounds that a threatened foreign action would be abusive and disruptive (*BG International Limited v Grynberg Production Corporation*, 2009 ABQB 452).

7.5 Does the national law allow for the national court and/or arbitral tribunal to order security for costs?

Applicable legislation does not specifically provide for security for costs. As an arbitral tribunal does not have an inherent power to require a party to post security for costs, the power to make such an order must derive from within the arbitration agreement or the rules applicable to the arbitration in question.

Court intervention in arbitration proceedings is limited to the grounds set out in the Model Law, which Canadian courts have not interpreted as including the power to order security for costs.

7.6 What is the approach of national courts to the enforcement of preliminary relief and interim measures ordered by arbitral tribunals in your jurisdiction and in other jurisdictions?

Whether or not the seat of the arbitration is Canada, courts will facilitate the arbitration process by granting interim measures to support those ordered by arbitral tribunals (Model Law, Article 1(2), 9).

For the enforcement of awards under the New York Convention or the Model Law, courts consider "award" to mean a final award. Courts do not enforce interim awards. This is modified in British Columbia and Ontario. British Columbia's act specifically defines "award" to be any decision on the substance of the dispute, including an interim award (which includes an interim award for the preservation of property). As well, the Ontario act treats orders of interim measures as awards.

8 Evidentiary Matters

8.1 What rules of evidence (if any) apply to arbitral proceedings in your jurisdiction?

Domestic rules of evidence do not apply to international arbitration proceedings in Canada. The arbitral tribunal has the power to determine the admissibility, relevance, materiality, and weight of any evidence. However, the arbitral tribunal's obligation to treat the parties fairly and equally can have a bearing on how evidence is addressed.

International arbitrations in Canada often adopt, or take guidance from, the IBA Rules on the Taking of Evidence in International Commercial Arbitration.

8.2 Are there limits on the scope of an arbitrator's authority to order the disclosure of documents and other disclosure (including third party disclosure)?

Other than to protect privileged documents, there are no limits on an arbitral tribunal's power to order disclosure from the parties. However, the arbitral tribunal does not have authority to order the disclosure of documents or other disclosure from a third party, and must seek court assistance in this regard.

8.3 Under what circumstances, if any, is a court able to intervene in matters of disclosure/discovery?

The arbitral tribunal, or a party with the approval of the arbitral tribunal, can request court assistance in taking evidence "within [the court's] competence and according to its rules of evidence" (Model Law, Article 27). 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. In Alberta, the courts 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. 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.

8.4 What, if any, laws, regulations or professional rules apply to the production of written and/or oral witness testimony? For example, must witnesses be sworn in before the tribunal or is cross-examination allowed?

Canadian arbitration legislation, regulations and professional rules do not contain specific rules governing the production of written or oral witness testimony in international commercial arbitration. The arbitral tribunal has discretion, absent agreement of the parties, to determine evidentiary matters (Model Law, Article 24).

Where written witness statements are provided to the arbitral tribunal, they must also be provided to all parties to the arbitration (Model Law, Article 24(3)). Generally, in the Canadian context, parties would expect to be allowed to cross-examine the opposing party's witnesses on their witness statements. The Model Law does not require that an oath be administered for a witness giving oral evidence at a hearing. However, subject to the requirement to treat parties equally, the arbitral tribunal may elect to administer an oath or affirmation.

8.5 What is the scope of the privilege rules under the law of your jurisdiction? For example, do all communications with outside counsel and/or in-house counsel attract privilege? In what circumstances is privilege deemed to have been waived?

The scope of privilege rules in Canada is broad and includes solicitor-client, litigation, and settlement privilege.

Solicitor-client privilege extends to all communications between legal counsel and their clients for the purpose of obtaining or providing legal advice. Privilege extends to in-house counsel and their client, but only to the extent counsel is acting in a legal capacity.

Litigation and settlement privilege includes all communications and documents created for the dominant purpose of actual or contemplated litigation or settlement, regardless of whether they were made by counsel.

A party can expressly or inadvertently waive privilege. Generally, privilege is deemed to have been waived where the party to which the privilege belongs communicates the privileged information to a third party or relies on such information in its pleadings.

9 Making an Award

9.1 What, if any, are the legal requirements of an arbitral award? For example, is there any requirement under the law of your jurisdiction that the Award contain reasons or that the arbitrators sign every page?

An arbitral award must be made in writing. It must state its date and place of arbitration, and be signed by the arbitrators. Further, unless the parties agree otherwise, the award must contain reasons for the arbitral tribunal's determination. A copy of the award must be delivered to each party.

