Alternate Dispute Resolution: Project Neutrals, DRBs, DABs, Mediation & Arbitration

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Overview

Presentation provides a brief summary, in turn, of each of the following ADR processes

• Project Neutral
• Dispute Review Boards
• Dispute Adjudication Boards
• Mediation
• Med-Arb (Mediation transitioned to Arbitration)
• Arbitration

• “In search of the better mousetrap” but no “one size fits all” solution
Project Neutral
Project Neutral

- **Project Neutral** sometimes referred to as:
  - Standing Neutral
  - Referee
  - Standing Mediator
  - Initial Decision Maker

- No statutory authority – role and responsibilities governed entirely by contract
- Potentially quick and effective dispute resolution procedure through real time dispute facilitation
- Mixed success in practice
Project Neutral (cont’d)

• **Project Neutral** can fill variety of roles and be “On Call” or in a “Standing Neutral” position:
  - Neutral expert called upon to render expert opinion(s) to the parties
  - Facilitator of partnering processes and of negotiations

• **Project Neutral often an ADR specialist:**
  - Retained at outset for duration of project
  - Familiar with the project plans and specifications
  - Regularly kept up to date on the status of the project
  - “On call” during construction to immediately step in and help resolve disputes that cannot be settled by the parties.
Project Neutral (cont’d)

• **Project Neutral can be:**
  - A consultant or construction expert who provides non-binding opinions
  - A mediator who facilitates the parties’ negotiations

• **Project Neutral can be similar to “One Person” DRB**

• **Project Neutral objectively analyzes & evaluates specific issues of liability, costs, schedule impact & damages, and make recommendations to parties.**

• **Project Neutral does not make a decision for parties and typically does not issue a result binding on the parties**
DRBs
Dispute Review Boards
DRBs – Dispute Review Boards

• **Background:**
  - Originated out of underground construction work
  - First DRB guidelines published in 1985 and revised in 1991 by the American Society of Civil Engineers

• **Dispute Review Board Foundation (DRBF)**
  - [www.drb.org](http://www.drb.org)
  - Organization “dedicated to promoting the avoidance and resolution of disputes worldwide using the unique and proven Dispute Board (DB) method”
  - Provides resources to the industry relating to DRBs, as well as conferences and training programs for prospective DRB members
DRBs – Dispute Review Boards (cont’d)

• No statutory basis – entirely creature of contract

• DRB General Concept
  • DRB comprised of 3 members who are respected and experienced with the industry
  • DRB formed before construction commences
  • DRB meets periodically at site and keeps abreast of status of project and any emerging issues
  • DRB hearing may be requested by either party at any time
  • DRB hearings held promptly and are informal
  • DRB recommendations are not binding, but may be considered by arbitral tribunals and courts
DRBs – Dispute Review Boards (cont’d)

• **Advantages of DRB**
  
  • DRB panel chosen by agreement of parties at outset
  
  • DRB members experienced professionals, knowledgeable in construction disputes and also DRB processes
  
  • DRB members, through regular site meetings, kept informed and thus can quickly hear dispute and render recommendation within a short time period
  
  • Either party can bring an issue to DRB at any time
  
  • Hearings are held informally and promptly
Some Issues to Consider

- As a creature of contract, many variations and gradations of DRB processes exist as contracts often drafted by people with little experience in drafting of DRB provisions
- Sometimes contracts provide DRB decision is binding unless disputed, essentially moving the DRB from a DRB to a DAB
- DRBs sometimes fail to get off the ground due to poor or inadequate contract provisions establishing and governing role, responsibilities, liabilities and indemnities of DRB members
Some Issues to Consider (cont’d)

• If DRB recommendations or decisions are followed but disputed by one party, and if ultimately arbitrator or court rules in that party’s favour, how can parties be placed back in their original positions?
  • E.g. DRB makes recommendation on interpretation of specification regarding equipment to be designed and supplied. Owner disputes and ultimately arbitrator agrees with Owner, but it is no longer feasible to change the equipment so what remedy will Owner have?
  • E.g. DRB makes recommendation that there is a “change” for which Owner required to $ million for the “change”. At end of project, arbitrator decides there was no change, but in the meantime Contractor has become bankrupt. How does Owner recover that money?
DABs
Dispute Adjudication Boards
DABs - Dispute Adjudication Boards

- Presently no statutory basis in Canada and so entirely a creature of contract
- Found in various forms of contracts, including FIDIC Red Book
  - Often mentioned, but not commonly, used in Canada
  - Often confused with DRBs
- Impartial and independent panel of 1 or 3 persons
- DAB can be:
  - permanent standing body during duration of contract, or
  - “ad hoc” to decide individual disputes
- Expedited dispute resolution process
DABs - Dispute Adjudication Boards (cont’d)

