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The International Comparative Legal Guide to:

Litigation & Dispute Resolution 2012

A practical cross-border insight into litigation & dispute resolution

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Chapter 8

Canada

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I. LITIGATION

1 Preliminaries

1.1 What type of legal system has Canada got? Are there any rules that govern civil procedure in Canada?

The law in every province and territory except Québec is based on the common law system. The system of private law in Québec is based on the civil law system, as codified in the *Civil Code of Québec*. Public law in all provinces and territories is based on the common law.

Unless otherwise specified, the discussion below relates only to the common law jurisdictions in Canada. Where common law jurisdictions differ, the focus here is on Ontario, as it is the jurisdiction in which the authors primarily practice.

Each province and territory has its own set of rules governing civil procedure. In Ontario, for instance, civil procedure is governed by the *Rules of Civil Procedure* (the "Ontario Rules"), available at www.canlii.org.

While the Ontario Rules are, in general, representative of the civil procedure rules in other provinces, litigants must, of course, be guided by the civil procedure rules of the province in which they are litigating.

1.2 How is the civil court system in Canada structured? What are the various levels of appeal and are there any specialist courts?

Each province and territory has its own system of courts. Claims below a certain amount ($25,000 in Ontario) may be brought in small claims courts. Larger civil claims must be brought in Superior Courts, which are known in various provinces as the Superior Court of Justice (Ontario), Supreme Court (British Columbia, Nova Scotia, Newfoundland and Labrador), or the Court of Queen's Bench (Manitoba, Saskatchewan, Alberta).

Appeals from the Superior Courts are generally brought to intermediate appellate courts, known in most provinces as the Court of Appeal. Further appeal lies to the Supreme Court of Canada. Leave to appeal to the Supreme Court of Canada is required for all civil matters.

There is also a system of federal courts. The largest federal court is the Federal Court, which has exclusive or concurrent jurisdiction over actions involving intellectual property, maritime law, federal administrative law, and against the federal government. The Tax Court of Canada is a specialist court with jurisdiction over taxation matters. Appeals from both the Federal Court and the Tax Court of Canada go to the Federal Court of Appeal, and then with leave to the Supreme Court of Canada.

Juries are generally available for civil trials in Canadian courts, except in the federal courts. However, they are quite rarely used.

1.3 What are the main stages in civil proceedings in Canada? What is their underlying timeframe?

The main stages of an action before the Canadian courts include:

- issuance of a statement of claim;
- delivery of a statement of defence;
- discovery of documents;
- examinations for discovery;
- exchange of expert reports;
- listing for trial;
- pre-trial conference; and
- trial.

The deadlines for each of these steps vary by jurisdiction. In practice, the timeline will often depend on the complexity of the case.

1.4 What is Canada's local judiciary's approach to exclusive jurisdiction clauses?

The Supreme Court of Canada has held that forum selection clauses should be enforced unless there is "strong reason" why enforcing the clause would be unreasonable or unjust: *Z.I. Pompey v. ECU-Line N.V.*, [2003] 1 S.C.R. 450.

It is generally more difficult to get an anti-suit injunction from a Canadian court than to have domestic proceedings stayed in favour of another jurisdiction: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897.

1.5 What are the costs of civil court proceedings in Canada? Who bears these costs?

The cost of litigation in Canada varies enormously depending on the complexity of the case.

The general rule is that the loser is required to pay the winner's costs. In most cases, this amounts to "partial indemnity" (also known as "party-and-party") costs, which in Ontario usually account for about 1/3-1/2 of the winner's total legal fees. Where the losing party behaved unreasonably or acted in bad faith, the winner

may be entitled to an increased measure of costs, known as "substantial indemnity" or "solicitor-client" costs.

Costs are discretionary, however, and a judge therefore has the power to order that no costs be awarded in appropriate circumstances, or even that the winner pay the loser's costs.

1.6 Are there any particular rules about funding litigation in Canada? Are contingency fee/conditional fee arrangements permissible? What are the rules pertaining to security for costs?

Contingency fees are permitted in Canada. They are quite common in certain types of litigation, including personal injury and class actions. There are certain exceptions to this, however. In Ontario, for instance, contingency fees are not allowed for criminal or family law matters.