9.2 What powers (if any) do arbitrators have to clarify, correct or amend an arbitral award?

The arbitral tribunal has the power, upon request and only if the arbitral tribunal considers the request to be justified, to (a) correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature, (b) give an interpretation of a specific point or part of the award, and (c) make an additional award as to claims presented in the arbitral proceedings but omitted from the award (Model Law, Article 33).

10 Challenge of an Award

10.1 On what bases, if any, are parties entitled to challenge an arbitral award made in your jurisdiction?

Parties may challenge an arbitral award on any of the bases set out in Article 34 of the Model Law. Canadian courts have narrowly interpreted those grounds.

10.2 Can parties agree to exclude any basis of challenge against an arbitral award that would otherwise apply as a matter of law?

Article 34 of the Model Law does not give the parties the freedom to contract out of its provisions.

10.3 Can parties agree to expand the scope of appeal of an arbitral award beyond the grounds available in relevant national laws?

Parties cannot create a right of appeal to the courts that is not provided for in the Model Law, as the court's jurisdiction is defined by statute and cannot be conferred by parties.

10.4 What is the procedure for appealing an arbitral award in your jurisdiction?

An international commercial arbitration cannot be appealed in Canada. However, a party can apply to set aside an arbitral award (Model Law, Article 34). Such application must be brought within three months of the date on which the applicant received the award. The rules of procedure vary between provinces.

11 Enforcement of an Award

11.1 Has your jurisdiction signed and/or ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards? Has it entered any reservations? What is the relevant national legislation?

Canada has ratified the New York Convention and the provinces and territories have incorporated it into their international arbitration legislation.

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.

11.2 Has your jurisdiction signed and/or ratified any regional Conventions concerning the recognition and enforcement of arbitral awards?

Canada has not signed or ratified any recognition and enforcement conventions other than the New York Convention.

11.3 What is the approach of the national courts in your jurisdiction towards the recognition and enforcement of arbitration awards in practice? What steps are parties required to take?

The procedure for recognition and enforcement is a summary one. An enforcing party may apply to the court with an affidavit exhibiting (a) the authenticated original or a certified copy of the award, (b) the original or certified copy of the arbitration agreement, and (c) any necessary translations. The actual procedural steps a party is required to take will vary depending on the rules of court of the jurisdiction. Parties should be aware that enforcement proceedings must be brought within the relevant limitation period.

11.4 What is the effect of an arbitration award in terms of *res judicata* in your jurisdiction? Does the fact that certain issues have been finally determined by an arbitral tribunal preclude those issues from being re-heard in a national court and, if so, in what circumstances?

Res judicata applies to final arbitration decisions. A court will not re-hear an issue between the parties that an arbitral tribunal has decided (*Nordion Inc v Life Technologies Inc*, 2015 ONSC 99).

11.5 What is the standard for refusing enforcement of an arbitral award on the grounds of public policy?

Canadian courts may refuse to enforce an award if such award conflicts with the public policy of Canada (Model Law, Article 34(2)(b)(ii)). In determining whether the award offends principles of public policy, Canadian courts consider whether enforcing the award would fundamentally conflict with principles of justice and fairness.

12 Confidentiality

12.1 Are arbitral proceedings sited in your jurisdiction confidential? In what circumstances, if any, are proceedings not protected by confidentiality? What, if any, law governs confidentiality?

Arbitral proceedings seated in Canada are private and generally treated as confidential between the parties. However, 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.

In order to preserve confidentiality, the parties should expressly provide for it in the arbitration agreement, ensure that any institutional rules they adopt provide for confidentiality, or provide for confidentiality in a separate procedural order or confidentiality agreement.

Even when there are confidentiality protections in place, confidentiality may be lost when a party seeks court intervention (such as to enforce an award) or if disclosure is otherwise required by law.

12.2 Can information disclosed in arbitral proceedings be referred to and/or relied on in subsequent proceedings?

In civil litigation in Canada, there is an "implied undertaking rule" that prevents the parties from using information disclosed in a proceeding for any other purpose. It remains an open question whether these principles apply in arbitrations seated in Canada.

Unless there is a confidentiality agreement or an institutional rule addressing the protection of information disclosed in arbitration proceedings, parties risk information discovered in one case being used in other proceedings.

13 Remedies / Interests / Costs

13.1 Are there limits on the types of remedies (including damages) that are available in arbitration (e.g., punitive damages)?

The Model Law does not impose any limitations on the power of the arbitral tribunal to award remedies. Nevertheless, the arbitral tribunal's power to grant remedies may be limited by the parties' agreement and the substantive law applicable to the dispute.

