Raising the Bar

Raising the Bar – Eighth Edition

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Dear Readers,

With the first big snowfall and the coming of the holiday season, we're thrilled to bring you the Winter 2014 edition of Raising the Bar.

This time, we're doing something a little different. Rather than our usual format, we're devoting this entire issue to a topic that clients have been increasingly asking us about: arbitration. Specifically, we're addressing the question of which types of cases are right for private arbitration rather than moving through the usual court process.

You may not have even considered that you could use arbitration for your case if you do not have a pre-existing arbitration agreement. But you can, and you should consider arbitration because it can bring important strategic and tactical advantages for the right cases.

In this issue, we analyze the key factors to consider, and whether those factors point to the courtroom or the hearing room for your dispute.

Thanks to our intrepid articling student, Elizabeth Winter, for her work in assisting us with this edition.

We hope you enjoy this issue of Raising the Bar and, as always, we look forward to hearing from you with any comments or any topics you'd like to read about in 2015.

Happy Holidays and all the best for the upcoming New Year!

Frank Cesario and Elisha Jamieson-Davies
Co-Editors

SHINE A LIGHT ON… ARBITRATION: WHEN DOES A HEARING ROOM BEAT A COURTROOM?

When employers face challenging and significant pieces of litigation, they may find that the court system does not always provide a satisfying means to deal with these claims. Quite apart from the usual concerns about building a case and proving it in court, employment-related and commercial litigation claims may also raise sensitive and complex problems.

In our experience, the court process is not always the best way for employers to solve those kinds of problems. The good news is that there is an alternative dispute resolution method for the right kind of case.

If your organization faces a litigation issue that needs a creative and tailor-made solution (as opposed to what is generally a one-size-fits-all court system), private arbitration can be a very effective alternative to litigation in the civil courts.

When properly planned and strategized, arbitration can bring an increased level of control to the dispute resolution process that allows parties to chart their own path, whether that path leads to a binding decision or a settlement.

Below we describe arbitration in the commercial/employment context, and discuss its pros and cons as compared with the court process.

WHAT IS COMMERCIAL ARBITRATION?

Commercial arbitration generally refers to the process where the parties choose (and pay) a private decision-maker to decide their dispute, rather than having their dispute decided by a judge following pleading, document production, discovery, motions and trial. Arbitration has some similarities to court litigation. These include the adversarial nature of the process, a neutral decision-maker, and a binding result. However, the two routes also have significant differences.

In Ontario, most commercial arbitrations are governed by the *Arbitration Act, 1991* (the "Act""). The Act provides that parties may agree to an arbitration either through "an independent agreement or part of another agreement."

First, an arbitration clause can be drafted into a contract to guide dispute resolution, if and when a dispute arises. But parties should be wary of incorporating standard form arbitration clauses into their contracts. A recent Ontario Superior Court decision dismissed a motion to stay an action because of an arbitration clause, finding that the standard form terms did not incorporate the dispute[1]. If you are drafting an arbitration clause, we can help you tailor it for your organization and the relationship covered by the contract so that you have a better chance of successfully invoking that clause.

Second, where a dispute arises between parties who do not have an arbitration agreement, the parties can agree to proceed with arbitration as an alternative to court proceedings.

In either scenario, parties should think carefully about the type of procedure they want for their arbitration. Since arbitration is consensual, the process can be more or less formal as the parties prefer. The process could look very much like a court process (albeit with a decision-maker chosen by the parties and in a private forum) or the process could be very streamlined and quick. Our experience is that the type of process engaged is a crucial strategic question for parties and their counsel. This strategic issue is overlooked, or underappreciated, at a party's peril.

ADVANTAGES AND DISADVANTAGES OF ARBITRATION AND LITIGATION

Parties will most often use their strategic thinking to consider and decide on their approach to litigation, but they do not often consider whether the litigation process itself can be adapted to fit their dispute. We have considered the most notable factors in deciding whether private arbitration might be a good alternative to court litigation for your organization's dispute, and the discussion below is organized around those topics.