• Unlike a DRB, DAB process intended to be form of “adjudication” and to settle disputes at outset
  • Decisions binding, unless written notice of dissatisfaction with decision given within xxx (usually 28 or 30) days of decision
  • If notice of dissatisfaction given, decision is provisionally “binding” in that it stands until dispute resolution process to resolve dissatisfaction is completed (e.g. by arbitration)

• DAB is usually deemed not to act as arbitrator
  • Although not acting as arbitrator, assumed courts will consider DAB decision valid as a creature of the contract
  • BUT – how can DAB decision be enforced?
DABs - Dispute Adjudication Boards (cont’d)

• DAB process also often fails to comply with requirements for arbitration under arbitration legislation and thus can not produce an arbitral award
  • Result: DAB decision can not be enforced directly as an arbitral award
  • To enforce, resort must be had to arbitration or litigation for an order by an arbitrator or court

• An Arbitral Award that enforces a DAB decision is enforceable (assuming Arbitral Award properly obtained and enforceable)
Mediation
What is Mediation?

- A voluntary and informal alternative dispute resolution method using a neutral third party mediator to assist two or more parties to resolve their dispute and reach a voluntary settlement.
- Mediator is chosen by the parties and facilitates negotiation, proposes solutions, encourages communication among the parties.
- Mediator has no binding decision making power.
- Where voluntary settlement is reached, only becomes binding when parties conclude a settlement agreement.
- Assisted negotiation.
Mediation – Advantages and Characteristics

- Voluntary participation
- Parties may terminate the process at any time
- Parties meet privately with mediator to resolve dispute on their own timing
- Confidential and without prejudice and cannot be used in court
- Participants lead the process
- Usually faster than arbitration or litigation
- Efficient and cost-effective
Mediation – Advantages and Characteristics (cont’d)

• Costs may vary depending on how many parties and issues are involved
• Tailor made solutions to disputes
• Preserves business relationships with minimal risk
• Opportunity to explore other side’s case without the cost of discovery
• High chance of settlement (but not assured)
• Where settlement reached avoids costly adversarial process of arbitration or litigation
• Parties avoid having an adversarial hearing with a judge or arbitrator imposing a decision on them
Mediation – Advantages and Characteristics (cont’d)

• Generally, two types of mediation
  • Facilitative –
    • mediator asks questions, normalizes parties’ positions
    • assists parties to explore and analyze options, does not make recommendations or provide opinions
  • Evaluative –
    • mediator assists parties in reaching resolution by pointing out weakness in each parties’ position based on facts and law, offers opinion on what a judge/arbitrator may decide
    • may make recommendations or suggestions on settlement amounts.

• Depending on the mediation, sometimes the mediator may be asked to move from a facilitative to evaluative role
Mediation – Practical and Strategic Issues

- Initiating Mediation
  - No disadvantage to initiating mediation process but always keep limitation period in mind
  - Can use a tiered mediation-arbitration clause (caution)
  - Available at any time during a dispute (prior to receipt of a judgment)
Mediation – Practical and Strategic Issues

• **Selection of Mediator**
  
  • Judge, Lawyer, Expert?
    
    • An understanding of mediation process is essential, and should have some training and experience as mediator
  
  • Depends on circumstances of each dispute
  
  • Facilitative mediation can be effective with an experienced mediator who understands the legal process but who is not necessarily an expert on the subject matter in dispute
  
  • Evaluative mediation works best where mediator has indepth knowledge or is an expert on the subject matter
  
  • Ask for a litigator’s input on appropriate mediators

• **Selection of Mediator may determine process, based on preferences of Mediator**
Med-Arb

Mediation Transition to Arbitration
“Med-Arb” is a process that starts as a mediation and, at some point agreed by the parties, transitions to and becomes an arbitration process.

No standard form Med-Arb agreement.

Existing Med-Arb agreements are often not well-suited to construction disputes without significant modification.

As much detail for the arbitration process as possible should be agreed to in advance of the mediation so as to avoid disputes over jurisdiction or issues to be arbitrated if the mediation is not successful, as that often results in a potential opportunity for parties to sabotage the process.
Mediation-Arbitration

• Med-Arb agreements must also address a number of issues not covered in a normal mediation agreement or arbitration agreement
  • Trigger to transition from mediation to arbitration, which should be time based rather than a decision of the Med-Arbitrator
  • Pre-Arbitration conference should be established before actual arbitration starts to confirm issues to be arbitrated and process
  • The extent, if any, to which Med-Arbitrator is able to rely on or be influenced by information or documents revealed during the mediation, especially in private caucus sessions with a party

• Advice: Proceed cautiously and ensure parties and Med-Arbitrator fully address things in advance that can affect enforceability of award
Arbitration
What is Arbitration?

