

**Arbitration Law of Canada:  
Practice and Procedure**

**Second Edition**

**J. Brian Casey**

**JURIS**

**Questions About This Publication**

For assistance with shipments, billing or other customer service matters, please call our Customer Services Department at:

1-631-350-2100

To obtain a copy of this book, call our Sales Department:

1-631-351-5430

Fax: 1-631-351-5712

Toll Free Order Line:

1-800-887-4064 (United States & Canada)

See our web page about this book:  
[www.jurispub.com](http://www.jurispub.com)

COPYRIGHT © 2011  
by JurisNet, LLC

---

All Rights Reserved  
Printed in the United States of America  
ISBN 978-1-933833-96-5

JurisNet, LLC  
71 New Street  
Huntington, New York 11743  
USA  
[www.jurispub.com](http://www.jurispub.com)

# TABLE OF CONTENTS

	<b>Page No.</b>
<b>Acknowledgements to the Second Edition</b> .....	xvii
<b>Acknowledgements to the First Edition</b> .....	xix
<b>Foreword to the First Edition</b> .....	xxi
<b>Table of Cases</b> .....	xxiii
<b>Glossary</b> .....	lvii
<b>Practice Notes Index</b> .....	lix
<b>Chapter 1, Introduction to Commercial Arbitration</b> .....	<b>1</b>
1.1 Historical Background .....	1
1.2 Modern Hallmarks of Arbitration .....	5
1.3 Other Common Forms of Dispute Resolution .....	7
1.3.1 Mediation.....	7
1.3.2 Conciliation.....	9
1.3.3 Drafting a Mediation/Conciliation Clause.....	10
1.3.4 Mini-Trial .....	11
1.3.5 Expert Determination and Valuation .....	12
1.3.6 Amiable Compositeur and Decisions Ex Aequo et Bono.....	14
1.3.7 Final Offer Arbitration.....	15
1.3.8 Hybrid Forms of Dispute Resolution.....	15
1.4 When to Consider Arbitration.....	18
<b>Chapter 2, Application and Scope of the Legislation</b> .....	<b>21</b>
2.1 Overview.....	21
2.2 Application and Scope of Federal Legislation.....	22
2.3 Provincial Legislation .....	24
2.4 Washington Convention .....	33
2.5 Application and Scope of the Provincial International Commercial Acts .....	34
2.6 Contracting out of the International and Domestic Acts.....	38
2.7 Oral Arbitration Agreements .....	42
2.8 Inter-Provincial Arbitration .....	43
2.9 Practice Notes—Characterizing the Agreement .....	43

## ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE

2.10	Proper Law of the Contract Distinguished from the Law of the Arbitration.....	44
2.11	Judicial Interpretation of the Domestic, International and Federal Acts .....	46
2.12	Party Autonomy .....	48
<b>Chapter 3, The Arbitration Agreement .....</b>		<b>49</b>
3.1	Arbitration Agreement Defined .....	49
3.2	Autonomy of Arbitration Agreement.....	50
3.3	The Law Applicable to the Agreement to Arbitrate .....	56
3.4	Arbitration Agreement as Contract.....	57
	3.4.1 Consensus Ad Idem .....	58
	3.4.2 Implied Agreement to Arbitrate.....	60
	3.4.3 Incorporation by Reference .....	61
3.5	Associated Parties and Assignees .....	63
	3.5.1 Operation of Law .....	63
	3.5.2 Additional Parties by Agreement of the Parties.....	66
	3.5.3 By Later Agreement of the Parties .....	66
3.6	Court Enforcement under the Domestic Acts .....	67
	3.6.1 Incapacity.....	67
	3.6.2 Invalidity.....	68
3.7	Court Enforcement under the Model Law .....	68
	3.7.1 Null and Void .....	69
	3.7.2 Inoperative .....	69
	3.7.3 Incapable of Being Performed .....	71
3.8	Termination.....	71
	3.8.1 Death.....	72
	3.8.2 Bankruptcy.....	72
3.9	Interpreting the Arbitration Agreement .....	73
3.10	Public Policy Considerations and Statutory Claims .....	80
3.11	<i>Scott v. Avery</i> Clauses .....	83
3.12	Negotiating and Drafting an Arbitration Agreement .....	83
	3.12.1 General Considerations.....	83
	3.12.2 What Is to Be Arbitrated: The Scope of the Clause.....	86
	3.12.3 Practice Note—Example of an Ad Hoc Clause .....	89
	3.12.4 Before Whom is It to Be Arbitrated?.....	89
	3.12.5 Where Is It to Be Arbitrated?.....	93
	3.12.6 Practice Note—Choosing the Place of Arbitration.....	95
	3.12.7 Institutional or Ad Hoc .....	95
3.13	Commencing Arbitration and Service .....	100

