International Commercial Arbitration: Some lessons from the Judicial Systems of Canada and the USA

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Abstract

The global trade and commerce are reviving substantially in the post pandemic period. They, in their train, also bring disputes during operations which are not even foreseen. Something, interestingly, influenced the world of alternate dispute redressal system the world over is the pandemic whose credit can be due to the protocols of the pandemic. An analysis of the judicial system of Canada and the USA and the emerging trends can throw greater insights for understanding the arbitral system in the context of the Judicial Systems of these two neighboring north American countries. It is attempted here to peruse the uncertainty that has been brought to lives during this period and how this has opened up opportunities of alternate dispute redressal system within the Canadian and US Judicial Procedures thereby making the environment promotional for international commercial transactions. Further, the USA and CANADA as the North American neighbors have several similarities and differences that can be observed when a comparative study is carried out. This paper is an attempt to narrate the lessons that can be learnt from the USA and the Canadian judicial systems in respect of international commercial arbitration.

Keywords: *Dispute, global trade, judicial systems, post pandemic*

I. Introduction:

While judicial litigation is winding, costly and time consuming, it is generally viewed that arbitrating and settling disputes are more comfortable from several angles. It is a process of ensuring a built in clause in the legally binding contracts where the parties to the contract appoint one person as an arbitrator. Some usefulness experienced by the contracting parties is that the disputes remain limited to the arbitrator with the resultant privacy and confidentiality which are always considered as important by the disputing parties. It is also realized that there are some flexibilities and practical advantages and are therefore deemed as efficient and innovative. Generally, despite the absence of an arbitration clause in the original contract, the disputing parties can still choose arbitration in case a dispute arises at a later date. It may be a situation of *ad hoc* arbitration, yet it provides opportunities in domestic disputes and many advantages can be enjoyed by settling for arbitration by the disputing parties even after the disputes has arisen. However, the laws of the land have their bearing on the process of arbitration and the relevant judicial systems

need to be studied to understand the possibility of arbitration. In countries like the USA and Canada, there are federal laws and provincial laws which determine the possibility of arbitration clause. Therefore, these aspects need to be perused for the right insights.

II. Objectives:

In this discussion paper, the following objectives are kept in view:

1. To locate the arbitration clause in the judicial systems of the USA and Canada in respect of their federal laws or provincial laws
2. To understand extend of the arbitration as to be domestic or global
3. To understand the application of the rules as to ad hoc or institutional
4. To understand the exclusion or inclusion of class actions under the laws

III. Methodology:

For the purpose of this paper, the methodology adopted is analytical and descriptive using secondary data from the published sources of print and web.

IV. Legal Sources and Comparisons:

The legal system of Canada and the USA may be discussed for arriving at appropriate the various legal sources that enable arbitration in these countries which have several similarities, but notable distinctions also.

(a). Canadian Arbitration Laws:

The situation of Canada may be taken up for consideration. Canada has a Federal System of Government and in that it is similar to the USA as well. It has also a parallel federal and provincial regime for arbitration like in the USA. But what is interesting to be noted is that the most important laws which control arbitration in Canada are located at the provincial or territorial level. The Federal arbitration canons are also there, which are invoked in limited circumstances where at least one of the parties to the arbitration is a federal department corporation, the crown or a crown corporation (*Commercial Arbitration Act*, RSC 1985). All other precepts on arbitrations in Canada are by and large lie in the judicial ambit of the provinces. They have specific canons relating to the domestic and international arbitrations. The provincial and territorial legislations which are applied to international commercial arbitration between various private parties of different countries are located at the provincial and territorial level (*International Commercial Arbitration*

Act, 2017). It also needs to be specifically noted that the United Nations Commission on International Trade Law-Model Laws have been either fully or in an altered form adopted in the whole of Canada in all its provinces and territories except in Quebec. Therefore, in Quebec, arbitration is controlled by the Civil Code of Quebec and the Quebec Code of Civil Procedure (*Québec Civil Code*, 1991).

Yet another issue is the arbitration of the disputes of two or more Canadian parties which are of a domestic nature. These domestic arbitrations fall in the ambit of separate legislative mechanisms (Arbitration Act, 2000). These Arbitration Acts are such as *Arbitration Act*, RSA 2000, c A-43; *Arbitration Act*, RSBC 1996, c 55; *Arbitration Act*, CCSM c A120; *Arbitration Act*, RSNB 2014, c 100; *Arbitration Act*, RSNL 1990, c A-14; *Arbitration Act*, RSNS 1989, c 19; *Arbitration Act*, 1991, SO 1991, c 17; *Arbitration Act*, RSPEI 1988, c A-16; *Arbitration Act*, 1992, SS 1992, c A-24.1; *Arbitration Act*, RSNWT 1988, c A-5; *Arbitration Act*, RSY 2002, c 8; *Civil Code of Procedure* (RSQ, c C-25 (as am), Arts. 940-952); *Quebec Civil Code* (SQ 1991, c 64, Arts. 2638-2643, 3121, 3133, 3148, 3168). These laws differ from province to province depending on specific issues like the validity of contracting out of statutory procedures, the power of courts to stay court proceedings in favor of arbitration, the consolidation of arbitration proceedings, the relationship between mediation and arbitration, and the right to appeal etc. The Canadian arbitration legislations also involve international agreements. Like the Canada has ratified the New York Convention and the ICSID Convention like the USA. . Canada's FTAs and BITs. Can also find some of the arbitration provisions.