- Alternative dispute resolution method that provides a final, binding and enforceable decision with minimal or no recourse to the courts.
- Private, consensual, confidential form of dispute resolution.
- Can agree to arbitration at the time parties enter into a contract or once a dispute arises (i.e. for present or future disputes).
- Results in a binding decision by 1 or 3 neutral decision-makers.
- The consent to arbitrate, once given, cannot be withdrawn unilaterally and is therefore mandatory.
- Can be an effective alternative to litigation in the courts.
Arbitration – Advantages and Characteristics

• **Generally (subject to applicable legislation):**
  - Affords each side a fair and equal opportunity to be heard
  - Party autonomy: the parties are free to agree on procedure and have higher degree of control and involvement
  - Greater flexibility that permits customizing the procedure to the nature and complexity of the dispute and needs of the parties
  - More efficient
  - Ability to select judges/experts to resolve the dispute
  - Real case management
Arbitration – Advantages and Characteristics (cont’d)

• Generally:
  • Arbitral awards are easier to enforce
  • Rules of evidence are more informal and less stringent than litigation in the courts
    • but see s. 13 of NWT/Nunavut Arbitration Act
  • Final and binding awards:
    • Limited rights of appeal in domestic arbitration and no rights of appeal with very limited rights of review in international arbitration
    • Arbitral awards are subject to less judicial review and appeal than court decisions, which enhances the finality
Arbitration – Advantages and Characteristics (cont’d)

• Confidentiality and privacy:
  • Avoids public scrutiny,
  • Protects confidential business information, and
  • Can preserve business relationship

• Disputes are usually resolved faster and more expeditiously, as the discovery and hearing procedure can be limited

• Can be less expensive than litigation

• Cost will depend on the system chosen and the circumstances of the particular case
Arbitration – Advantages and Characteristics (cont’d)

• Advantages in an international setting
  • All of the above, plus
    • Arbitral proceedings are generally more predictable than court proceedings in an international context (i.e. avoid competing actions in courts of different countries, forum non conveniens arguments)
    • Neutral forum: no “home court” advantage
    • Allows parties to resolve dispute outside of a national court system, and provides the opportunity to have proceedings in a more neutral environment, and avoid jury trials, corrupt or inadequate court systems.
Arbitration – Advantages and Characteristics (cont’d)

• Advantages in an international setting (cont’d)
  • Offers parties a greater opportunity to resolve dispute according to their choice of law
  • Awards are much easier to enforce (less expensive and less delay) than court judgments, therefore having a fundamental advantage in an international setting (1958 New York Convention)
Arbitration – Advantages and Characteristics (cont’d)

• Advantages in an international setting (cont’d)
  • Much unpredictable risk in a contractual relationship can be mitigated
  • In a contractual relationship with a foreign State or a State entity, arbitration is much more attractive than litigation in the courts of that State

• Conclusion
  • Arbitration can be cost-effective and swift means of resolving commercial disputes but it takes a concerted amount of effort, focus and active participation by all participants (parties, counsel, and arbitrators)
Governing Legislation in Canada

• What legislation governs commercial arbitration agreements?
  • Different legislative regimes apply to regulate different arbitration agreements
  • Depends on whether the arbitration is domestic or international and whether the federal or provincial/territorial arbitration act applies in the circumstances
Governing Legislation in Canada (cont’d)

- **UNCITRAL Model Law**
  - Designed to assist States in reforming and modernizing their laws on arbitral procedure to take into account the particular features and needs of international commercial arbitration
  - Covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award
• UNCITRAL Model Law (cont’d)
  • Reflects worldwide consensus on key aspects of the international arbitration practice
  • Has been accepted by States of all regions
  • In 1986, Canada, with consent of the provinces, adopted the Model Law and became the first country in the world to do so
  • Today, the Model Law governs Canadian international arbitrations and has been adopted throughout Canada (including NWT and Nunavut) with only minor modifications
International and Domestic Commercial Arbitration


- Governs all commercial arbitrations, whether domestic or international, but only in relation to matters where at least one of the parties is Her Majesty in right of Canada, or a department of the Canadian federal government, or a Crown corporation or in relation to maritime or admiralty matters.
International Commercial Arbitration

- Where the federal *Commercial Arbitration Act* does not apply, the international arbitration legislation in force in the Territory in which the arbitration is brought applies to all international commercial arbitrations between parties where the arbitration is considered international, as defined by article 1(3) of the UNCITRAL Model Law
  - It is international if: parties have places of business in different countries; one party has its place of business outside Canada; a substantial part of the obligations of the commercial relationship is to be performed, or the subject-matter of the dispute, is most closely connected to a place outside Canada
Governing Legislation in Canada (cont’d)

TERRITORIAL

International Commercial Arbitration Acts


TERRITORIAL

Domestic Arbitration Acts


The Domestic Arbitration Act of the Territory in which the arbitration is brought applies to domestic arbitrations, unless excluded by law (e.g. for labour arbitrations), or where the International Arbitration Act of the Territory applies, or where the Federal *Commercial Arbitration Act* applies.
How do domestic and international arbitration laws differ?