Time/Speed –

Time can be a crucial consideration in choosing arbitration or court. Some disputes are very time-sensitive. We are all familiar with the fact that a court case can take up to two years to wind its way through the system, and that booking motions and trials can leave parties waiting in line. Arbitration can offer a faster alternative because the parties can tailor their process as they (and the arbitrator) see fit, and because the parties do not have to deal with the wait times at most courthouses. Arbitration awards also may be issued more quickly than a court judgment and the parties can even choose to require a

decision “deadline”in their arbitration agreement. However, it may be that for whatever reason you are not seeking or prioritizing speed in dealing with your case; if so, the regular timelines of the court system better fit your objectives.

Decision-maker –

In court, the decision-maker is usually unknown to the parties in advance of proceedings and the identity of the decision-maker is outside the parties’ control. In other words, parties cannot “judge shop”. By contrast, arbitration allows the parties to chose their own adjudicator. This choice is very important for two reasons. First, it ensures that the arbitrator has a high level of expertise in the subject area. Where a dispute is highly technical or complex, this feature can be beneficial to both parties. Second, the arbitrator usually has a strong influence on the process followed in the arbitration, and certainly at the hearing itself. A thoughtful and experienced arbitrator can make the process more efficient and effective. The choice of arbitrator is key and, in our experience, is one of the most important strategic choices in the process.

Flexibility of Procedure –

Arbitrators (and the parties) are given significant leeway with respect to the procedure for an arbitration and for the hearing. Arbitrators have the authority under the Act to “determine the procedure to be followed in the arbitration”, subject to the requirements that the parties shall be treated equally and fairly and that each party shall be given an opportunity to present a case and to respond to the other parties’ cases. The arbitrator can conduct the arbitration on the basis of documents or may hold oral hearings, with the proviso that a hearing shall be held if any party requests it.

By way of example, parties can choose:

- the location of the proceedings
- dates for the proceedings
- the extent of, and process to be followed for, document production and oral discovery (or, indeed, whether to have those steps at all)
- the adjudicator
- how evidence-in-chief will be presented (i.e. by way of affidavit or oral testimony)
- whether the case will be decided by a single arbitrator or a panel.

If you want a tailor-made process, arbitration is likely the way to go.

As a comparison, court proceedings are formal and follow a specific process. However, this may be advantageous in some circumstances. For example, given the high level of creativity and control over the arbitration process, arbitration is only as effective as the combination of the parties, their counsel, and the arbitration panel. Where parties are not cooperative, the arbitration process can be hindered and not more speedy or smooth than the court system. Furthermore, if you think that the use and strict enforcement of court rules will be to your benefit, you may want to choose the court process for those strategic reasons.

Application of law

Arbitrators under the Act, like judges, have broad remedial authority, including the power to order damages, specific performance, injunctions, other equitable remedies as well as the power to award costs of an arbitration. However, it is important to consider whether arbitrators will apply legal principles as rigorously as a judge.

Public vs. Private Forum –

Arbitration has a distinct advantage where parties are attempting to solve a dispute of a sensitive nature and would prefer for the proceedings to be conducted in private. Arbitration proceedings are generally only open to the parties and the awards are kept confidential.

However, you should note that the confidentiality of arbitration is a rebuttable presumption. In a recent arbitration award, Arbitrator (and former Ontario Court of Appeal justice) Robert Armstrong ruled that the arbitration proceedings before him should be made public due to their broad public interest[2]. The case concerned the funding of blue box recycling, an environmental protection program involving large amounts of taxpayer dollars in Ontario. Arbitrator Armstrong discussed four factors to determine whether the presumption of confidentiality should be rebutted: the nature of the dispute, the impact of the public attending the arbitration, any potential negative effect on the parties and whether there is a legitimate public interest to be served in ordering a public hearing.

