# Kluwer Arbitration Blog

## “Do You Know What Your Neighbour Is Doing?”: Understanding Key Differences in International Arbitration in the U.S and Canada

Rachel Howie, Diora Ziyaeva (Dentons) · Monday, April 25th, 2022

A dual webinar series “Do You Know What Your Neighbour is Doing?” (available at links here and here) recently hosted by Dentons provided an overview of how to navigate international arbitration in the United States (“US”) and Canada. The first webinar was moderated by Rachel Howie, FCIArb (Calgary). It featured three panelists who discussed international arbitration in the US: John J. Hay (New York, Head of the US International Dispute Resolution group), Kristen Weil (New York) and Diora Ziyaeva (New York). The second webinar was moderated by Diora Ziyaeva, with three panelists: Mike Schafler, FCIArb, QArb (Toronto, Member of the Dentons Canada Region Board), Chloe Snider (Toronto), and Rachel Howie, all of whom addressed international arbitration in Canada.

The two webinars engaged in wide ranging discussions to familiarize businesses operating in either the US or Canada with practical differences in international arbitration systems between these countries. While similar in some respects, there are also critical differences as discussed below.

### Arbitration Legislation

International arbitration in the US is governed by the *Federal Arbitration Act* (“**FAA**“). However, state law can also be relevant, if not contradictory to federal law (e.g., parties can contract to apply state arbitration law in commercial transactions. If there is a conflict between state and federal arbitration law, parties’ choice of law will not override the FAA. (*Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52 (1995)). This is in contrast to Canada where each province and territory has separate and specific legislation governing international arbitration, except for Quebec where the *Code of Civil Procedure* governs both domestic and international arbitrations. Generally, these statutes addressing international arbitration (including in Quebec) are based on the UNCITRAL Model Law. That does not mean these statutes are without difference. Some provinces have customized their legislation adding specific details. There is also federal legislation, the *Commercial Arbitration Act*, which applies when an international arbitration involves the Crown or any Crown corporation, or admiralty and maritime matters.

## Arbitral Institutions

There is a strong tradition of *ad hoc* arbitration in Canada that is not shared in the US. While there has been a shift of late toward institutional arbitration, and an increase in Canadian-based arbitral institutions, many dispute resolution clauses still refer disputes to *ad hoc* arbitration. See an earlier blog posting for more detail on this tradition. A key issue flagged by the panel in this regard is that under most legislation in Canada, if the arbitration is truly *ad hoc* then if the parties cannot agree on an arbitrator a party will need to apply to the appropriate court to have an arbitrator appointed. Given the timelines for this type of an application in many courts it may be prudent to, at a minimum, include in the dispute resolution clause agreement on an arbitral institution to act as appointing authority (and there are many institutions that will do this, even if their rules are not subsequently used and the institute does not ultimately administer the dispute).

The arbitral institutions commonly referred to in both countries provide to parties a range of choices in applicable rules for an arbitration. Institutional rules can differ in certain respects (for example, different thresholds for expedited procedure rules, or different approaches to consolidation), and therefore businesses must recognize what rules would benefit them the most when choosing an arbitral institution. One example highlighted by the panel is the potential for companies with smaller, more routine disputes, that they wish to refer to arbitration to draft into their dispute resolution clauses agreement to institutional arbitration using rules with an expedited procedure. This way those companies can look to streamline their own approaches to the disputes with their business and in-house teams.

## Arbitration Procedure

The procedure for an arbitration is essentially a function of the arbitration clause, governing legislation and the rules (if any) governing the arbitration; this did not vary between the countries. With that in mind, the panelists from both webinars raised three differences between the US and Canadian systems that businesses should remain conscious of: arbitral jurisdiction, discovery and costs.

### *Arbitral Jurisdiction*

An important discussion between the panelists centered on the arbitrator's jurisdiction. In Canada, as in many jurisdictions, the principle of competence-competence generally dictates that the arbitrator has the power to rule on questions of their jurisdiction. This is enshrined in legislation and case law. As a result, the arbitrator will usually be the one to determine their jurisdiction and whether a matter is arbitrable. In contrast, in the US, there is no default rule giving the arbitrators the authority to decide their own jurisdiction and the arbitrability of the matter at issue. Rather, the court will decide whether the question of arbitrability has been delegated to the arbitrators. In doing so, the FAA provides that a presumption of arbitrability is applied when assessing whether a matter falls within the scope of the arbitration clause.

