

大成 DENTONS

CPD Bootcamp 2019

Arbitration to Litigation



Arbitration vs. Litigation

Statutory Restrictions

Cannot contract out of legislation that restricts the use of alternative dispute resolution or requires access to the courts and/or tribunals

Consumer Protection

Employment

Privacy

Commercial disputes can still proceed against specific “consumers” i.e. business customers who do not have the same protections under legislation.

Examples of Legislation that Intervenes in Contracted Arbitration Clauses

- British Columbia *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 ("BPCPA")

172(1) The director or a person other than a supplier, whether or not the person bringing the action has a special interest or any interest under this Act or is affected by a consumer transaction that gives rise to the action, may bring an action in Supreme Court for one or both of the following:

- (a) a declaration that an act or practice engaged in or about to be engaged in by a supplier in respect of a consumer transaction contravenes this Act or the regulations;
- (b) an interim or permanent injunction restraining a supplier from contravening this Act or the regulations.

- Newfoundland and Labrador, *Privacy Act*, RSNL 1990 Chapter P-22

8. An action for violation of privacy shall be heard and determined by the Trial Division.

Unconscionability

Test for unconscionability:

1. a grossly unfair and improvident transaction;
2. a victim's lack of independent legal advice or other suitable advice;
3. an overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability; and
4. the other party's knowingly taking advantage of this vulnerability.

Contractual Limitations

- **Intellectual Property Disputes & Injunctions**
 - Does contract preclude the ability to bring an injunction because the parties are bound to arbitrate (or commence alternative dispute resolution)?
- **Anti-Arbitration Injunction**
 - Have parties agreed not to arbitrate?
 - Could initiating a related (or parallel) action be interpreted as foregoing the contracted arbitration agreement?
- **Ambiguity**
 - Is there a jurisdiction clause?
 - Does the enforcement of the arbitration clause deem another provisions as superfluous?

Timeliness

- Has there been an undue delay in seeking a stay of the court proceedings?
 - An undue delay has been interpreted to mean – *has a party taken too long to initiate a request for a stay?*
 - Is the delay *objectively reasonable*?
 - Do the submissions resemble the hallmarks of a *delaying tactic*?
- Would permitting arbitration leave a party without a remedy?



Key Developments

Arbitration or litigation: case studies

Case study #1

- You are about to enter into a service contract
- Given the service, your counterparties tend to be well-known and established companies
- From your own experience, you expect fairly frequent, uncomplicated, disputes (ex. timeliness of performance or payment, amounts owing on invoices)
- Your company and the supplier are both local Canadian entities

What do you think?

A Litigation

B Arbitration



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What if:

- Each potential dispute is likely to be within or only slightly over the monetary limits for the local small claims court
- The counterparties are not as established

What do you think?

A Litigation

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Case study #2

- You are purchasing a business or part thereof from a competitor
- You have several carefully negotiated representations and warranties from the seller and clauses on deliverables and timing
- Some of these are nice to have but a few will be critical to your ability to successfully launch your operation of the purchased business

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What if:

- You are making the purchase from an entity with whom you need to maintain a long-term working relationship?

What do you think?

A Litigation

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Case study #3

- You are developing or building a project in Canada
- You need to source a key component from another entity in Canada
- If the component is not delivered, or not delivered on time, there will be extensive costs and delays

What do you think?

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Case study #3

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- You need to source a key component from another entity in Canada
- If the component is not delivered, or not delivered on time, there will be extensive costs and delays

What if:

- You are developing/building the project in another country?
- What if there are other subsidiary entities, or there is a form of supply chain, involved on the counterparty side?

What do you think?

A Litigation

B Arbitration

Case study #4

- You are selling a part or all of a business
- Because of the nature of the assets involved in the sale, you think it's more likely that you will face a claim than be the party wanting to bring a claim against the buyer
- Any dispute would likely be highly technical and unique to your industry

What do you think?

A Litigation

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Case study #4

- You are selling a part or all of a business
- Because of the nature of the assets involved in the sale, you think it's more likely that you will face a claim than be the party wanting to bring a claim against the buyer
- Any dispute would likely be highly technical and unique to your industry

What if:

- Given the nature of the industry, its likely your counterparty could assign its part in your agreement further?

What do you think?

A Litigation

B Arbitration

Your Presenters



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Thank you



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