Despite recognising contingency fee agreements, Canadian courts maintain the common-law prohibition against champerty and maintenance. This may limit third-party funding of litigation, especially where the third party has no legitimate interest in the claim: see *Fredrickson v. Insurance Corp. of British Columbia* [1986], 28 D.L.R. (4th) 414 (B.C.C.A.). Third-party litigation funding does exist in Canada, but it is still in its infancy.

Security for costs is available in Canada. In Ontario, it is governed by Rule 56.01. Security for costs is available where:

- the plaintiff is ordinarily resident outside Ontario;
- the plaintiff has brought another proceeding in Ontario or elsewhere seeking the same relief;
- the defendant has an outstanding unpaid costs order against the plaintiff;
- the plaintiff is a corporation and lacks sufficient assets in Ontario to pay the defendant's costs;
- the action is frivolous and vexatious and the plaintiff lacks sufficient assets in Ontario to pay the defendant's costs; or
- a statute entitles the defendant to security for costs.

It remains a discretionary matter for the judge, and courts may be reluctant to order security for costs against an impecunious plaintiff.

2 Before Commencing Proceedings

2.1 Is there any particular formality with which you must comply before you initiate proceedings?

For the most part, there are no formalities required before initiating proceedings. However, such formalities may be required by contract or under certain specific statutory regimes (for example in some cases, the *Libel and Slander Act* in Ontario requires service of a libel notice before commencing an action).

2.2 What limitation periods apply to different classes of claim for the bringing of proceedings before your civil courts? How are they calculated? Are time limits treated as a substantive or procedural law issue?

Each province and territory has its own limitation laws. In Ontario, the *Limitations Act, 2002* establishes a two-year basic limitation period for most claims. This period begins to run on the earlier of the day on which the claim became known to the plaintiff, and the day on which it was discoverable. Regardless of when the claim became known to the plaintiff, however, it generally must be brought within 15 years of the date the underlying event or omission occurred.

Judges have no jurisdiction to waive or extend a limitation period, although in certain circumstances the period may be suspended or extended by contract.

3 Commencing Proceedings

3.1 How are civil proceedings commenced (issued and served) in Canada? What various means of service are there? What is the deemed date of service? How is service effected outside Canada? Is there a preferred method of service of foreign proceedings in Canada?

An action is generally commenced by issuing a statement of claim. However, where there is insufficient time to prepare a statement of claim, a plaintiff may also commence an action by filing a notice of action (a shorter document), to be followed shortly by a statement of claim.

Under the Ontario Rules, a statement of claim may be served personally, or through a recognised alternative to personal service. This is generally done either by leaving a copy with an individual defendant, or with an officer, director or agent of a corporation, or by leaving a copy with the party's lawyer.

In situations where Ontario courts presumptively have jurisdiction (enumerated in Ontario Rule 17.02), a statement of claim may be served outside the province by right. In all other cases, leave of the court is required.

Service outside Ontario may be effected by: (a) serving the statement of claim in the same manner as prescribed in Ontario; (b) serving the central authority of a contracting statue under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters; or (c) serving in a manner provided for by the rules of the jurisdiction, as long as it could reasonably be expected to come to the attention of the person being served.

The preferred method for serving a foreign claim in Canada is on the defendant's lawyer.

A civil proceeding dealing with certain issues may be brought by way of application, which is a more summary procedure. An application is commenced by notice of application, which must be served in the same way as a statement of claim.

3.2 Are any pre-action interim remedies available in Canada? How do you apply for them? What are the main criteria for obtaining these?

A motion for pre-action interim relief may be brought in an urgent case. The moving party must undertake to commence proceedings as soon as possible: Ontario Rule 37.17.

3.3 What are the main elements of the claimant's pleadings?

The basic rule is that the statement of claim must contain "a concise statement of the material facts" on which the plaintiff relies: Ontario Rule 25.06(1). The plaintiff should clearly identify the cause of action on which he or she relies, and he or she must plead facts that, if true, would establish every element of that cause of action. The statement should also clearly identify the relief sought by the plaintiff.

A statement of claim must be divided into consecutively-numbered paragraphs, and each allegation should be contained in a separate paragraph: Ontario Rule 25.02.

3.4 Can the pleadings be amended? If so, are there any restrictions?

Pleadings can be amended without leave of the court up until the plaintiff's delivery of a reply, or ten days after the delivery of a statement of defence: Ontario Rule 26.02(a).

After that, leave of the court is required. However, courts must grant such leave unless the amendments would cause prejudice to the other side that cannot be compensated for with an adjournment or costs: Ontario Rule 26.01. In practice, this means that amendments are usually allowed, even on the eve of trial.