## TABLE OF CONTENTS

3.14	Third Party and Multi-Party Disputes.....	101
3.15	Consumer and Class Actions .....	104
3.16	Optional Arbitration Clauses .....	105
	3.16.1 Practice Note—Optional Arbitration Clauses.....	108
3.17	Agreement to Arbitrate after a Dispute has Arisen: Submissions .....	108
3.18	Stepped or Progressive Dispute Resolution Clauses .....	109
	3.18.1 Negotiation .....	109
	3.18.2 ADR.....	111
	3.18.3 Practice Note-enforcement of Progressive or Stepped Clauses .....	114
3.19	Breach of Arbitration Agreement .....	114
 <b>Chapter 4, Commencing the Arbitral Process and Choosing an Arbitrator .....</b>		
		117
4.1	Rules Regarding Commencement.....	117
4.2	Form of Commencing Document .....	118
4.3	Service of Commencing Document.....	119
	4.3.1 Practice Note—Commencing Arbitration .....	121
4.4	Time Limits and Limitation Periods.....	122
	4.4.1 Time Limits in the Agreement.....	122
	4.4.2 Relief from Contractual Time Limits .....	123
	4.4.3 Limitation Act time limits.....	125
	4.4.4 Practice Note—Time Limits .....	126
4.5	Commencement and Empowerment.....	126
4.6	Composition of the Arbitral Tribunal .....	127
4.7	Choosing an Arbitrator .....	128
	4.7.1 What to Look For In an Arbitrator.....	129
	4.7.2 Finding an Arbitrator .....	129
	4.7.3 Party Appointment of a Sole Arbitrator.....	130
	4.7.4 Appointing Authority Appointments .....	131
	4.7.5 Institutional Assistance .....	131
	4.7.6 Court Assistance in Appointment.....	131
	4.7.7 Three Arbitrators .....	132
	4.7.8 Powers of the Chair .....	132
4.8	Independence and Impartiality.....	133
	4.8.1 Independence .....	133
	4.8.2 Impartiality and Bias.....	135
	4.8.3 Disclosure Guidelines.....	139
	4.8.4 Nationality .....	141

## ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE

4.8.5	The Partisan Arbitrator .....	142
4.8.6	Practice Note—Choosing an Arbitrator.....	144
4.9	Challenge .....	147
4.9.1	Reasonable Apprehension of Bias .....	147
4.9.2	Qualifications of Arbitrators.....	148
4.9.3	Method of Challenge .....	148
4.9.4	Practice Note—Challenge.....	149
4.9.5	Waiver.....	150
4.10	Counsel to the Tribunal.....	151
4.11	Clerks and Registrars.....	151
4.12	Termination of Arbitrator’s Mandate.....	152
4.13	Arbitrator’s Immunity from Suit.....	153
4.14	Arbitrator’s Fees .....	155
4.14.1	Practice Note—Arbitrator’s fees .....	156
<b>Chapter 5, The Arbitral Tribunal’s Jurisdiction .....</b>		<b>159</b>
5.1	The Jurisdiction to Decide Jurisdiction.....	160
5.1.1	Jurisdiction under the Domestic Acts .....	160
5.1.2	Jurisdiction under the Model Law .....	161
5.1.3	Jurisdiction of the Court to Determine the Arbitrator’s Jurisdiction.....	161
5.2	Jurisdiction over the Parties.....	162
5.3	Jurisdiction to Determine the Applicable Rules of Law .....	164
5.4	Subject Matter Jurisdiction and Jurisdiction to Craft a Remedy .....	165
5.5	Objection to Jurisdiction.....	167
5.5.1	Waiver.....	167
5.5.2	Court Review of Jurisdiction .....	168
5.6	Exceeding Authority during the Arbitration.....	169
5.7	Jurisdiction to Determine Procedure.....	170
5.8	Jurisdiction to Make Interim Preservation Awards .....	171
5.8.1	The Test for an Interim Measure of Protection.....	173
5.8.2	Practice Note—Interim Measures.....	174
5.9	Jurisdiction to Award Interest.....	176
5.9.1	Interest under the Domestic Acts.....	176
5.9.2	Interest under the Model Law .....	177
5.10	Jurisdiction to Award Costs.....	179
5.10.1	Costs under the Domestic Acts.....	179
5.10.2	Costs under the Model Law .....	180
5.10.3	Practice Notes—Costs .....	182