- Most significant differences relate to appeals of awards
- Unless the international arbitration agreement allows an appeal to a domestic court, no appeal rights for an international arbitral award will exist (as distinct from the right to apply to have the award set aside on the limited basis allowed under the Model Law)
- Under domestic arbitration acts, depending on language of arbitration agreement, it may be open for parties, by obtaining leave of the court, to appeal on a point of law, fact or mixed fact and law
Arbitration Agreements – Legal Requirements (cont’d)

INTERNATIONAL

• The UNCITRAL Model Law requirements of an arbitration agreement, as incorporated in the relevant legislation, apply
  • An “arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship whether contractual or not
  • May be in the form of an arbitration clause in a contract or in the form of a separate agreement
  • The arbitration agreement must be in writing, and one of the forms of agreement set out in the Model Law will suffice
  • A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement
Arbitration Agreements – Legal Requirements

**Domestic**

- Under most domestic arbitration acts, an “arbitration agreement” means an agreement by which two or more persons agree to submit a matter in dispute (in some cases a dispute that has arisen or may arise between them) to arbitration.
- Arbitration agreement may be oral or written.
  - Except: in s. 1 of NWT/Nunavut domestic act, “submission” means a “written agreement to submit differences to arbitration.”
- May be an independent agreement or part of another agreement.
- Arbitration agreement may be revoked only in accordance with the ordinary rules of contract law.
Drafting an Arbitration Clause

Necessary components of a clear arbitration clause include:

• Agreement to arbitrate
• Scope of disputes to be arbitrated, in terms of both the parties and the subject matter (i.e., usually “all disputes”)
• Number of arbitrators (one or three)
• Place of the arbitration (i.e., the legal seat of the arbitration)
• Place of the hearing (as opposed to the seat of the arbitration)
• Substantive and procedural law governing the dispute
• Language of the proceedings
• Institutional or *ad hoc* arbitration (see below)
Drafting an Arbitration Clause (cont’d)

• **Optional components that should be considered include:**
  - Rules that will govern the arbitration
  - Entry of an award in court
  - Intervention of courts
  - Rights of appeal (if any)
  - Confidentiality
  - Costs and interest award provisions
  - Multi-party arbitration provision
  - Ability to grant interim measures
  - Conferring jurisdiction on arbitral tribunal to fill gaps or adapt contract terms, i.e. to deal with situations where parties have negotiated long-term contracts where key terms will be renegotiated at intervals and those negotiations may fail
Optional components that **should** be considered include (cont’d):

- Intermediate dispute resolution clauses “multi-tier” or “step”
- Method of selection / appointment of arbitrator(s)
- Arbitrator qualifications
- Preconditions as to arbitration, such as negotiation or mediation
- Disclosure, discovery rights
- Time limits
- Limitation periods
Institutional vs Ad Hoc Arbitration

• Arbitration Agreements often dictate disputes will be submitted to arbitration under the rules of and governed by a specific arbitration institute, such as ADR Canada, ICC, LCIA, ICDR, etc.

• In absence of such an agreement, the arbitration will be “ad hoc”
Key Features of Institutional Arbitration vs. Ad Hoc

- Institution administers the proceedings (for a fee)
- Appoints the arbitrators (if parties cannot agree)
- Reduces pre-arbitration litigation and delays over appointments and challenges to arbitrators
- Institution’s rules can be adopted
- Can be more predictable
- Provides supervision and administration - but at a price
- More expensive but avoids court costs
- Awards may be more readily recognized and enforced
- **MUST** always check Rules of institution to verify they are satisfactory (for instance, do they provide for injunctions or interim measures of protection? Do they set out time limits? etc.)
Institutional vs Ad Hoc Arbitration (cont’d)

Key Features of Ad Hoc vs. Institutional Arbitration:

- Not administered or supervised by arbitral institution (save fees)
- Popular in Canada for domestic commercial arbitration
- Relevant legislation often provides for rules if contract is silent and parties fail to agree on rules
- May or may not adopt the rules of a particular institution
- Requires greater party co-operation
- Procedures can be more flexible and tailored to needs of the parties & dispute
- Heavy reliance on arbitrators to keep process moving
- UNCITRAL Arbitration Rules can be more readily adapted than institutional rules
- Can lead to extra delay and cost if a party needs to resort to court to appoint an arbitrator or compel arbitration
Model Arbitration Clauses

