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International Arbitration

A review for 2022
Canada and beyond

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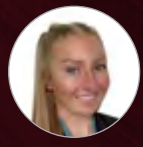

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Dentons is pleased to bring you our reflections on international arbitration for 2022 in Canada. The following compiles the legal trends and developments that we have seen in the last year that are likely to impact international arbitration going forward. Please feel free to contact us if you would like any further information on how these developments might impact your interests with respect to dispute resolution clause drafting, investment structuring, international commercial or investor-state arbitration, and enforcement.

Institution and Rules Updates

Updates to arbitration rules

2021 introduced notable changes in several leading international arbitral institution procedural rules: the 2020 Revision of the IBA Rules on the Taking of Evidence were released in February 2021; UNCITRAL released its Expedited Arbitration Rules; the 2021 ICC Arbitration Rules entered into force; and there were amendments in the 2021 ICDR International Dispute Resolution Procedures. These updates seek to further procedural fairness and efficiency, while also reflecting the realities of international arbitration proceedings, specifically following the progression seen in the sector over the last two years.

UNCITRAL Expedited Arbitration Rules

The UNCITRAL Expedited Arbitration Rules ("Expedited Rules") entered into force on 19 September 2021. The Expedited Rules modify certain aspects of the UNCITRAL Arbitration Rules ("UAR") and must be read in conjunction with them.

As noted in the Explanatory Note to the Expedited Rules, their main goal is to provide a streamlined and simplified procedure with a shortened time frame, allowing the parties to reach a cost and time effective final resolution of their dispute. Importantly, parties must expressly agree to refer their dispute to the Expedited Rules, the rules will not apply automatically or if a party unilaterally requests it.

The key provisions of the Expedited Rules are:

- The parties and the arbitral tribunal shall conduct the proceedings expeditiously;
- The tribunal may use any technological means it considers appropriate;
- The tribunal may hold consultations and hearings remotely;
- The tribunal may decide that there will be no hearings;
- The time limits are reduced;
- The default rule is one sole arbitrator, but the parties may agree otherwise; and
- The default position is that the award has to be made within six months from the date of the constitution of the tribunal.

Of course, the parties may by agreement customize any aspect of the Expedited Rules to suit their specific needs. See our full discussion on the Expedited Rules here.

2020 Revision of the IBA Rules on the Taking of Evidence in International Arbitration

The 2020 Revision of the International Bar Association Rules on the Taking of Evidence in International Arbitration ("IBA Rules") was released in February 2021, updating the previous 2010 edition. The purpose of the revisions was to streamline and provide greater clarity to the rules and acknowledge new facets of practice, such as the use of technology in arbitrations.

The key updates include:

- Adding cybersecurity and data protection to the list of evidentiary issues that are proposed to be discussed between the arbitral tribunal and the parties during their consultation on evidentiary issues;
- Providing for the possibility to hold virtual hearings, on the tribunal's motion after consultation with the parties. It also includes a definition for the term "Remote Hearing"; and
- Empowering the arbitral tribunal to potentially exclude illegally obtained evidence.

See our full discussion of the new rules here.

2021 ICC Arbitration Rules

The 2021 International Chamber of Commerce Arbitration Rules ("ICC Rules") apply to all arbitrations filed with the ICC after January 1, 2021. With this latest iteration, the ICC advances its rules to move toward greater efficiency, flexibility and transparency in ICC arbitrations.

The main changes include:

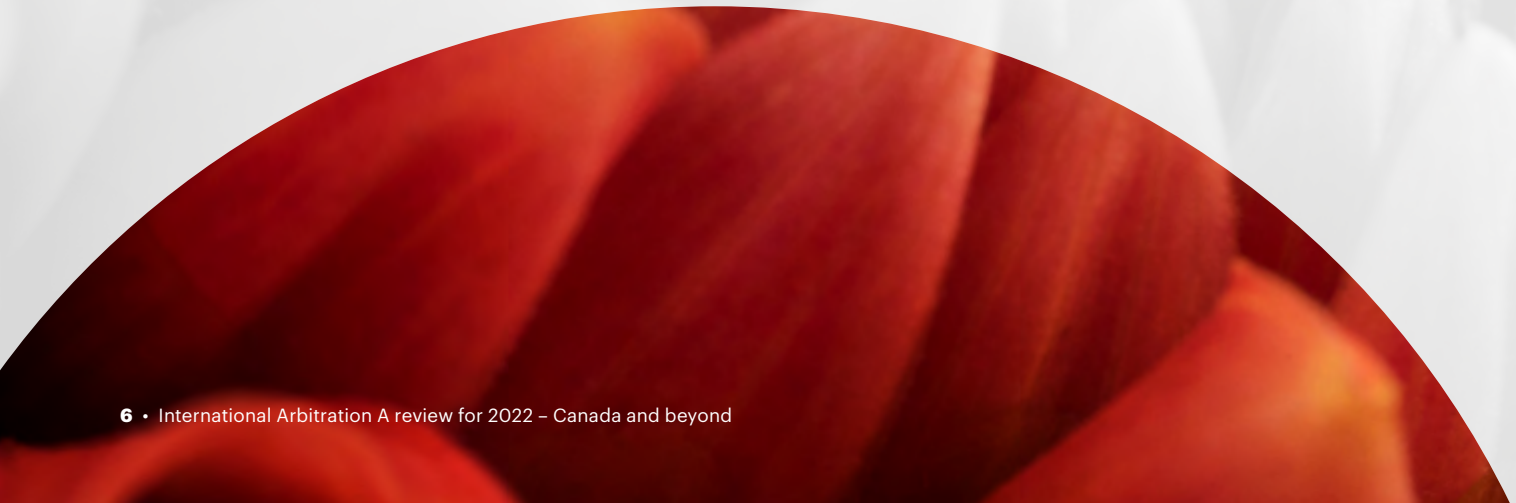
- A party entering into an arrangement for the funding of claims or defences with a non-party economically interested in the outcome of the arbitration shall disclose the existence of that non-party;
- A request to join a new party to an arbitration may be made after the appointment of an arbitrator, provided that new party accepts the constitution of the tribunal and agrees to the Terms of Reference, where applicable;
- If an agreement between the parties regarding the method of appointing arbitrations results in a significant risk of unequal treatment and unfairness, the ICC may reject such agreement;
- The tribunal has the positive duty to use case management techniques to ensure an expeditious and cost-effective arbitration; and
- All hearings may proceed virtually.

The ICC Rules changes present an interesting development in their potential for joinder of third parties, an area that is seeing increasing difference between institutional rules. For further detail on these changes see our full discussion here.

ICDR 2021 Rules

On March 1, 2021, the International Centre for Dispute Resolution (ICDR) released the 2021 update to its international arbitration and mediation rules. The year-long review led to the following significant developments for international arbitration under the rules:

- Clarification on the role of the International Administrative Review Council. The IARC, an administrative decision-making body, can now act as the decision making authority for various administrative issues during the initial stages of the case. These include issues regarding the number of arbitrators and place of arbitration.
- Changes to the rules on joinder. It is now possible to apply for joinder even after a tribunal is constituted, provided the party to be joined to the proceedings consents (even if an existing party objects) and the tribunal decides the joinder is appropriate.
- Expansion of the rules on consolidation. Arbitrations may now be consolidated if they involve the same or related parties.



