

A Quick Reference Guide to Arbitration Procedures in the USA, England, Bermuda and Canada

| | USA | ENGLAND | BERMUDA | CANADA |
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| Statute | Federal Arbitration Act of 1925 | The Arbitration Act 1996 | The Bermuda International Conciliation and Arbitration Act 1993 (incorporating the UNCITRAL Model Law) | Commercial Arbitration Act, 1985 (based on the UNCITRAL Model Law) in addition, nine of the ten provinces and all three of the territories have enacted statutes based on the Model Law |
| Are Anti-Suit Injunctions Available? | Yes, although typically arbitration agreements are enforced by an application to dismiss the court proceeding | Yes, these are routinely granted to restrain court proceedings brought in breach of an arbitration clause | Yes, these are routinely granted to restrain court proceedings brought in breach of an arbitration clause | Yes, although Canadian courts will generally expect that a stay or other termination first be sought and denied in the foreign court proceeding |
| Can Arbitrators Rule on Jurisdiction? | Generally no, unless parties have agreed or if adopted rules permit | Yes, as a preliminary matter although there is an opportunity for further review by the supervising court | Yes, as a preliminary matter although there is an opportunity for further review by the supervising court | Yes, as a preliminary matter or in a final award, although there is an opportunity for reconsideration by the supervising court |
| Must Arbitrators Be Independent/Neutral/ Impartial? | Yes unless agreed otherwise. Certain arbitration rules may permit non-neutral party-appointed arbitrators | Yes | Yes | Yes |
| What Is Procedure for Challenging/Removing Arbitrator? | General view is that courts lack jurisdiction to consider interlocutory challenges | An interlocutory application can be made to the court to remove an arbitrator, including for lack of impartiality or on basis of insufficient qualifications | Challenging party must file written challenge with the panel within 15 days. If challenge is rejected, an application to court for review can be made | Generally speaking, challenges are to be made to the arbitral panel and, if unsuccessful at first instance, then to the supervising court |
| Indemnification/Immunity of Arbitrators? | Generally yes but “hold harmless” agreements common | Yes | Yes | Yes |

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| Are Ex Parte Communications with Arbitrators Permitted? | Yes, if expressly agreed - in some cases ex parte communications with party-appointees continue through to final hearing | No, unless purely administrative or - if parties agree - solely to discuss selection of third arbitrator / chair. Discussion of merits is prohibited. | No, unless purely administrative or - if parties agree - solely to discuss selection of third arbitrator / chair. Discussion of merits is prohibited. | Any ex parte communication which gives rise to a reasonable apprehension of bias will be sufficient ground for the courts to set aside an award and/or stay ongoing arbitral proceedings |
| Are "Honourable Engagement" Clauses Enforceable? | Yes | Yes | Yes | Likely yes |
| Are Arbitrations Confidential? | No, unless parties so stipulate | Yes | Yes | Generally no (except in B.C. and Quebec), unless the parties agree to it or the governing arbitral institution's rule require it |
| Is Security for Costs Available? | Generally yes | Yes | No | Yes |
| Is Consolidation of Proceedings Possible? | No, unless parties have expressly agreed | No, unless parties have expressly agreed | No, unless parties have expressly agreed | No, unless parties have expressly agreed or the supervising court orders it |
| Are Formal Pleadings Common? | Yes, although not routine and tend to be less detailed than English-style pleadings | Yes | Yes but often less formal and detailed than English pleadings | Yes |
| What Is Practice for Disclosure/ Discovery of Documents? | Generally broad discovery is sought by parties and allowed by arbitrators | Practice varies considerably according to nationality of arbitrators. English panels tend to adopt English court procedures or IBA Rules | Practice varies considerably according to nationality of arbitrators. Bermudian/English panels tend to adopt Bermuda court procedures or IBA rules | IBA Rules are frequently used. As a guide to the expectations of Canadian panels, civil procedure in Canada tends toward relatively broad documentary discovery. |
| Do Parties File Written Witness Statements? | Generally no | Yes | Generally yes | Generally yes |
| Can Witnesses Be Deposed? | Yes | No | No | No |
| Is Discovery Available Against Third Parties? | Yes but there are practical limitations | Yes but there are significant practical limitations and US 1782 discovery is not available | Yes but there are significant practical limitations and US 1782 discovery is not available | No |
| What Rules of Evidence Apply? | Generally, formal rules of evidence do not apply | Unless agreed otherwise by the parties, the arbitrators determine whether to apply strict rules of evidence | Unless agreed otherwise by the parties, the arbitrators determine whether to apply strict rules of evidence | Unless agreed otherwise by the parties, the arbitrators determine whether to apply strict rules of evidence and in so doing often refer to the IBA Rules |
| Are Arbitrators Required to Produce a Reasoned Award? | No unless parties agree or adopted rules require it | Yes, unless the parties have agreed otherwise | Yes, unless the parties have agreed otherwise | Yes, unless the parties have agreed otherwise |
| Do the Arbitrators Have Jurisdiction to Award Interest? | Generally pre-award interest may be awarded as allowed by applicable State law | Yes, both pre-award and post-award interest | Yes, both pre-award and post-award interest at simple or compound rates | Yes, both pre-award and post-award interest |

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| Is the Losing Party Ordered to Pay the Winning Party's Legal Costs? | Generally no | Generally yes - agreements to prohibit costs shifting are unenforceable | Generally yes - agreements to prohibit costs shifting are permitted | Generally yes - agreements to prohibit costs shifting are permitted |
| What Is the Scope of Parties' Rights of Appeal? | Narrow but limited rights of appeal do exist including for "manifest disregard for the law" and "complete irrationality" | Broad by international standards and includes right to appeal on points of law (unless right is expressly waived) | Very limited | Very limited |
| Enforcement of Award? | New York Convention applies | New York Convention applies | New York Convention applies | New York Convention applies provided that the legal relationship is commercial |