• Arbitral institutions often recommend model clauses for future disputes

• In each case, consider appropriate dispute resolution method and particular needs of contract or client

• If an institution is to administer the arbitration, consider using institution’s model clause without modification
  • Except if absent from model clause, it is recommended to modify to address the place and language of the arbitration, the number of arbitrators (one or three) and the law governing the agreement

• Always check Institution’s website for the most recent version of the clause (and its rules) before you use it
Model Arbitration Clauses (cont’d)

• Some Arbitral Institutions (alphabetically)
  • ADR Chambers
  • ADR Institute of Canada
  • American Arbitration Association (AAA)
  • British Columbia International Commercial Arbitration Centre (BCICAC)
  • Canadian Commercial Arbitration Centre (CCAC)
  • CPR Institute for Dispute Resolution (New York)
  • Chamber of Commerce and Industry of Geneva
  • Hong Kong International Arbitration Centre (HKIAC)
Model Arbitration Clauses (cont’d)

• Some Arbitral Institutions (cont’d)
  • International Chamber of Commerce (ICC)
  • International Centre for Dispute Resolution (ICDR)
  • International Centre for Settlement of Investment Disputes (ICSID) (for investor-State arbitration)
  • London Court of International Arbitration (LCIA)
  • Singapore International Arbitration Centre (SIAC)
  • Stockholm Chamber of Commerce (SCC)
  • United Nations Commission on International Trade Law (UNCITRAL) (Note that UNCITRAL provides a Model Clause and Rules but does not administer disputes)
Example of Institutional Model Clause: Domestic

ADR Institute of Canada – Model Clause

• “All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, shall be arbitrated and finally resolved, pursuant to the National Arbitration Rules of the ADR Institute of Canada, Inc. [the Simplified Arbitration Rules of the ADR Institute of Canada, Inc.] The place of arbitration shall be [specify City and Province/Territory of Canada]. The language of the arbitration shall be English or French [specify the language].”
Example of Institutional Model Clause: International

- ICC’s Model Arbitration Clause
  
  - All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.
Example of Institutional Model Clause: International (cont’d)

AAA’s Model Arbitration Clause

• “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the International Centre for Dispute Resolution in accordance with its International Arbitration Rules.”

or

• “Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be determined by arbitration administered by the American Arbitration Association in accordance with its International Arbitration Rules.”
Model Arbitration Clauses (cont’d)

• Other model arbitration clauses, and the most up to date versions of the preceding clauses, can be found on the websites of the various arbitral institutions identified earlier.

• Copies of rules and other materials can also be downloaded from the websites, as well as the rate structure for the use of an arbitral institution to administer the arbitration.
Model Arbitration Clauses (cont’d)

• Ad hoc model clauses

UNCITRAL’s model clause:

“Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules.

Note – Parties should consider adding:

• the appointing authority shall be … [name of institution or person];
• the number of arbitrators shall be [one or three];
• the place of arbitration shall be… [town and country];
• the language to be used in the arbitral proceedings shall be…”
Example of Multi-step ADR clause:

• “The parties agree to attempt to resolve all disputes arising out of or in connection with this agreement, including its existence and validity or its breach or termination by either party, by structured negotiation with the assistance of a mediator appointed by agreement of the parties [or under the *Commercial Mediation Rules” of an Institution]].

• If the dispute cannot be settled within a period of 30 days after the mediator has been appointed, or such longer period agreed to by the parties, the dispute shall be referred to and finally resolved by arbitration in accordance with the [*Arbitration Act] and the [*Rules of __ or prescribed by the Act]
Enforcement of Arbitration Agreement

What is the approach of courts to enforcement of arbitration agreements?

- Courts have been enforcing arbitration agreements and have applied the principles of the UNCITRAL Model Law in favour of arbitration in cases where parties seek to stay judicial proceedings.

- Recent case law at both the federal and provincial level demonstrates that Canadian courts are increasingly giving effect to the Model Law as adopted by Canadian provincial and federal governments by demonstrating a tendency towards enforcement of arbitral agreements, the recognition of the primacy of arbitration and limitation of judicial intervention.
Enforcement of Arbitration Agreement (cont’d)

• What is the approach of courts to enforcement? (cont’d)
  • Courts will give effect to parties’ intention to arbitrate even in cases where the written agreement relating to arbitration is unclear or poorly drafted
  • Since the adoption of the Model Law in 1986, Canadian courts have consistently upheld parties’ rights to arbitrate their differences where they have agreed to do so by contract and courts have increasingly resolved any ambiguities in such agreements in favour of giving effect to the parties’ intention to refer disputes to arbitration
Enforcement of Arbitration Agreement (cont’d)