- Article 14(7) deals with the authority provided to tribunals for disclosure of third party funding or interests, along with their identity and the nature of the undertakings. Specifically, the tribunal may require the parties to, on application by one of the parties or on its own initiative, disclose: 1) the financial contributions of a non-party in the arbitration; or 2) the economic interests of a non-party in the arbitration's outcome.
- Article 22 reaffirms the ICDR's commitment to cybersecurity, privacy and data protection. In furtherance of that, the tribunal is now required to discuss the appropriate level of security and compliance required in each case.
- Article 23 focuses on increasing efficiency in arbitration proceedings by allowing a party to seek early disposition of its case. The following steps must be fulfilled by the party seeking early disposition:
    - Request leave to file an application for early disposition – when this is done, the parties have the right to be heard on: 1) whether leave to file the application should be granted; and 2) if leave is granted, whether early disposition should be granted;
    - The tribunal "is to allow" the filing if it determines that: 1) application has a reasonable possibility of success; 2) the application will dispose or narrow the issues; and 3) it is more efficient to consider the application at this stage than doing so later with the merits; and
    - Once the application is filed, the tribunal may make an order or award in connection with the application.
- Article E-5 has increased the monetary limit for the availability of international expedited procedures, from US$250,000 to US$500,000.

Town Elder Arbitration Rules

One new proposal, the Town Elder Arbitration ("TEA") Rules, aims to supplement and amend the UNCITRAL Arbitration Rules. These rules seek to optimize and introduce efficiencies in the arbitration process through a decision tree process. Rather than a case conference, the TEA Rules propose a more substantive meeting where the parties would discuss their respective positions, their business interests and need for a decision in detail.

Based on this discussion, the arbitral panel drafts a "decision tree", organized to ensure that the determination of one issue could: a) dispose of the case; b) eliminate or narrow down the consideration of other issues; c) lead to settlement; or d) change the focus of the arbitration to different issues.

After hearing each issue, the arbitral tribunal will make a decision on that issue – doing so will then determine the next steps for the proceeding. The goal of the TEA Rules is to create an efficient decision tree, and eliminate the need to determine every issue initially presented.

CIArb Framework Guideline on the Use of Technology in International Arbitration

The CIArb Framework Guideline on the Use of Technology in International Arbitration, released on November 30, 2021, sets out general principles for counsel and arbitrators on the use of technology. Importantly, the Guideline looks at practical implications from technology used privately (by one or more parties in the course of preparing and bringing their case) and by everyone involved in the arbitration (as a means to facilitate the proceeding). The questions and considerations posed in the Guideline can help parties examining the role of technology in their arbitrations.

Climate Change and International Arbitration

International arbitrations are intertwined with various aspects of climate change, and they can create an efficient forum for the resolution of climate change related disputes. At the same time, the international arbitration community is becoming more conscious in monitoring and reducing its own environmental footprint.

Arbitration and climate change

States and industry sectors, such as energy, manufacturing, and construction, are at a high risk of being involved in climate change-related disputes. Some disputes arise directly from climate change events, while others result more indirectly. Both international commercial arbitration and investor-state arbitration are expected to see an increase in climate change-related disputes as the area advances.