(b). The Specific Arbitration Rules of Canada:

Besides the direct legislations on arbitration, there are other requirements for the processes and procedures to be set in motion. In Canada, the formal requirements for arbitration agreements are not too many except some basic minimum . The arbitration agreements can be unattached documents or those parts of clauses to any agreement that exists already. According to the UNCITRAL Model Law, any arbitration agreement that is binding on the parties need to be in writing and signed by both disputants. Such formal need for the domestic arbitration agreements can be found in provincial laws of Canada which of course vary from province to province. One such example is that of the domestic law of Ontario where the arbitration agreement need not be signed. The Canadian courts have enforced all such agreements for long time which were agreed to by the disputing parties. They normally hold on to the intention of the parties and the agreements are enforced. The exceptions will only be where the agreements are null and void, inoperative, or incapable of being enforced.

A similarity between the US and Canadian laws is that parties to Canadian arbitrations have substantial flexibility to opt for their own arbitral procedure and determining the scope of pre-hearing disclosure of documents and such other evidences. The laws in the various provinces have their domestic arbitrations which establish some default procedural rules. But parties are usually allowed permitted to select their own procedural rules. Based on the particular laws, the parties may change and give away their procedural and other rights.. Arbitrators under the UNICITRAL Model Law have wide discretion for procedures. "They have the authority to order parties to produce documents and to request a court's assistance in taking evidence. Canadian courts have been willing to lend their enforcement powers to facilitate arbitral proceedings, including by ordering witnesses to attend hearings, give evidence, or produce documents."(Charles B. Rosenberg and Eric Morgan, 2019).

The parties to the dispute may choose arbitration rules from an arbitral institution or may draft their own *ad hoc rules of* procedures. In Canada there has been a tradition of *ad hoc* domestic arbitration as no countrywide arbitral institution has existed for long. "The ADR Institute of Canada ("ADRIC"), based in Toronto, has adopted the National Arbitration Rules relating to domestic disputes and administers arbitrations under these rules. The ICC is also active in Canada, while the British Columbia International Commercial Arbitration Centre ("BCICAC") is often used for arbitrations centered in Vancouver."(Charles B. Rosenberg and Eric Morgan, 2019).

(c). Class Action

It is also necessary to look into the interconnection between Class suits and arbitration. In the Canadian judicial system, this interconnection is not as definite as in the case of the USA. While arbitration clauses are enforceable in the case of commercial agreements, when it comes to consumer class, there is no such certainty. However, there are mandatory arbitration clauses in the case of consumer contracts also.

(d). Arbitration Laws of the USA.

In the USA, there are three different regimes of arbitration laws which are based on the international agreements, federal laws, and the state laws. Certain differences in the procedures and mechanisms can be observed among the State and Federal laws which would control arbitration agreements.

The Federal Arbitration Act of 1925 governs the arbitration agreements and are followed in the Federal and State Courts. The Federal Arbitration Act is the legal framework for all arbitrations – both domestic and international. It regulates the interstate commerce which is among the states and the foreign arbitrations.

The Chapters of the Federal Arbitration Act, 1925 provide three distinct aspects. In the first chapter, the ground work for arbitration procedures and enforcement at the court level are emphasized. In the second chapter, the law enforceable for the New York Convention are provided. Chapter third is regulatory provision for the Panama Convention. In this, the commercial arbitrations of 19 members of the organization which are the states of the USA. Though the USA has not specifically adopted the UNCITRAL Model Laws, the Federal Arbitration Act has been consistent to interpret the arbitration agreements in the line of the Model Law. The US has the Common Law jurisdiction because of which case laws provide the source of law for arbitration both at the federal and state levels. As a country, the USA has entered into international agreements on arbitration and as such a party to the various conventions like the New York Convention, the Panama Convention and the International Centre for Settlement of Investment Disputes Convention. It has also included the arbitration clauses in its Free Trade Agreements as well as Bilateral Investment Treaties.

(e). The US Rules for Arbitration

In the USA, the will of the parties of the arbitration agreements prevail. The Federal Arbitration Act lays down the foundational rules for arbitration proceedings like the necessity for the agreements to be in writing. But the details of the arbitration are to be decided by the parties. Most of the times, the Federal Arbitration Act provides for the rules which the parties to the arbitration have to finalize like the methods of selection of the arbitrators etc when the parties themselves have not decided.

(f.). Class Action Suits in the USA

Class action arbitrations are regulated by the consent of the parties. The U.S. Supreme Court of the USA has explained that due to the flexibility and contractual nature of arbitration agreements, parties can "specify with whom they choose to arbitrate their disputes" (*Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 2010) It is also laid down that the courts and arbitrators must "give effect to the contractual rights and expectations of the parties." (*Volt Info. Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*1989). The parties have to provide for class actions in their arbitration agreements, and such provisions are valid. Such details must be enforced. However, if arbitration agreements do not provide for such class action, the Supreme Court ordered that arbitrator cannot institute a class action as 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 bases for compelling class arbitration." (*Lamps Plus, Inc. v. Varela*, 2019).

V. Conclusion

Thus, it can be noted that there are similarities and differences between the arbitration laws of the two neighboring countries of north America viz the USA and Canada. A clear and pointed understanding of the sources of law, arbitration rules, and class actions can help those attorneys who draft the contracts which are inclusive of the arbitration clauses as well. This will stand to help the parties to meet their interests and expectations. In the wake of the increasing international trades and commerce and the commercial arbitrations are becoming necessary to protect the interest of the commercial parties, a clear insight of the laws relating to arbitration in the different countries will stand to benefit the trading parties from different perspectives. Its importance is significant in the post pandemic period.

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