What is the approach of courts to enforcement? (cont’d)

- The Courts will refer to any provisions in the governing provincial or federal legislation.
Enforcement of Arbitration Agreement (cont’d)

• What is the approach of courts to enforcement? (cont’d)
  • Canada’s highest level of court, the Supreme Court of Canada, has expressed strong support and respect for the arbitral process and has upheld legislative affirmation of the autonomy of arbitrations (see Desputeaux v. Editions Chouette (1987) Inc. (2003), 223 D.L.R. (4th) 407)
  • Generally, under the domestic acts, it is mandatory for a court to stay a proceeding commenced by a party to an arbitration agreement in respect of a matter to be submitted to arbitration under an agreement on a motion by another party to an arbitration agreement, except:
    • (1) where a party entered into an arbitration agreement while under a legal incapacity,
Enforcement of Arbitration Agreement (cont’d)

• What is the approach of courts to enforcement? (cont’d)

• (2) the arbitration agreement is invalid,
• (3) the subject matter of the dispute is not capable of being subject of arbitration under the law of the province (for example, because it is contrary to public policy),
• (4) the motion to stay proceedings was brought with undue delay, or
• (5) the matter is proper for default or summary judgment (see e.g., s. 7 of Ontario domestic Arbitration Act)
Enforcement of Arbitration Agreement (cont’d)

• What is the approach of courts to enforcement? (cont’d)
  • The exceptions are usually construed restrictively
  • Courts have an important supervisory role but the domestic Acts generally make it clear that court intervention is permitted only in specific enumerated instances
  • Courts are generally not permitted to intervene in matters governed by the domestic arbitration Acts, except for the purpose of assisting in the conduct of the arbitration, to ensure the arbitration is conducted in accordance with the arbitration agreement, to prevent unequal or unfair treatment of parties to arbitration agreements and to enforce awards
Enforcement of a Foreign Award – The 1958 New York Convention

• One key advantage to using international commercial arbitration, rather than litigation in national courts, is greater enforceability of arbitral awards than judgments in other jurisdictions
  • Enforcement is usually sought in jurisdictions where the unsuccessful party has assets
  • The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NY Convention) is the mechanism that makes this possible
Enforcement of a Foreign Award – The 1958 New York Convention (cont’d)

• This convention is extremely effective in ensuring that arbitral awards have a high level of voluntary compliance and, where this does not happen, effective means of obtaining recognition and enforcement of the award against an unwilling unsuccessful party are available.

• In 1986, Canada acceded to and ratified the NY Convention.

• Article V of the NY Convention provides for limited, defined grounds upon which recognition and enforcement of an arbitral award may be refused.
Enforcement of a Foreign Award – The 1958 New York Convention (cont’d)

- Article V of the NY Convention provides:
  - The parties to the arbitration agreement did not have capacity (under the law applicable to them) or the arbitration agreement is invalid under the law to which the parties have subjected it
  - The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his or her case
  - The award deals with subject matter beyond the scope of the submission to arbitration
Enforcement of a Foreign Award – The 1958 New York Convention (cont’d)

• Article V of the NY Convention provides (cont’d)
  • The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties (or the law of the seat of arbitration)
  • The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the country in which that award was made
  • A court in the jurisdiction where recognition and enforcement are sought finds that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country or that the recognition or enforcement of the award would be contrary to the public policy of that country
Enforcement of a Foreign Award – The 1958 New York Convention (cont’d)

• These provisions of the NY Convention should be kept in mind when drafting the arbitration agreement, in particular, when choosing the seat of the arbitration so as to ensure that the procedure contemplated by the parties will lead to an enforceable award.

• The NY Convention currently has 142 parties. In most cases, it is desirable for the seat of the arbitration to be in a country that has signed the Convention.

• The federal government implemented the NY Convention through the enactment at the federal level of the United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, c. 16 (2nd Supp.)
Enforcement of a Foreign Award – The 1958 New York Convention (cont’d)

• The provinces & territories implemented the NY Convention either
  • within the same statute as the implementation of the Model Law (for instance, Alberta, Manitoba, New Brunswick, Newfoundland, the Northwest Territories, Nova Scotia, Nunavut, PEI and Ontario, see international legislation cited above at 2.1) or
Enforcement of a Domestic & International Arbitration Awards

• Subject to the grounds for appeal of an award under the applicable arbitration legislation, the courts in Canada have given considerable deference to arbitrations and consistently upheld awards.