Contractual disputes arising out of transitions to comply with climate targets

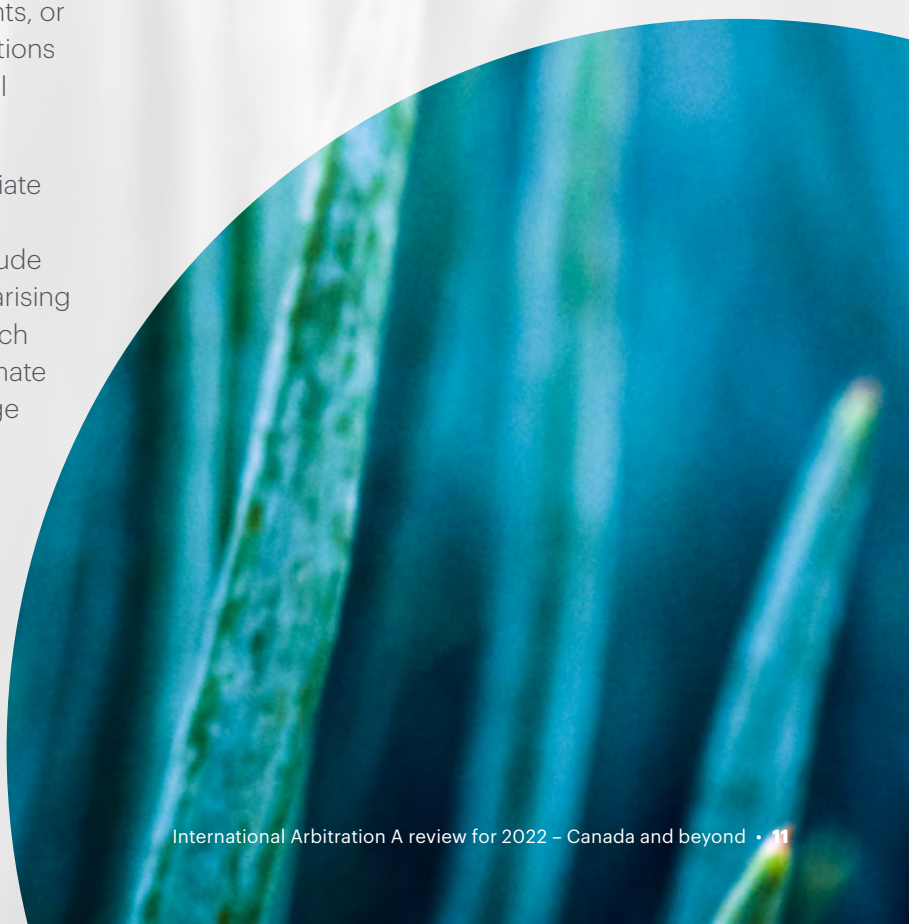
All industries are facing challenging transitions to meet global climate targets. Some of these may be imposed by legislation or regulatory action while others are adopted by industry or individual companies as goals. As climate change and related goals become solidified in business to business, or joint venture agreements, or even as these feature into supply chain considerations and ESG concerns, there is an increasing potential for disputes.

International commercial arbitration is an appropriate forum for dispute resolution as a result of its swift, confidential and enforceable nature. This can include resolution of force majeure claims such as those arising out of extreme weather events, damages for breach of representations or warranty with respect to climate change measures or standards, and even coverage disputes if climate change measures form part of the policy.

Investor-state arbitrations

As states continue to examine their regulatory schemes, pre-existing investments may be impacted by new legal and regulatory changes in response to environmental commitments made by host states, such as the Paris Agreement. While investment treaties offer foreign investors some protection against certain host state activity, it is increasingly pressing for foreign investors in areas impacted by possible climate change regulation to seek investment structuring advice. As new laws are deployed, there will likely also be an increase in disputes around the extent to which investment treaties offer protection against host state measures and potentially in counterclaims grounded in climate change-related obligations.

See our more fulsome coverage of the issue here.



Greener Arbitrations

Another key development on this topic is the Campaign for Greener Arbitrations. The Campaign looks at how arbitrations are conducted, with a view to identifying and promoting greener practices, and includes protocols that can be adopted for parties, arbitrators, law firms, conferences and hearing venues.

Right to a Physical Hearing Project

In late 2020, the International Council for Commercial Arbitration began a research project to examine "Does a Right to a Physical Hearing Exist in International Arbitration?" Throughout 2021, the project released reports from several jurisdictions, identifying and confirming trends and divergent approaches. The final report is scheduled to be presented at the ICCA Congress to be held in Edinburgh in September 2022, and is expected to be a prescient addition to the practice of international arbitration as parties reflect on the pivot to virtual proceedings in 2020, best practices going forward, and environmental footprints.

Select Cases

Agreements to Arbitrate

***Bakaris v Southern Sky* – Conflicting Dispute Resolution Clauses**

In *Bakaris*, the Ontario Superior Court of Justice was tasked with determining the enforceability of an arbitration agreement in the face of a competing dispute resolution provision giving jurisdiction to the courts. The Applicant, an entrepreneur working and living in Zimbabwe, entered into a memorandum of agreement (the "**MOA**") with the Respondent, Southern Sun Pharma Inc., a British Columbia holding company. After a dispute arose, the Applicant commenced an application before the Ontario Superior Court of Justice. In response, the Respondent sought a stay of proceedings pursuant to the *International Commercial Arbitration Act, 2017,* which adopts the 2006 UNCITRAL Model Law on International Commercial Arbitration.