4 Defending a Claim

4.1 What are the main elements of a statement of defence? Can the defendant bring counterclaims/claim or defence of set-off?

A statement of defence must conform to the rules described above for statements of claim. It must also specify which allegations are admitted by the defendant, which allegations are denied, and which allegations the defendant has no knowledge of. It should include any alternative facts relied on by the defendant, and set out any affirmative defences upon which the defendant intends to rely, including set-off: Ontario Rule 25.07.

If the defendant wishes to bring a counter-claim, he or she must do so in the same document as the statement of defence. In such a case, the statement of defence must be entitled "Statement of Defence and Counterclaim": Ontario Rule 27.02.

4.2 What is the time limit within which the statement of defence has to be served?

The timelines depend on whether the statement of claim was served outside the province. In Ontario, a statement of defence must be filed and served within twenty days if the defendant was served with the claim in Ontario. The defendant can extend this to thirty days by filing a basic pleading called a Notice of Intent to Defend. A defendant served elsewhere in Canada or in the United States must respond within forty days, and a defendant served outside Canada or the USA must respond within sixty days: Ontario Rule 18.01.

4.3 Is there a mechanism in your civil justice system whereby a defendant can pass on liability by bringing an action against a third party?

The Ontario Rules and those in other jurisdictions permit a defendant to bring a third party claim. This may be an independent claim, as long as it arises out of facts related to the initial claim.

A third party claim is commenced by originating process in same manner as a statement of claim, and must be responded to by a third party defence. In Ontario, a third party claim must generally be issued within ten days after the defendant delivers a statement of defence or within ten days after the plaintiff delivers a reply. Such a claim may not be issued after the defendant is noted in default. However, the court may grant leave to file a third party claim after these deadlines: Ontario Rule 29.02.

4.4 What happens if the defendant does not defend the claim?

If the defendant does not defend the claim, the plaintiff may note him or her in default and obtain a default judgment against the plaintiff without trial: Ontario Rule 19.

The court may set aside a noting in default or default judgment. The party seeking to set such an order aside will generally have to prove that: (a) the motion to set aside was brought promptly; (b) there is a reasonable explanation for the non-compliance with the Rules; and (c) there is an arguable defence on the facts of the case.

4.5 Can the defendant dispute the court's jurisdiction?

A defendant can dispute the court's jurisdiction in three ways:

- by arguing that extra-provincial service was not authorised by the Rules;
- by arguing that an order granting leave for extra-provincial service should be set aside; or
- by arguing that the jurisdiction is not a convenient forum for the proceeding.

In Ontario and most other jurisdictions, these arguments must be raised before the defendant has filed a notice of appearance, notice of intent to defend, or statement of defence. Filing any pleading in an action can constitute attornment.

5 Joinder & Consolidation

5.1 Is there a mechanism in your civil justice system whereby a third party can be joined into ongoing proceedings in appropriate circumstances? If so, what are those circumstances?

There is provision for the joinder of multiple plaintiffs or defendants in a single action where the claims arise out of common facts, where a common question of fact or law may arise, or where a joinder would promote the convenient administration of justice for some other reason: Ontario Rule 5.02.

5.2 Does your civil justice system allow for the consolidation of two sets of proceedings in appropriate circumstances? If so, what are those circumstances?

Where two or more proceedings before the court pose common questions of fact or law or seek relief arising out of the same facts, the court may order that:

- the proceedings be consolidated;
- the proceedings be heard at the same time;
- the proceedings be heard consecutively;
- any of the proceedings be stayed until another proceeding is determined; or
- any of the proceedings be asserted by way of counterclaim in another proceeding: see Ontario Rule 6.01.

5.3 Do you have split trials/bifurcation of proceedings?

Canadian courts have the inherent jurisdiction to bifurcate proceedings when necessary. However, this is the exception rather than the rule, and courts will only exercise their jurisdiction to bifurcate trials in clear cases.

6 Duties & Powers of the Courts

6.1 Is there any particular case allocation system before the civil courts in Canada? How are cases allocated?

There is no general case allocation system in Canadian courts. There are some local exceptions to this, however. In Toronto, for instance, there is a Commercial List, staffed by judges with experience in managing complex commercial litigation.

6.2 Do the courts in Canada have any particular case management powers? What interim applications can the parties make? What are the cost consequences?