13.2 What, if any, interest is available, and how is the rate of interest determined?

The Model Law does not expressly grant the arbitral tribunal power to award interest. However, the substantive contract in dispute, the law governing the dispute, or the arbitration agreement may provide for such power. If the applicable law is Canadian law, the award of pre-judgment interest is an issue of substantive law and accordingly, the arbitral tribunal may make an award for interest. Interest rates usually follow provincial regulations.

13.3 Are parties entitled to recover fees and/or costs and, if so, on what basis? What is the general practice with regard to shifting fees and costs between the parties?

Subject to the agreement of the parties, the arbitral tribunal has broad discretion to allocate costs as it sees fit. For example, the arbitral tribunal may determine allocation of costs based on the complexity of the case, the relative success of each party on its claims or defences, or the conduct of the parties during the arbitration.

In international arbitrations, the general practice is that the successful party recovers its reasonable proven costs.

13.4 Is an award subject to tax? If so, in what circumstances and on what basis?

Depending on the nature of the award, applicable law, and the characteristics of the parties involved, the award may be subject to taxation either in Canada or in another jurisdiction.

13.5 Are there any restrictions on third parties, including lawyers, funding claims under the law of your jurisdiction? Are contingency fees legal under the law of your jurisdiction? Are there any "professional" funders active in the market, either for litigation or arbitration?

The law on third-party funding is still developing in Canada. Under the tort of champerty, such funding would be illegal if the funder were to hold an improper motive. In determining that, courts consider factors such as whether (a) funding is the only means for the party to access justice, (b) the funder is taking advantage of the party, and (c) the party retains control of the litigation (*Fehr v Sun Life Assurance Co. of Canada*, 2012 ONSC 2715).

Reasonable contingency fees are legal. Depending on the applicable law, they may be subject to caps or court approval.

Canadian and foreign professional funders are active in Canada.

14 Investor State Arbitrations

14.1 Has your jurisdiction signed and ratified the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) (otherwise known as "ICSID")?

Canada ratified the ICSID Convention on December 1, 2013.

14.2 How many Bilateral Investment Treaties (BITs) or other multi-party investment treaties (such as the Energy Charter Treaty) is your jurisdiction party to?

According to Global Affairs Canada, Canada is party to 30 bilateral investment treaties that are currently in force, and seven that are signed but not yet in force. Treaties with 15 other countries are in various stages of the negotiation process.

Canada is also party to 11 Free Trade Agreements ("FTAs") that are in force and contain investment provisions, and three FTAs that are concluded but not yet in force. Currently, there are eight FTAs that are in various stages of negotiation.

14.3 Does your jurisdiction have any noteworthy language that it uses in its investment treaties (for example in relation to "most favoured nation" or exhaustion of local remedies provisions)? If so, what is the intended significance of that language?

Canada's investment treaties provide fairly standard investor protections, such as national treatment, most favoured nation treatment, and protection against expropriation.

One noteworthy provision in the NAFTA and subsequent Canadian investment treaties relates to minimum standard of treatment ("MST"). While Canada's MST clauses include a reference to "fair and equitable treatment", this language does not impose any higher standard of treatment than the customary minimum standard of treatment of aliens in international law.

14.4 What is the approach of the national courts in your jurisdiction towards the defence of state immunity regarding jurisdiction and execution?

Under Canada's *State Immunity Act*, RSC 1985, c S-18, foreign states (including their agencies) are immune from the jurisdiction of the Canadian courts. The *State Immunity Act* makes property of a foreign state located in Canada immune from execution.

However, where a state has entered into a commercial agreement that is subject to arbitration, it is deemed to have waived its immunity for the purposes of enforcement of the eventual arbitral award. It follows that the successful party can execute its award against such state's commercial property (*Collavino Inc v Tihama Development Authority (Yemen)*, 2007 ABQB 212).

15 General

15.1 Are there noteworthy trends in or current issues affecting the use of arbitration in your jurisdiction (such as pending or proposed legislation)? Are there any trends regarding the type of disputes commonly being referred to arbitration?

Arbitration is an established and growing method of settling commercial disputes in Canada. In particular, arbitration is common in the energy and mining sectors, where disputes often involve parties of different nationalities, working on long-term, highly technical and expensive projects. Arbitration clauses have also been increasingly negotiated into contracts dealing with construction, insurance, infrastructure, information technology, and software.

15.2 What, if any, recent steps have institutions in your jurisdiction taken to address current issues in arbitration (such as time and costs)?

The ADR Institute of Canada recently revised and updated its Arbitration Rules. The Rules' express purpose is to "enable parties involved in a dispute to reach a just, speedy, and cost-effective determination of it, taking into account the values that distinguish arbitration from litigation".

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