The Respondent sought the stay because the MOA contained a mandatory arbitration agreement. It said the parties "shall" resolve "any dispute, disagreement or claim" concerning the MOA by arbitration under the "London Court of International Arbitration, Arbitration Rules". The clause further specified the number of arbitrators, the seat of the arbitration, and the language to be used in the proceedings. However, the MOA also contained a provision stating that the "courts of Canada" shall have nonexclusive jurisdiction to settle any dispute or claim arising out of or in connection with the MOA. The Applicant submitted that, in light of the competing provisions in the MOA, he was entitled to choose the forum to resolve the dispute.

The court rejected the Applicant's submission. It confirmed that the test for demonstrating that a dispute is subject to arbitration is not onerous: where a dispute arguably falls within the scope of an arbitration agreement, a stay should be granted in favour of arbitration. In this case, since the parties specifically turned their minds to mandatory arbitration within the MOA, it was at least arguable in this case that the dispute fell within the arbitration agreement's scope. The court granted a stay of the litigation.

Razar Contracting Services Ltd v Evoqua Water* – *Arbitration Agreements must Satisfy Common Law Requirements for a Contract

The parties involved in this case were engaged in a project to expand a potato processing plant in southwest Manitoba. Their agreement consisted of a series of purchase orders issued by the Defendant. The bottom of each purchase order contained a website link to further terms and conditions. The Plaintiff, however, could not access the terms and conditions via that link. Unbeknownst to the Plaintiff, the terms and conditions contained an arbitration agreement requiring that all disputes between the parties be submitted to arbitration in Pittsburgh.

The Plaintiff brought an action in the Manitoba Court of Queen's Bench seeking damages for unpaid invoices and costs for delay. In response, the Defendant brought an application seeking a stay on grounds that the court did not have jurisdiction because the dispute fell within the scope of the arbitration agreement contained within the terms and conditions.

The court refused to grant the Defendant's request for a stay. The Defendant's terms and conditions did not contain a valid arbitration agreement, as defined within Article 7(2) of the 1985 UNCITRAL Model Law on International Commercial Arbitration, which is scheduled to the Manitoba *International Commercial Arbitration Act*. Article 7(2) requires that an arbitration agreement be in writing, meaning that it must be: (i) in a document signed by the parties; (ii) in an exchange of communications between the parties; or (iii) in an exchange of statements of claim and defence where an arbitration agreement is alleged by one party and not denied by the other. According to the court, what took place between the parties was not an exchange of documents (the Plaintiff could not access the terms). The court also found that the reference to the terms and conditions in the Defendant's purchase order was insufficient under common law to demonstrate the three elements required for a binding contract: intention to contract; settlement of essential terms; and sufficiently certain terms. Accordingly, there was no agreement to arbitrate.

Article 16 of the Model Law

Russian Federation v Luxtona Limited

Russia brought an application under Ontario's *International Commercial Arbitration Act, 2017*, to set aside an interim arbitral award finding that Russia had consented to arbitrate Luxtona's claims. This application was assigned to a judge on the commercial list. Russia then filed fresh evidence in support of its application that was not before the tribunal when the tribunal rendered the interim award at issue. The judge seized with the matter found that Russia was entitled as of right to adduce this evidence.

That judge left the commercial list and the matter was re-assigned to another judge. The parties to this dispute asked the new judge to decide further evidentiary issues, and during such inquiry the court held it was not bound by the prior ruling on the fresh evidence and that Russia was not entitled to file the new expert evidence. Russia appealed this interlocutory decision two grounds: 1) did the applications judge err in revisiting the previous decision; and 2) if 'no' did that judge err in finding Russia was not entitled to adduce the fresh evidence?

