

The International Comparative Legal Guide to:

International Arbitration 2007

A practical insight to cross-border International Arbitration work



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Regional Overview: North America

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Bermuda

Arbitration agreements in Bermuda, a self-governing territory of the United Kingdom, are governed by two different statutes. First, the Arbitration Act 1986, which is derived from the English Arbitration Acts 1950 - 1979, applies to domestic arbitrations held in Bermuda. Second, the Bermuda International Conciliation and Arbitration Act 1993 applies to international arbitrations, and adopts the UNCITRAL Model Law on International Commercial Arbitration of 1986 without any changes.

The United Kingdom extended the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) to Bermuda on 14 November 1979. The Convention is attached as Schedule 3 to the 1993 Arbitration Act. Bermuda has not entered any reservations regarding its ratification of the New York Convention. The United Kingdom has also ratified and extended to Bermuda the Washington Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (1965) ("ICSID Convention"), although Bermuda is not a party to any bilateral or multilateral investment treaties. To date there have been no ICSID arbitrations involving Bermuda.

Commercial arbitration in Bermuda has been directly linked with the growth of international companies and in particular insurance and reinsurance companies in Bermuda, which is one of the world's leading reinsurance markets and the most popular domicile for captive insurance companies. Arbitration clauses can be found in many insurance and reinsurance contracts. Often, these contracts name Bermuda as the arbitral seat, although they sometimes provide for arbitration in other locations, including in London under New York substantive law (the so-called "Bermuda form"). At present, providing for arbitration in Bermuda pursuant to Bermudian substantive and procedural law is becoming increasingly popular in lieu of "Bermuda form" arbitration clauses.

Canada

Canadian arbitration agreements are governed by both federal and provincial law. The federal Commercial Arbitration Act, implemented in 1985, governs all cases in which a department of the federal government, or Her Majesty in the Right of Canada, are parties. Provincial acts govern each of the ten provinces and three territories and cover all other domestic and international arbitrations. These provincial acts are based largely on the UNCITRAL Model Law, with only slight legislative modifications. These minor differences include allowing an arbitrator to employ mediation and other dispute resolution techniques at any time during the arbitration process, as well as allowing courts to

consolidate or stay multiple arbitration proceedings.

Canada has also ratified the New York Convention without any reservations, implementing it through the United Nations Foreign Arbitral Awards Convention Act of 1985. Arbitral awards are subject to judicial review only on a very limited basis. Generally, Canadian courts will recognise a foreign arbitral award under the provisions of the New York Convention unless it is clearly contrary to fundamental principles of justice. Canadian law requires only impartiality in choosing an arbitrator; otherwise, party autonomy allows for free choice of arbitrators. Canadian arbitrators are imparted with the jurisdiction to decide their own jurisdiction.

Canada has signed, but not ratified, the ICSID Convention, as various provinces have not yet implemented the legislative measures necessary under ICSID. Nevertheless, Canadian courts recognise and enforce arbitral awards under ICSID's Additional Facility Rules. Canada is also party to 17 bilateral investment treaties ("BITs"), which allow for arbitration pursuant to the ICSID Rules.

Canadian courts favour arbitration proceedings, and arbitration is expected to continue to rise as a preferred means of resolving disputes. Recent developments in Canadian law also support greater judicial assistance for obtaining discovery from non-parties in arbitration proceedings.

United States

In the United States, international arbitration is regulated by both state and federal law. While states generally conduct arbitration by reference to statutes based in whole or in part on the Uniform Arbitration Act and the UNCITRAL Model Law, arbitration involving foreign commerce is governed by Chapters 2 and 3 of the Federal Arbitration Act ("FAA"). First adopted in 1925, the FAA has been amended only slightly in the 82 years following its enactment, most notably to reflect U.S. accession to the New York Convention. Procedures for international arbitrations in any state are controlled by the FAA and state procedural laws that are consistent with the FAA's pro-arbitration policy. A large body of jurisprudence from U.S. courts assists in implementing and interpreting the various provisions of the FAA.

The United States acceded to the New York Convention on 30 September 1970 subject to the reservations that it would only apply the Convention: (1) to arbitral awards rendered in countries that have ratified the Convention; and (2) to arbitral awards regarding disputes arising out of "commercial" relationships.

In 1966, the United States ratified the ICSID Convention. It has subsequently ratified more than 40 BITs and is currently a party to a number of multilateral investment treaties, including the Inter-

American Convention on International Commercial Arbitration and the North American and Central American-Dominican Republic Free Trade Agreements.

The United States has become a popular forum for international arbitration, as U.S. courts strongly favour the process of arbitration and the recognition and enforcement of arbitral awards. Courts normally will vacate or decline to enforce an award only under the standards set forth in the New York Convention, which are narrowly construed. The United States has become a popular forum for intellectual property arbitration in particular due to its liberal policy regarding the arbitrability of intellectual property rights.



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Because of the popularity of arbitration in the United States and the significant amount of commerce transacted in and with the United States, U.S. laws pertaining to arbitration continue to evolve at a fast pace. In the past year alone, U.S. courts have issued significant decisions on a number of matters concerning arbitration, including decisions on the enforcement of foreign arbitral awards that have been legally nullified in the country in which the award was made and the ability of U.S. courts to order discovery in support of foreign arbitral proceedings. We expect further significant developments in U.S. arbitration laws in the future.



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Kenneth Beale's practice focuses on the resolution of international disputes, particularly through international arbitration and litigation. Mr. Beale also has experience handling complex criminal and internal corporate investigations. Mr. Beale has represented clients in cross-border disputes, international arbitrations, complex criminal investigations and corporate internal investigations, in areas such as oil and gas, telecommunications, pharmaceuticals, and aerospace and defense. Previously an attorney at then Wilmer, Cutler & Pickering in Washington, D.C., Mr. Beale now practices out of Wilmer Cutler Pickering Hale & Dorr's London office.

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Wilmer Cutler Pickering Hale and Dorr LLP is an international law firm with offices in London, Baltimore, Beijing, Berlin, Boston, Brussels, New York, Oxford, Palo Alto, Waltham and Washington, D.C. The firm offers one of the world's premier international arbitration and dispute resolution practices, covering virtually all forms of international arbitration and dispute resolution. The firm is experienced in handling disputes administered under a wide variety of institutional rules, including the ICC, AAA, LCIA, UNCITRAL, and ICSID rules.

WilmerHale also has extensive experience with more specialized forms of institutional arbitration and ad hoc arbitrations. The firm's lawyers have been involved in arbitrations sited across the world, and the group has handled disputes governed by the laws of more than 30 different legal systems. WilmerHale has successfully represented clients in four of the largest, most complex arbitrations in the history of the ICC, and handled one of the largest ad hoc arbitrations to arise in the past decade.