## TABLE OF CONTENTS

5.11	Jurisdiction to Award Security for Costs .....	183
5.11.1	Security for the Tribunal’s Fees and Costs .....	183
5.11.2	Jurisdiction to Award Security for the Costs of a Party .....	184
5.12	Jurisdiction upon Settlement .....	186
5.12.1	Practice Note—Settlement .....	186
<b>Chapter 6, Conduct of Arbitral Proceedings .....</b>		<b>187</b>
6.1	Rules of Procedure .....	187
6.2	Preliminary Hearings and Preliminary Meetings .....	190
6.2.1	Practice Notes—First Procedural Hearing .....	191
6.2.2	Communications .....	195
6.2.3	Conduct of Counsel .....	196
6.3	Statements .....	196
6.3.1	Domestic Acts .....	196
6.3.2	Model Law .....	198
6.3.3	Supplementary Statements or Amending Statements .....	199
6.3.4	Failure to Submit Statements .....	199
6.3.5	Practice Note—Pleadings .....	200
6.4	Terms of Reference and Submissions .....	201
6.5	Production of Documents and Pre-hearing Discovery .....	202
6.5.1	Document Disclosure and Exchange .....	203
6.5.2	Pre-hearing Oral Examination .....	208
6.5.3	Discovery from Non-parties .....	209
6.6	Method of Hearing .....	210
6.6.1	Basic Requirements for a Hearing .....	210
6.6.2	Waiver .....	211
6.7	Adjournments .....	213
6.8	Time and Place of Arbitration Hearing .....	214
6.8.1	Distinguishing the Place of Arbitration from the Place of Hearing .....	214
6.9	Privacy and Confidentiality .....	216
6.9.1	Privacy of the Arbitration .....	216
6.9.2	Confidentiality of the Arbitration .....	217
6.9.3	Practice Note—Confidentiality .....	220
6.9.4	Exceptions to Confidentiality .....	221
6.9.5	The Deemed Undertaking Rule .....	225
6.10	Amicus Curiae .....	226

## ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE

6.11	Delay of Proceedings.....	227
	6.11.1 Delay by a Respondent .....	227
	6.11.2 Delay by Claimant .....	230
	6.11.3 Delay by Tribunal.....	231
6.12	Rules of Evidence .....	232
	6.12.1 Domestic Acts.....	232
	6.12.2 Model Law.....	233
	6.12.3 Rulings on Evidence .....	235
6.13	Evidence at a Hearing.....	235
	6.13.1 Witness Statements as Evidence.....	235
	6.13.2 Oral Evidence under Oath.....	236
	6.13.3 Compelling Answers from Witnesses.....	237
	6.13.4 Compelling Non-parties to Appear.....	238
	6.13.5 Obtaining Testimony and Documents from a Witness out of the Jurisdiction.....	241
	6.13.6 Restrictions on Evidence .....	243
6.14	Expert Evidence.....	244
	6.14.1 Expert Appointed by Tribunal .....	244
	6.14.2 Expert Reports .....	245
	6.14.3 Other Methods of Presenting Expert Evidence.....	247
6.15	Order of Presentation .....	247
6.16	Exclusion Orders.....	248
6.17	Hearsay v. Natural Justice .....	248
6.18	Cross-examination .....	249
	6.18.1 Cross-examination and Natural Justice.....	249
	6.18.2 Practice Note—Time Limits on Examinations .....	251
6.19	Inspection of Property or Documents .....	251
6.20	Representation by Counsel .....	252
6.21	Keeping a Record.....	253
6.22	Contractual Time Limits.....	254
6.23	Practice Note—The Arbitral Hearing .....	256
	<b>Chapter 7, Court Involvement in the Arbitral Process .....</b>	<b>259</b>
7.1	Introduction.....	259
7.2	Constitutionality of Agreement to Oust Court’s Jurisdiction ..	262
7.3	Breach of the Agreement to Arbitrate.....	262
7.4	Stay of Court Proceedings .....	263
	7.4.1 The Standard of Review .....	266
	7.4.2 Grounds to Refuse a Stay under the Domestic Acts.....	268
	7.4.3 Grounds to Refuse a Stay under the Model Law .....	278