Case management is available in some jurisdictions. Where a case is assigned to case management, the court has extensive powers to supervise and control the progress of litigation. A judge or case management master may establish a timetable governing the progress of a case.

Parties may make a wide range of interim applications, including:

- interim or interlocutory injunctions, including *Mareva* injunctions (freezing orders) and Anton Piller orders (search orders);
- motions for particulars;
- motions for security for costs;
- matters relating to the amendment of pleadings;
- motions to strike pleadings;
- motions to compel the production of documents or responses to questions in examinations for discovery; and
- motions for summary judgment.

As noted above, cost consequences are a discretionary matter for the judge or master hearing a motion. However, costs will usually be awarded to the successful party on the motion.

6.3 What sanctions are the courts in Canada empowered to impose on a party that disobeys the court's orders or directions?

The primary and most common sanction is an adverse costs award. As noted above, courts can order that a party bear a higher-than-usual proportion of the other side's costs where that party is deemed to have acted unreasonably or in bad faith.

In extraordinary cases, in the face of a clear breach of a court order, the court has the power to hold a non-compliant party in contempt of court. This can result in imprisonment.

6.4 Do the courts in Canada have the power to strike out part of a statement of case? If so, in what circumstances?

Canadian courts do have the power to strike out all or part of a statement of claim. This can be done based on non-compliance with the requirements of the rule relating to the substance or form of a statement of claim.

A statement of claim may also be struck out where the allegations in it do not disclose a reasonable cause of action against the defendant, even when assumed to be true.

6.5 Can the civil courts in Canada enter summary judgment?

Canadian courts do have the power to issue summary judgment in favour of any party, in whole or in part, without trial. This power is generally exercised when the court concludes that a trial would be unnecessary, or where no facts are in dispute.

Certain jurisdictions, including Ontario and British Columbia, have recently liberalised the rules governing summary judgment to give judges enhanced powers to receive evidence, weigh credibility, and resolve factual disputes without trial. In Ontario, summary judgment will now be granted where a judge can gain a "full appreciation" of the evidence and issues without trial: *Combined Air Mechanical Services v. Flesch*, 2011 ONCA 764.

6.6 Do the courts in Canada have any powers to discontinue or stay the proceedings? If so, in what circumstances?

A court may stay or dismiss an action where:

- the court has no jurisdiction over the subject matter of the action;
- the plaintiff lacks legal capacity to bring the action, or the defendant lacks legal capacity to be sued;
- the action is duplicative of other proceedings; or
- the action is frivolous, vexatious, or an abuse of process: Ontario Rule 21.01(3).

An action may also be discontinued by the plaintiff, although leave of the court is required to do so after the close of pleadings.

7 Disclosure

7.1 What are the basic rules of disclosure in civil proceedings in Canada? Are there any classes of documents that do not require disclosure?

Every document relevant to any matter in issue that is or has been in the possession, control, or power of either party must be disclosed to the other parties. It does not matter whether the document helps or harms its case or those of the other parties.

Each party must provide all other parties with a sworn affidavit of documents listing all relevant documents, documents which it refuses to produce on the basis of a privilege claim, and documents that it no longer has in its possession.

A party may request to inspect any or all non-privileged documents in the possession, control, or power of another party.

7.2 What are the rules on privilege in civil proceedings in Canada?

There are three main types of privilege in Canada:

- solicitor-client privilege protects confidential communications between a lawyer and client relating to seeking, formulating, or giving legal advice;
- litigation privilege protects all information created or communicated with the dominant purpose of responding to specific or contemplated litigation; and
- settlement privilege protects statements made in a good faith effort to reach a settlement or compromise of a dispute.

Solicitor-client privilege is jealously protected by Canadian courts. Canadian courts recognise that solicitor-client privilege can apply to advice given by in-house counsel, so long as it constitutes legal and not business advice.

7.3 What are the rules in Canada with respect to disclosure by third parties?

The party seeking the disclosure must bring a motion before the court. The test is whether the document is relevant to a material issue in the action, and whether it would be unfair to require the moving party to proceed to trial without the disclosure: Ontario Rule 30.10.

A non-party from whom disclosure is sought has the right to appear and object to the production.

7.4 What is the court's role in disclosure in civil proceedings in Canada?

Courts are generally not directly involved in discovery or disclosure unless a dispute arises. Where there is a dispute, courts have the jurisdiction to order the production of documents or to compel answers to questions asked in examinations for discovery, and to sanction parties with costs. In extreme cases, courts can dismiss a claim or strike a statement of defence for failure to comply with certain discovery obligations.

