

# Don't forget the arbitration provision

May 20, 2020

Dispute resolution, both short- and long-term, has seen a substantial shift in the last few months. Whether litigation or arbitration eventually returns to exactly the same format that many of us were accustomed to, or emerges as something new, remains to be seen. In either event, the changes and developments in these areas over the last few weeks have shown that there are now additional considerations for parties when drafting dispute resolution provisions. The following provides a brief overview of a few of the matters that parties might want to address when drafting (or looking to amend) an arbitration provision.

## Arbitrator appointment

It is still common for precedent arbitration provisions in agreements in Canada to default to the applicable domestic or international commercial arbitration statute, and not specifically direct adherence to a set of arbitral rules. While this can provide the parties with flexibility to decide what will work best in a specific dispute, it also usually means that (without anything further in the clause) the local courts are the appointing authority where the parties cannot agree on the constitution of the tribunal. If the local courts are not able to hear an application to appoint the tribunal, or not able to hear such an application in the near future, that can add to delay in the proceedings.

One interesting development here, that we'll be covering in more detail in a future insight, are the impending amendments in British Columbia to that province's *Arbitration Act* which would add the ability for a party to apply to the British Columbia International Commercial Arbitration Centre to appoint an arbitrator. This was the result of efforts undertaken to amend that legislation long before COVID-19 was a reality, and perhaps having an appointing institution referenced in the legislation is indicative of a future trend that other provinces will follow.

## Emergency arbitrator relief

While the courts in Canada generally maintain jurisdiction to award urgent interim (usually injunctive) relief, and to enforce interim relief in aid of the arbitration process, the expediency of these processes can sometimes be challenging. If the parties have already decided that they want any disputes as a result of their transaction or arrangement to proceed to arbitration, the adoption of a set of arbitral rules with robust emergency arbitrator provisions could allow them to seek injunctive or other relief on an interim basis. In some cases, in a matter of days. This would also maintain a certain level of confidentiality over the proceedings as opposed to being in open court. Depending on the nature of the underlying agreement and the types of issues that might be involved, this could be a highly useful point to consider at the drafting stage.

## Virtual/remote video hearings

Many of us, if we haven't already, will soon also have the experience of participating in negotiations, mediations, and arbitration proceedings at different stages through to complete hearings by video conference. A number of arbitral institutions have provided guidance on how to approach these proceedings which are both extremely helpful and underscore the need to consider many different items than one would typically have to consider in a live in-person format. Some institutional rules clearly provide for video conference or virtual proceedings at interim or emergency stages. Whether the parties' intent is for the tribunal to have the jurisdiction to direct a fully virtual hearing over the objections of a party (whether mid-dispute or at the outset) raises several interesting issues and would require a much more detailed analysis. In light of what we've learned the last few weeks there is, however, a very real possibility going forward that parts of matters might proceed through remote video or some type of hybrid proceeding. If the parties have strong views on this, or there are factors that would have an impact on proceeding preference, it would be best to consider whether to raise those at the drafting stage (such as around challenges as a result of that video conference proceeding) and discuss any associated risks.

## Seat

How local courts are adjusting to social and physical distancing might also impact where parties might want to seat their arbitration. Developments from institutions – such as the recently announced International Arbitration Centre Alliance (which sees an alliance of London's International Dispute Resolution Centre, Toronto's Arbitration Place and Singapore's Maxwell Chambers to aid in hearings in the "new normal") – might become more common. Depending on the location of the parties, counsel and witnesses the parties may now prefer a specific seat for different reasons. While very forward-looking, the situation on the ground with respect to potential enforcement or set-aside proceedings might also be something to consider (and this can have a spillover effect to which rules you might want to choose in certain circumstances).

## Takeaways

There are a lot of pressing matters right now, and an abundance of information on real and potential impacts from the current COVID-19 situation. Setting an appropriate process, and drafting an arbitration provision that works for your business can often be the difference between additional procedural wrangling and what could be a relatively straight-forward or more predictable proceeding. This might be a time where some clarity would assist, and a good time to not forget the dispute resolution provisions, in both what is being drafted and what has been drafted that could be changed.

## Your Key Contacts



**David R. Elliott**  
Partner, Ottawa  
D +1 613 783 9638  
[David.Elliott@dentons.com](mailto:David.Elliott@dentons.com)



**Rachel A. Howie, FCI Arb**  
Partner, Calgary  
D +1 403 268 6353  
[rachel.howie@dentons.com](mailto:rachel.howie@dentons.com)



**Mike (Michael) D. Schafler, Q. Arb**  
Partner, Toronto  
D +1 416 863 4457  
M +1 647 299 4457  
[michael.schafler@dentons.com](mailto:michael.schafler@dentons.com)



**Gord (Gordon) L. Tarnowsky, Q.C.**  
Partner, Calgary  
D +1 403 268 3024  
M +1 403 617 3001  
[gord.tarnowsky@dentons.com](mailto:gord.tarnowsky@dentons.com)



**David Wotherspoon**

Partner, Vancouver

D +1 604 691 6429

M +1 604 612 3179

[david.wotherspoon@dentons.com](mailto:david.wotherspoon@dentons.com)