## TABLE OF CONTENTS

7.4.4	Arbitration Agreement Covering only Part of Court Claim.....	283
7.4.5	Additional Parties .....	289
7.4.6	Residual Discretion to Refuse a Stay.....	292
7.4.7	Can the Plaintiff Seek a Stay?.....	292
7.4.8	Lack of Remedy.....	293
7.4.9	Effect of Refusing a Stay .....	295
7.4.10	Removing a Stay .....	296
7.4.11	Practice Note—Staying Court Proceedings.....	296
7.5	Appeal of Decision Regarding Stay of Court Proceedings.....	298
7.6	Enjoining Arbitration and Anti-suit Injunctions .....	299
7.6.1	Enjoining Arbitration.....	299
7.6.2	Anti-suit Injunctions .....	301
7.7	Court Appointment of Arbitrator .....	302
7.7.1	Domestic Acts.....	302
7.7.2	Model Law.....	303
7.7.3	Appointment of Substitute Arbitrator .....	304
7.7.4	Practice Note—Court Appointment of Arbitrators.....	305
7.8	Interim Preservation Orders.....	305
7.9	Questions of Law .....	307
7.10	Court Enforcement of Arbitral Orders and Directions.....	308
7.10.1	Domestic Acts.....	308
7.10.2	Model Law.....	309
7.11	Appeals from Interim Preservation Orders .....	309
7.12	Court Assistance in Compelling Discovery from a Party .....	311
7.12.1	In the Jurisdiction of the Place of Arbitration.....	311
7.12.2	Practice Note—Court Assistance in Discovery of a Non-party .....	313
7.12.3	Court Aided Discovery in the United States.....	314
7.13	Court Assistance in Taking Evidence .....	315
7.13.1	Domestic Acts.....	315
7.13.2	Model Law.....	316
7.13.3	Practice Note—Court Assistance in Compelling Witness Attendance .....	316
7.14	Court Ordered Extension of Time Limits .....	317
7.14.1	Time Limits in the Agreement.....	317
7.14.2	Time Limits under the Applicable Law of the Contract.....	319
7.14.3	Time Limits under the Arbitration Acts.....	319
7.15	Court Ordered Consolidation.....	320

## ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE

7.16	Court Involvement following Delay or Default of a Party .....	322
7.17	Declaration of Invalidity of Arbitration .....	324
7.18	Bankruptcy .....	326
	7.18.1 Petitioning a Party into Bankruptcy .....	326
	7.18.2 The Effect of Bankruptcy on the Agreement to Arbitrate .....	326
7.19	Removal of Arbitrator .....	328
	7.19.1 Domestic Acts .....	328
	7.19.2 Removal of Arbitrator under the Model Law .....	331
	7.19.3 Failure to Treat Parties Fairly and with Equality .....	331
	7.19.4 Reasonable Apprehension of Bias .....	335
	7.19.5 Practice Note—Removal of Arbitrator .....	341
7.20	Court Review of Jurisdiction .....	343
	7.20.1 Domestic Acts .....	343
	7.20.2 Court Review of Jurisdiction under Model Law .....	344
	7.20.3 Standard of Review .....	344
	7.20.4 Practice Note—Court Review of Jurisdiction .....	346
7.21	Court Ordered Explanation of Award and Deliberative Secrecy .....	347
7.22	Appeals and Setting Aside of Awards .....	348
7.23	General or Residual Powers of Involvement under the Domestic Acts .....	348
	<b>Chapter 8, The Award .....</b>	<b>351</b>
8.1	Definition .....	351
8.2	Final, Partial and Interim Awards .....	352
8.3	Decision of the Tribunal .....	354
8.4	Application of Law and Equity .....	355
	8.4.1 The Award Must Be in Accordance with Law .....	355
	8.4.2 In Accordance with the Terms of the Contract and Usage of the Trade .....	357
	8.4.3 Ex Aequo et Bono .....	358
8.5	Remedies .....	359
	8.5.1 Adaption .....	360
	8.5.2 Rectification .....	361
	8.5.3 Punitive Damages .....	361
8.6	Interest .....	362
	8.6.1 Domestic Acts .....	362
	8.6.2 Model Law .....	362