In Ontario, where parties fail to agree on a discovery plan, one can be imposed by the courts. Where a case is assigned to case management, courts also play a more active role supervising discovery and setting a timetable.

7.5 Are there any restrictions on the use of documents obtained by disclosure in Canada?

At common law and under the civil procedure rules of most provinces, there is a "deemed undertaking" that a party receiving documents or information from the discovery process may not use that information outside the litigation for which the documents or information were produced.

Exceptions to this rule include:

- use to which the disclosing party consents;
- use of evidence which is filed in court; and
- the party receiving the evidence can use it to impeach a witness's credibility in another action.

8 Evidence

8.1 What are the basic rules of evidence in Canada?

Each jurisdiction has an *Evidence Act*, which supplements, rather than codifies, the common law.

The most basic rule of admissibility is that the probative value of evidence must outweigh its prejudicial effects. Evidence must also be relevant to be admissible.

8.2 What types of evidence are admissible, which ones are not? What about expert evidence in particular?

Relevant fact evidence is generally admissible, as long as its probative value outweighs its prejudicial effects.

The largest exception to this is the rule that hearsay (second-hand evidence) is generally not admissible. Hearsay will be admissible, however, where the court is satisfied that it is reliable and necessary.

In order for expert opinion evidence to be admissible, the court must be satisfied that:

- the expert is qualified;
- the evidence is relevant;
- the evidence is necessary; and
- there is no other applicable exclusionary rule: *R. v. Mohan*, [1994] 2 S.C.R. 9.

Provincial rules of procedure also impose other requirements for the admission of expert evidence. In Ontario, for instance, expert reports must be filed at least ninety days before trial, and no more than three expert witnesses can be called by each side without leave of the court.

8.3 Are there any particular rules regarding the calling of witnesses of fact? The making of witness statements or depositions?

A party may call any fact witness whose evidence is admissible. If necessary, a party may compel a witness's attendance through a summons.

A party may conduct an oral examination for discovery (a deposition) of any party adverse in interest. A corporation may produce any officer, director, or employee for examination, but the court has the power to order the examination of a corporate representative. Only one representative from a corporate may be examined without leave of the court.

A party must also receive leave of the court if it wishes to examine a non-party.

8.4 What is the court's role in the parties' provision of evidence in civil proceedings in Canada?

The court has a role in ensuring compliance with discovery obligations. As noted above, it may order the examination of a non-party or of a different corporate representative, and it may compel answers to disputed questions at examinations for discovery.

At trial, judges have the power to compel the attendance of witnesses by enforcing summonses.

9 Judgments & Orders

9.1 What different types of judgments and orders are the civil courts in Canada empowered to issue and in what circumstances?

Canadian courts have the power to make a wide variety of judgments and orders in law or equity.

Upon default judgment, summary judgment, or after a trial, the court can grant judgment for monetary damages, specific performance, or declaratory relief.

Courts also have brought discretion to issue a wide range of orders, depending on the circumstances. These include orders:

- permitting amendments to a pleading;
- striking a pleading;
- dismissing an action;
- requiring a party to post security for costs;
- compelling compliance with discovery obligations;
- relating to case management and scheduling;
- granting an interim or interlocutory injunction;
- relating to the structure and conduct of a trial;
- relating to the admissibility of evidence at trial; and
- enforcing a judgment.

9.2 What powers do your local courts have to make rulings on damages/interests/costs of the litigation?

Courts have broad powers to award damages. This includes:

- general damages;
- special damages: specific losses capable of precise calculation;
- prospective damages: damages for losses not yet suffered;
- aggravated damages: damages for mental distress; and
- punitive damages: damages awarded in exceptional cases where the defendant's conduct offends the court's sense of decency.

As noted above, costs are a matter for the discretion of the court. In most cases, however, the successful party is awarded costs amounting to roughly 1/3-1/2 of actual legal fees.

Courts also have the power to order both pre-judgment and post-judgment interest on both the award and costs. Though an interest rate is prescribed by legislation, courts have the power to disallow or vary interest.

9.3 How can a domestic/foreign judgment be enforced?

A domestic judgment can be enforced by getting a writ of seizure and sale, a garnishment order, or writ of sequestration. A creditor may conduct an examination in aid of execution (also known as a judgment debtor examination), in order to identify and locate a debtor's assets.