The court found that the application judge was not bound by evidentiary rulings of a prior application judge. It is hoped that matters not be re-litigated but, like a trial judge, the application judge may change interlocutory rulings before becoming *functus officio*. Further, because the language of Article 16(3) of the Model Law required the court "to decide the matter" of the tribunal's jurisdiction, Russia's original application was one for a hearing *de novo* and the parties were not restricted to the evidentiary record placed before the tribunal.

Stays of Proceedings

Kore Meals LLC v Freshii Development LLC

In this case the Defendant, a Chicago-based company, and the Plaintiff, a Houston-based company looking to develop franchises, entered into an agreement containing an arbitration clause referring all disputes to arbitration by the AAA in the city where Freshii has its business address (Chicago). When the Plaintiff initiated litigation in Ontario for breach of contract naming both the contract counterparty, Freshii Development, and Freshii's parent corporation, an Ontario company, the Defendants brought a motion to stay the litigation in favour of arbitration.

In response to the stay, the Plaintiff argued that arbitration in Chicago would be an artificial and inconvenient exercise, as Freshii does not actually carry on business in Chicago. Specifically, it argued the question of whether and where to submit to arbitration cannot ignore the convenience factor as the choice of venue is directly related to access to justice. None of the witnesses or documents were located in Chicago and it would be unduly burdensome to force arbitration there. According to the court, because any such arbitration at that time was likely to be held virtually, with submissions made online, it was not unfair to stay the litigation and uphold the arbitration clause. "Chicago and Toronto are all on the same cyber street."

Investor-State Disputes and Canada

Canada's Updated Model BIT

Canada published its new Model Foreign Investment Promotion and Protection Agreement on May 12, 2021. This replaced the previous model agreement, released in 2004. The new model is a vastly amended document that suggests increased definition, and changes, to the standards of protection therein along with procedural efficiencies in an opt-in section for Expedited Arbitration for disputes where damages claimed are under CA$10 million.

On the standards of treatment, the new model agreement refines definitions for national treatment and most favoured nation treatment (Articles 5 and 6) stipulating that different treatment "does not, in and of itself, establish discrimination based on nationality" (paragraph 5 of each Article, respectively). It is thus necessary, as set out in Articles 5(4) and 6(4) to look to "the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives." The changes do not end there as the new model agreement removes the obligation to provide fair and equitable treatment. There is, of course, still a requirement to afford a minimum standard of treatment, however this is defined in greater detail (Article 8(1)) as a denial of justice, manifest arbitrariness, a fundamental breach of due process, failure to provide full protection and security or a "targeted discrimination on manifestly wrongful grounds such as gender, race or religious beliefs." There is also additional language on what constitutes an indirect expropriation, noting at Article 9(3): "A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation, even if it has an effect equivalent to direct expropriation."

These changes, in particular the Expedited Arbitration mechanism, are unique as are the additional considerations in the protections afforded. There are a number of countries with which Canada could pursue investment treaties in the future and it will be interesting to watch how this model is implemented, or modified, in future negotiations.

ICSID Rules

As previously reported in our Year in Review, the International Centre for Settlement of Investment Disputes ("ICSID") is in the process of amending its rules and regulations. On November 12, 2021, the latest working paper on the amendments was released, recommending a comprehensive amendment for both ICSID Convention and ICSID Additional Facility rules. These changes are multi-faceted and specifically address third party funding disclosure, bifurcation and security for costs. The amendments are expected to be voted on in March 2022 and if approved would enter into force on July 1, 2022.