• Exceptions include (e.g. under s. 28(1) of the *Arbitration Act*, R.S.N.W.T. 1988, c. A-5 as amended):

  “(a) arbitrator or umpire has misconducted himself or herself, or
  (b) an arbitration or an award has been improperly procured.”
Enforcement of a Domestic & International Arbitration Awards (cont’d)

• **Approach of Canadian courts towards enforcement of arbitration awards**
  
  • Enforcement of an arbitral award requires an application to a court in the enforcing jurisdiction, generally on notice to the person against whom enforcement is sought, and must be supported by an original or certified copy of the arbitration award
  
  • Court will enforce arbitration awards made in Canada or in a foreign jurisdiction and will refer to the *NY Convention* to enforce an award where none of the limited circumstances set out therein for refusing to enforce it are made out
Enforcement of a Domestic & International Arbitration Awards (cont’d)

• Approach of Canadian courts towards enforcement of arbitration awards (cont’d)
  • Once Judgment has been granted recognizing the award, a court has the power to enforce that award by any means normally available for any final order or judgment of the court
  • Recent case law at both the federal and provincial level demonstrates that Canadian courts are increasingly upholding and giving effect to the UNCITRAL Model Law and the NY Convention and other conventions as adopted by Canadian provincial and federal governments by demonstrating a tendency towards limiting the scope of judicial review over both Canadian and foreign arbitral awards
Example of Ad Hoc Domestic Arbitration Process under Arbitration Act, NWT & Nunavut
Initiating Arbitration

• Notice of Arbitration, which should generally include:
  • Introduction
  • Parties
  • Relevant Factual Background and Overview of Claims
  • Tribunal's Jurisdiction
  • Procedural Matters
    • Number of arbitrators as per agreement to arbitrate
    • Either:
      • appointment of arbitrator as party appointed arbitrator if more than one
      • Identification of nominee for arbitrator if there is to be a sole arbitrator
  • Conclusion and Relief Requested
Appointment of Arbitrators

• **Arbitration Act:**
  
  • s. 5: single arbitrator unless arbitration agreement specifies more than 1
  
  • s. 6: where reference is to 2 arbitrators (i.e. each party appoints one), the 2 arbitrators may appoint an “umpire” at “any time within the period during which they have power to make the award”.
  
  • s. 8: role of “umpire”

    Where umpire to act

    8. The umpire may without delay enter on the reference instead of the arbitrators where the arbitrators

    (a) have allowed their time or extended time to expire without making an award; or

    (b) have delivered to any party to the submission or to the umpire a notice, in writing, stating that they cannot agree.
• S. 11 addresses failure to appoint Arbitrator

Service of notice
11.  (1) Where
   (a) a submission provides that the reference is to a single arbitrator and the persons whose concurrence is necessary do not, after differences have arisen, concur in the appointment of an arbitrator, an arbitrator or an umpire is to be appointed by a person and that person does not make the appointment, or
   (b) an arbitrator or umpire refuses to act or is incapable of acting or dies and the person having the right to appoint a person to fill the vacancy has not made the appointment,
   (c) a party may serve the other party or the arbitrators or the person who has the right to make the appointment, as the case may be, with a written notice to concur in the appointment of a single arbitrator or to appoint an arbitrator or umpire.
Evidence in Proceedings

• Evidence governed by s. 13 & 17 of Arbitration Act, which limits arbitrator’s ability to “let it all in”:

  Application of Evidence Act

  13. All provisions of the Evidence Act that are not inconsistent with this Act apply to proceedings under this Act.

  17. Witnesses on a reference shall be examined on oath.

• Compare this to s. 6(2) of the B.C. Act, which gives arbitrator more discretion:

  In an arbitration, the arbitrator

  (a) must admit all evidence that would be admissible in a court,

  (b) may admit in addition other evidence that the arbitrator considers relevant to the issues in dispute, and

  (c) may determine, subject to the rules of natural justice, how evidence is to be admitted.

• And compare both of above to s. 21(1) of Alberta Act:

  “arbitral tribunal is not bound by the rules of evidence. and has power to determine the admissibility, relevant and weight of any evidence”
• NOTE s. 41 of Arbitration Act of NWT:

41. (1) The Commissioner may make rules of practice and procedure, including tariffs of fees and costs, for the better carrying out of the purposes of this Act and for regulating the practice under this Act, and, until these rules are made, the Rules of the Supreme Court apply, with such modifications as the circumstances require, to all causes, matters and proceedings under this Act.

• Compare this to BC (BCICAC rules apply if no agreement)

• Compare both to Alberta: s.20(1) of Alberta Act

“Tribunal may determine the procedure to be followed in the arbitration”
Pre-Hearing Meetings

• After first pre-arbitration meeting, prepare and sign document confirming agreements form part of arbitration agreement

• Schedule meetings to monitor progress to hearing

  → → → Agenda

1. → Arbitration provisions in agreement(s)
   (a) → Confirm arbitration provisions
   (b) → If more than 1 agreement, extent of consolidation, if any

2. → Arbitrator Disclosure Statements

3. → Confirmation of appointment of arbitrators

4. → Rules of Procedure (institutional rules or ad hoc by tribunal?)