A party seeking to enforce a foreign judgment must commence proceedings in domestic courts. A Canadian court will usually enforce the decision of a foreign court as long as that court has a "real and substantial connection" to the dispute and the foreign order is not offensive to Canadian public policy. The traditional defences to the enforcement of a foreign judgment are that the judgment was obtained through fraud, that the foreign proceedings were unfair or violated the principles of natural justice, or that enforcing the judgment would violate Canadian public policy.

In Ontario, the *Reciprocal Enforcement of Judgments Act* allows a judgment from any other province or territory (with the exception of Québec) to be enforced in the same manner as an Ontario judgment simply by registering it with the Ontario Superior Court of Justice.

9.4 What are the rules of appeal against a judgment of a civil court of Canada?

A judgment or final order in the Superior Court (as opposed to a small claims court) can generally be appealed as of right to the appropriate court of appeal. In Ontario, the system is complicated slightly by the fact that certain judgments, including those under $50,000, are instead appealed to an intermediate court called the Divisional Court. The Divisional Court is composed of judges of the Superior Court of Justice, who usually sit as a panel of three on the Divisional Court.

Decisions of courts of appeal may be appealed, with leave, to the Supreme Court of Canada.

II. ALTERNATIVE DISPUTE RESOLUTION

1 Preliminaries

1.1 What methods of alternative dispute resolution are available and frequently used in Canada? Arbitration/Mediation/Expert Determination/Tribunals (or other specialist courts)/Ombudsman? (Please provide a brief overview of each available method.)

The primary methods of alternative dispute resolution used in Canada are arbitration and mediation.

There is a strong presumption in favour of courts enforcing arbitration clauses. Where a valid arbitration clause exists, a court will stay judicial proceedings seeking to circumvent arbitration. Unless an arbitration agreement provides otherwise, Canadian arbitrators have the power to rule on their own jurisdiction. The parties, in conjunction with the arbitrator, have broad discretion as to how an arbitration will be conducted.

Mediation is also common in Canada. Many court systems offer mediation services. In some jurisdictions, including parts of Ontario, mediation is actually mandatory for certain cases.

1.2 What are the laws or rules governing the different methods of alternative dispute resolution?

Like the courts, arbitration is regulated by provincial and territorial legislation, with a separate system in place for matters in federal jurisdiction (such as maritime disputes). Some provinces, including Ontario, have separate legislation dealing with international arbitration.

Ontario and Nova Scotia also have legislation regulating mediation, based on the United National Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation.

1.3 Are there any areas of law in Canada that cannot use Arbitration/Mediation/ Expert Determination/Tribunals/ Ombudsman as a means of alternative dispute resolution?

Although criminal matters are not arbitrable in Canada, courts are otherwise very reluctant to interfere with the parties' autonomy to choose arbitration.

1.4 Can local courts provide any assistance to parties that wish to invoke the available methods of alternative dispute resolution? For example, will a court - pre or post the constitution of an arbitral tribunal - issue interim or provisional measures of protection (i.e. holding orders pending the final outcome) in support of arbitration proceedings, will the court force parties to arbitrate when they have so agreed, or will the court order parties to mediate or seek expert determination? Is there anything that is particular to Canada in this context?

Canadian arbitration legislation gives arbitrators and courts concurrent jurisdiction over interim measures, unless the arbitration clause provides differently. There is some dispute over how this power should be exercised by courts. Some courts will grant relief so long as the usual test for such relief is met, regardless of the arbitration clause. Other courts, however, will refuse to grant relief unless the moving party can demonstrate that the arbitral tribunal is unable to grant the relief sought.

Arbitral tribunals in Canada lack the jurisdiction to grant interlocutory relief binding third parties, such as *Mareva* injunctions (freezing orders), so these remedies must always be sought from the courts.

1.5 How binding are the available methods of alternative dispute resolution in nature? For example, are there any rights of appeal from arbitration awards and expert determination decisions, are there any sanctions for refusing to mediate, and do settlement agreements reached at mediation need to be sanctioned by the court? Is there anything that is particular to Canada in this context?

The rules with respect to appeals differ across the provinces. Appeal rights may also be supplemented or (in some provinces) eliminated by the consent of the parties.