While the vast majority of arbitration proceedings will not have the kind of broad public interest to engage with this test, it is important for parties to consider in certain circumstances.

It may also be that the parties desire a public forum. For example, the public nature of the proceeding may provide settlement leverage in some circumstances. It may also be important to a party when there is a key principle at stake. In those circumstances, the court process may be preferred.

Joinder of parties and related disputes –

It is harder to join third parties and related disputes at arbitration than in court proceedings, because of the consensual nature of the arbitration process. All parties must agree for this to move forward. By contrast, court proceedings have a specific process for the joinder of parties and related disputes to be determined by the courts.

Binding results –

Both court proceedings and arbitration awards produce binding results for interim and final decisions. However, only court decisions contribute to the common law, as arbitral awards do not have precedential value. Depending on the breadth of the topic and its likelihood to come up in the future, this may be a consideration.

Right of Appeal –

Appeal rights are an important strategic consideration, because they affect the finality of a decision. Depending on the scope of your arbitration agreement, your appeal rights can be limited in an arbitration. The Act provides that, in the absence of a specific agreement as to appeal rights, a party to an arbitration may only appeal to the court on a question of law and requires leave of the court to do so. As a further hurdle, leave shall only be granted if the importance to the parties of the matters at stake in the arbitration justifies an appeal and determination of the question of law at issue will significantly affect the rights of the parties.

However, the parties may make an arbitration agreement to provide for an appeal to the court on a question of law, on a question of fact or on a question of mixed fact and law. This makes it crucial to decide on and address appeal rights at the front-end of the process.

The Act also provides certain limited grounds upon which a party may apply to the court to “set aside”an arbitration award. These grounds include, broadly speaking, failure to comply with the Act and procedural fairness and jurisdictional issues.

Where parties would prefer to have full recourse against an award, court proceedings would allow a party who is unhappy with an interim or final decision to appeal to a higher court as of right on all issues.

Enforcement –

The Act provides that a successful party in an arbitration may make an application to the court to enforce the arbitration award and the court has the same powers to enforce arbitration awards as with its own judgments. Court orders are, obviously, also enforceable.

Ongoing relationships –

Arbitration can be helpful for parties who have an ongoing business or contractual relationship. While arbitration remains adversarial, the ability to tailor and shorten the process may allow business partners to resolve a particular dispute without undue harm to their relationships. The flip side of this coin is where you think the opposing party is likely to stall or be uncooperative, the structure and formality of court proceedings may be more conducive to solving the dispute.

Cost–

Finally, legal proceedings (whether in court or in arbitration) can be expensive. It is important to keep in mind that the expense of arbitration varies depending on the length and complexity of the dispute and the fees of the arbitrator or arbitration panel. If your concern is legal fees in getting through the various steps in the court system, an arbitration with fewer procedural steps could be the right fit. However, arbitrators charge fees (sometimes significant ones) and therefore this cost must be factored into your calculation. Thus, some disputes could be solved in a more cost effective manner in court, while others could be more cost effective in arbitration.

CONCLUSION

Arbitration is a practical alternative to court litigation where parties are in need of a binding, adjudicative process, but do not want to be hindered by the wait times and formalities of court proceedings. Counsel and their clients have the ability to be creative and craft a process that is tailored to the complexity of the dispute and the needs of the parties. However, as we have described above, there are a number of strategic considerations at play which must be taken into account when choosing your forum. Retaining counsel at the front-end who knows the players (both judges and arbitrators) and has experience advocating in both forums will assist you in making these decisions. It could even provide you with that game-changing advantage over the other party. We would be pleased to discuss with you whether your dispute could be best resolved through arbitration.

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[1]*2156775 Ontario Inc. (c.o.b. D''Angelo Brands) v. Just Energy Ontario LP*, [2014] O.J. NO. 2629 (S.C.J.)

[2]*Re Association of Municipalities of Ontario and The City of Toronto v. Stewardship Ontario* (March 2014)