## TABLE OF CONTENTS

8.7	Costs and Attorney’s Fees .....	365
	8.7.1 Costs under the Model Law .....	365
	8.7.2 Costs under the Domestic Acts .....	367
	8.7.3 Practice Note—Costs .....	369
8.8	Cost Consequences of Offers to Settle.....	369
8.9	Costs of the Arbitrators.....	370
8.10	Form and Content of the Award .....	371
	8.10.1 Dissenting Opinions.....	374
	8.10.2 Practice Note—Writing an Award.....	376
8.11	Denomination of Award .....	378
8.12	Settlement .....	378
8.13	Place of Award .....	378
8.14	Binding Nature of Award .....	379
	8.14.1 Binding as between the Parties .....	379
	8.14.2 Recognized by the Court: Res Judicata and Issue Estoppel .....	380
	8.14.3 Effect on Third Parties .....	381
8.15	Explanation and Correction of Errors and Deliberative Secrecy.....	381
	8.15.1 Explanations .....	381
	8.15.2 Correction of Errors and Additional Awards.....	382
8.16	Practice Notes—Reviewing an Award .....	383
8.17	Confidentiality of the Award .....	384
8.18	Time Limits for Rendering Award .....	387
	<b>Chapter 9, Remedies against Awards .....</b>	<b>389</b>
9.1	Appeal of Procedural and Interlocutory Orders.....	389
9.2	Appeal of Awards .....	390
	9.2.1 Interim Awards .....	390
	9.2.2 Appeals under the Model Law .....	392
	9.2.3 Domestic Appeals .....	394
	9.2.4 Limiting the Right of Appeal.....	395
	9.2.5 Practice Note—Appeals.....	398
	9.2.6 Time Limits for Appeals.....	398
	9.2.7 Application for Leave to Appeal .....	399
	9.2.8 Practice Notes—Leave to Appeal.....	407
	9.2.9 Appeal of the Decision Refusing Leave to Appeal.....	409
	9.2.10 Appeals without Leave .....	410
	9.2.11 Appeal on Questions of Fact or Mixed Fact and Law ..	410
	9.2.12 Appeal of Costs.....	411

## ARBITRATION LAW OF CANADA: PRACTICE AND PROCEDURE

9.2.13	Powers of the Court on Appeal	411
9.3	Enforcement of Award Pending Appeal	412
9.4	Appeal to the Court of Appeal	414
9.5	Setting aside an Award	414
9.5.1	Grounds for Setting Aside an Award	415
9.6	The Standard of Review	421
9.6.1	Lack of Jurisdiction	421
9.6.2	Excess of Jurisdiction	421
9.6.3	Lack of Proper Conduct or Procedure	423
9.7	Waiver	424
9.7.1	Waiver by Express Agreement	424
9.7.2	Waiver by Conduct	424
9.8	Award under Model Law Conflicting with Public Policy	426
9.9	Omissions	427
9.10	Time Limit for Challenge	428
9.11	Extension of Limitation Periods	428
9.12	Stay Pending Application to Set Aside Award	429
<b>Chapter 10, Recognition and Enforcement of Awards</b>		<b>431</b>
10.1	Recognition	431
10.2	Enforcement under the Domestic Acts	432
10.2.1	Unusual Remedies	436
10.3	Enforcement of International Awards	437
10.3.1	The New York Convention	437
10.3.2	The Model Law	439
10.3.3	Similar Treatment of International Awards	440
10.3.4	Grounds for Refusing Recognition or Enforcement	440
10.3.5	Public Policy	442
10.3.6	Practice Note—Public Policy	448
10.3.7	Waiver or Estoppel	448
10.3.8	Stay of Enforcement	450
10.3.9	Enforcement Notwithstanding Supervisory Court Annulment	452
10.4	Limitation Periods	453
10.4.1	Domestic Act Limitation Periods	453
10.4.2	Limitation Periods regarding International Awards	454
10.5	Practice Note—Enforcement of Awards	456
10.5.1	Domestic Acts	456
10.5.2	International Acts	457
10.6	Enforcement of Partial and Interim Awards	458

## TABLE OF CONTENTS

	<b>Page No.</b>
<b>Index</b> .....	461
<b>Appendices</b> .....	APP-1
Redfern Schedule.....	APP-1
Alberta Arbitration Act.....	APP-3
Alberta International Commercial Arbitration Act.....	APP-29
British Columbia Commercial Arbitration Act.....	APP-55
British Columbia International Commercial Arbitration Act.....	APP-71
British Columbia Foreign Arbitral Awards Act.....	APP-93
Ontario Arbitration Act, 1991.....	APP-101
Ontario International Commercial Arbitration Act.....	APP-135
UNCITRAL Model Law (1985).....	APP-155
UNCITRAL Arbitration Rules (2010).....	APP-203
IBA Guidelines on Conflicts of Interest in International Arbitration .....	APP-233
IBA Rules on the Taking of Evidence in International Arbitration.....	APP-257
ADR Institute of Canada National Arbitration Rules .....	APP-275
ADR Institute of Canada Mediation Rules .....	APP-295
ADR Chambers Arbitration Rules .....	APP-315
ADR Chambers Arbitration Rules .....	APP-327
CCAC General Commercial Arbitration Rules .....	APP-341
CCAC International Arbitration Rules .....	APP-353
American Arbitration Association ICDR Rules.....	APP-375
ICC Arbitration and ADR Rules (2012).....	APP-409
LCIA Arbitration Rules .....	APP-467

