Kluwer Arbitration Blog

It’s a Beautiful Day in the Neighborhood? An Overview of Arbitration Law in the U.S. and Canada

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Introduction

The United States and its neighbor to the north, Canada, share the world’s longest border, a common language, and similar values, resulting in one of the most stable and mutually beneficial international business relationships in the world. Indeed the United States is Canada’s largest trading partner, and Canada is the United States’ second largest trading partner. As Mr. Rogers eloquently put it, “it’s a beautiful day in the neighborhood”. However, even with the most stable business relationships, disputes inevitably arise.

The United States and Canada have incorporated arbitration into their legal regimes in similar manners, but a number of critical differences exist of which U.S. companies doing business in Canada and vice-versa should be aware. This article addresses several important issues that parties doing business between the United States and Canada should consider when drafting an arbitration clause to ensure that the clause meets their expectations.

Sources of Law

United States: The Federal Arbitration Act (“FAA”) regulates domestic and international arbitrations in which the underlying transaction involves “interstate commerce”, such as transactions between the U.S. and Canada. The federal government has not adopted the UNCITRAL Model Law, but federal courts have interpreted the FAA consistently with the UNCITRAL Model Law. But where underlying transactions take place completely within one state, that state’s arbitration acts govern. Most states have adopted some version of the Uniform Arbitration Act, and some have adopted variations of the UNCITRAL Model Law.

Canada: In contrast to the United States, the key legislation governing arbitration in Canada is found primarily at the provincial or territorial – rather than the federal – level. While a federal arbitration statute does exist, it applies only in limited circumstances where at least one of the parties to the arbitration is the Crown, a federal departmental corporation, or a Crown corporation. The legislation governing Canadian arbitrations is largely the realm of the provinces, which have enacted discrete statutes pertaining to both international and domestic arbitrations. With the exception of Quebec, each province and territory has adopted the UNCITRAL Model Law either

wholesale or in modified form. In addition to international arbitration statutes, all provinces and territories have adopted separate legislation governing domestic arbitration.

Arbitration Rules

United States: The FAA provides some foundational rules for arbitration proceedings such as requiring that arbitration agreements be in writing, but leaves much of the details to the parties. Regardless of the parties' agreement, the FAA allows parties to "summon . . . any person to attend before them . . . as a witness". In terms of review, the FAA allows courts to vacate an arbitral award only on limited grounds, including "corruption, fraud, or undue means". Parties have the option of conducting an ad hoc arbitration or administering an arbitration through any number of arbitration institutions, such as JAMS, CPR, or AAA, among others.

Canada: Legislation governing international arbitrations which incorporate the UNCITRAL Model Law typically require that a binding arbitration agreement be in writing and signed by the parties. The formal requirements for domestic arbitration agreements are found in provincial legislation, which differ between the provinces. As in the United States, parties to Canadian arbitrations have significant flexibility to choose their own arbitral procedure and may adopt a specific set of arbitration rules from an arbitral institution or create their own ad hoc procedural rules. Canada has a strong tradition of ad hoc domestic arbitration while institutes are becoming more established. The ADR Institute of Canada, based in Toronto, has adopted the National Arbitration Rules relating to domestic disputes, while the British Columbia International Commercial Arbitration Centre is often used for arbitrations centered in Vancouver.

Class Actions

United States: The U.S. Supreme Court has explained that, due to the flexibility and contractual nature of arbitration agreements, parties can "specify with whom they choose to arbitrate their disputes" and courts and arbitrators must "give effect to the contractual rights and expectations of the parties". In cases where an arbitration agreement is silent on class actions, the U.S. Supreme Court has held that an arbitrator cannot institute a class action because it would "change the nature of arbitration to such a degree that it cannot be presumed the parties consented to it by simply agreeing to submit their disputes to an arbitrator". For the same reason, an ambiguous arbitration agreement cannot provide "the necessary 'contractual basis' for compelling class arbitration". Agreements that waive class action rights are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract".

Canada: Arbitration clauses are typically enforceable in the context of commercial contracts but may be unenforceable in the context of consumer contracts. Several Canadian provinces have amended their consumer protection statutes to limit the circumstances in which consumer disputes (including class actions) may be submitted to arbitration. Canadian courts have interpreted such legislation as permitting consumer class proceedings despite the existence of mandatory arbitration clauses in the underlying consumer contracts. While the use and permissible scope of arbitration clauses in employment contracts is the subject of ongoing litigation before the Supreme Court of Canada, parties should be mindful that such clauses may not be fully enforceable in the Canadian employment context by virtue of the governing employment legislation.

Conclusion

As it's not always a "beautiful day in the neighborhood", U.S. companies doing business in Canada and vice-versa should be aware of the similarities and notable differences between the U.S. and Canadian arbitration regimes. By properly understanding these similarities and differences, contract drafters can ensure that an arbitration clause fully meets the expectations of the parties.

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