Generally, the courts in the US will determine arbitrability, unless there is clear and unmistakable evidence that the parties agreed to have the issue decided by the arbitrator. Therefore, as explained by Diora Ziyaeva, "the recent trend has been for courts to find that the issue of arbitrability has been delegated to the arbitrator." (*See e.g., First Options of Chicago, Inc v Kaplan,* 514 US 938, 944-45 (1995); *AT&T Technologies, Inc v Communications Workers,* 475 US 643, 649 (1986) and

further discussion here.) However, the language of the arbitration clause or institutional rules can provide that the arbitrator shall decide upon their own jurisdiction. Notably, in its fairly recent decision, the US Supreme Court held that when an arbitration agreement contains a clear and unmistakable delegation of authority to the arbitrator, the issue of arbitrability must be decided by the arbitrator. (*Henry Schein, Inc v Archer & White Sales, Inc*, 139 S Ct 524 (2019).) However, there are lower courts that still found that when an arbitration claim is groundless, the issue of arbitrability is to be decided by the court, notwithstanding a clear and unmistakable delegation of authority. (*See e.g., Metropolitan Life Insurance Co v Bucsek*, 919 F3d 184 (2d Cir), cert. denied, 140 S Ct 256, 205 L Ed 2d 134 (2019); *20/20 Communications, Inc v Crawford*, 930 F3d 715 (5th Cir 2019).)

In Canada, the arbitrator generally decides on their jurisdiction in international arbitrations unless the issue was one of a pure question of law or a question of mixed fact and law that necessitated only a superficial consideration of the evidence. As such, Canadian courts are directed to follow this procedure, but may depart from this rule if there are issues of access to justice, such as where an agreement to arbitrate is unconscionable, as Dentons has discussed in the past.

***Discovery***

Other procedural differences can influence the arbitration process. As is well-known, the discovery process in US litigation is long and tedious. In the words of one of the panelists, US lawyers depose "anything that moves," and this process will sometimes find its way into international arbitrations. In contrast, Canadian lawyers rarely incorporate an oral discovery process in international arbitration cases. The significance of this difference is that businesses can avoid time-consuming discovery in the US by ensuring that the institutional rules agreed to by the parties are those that limit discovery processes. As pointed out by Kristen Weil, "careful drafting of [a] dispute resolution clause can avoid very costly problems in the future."

***Costs***

As for lawyer fees, generally the case in Canadian law is that costs follow the event and are awarded to the successful party (*see e.g., Alberta Rules of Court*, AR 124/2010, rule 10.29(1)). However, in the US, the general legal principle is that parties bear their own costs unless they have contracted otherwise. As such, in order for a prevailing party to obtain an award on costs in the US, it must carefully consider the applicable arbitration rules that actually provide for prevailing party fees (because some do not). On the other hand, a party can overcome the provision in the rules by agreeing to the costs allocation in the contract. Parties in Canada may also want to address costs in their dispute resolution provision if they want to be clear that the successful party shall be awarded costs (local laws or rules may not apply to an international arbitration), or if they would prefer that each party bear their own costs.

**Takeaway Points**

The guidance from the panelists' insights on navigating international arbitration in the US and Canada can be summarized in the following points: *first*, always be mindful of the applicable statutes in either country, both federal and state/provincial; *second*, always be conscious of the above-mentioned differences especially when drafting arbitration clauses. In particular, when drafting arbitration clauses, it is important to: (1) look for key items, such as a clause that provides

for a binding submission of all disputes to arbitration, the applicable laws, a recognized seat and language; (2) determine whether an *ad hoc* arbitration or a specific institution are preferrable to you (as appointing authority or for the entire dispute), considering whether their applicable rules best fit the circumstances of your business relationship; (3) consider, when choosing a seat of arbitration, the applicable court system's treatment of arbitration, as the court will have a supervisory role; and (4) in the US, be aware of including or excluding discovery procedures and, most importantly, the delegation of the power to rule on arbitrability to the arbitrator.

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