CETA

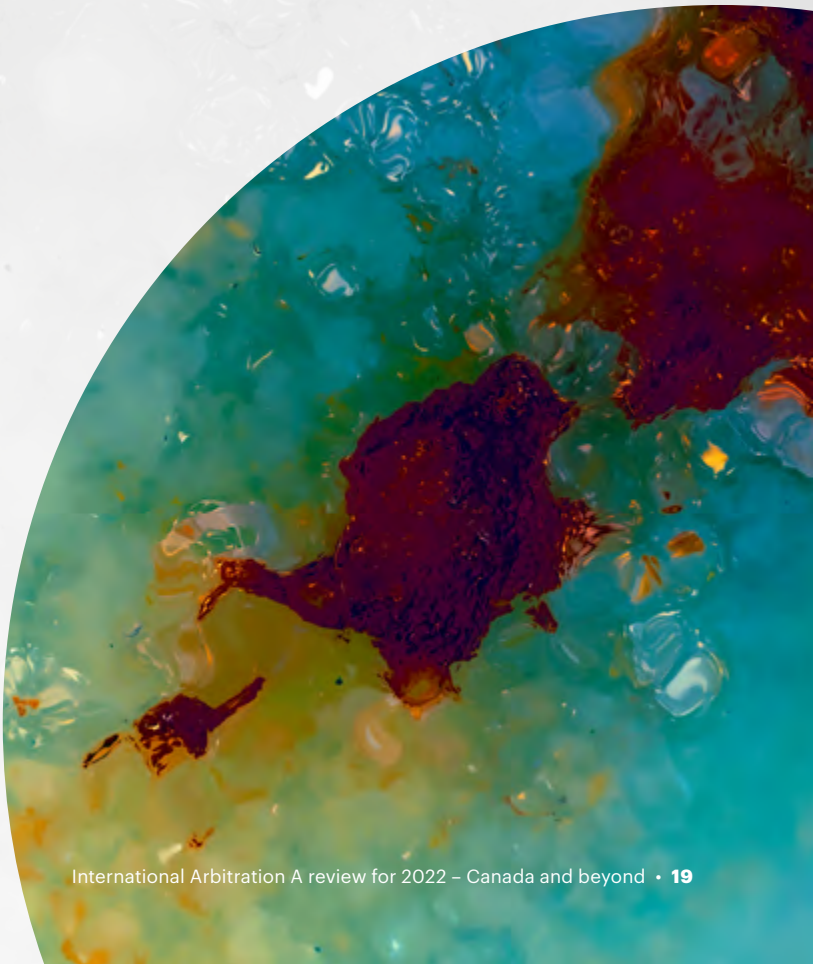
Canada and the European Union moved forward on their discussions to implement the investment court envisioned by the Canada-EU Comprehensive Economic and Trade Agreement ("CETA"). On January 29, 2021, the parties officially approved a code of conduct for the members of the investment court, rules for mediation, rules for binding interpretations and rules for the appellate tribunal. These procedures and rules add to the terms already in CETA for investor-state disputes and are necessary for the investment court to function. This, of course, will not happen until there is full ratification of CETA by all member states.

Mediation in Investor-State Disputes

The discussion around mediation under the CETA relates to a growing focus on mediation in investor-state disputes more generally. On July 12, 2021, ICSID released two papers on mediation of investment disputes. The first, a Background Paper on Investment Mediation, introduces the process and ICSID's draft rules for investor-state mediation. The second paper, an Overview of Investment Treaty Clauses on Mediation, looks at mediation provisions in free trade agreements, investment treaties along with model clauses. Three Canadian bilateral investment treaties, along with the CETA, are discussed in this second paper which provides a careful assessment of how states have looked to implement mediation to date in their agreements.

The recent focus on mediation is a trend expected to continue into the future, however the practical realities of mediation in an investor-state context might take some time to materialize. There are unique considerations, such as the ability for a state to truly have authority "in the room" for the mediation to achieve a settlement when there can be complex political and governmental or even bureaucratic challenges to achieve those lines of communication. Another potential challenge may arise if settlements must become public in some fashion and implications from that public perception or scrutiny around an agreed settlement, and issues if the claim faced by the state is one of two or more similar claims.

Canada's new Model Foreign Investment Promotion and Protection Agreement, which was released only shortly before the ICSID reports, also includes at Article 26 (and Article 48 for Expedited matters) provisions on mediation. These are clear that mediation "is without prejudice to the legal position or rights of a disputing party", that mediation may occur at any time and that the process is expectedly flexible. If adopted into future investment agreements it remains to be seen whether this will help to provide an expedient path to the resolution of investor-state disputes.



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