5. → Counterclaims?

6. → Possible settlement negotiations and effect on scheduling proceedings

7. → Routing of written communications with arbitrators

8. → Submissions (method, copies, numbering, references, etc.)
9. → Scheduling, time limits and consequences of late submission
   (a) → Statement of Claimant’s Position
   (b) → Statement of Response and/or Counterclaim
   (c) → Response to Counterclaim (if any)
   (d) → Lists of Documents
      (i) → Agreement, if any, on origin and receipt of documents, dispensing with need to produce originals, correctness of photocopies, etc. unless party objects to a specific document?
   (e) → Joint Assembly of Documents
   (f) → Agreed Statement of Facts
   (g) → Any physical evidence other than documents?
      (i) → Arrangements for submission/preservation, if any
      (ii) → On-site inspections, if any
   (h) → Examination for Discovery, if any
Pre-Hearing Meetings (cont’d)

(i) → Witnesses: exchange names & brief summary of evidence
(ii) → Claimant
(iii) → Respondent
(iv) → Experts and expert reports
(j) → Presentation of Evidence (oral, by affidavit or other means)
(k) → Hearing
(i) → Premises in [*City?] date(s) & hearing times
(ii) → Continuous once commenced? Adjournments?
(iii) → Any limits on aggregate amount of time allotted each party? (evidence in-chief, cross-examination, re-examination, oral argument)
(iv) → Presence of witnesses in hearing room when not testifying?
(v) → Presence of party representatives in hearing (and whether such representatives will be giving evidence)
(vi) → Arrangements for a record of the hearings
Pre-Hearing Meetings (cont’d)

10. → Arbitrator’s Fees & Expenses
    (a) → Hourly/Daily
    (b) → Hearings - Per-Diem
    (c) → Travel time and cost
    (d) → Hotel - government rates?
    (e) → Hearing Room(s)

11. → Administrative services that may be needed by arbitral tribunal

12. → Deposit as security for Costs of Arbitration
    (a) → Amount
    (b) → Management of Deposit
    (c) → Supplementary Deposits

13. → Security for Fees & Costs

14. → Additional Pre-Arbitration Meetings

15. → Other Matters
Managing Issues in Dispute

• **Consider Using Scott Schedule**
  • Convenient framework to identify and narrow issues in dispute
  • Tabular document logging the following:
    • Claimant’s position on various issues, including ref. to pleadings
    • Relevant evidence in support of Claimant
    • Respondent’s reply to each issue with:
      • Statement of admission or denial
      • Reasons for Respondent’s denial

• Reduces time and cost in hearing and deliberations of arbitrator

• Particularly useful in construction disputes where there may be multiple heads of claims for various defects
Managing Document Disclosure Requests

• **Consider Using Redfern Schedule**
  - Collaborative document that facilitates the discovery process and tries to avoid wide-sweeping litigation type discovery
  - Tabular document logging the following:
    - Description of document requested and ref. to pleadings
    - Requesting party’s justification for requesting document
    - Opposing party’s reasons, if any, for refusing the request
    - Tribunal’s decision on request
Timing of Award

- s. 20 of Arbitration Act requires award:
  - Within 3 months after entering on the reference, or
  - Within 3 months after called on to act by notice from a party or before a later date to which all parties agree “by a writing signed by them”

- s. 21 requires umpire to make award within 1 month after original or extended time for arbitrators has expired, or longer period as agreed by those who appointed him/her

- s. 22 says court may extend the time for arbitrator or umpire to make award
Costs and Fees for Arbitrator

• s. 31: costs are in discretion of arbitrator or umpire

• s. 33 Fees:
  • If arbitration agreement or parties agree on arbitrator’s or umpire’s fees, that agreement governs.
  • If no express agreement, fees are as specified in tariff referred to in subsection 41(2) - if such a tariff exists
    • Penalty assessed if arbitrator/umpire charge more than prescribed tariff (penalty = 3 x amount of over-charge)
  • A party can require costs of arbitration, including fees of arbitrator and umpire, taxed by Clerk of the [NWT/Nunavut] Court
Enforcement & Appeal

• s. 26 - Enforcement
  An award may, by leave of a judge, be enforced in the same manner as a judgment or an order to the same effect.

• s. 27 Appeal where agreement provides for appeal
  • If arbitration agreement provides for an appeal, appeal governed by provisions for appeal in the agreement

• s. 28 Appeal as of right
  • Regardless of agreement, any party can apply to set aside award on the grounds that:
    • Arbitrator or umpire has misconducted himself/herself
    • Arbitration or an award has been improperly procured
Thank You