In Ontario, appeals from arbitration awards may be brought to the Superior Court of Justice. Unless the parties agree otherwise, however, appeals may only be brought on questions of law, and leave of the court is required. As noted above, courts will generally defer to arbitrators on questions of fact and mixed fact and law, but legal issues will usually be reviewed on a correctness standard.

Regardless of appeal rights, in most provinces a court has the jurisdiction to set aside an arbitral award on a number of grounds, including an invalid arbitration agreement, an award outside of the jurisdiction of the arbitrator, an improperly composed arbitral tribunal, manifestly unfair or unequal treatment of a party, a reasonable apprehension of bias on the part of the arbitrator, or an award obtained by fraud.

Mediation is not binding, and does not in itself result in enforceable awards. However, a release or settlement agreement entered into as a consequence of mediation is enforceable in court as a matter of contract. In Ontario and Nova Scotia, mediation legislation simplifies this process and allows settlement agreements obtained through mediation to be presented to the court for enforcement in much the same manner as arbitral awards.

2 Alternative Dispute Resolution Institutions

2.1 What are the major alternative dispute resolution institutions in Canada?

Major Canadian ADR institutions include ADR Chambers and the British Columbia International Commercial Arbitration Centre.

2.2 Do any of the mentioned alternative dispute resolution mechanisms provide binding and enforceable solutions?

Subject to the appeal procedures described above, arbitration awards are binding and enforceable under both the provincial domestic and international arbitration statutes and the New York Convention.

A domestic arbitration award may be enforced either by a simple application in Superior Court, or, where the arbitration has taken place in another province, under provincial reciprocal judgment enforcement legislation.

A party seeking to enforce a foreign arbitral award in Canada must bring an application in Superior Court under provincial legislation incorporating the provisions of the New York Convention or the UNCITRAL Model Law on International Commercial Arbitration. Though there are grounds under which the court may decline to enforce the award, this is rare.

3 Trends & Developments

3.1 Are there any trends in the use of the different alternative dispute resolution methods?

Although all methods of alternative dispute resolution have become more common in Canada in recent years, the enactment of legislation regulating commercial mediation in Ontario and Nova Scotia is an important development.

These laws impose a number of significant rules on mediations. In particular, mediators are under a positive duty to investigate any potential conflicts of interest, and to information parties of such circumstances. In addition, the laws impose confidentiality requirements on the mediator, the parties, and anyone else involved in the mediation. Although it is certainly possible to agree to these matters by contract, having them in the legislation as default rules makes it cheaper, easier, and safer for parties to mediate.

The laws also make it easier to enforce a settlement coming out of mediation, allowing the party seeking enforcement to avoid the expense of suing for breach of contract.

Especially if this trend continues and the UNCITRAL Model Law on International Commercial Conciliation is adopted in additional jurisdictions, mediation will likely become even more attractive to parties in Canada.

3.2 Please provide, in no more than 300 words, a summary of any current issues or proceedings affecting the use of those alternative dispute resolution methods in Canada?

The Supreme Court of Canada has decided two recent cases dealing with arbitration.

In *Yugraneft Corp. v. Rexx Management Corp.*, 2010 SCC 19, the Court held that an application to enforce a foreign international arbitration award under the New York Convention is required to conform to a domestic limitation period. That case concerned an application brought in Alberta to enforce a Russian arbitration award and the application was brought more than three years after the arbitration award. Even though there was a ten-year limitation period on an application to enforce a domestic or foreign judgment, Rexx Management argued that the application to enforce an arbitral award was instead governed by the two-year general limitation period under the Alberta statute of limitations.

All three levels of court accepted Rexx Management's argument that the application was statute-barred. In effect, the Supreme Court of Canada held that the list of grounds in the New York Convention on which a domestic court can refuse to enforce a foreign arbitral award was not exhaustive. In accordance with the general rules relating to interpretation of treaties, practice in other countries, and scholarly opinion, the Court held that limitation periods constitute an additional ground of non-enforcement.

In *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, the Supreme Court of Canada dealt with a conflict between a broad arbitration clause in a consumer's mobile phone contract and a provision in provincial consumer protection legislation purporting to protect consumers' rights to access the courts. In a 5-4 decision, the Supreme Court held that the provincial legislation trumped the arbitration clause, and permitted the consumer to bring a class action relating to consumer protection claims. The strongly-worded dissent criticised the majority decision's "hostility to arbitration". It remains to be seen whether *Seidel* represents a broader retreat from Canadian courts' recent enthusiasm for enforcing arbitration agreements.

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