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Dispute Resolution

General Considerations

Disputes can arise at any time. Frequently, they occur between co-contracting parties, employers and their employees, businesses and their clients, or among shareholders under a Unanimous Shareholders' Agreement.

Disputes may also arise between a business and various levels of government, particularly in heavily regulated industries. Most government decisions in Canada, though, are ultimately reviewable and subject to a court's scrutiny. Governments may similarly be the subject of damages claims in tort and contract.

Often, mechanisms and processes to resolve disputes are not thought of until conflicts arise. It is always best to establish a rational approach to dispute resolution when doing business in Canada and negotiating any formal business arrangement or agreement.

Should issues arise, there are two basic options available for dispute resolution:

- Litigating through the courts
- Alternative dispute resolution (mediation and arbitration)

Litigating Through the Courts

Choice of Governing Law and Forum

In Canada, parties may choose which laws govern their agreement through the inclusion of a "choice of law" clause. However, this clause is subject to certain limitations, such as legal provisions of public order, which may not be contractually waived. Parties can also include a "choice of forum" clause in their contract, requiring any disputes that arise to be dealt with in a specific jurisdiction or forum.

Canadian courts will presumptively uphold such clauses unless the validity of the contract itself is called into question, there is a statutory prohibition, or there are very strong public policy reasons for overriding the provision.

Of note, in Québec, the courts do not allow the inclusion of choice of law clauses in consumer contracts and consider choice of forum clauses as unenforceable against consumers.

Where parties have not included a forum clause, Canadian courts may decline to take jurisdiction over matters if there is a forum better suited to hear the case. Canadian courts are increasingly open to conducting various parts of the litigation process, including examinations, hearings, and even trials, virtually through video-conferencing software. Thus, even if the litigation forum is within Canada, witnesses and other participants may not need to attend in-person. While this adoption was accelerated by the difficulties surrounding the COVID-19 pandemic, these changes are widely expected to continue.

Treatment of Commercial Matters

Delay in scheduling and hearing matters before the courts has become common across Canada. Several Canadian jurisdictions have taken steps to reform and speed up the litigation process, particularly with respect to commercial matters.

In Toronto, parties in a commercial dispute can opt to proceed before a special branch of the Superior Court known as the "Commercial List." If available, it is generally the preferred route as it allows cases to be heard by a judge specializing in commercial litigation, often resulting in a speedier trial and decision.

A key benefit to the Commercial List is that matters are subject to the "case management" process. Case management allows parties to appoint a designated judge or associate judge to manage the procedural, scheduling, and timetabling aspects of a case prior to trial, in order to move to trial more quickly. While case conferences have traditionally been reserved for procedural matters, there have been recent examples in Ontario of case management judges granting substantive relief without requiring a full hearing. This has been received as an attempt from the courts to address the length delays and backlog of cases.

In British Columbia, parties are similarly entitled to a "case management" process to obtain orders enforcing strict timetables in the litigation. At the request of one of the parties, the court may, in certain circumstances, make an early assignment of the trial judge to oversee pretrial matters.

In the province of Québec, pursuant to legislation that came into effect on January 1, 2016, parties to an eventual litigation have the obligation to consider alternative dispute resolution methods before introducing a civil claim. The legislation also encourages litigators to present oral contestations (rather than proceeding in writing), which significantly reduces fees and costs.

In addition, most provinces have provisions for a simplified civil claim procedure, which is a streamlined and less costly process for resolving civil claims of relatively modest amounts. This process is available in respect of claims within a statutorily defined amount which relate to disputes arising from money and/or property.

In Ontario, the simplified procedure rules apply where a claim is for more than $35,000 but no more than $200,000. Claims for $35,000 or less are handled by the Small Claims Court.

In Québec, claims relating to amounts between $15,000 and $75,000 are received by the Civil Division of the Court of Québec. Claims between $75,000 and $100,000 fall under the concurrent jurisdiction of the Superior Court and of the Court of Quebec. Claims in the Court of Quebec are governed by special simplified rules of procedure. Claims below $15,000 fall under the jurisdiction of the province's Small Claims Court.

British Columbia has several rules to expedite certain cases, including Fast Track Litigation for many matters where the amount at issue is less than $100,000. British Columbia also has a Small Claims Court where the amount at issue is less than $35,000, as well as a Civil Resolution Tribunal to resolve certain types of claims (including certain disputes about stratas, societies, and cooperative associations) as well as claims below $5,000. Most provinces also have provisions for a summary judgment and/or summary trial procedure, allowing for a final determination of an issue or proceeding prior to trial. The Supreme Court of Canada has emphasized that summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely, and just adjudication of claims.

Discovery Obligations

The scope of documentary discovery in most Canadian provinces (with some exceptions) is similar to that of the United States. The general rule is that parties to civil litigation must, after the pleadings have been exchanged, disclose the existence of all documents relevant to the litigation, whether or not those documents are favourable to their position. The term "document" has been defined broadly to include both hard copy and electronic communications, videos, tape recordings, and other sources of information.

In Québec, parties need only disclose documents that they intend to rely on at trial or that have been specifically requested by the other party. British Columbia's rules provide that only those documents relating to "material facts" must be produced, but the rules also permit a party to apply for production on the broader relevance standard.

Parties must also produce the content of relevant non-privileged documents. If there is a dispute over a claim of privilege, a judge will make a determination on the issue on a motion by a party. Before bringing a motion, a party should consider whether the time and expense of the motion is worth the effort and how much impact, if any, the motion contemplated will improve the chances that the issue will resolve in a manner favorable to a party. This can help avoid lengthening the litigation process and burdening the courts with issues that, in many cases, can be resolved in practical ways such as mere conversations between the parties or case conferences.

Following the documentary discovery period, parties can examine an opposing party (in the case of an individual) or a representative of an opposing party (in the case of a corporation or organization). This is commonly referred to as "examination for discovery". It is important to note that in most provinces, each party is entitled to examine only one representative of an opposing party (even if that party is a large corporation), subject to certain exceptions requiring court approval.

Damages Awards

Damages awards tend to be lower in Canada than in the United States, particularly in the area of tort claims (known as "extra-contractual liability" in Québec). One reason for this is that few jury trials occur in civil cases in Canada. The Supreme Court of Canada has also set an upper limit for awards of non-pecuniary general damages (i.e., pain and suffering) in negligence cases, which is adjusted annually for inflation. Furthermore, awards of punitive damages are relatively rare and tend to be quite modest (generally in the tens of thousands of dollars, depending on the circumstances). In Québec, punitive damages are even more modest and are exceptionally rare.

Costs

In the United States, parties in a dispute typically pay their own legal costs. By contrast, the general rule in Canadian courts is that a portion of the costs of litigation is ordered to be paid by the losing party to the successful one.

The share of costs that a losing party may be required to pay will be affected by its conduct over the course of the action. For example, the portion of costs might be higher if a party makes unsubstantiated allegations of fraud or if an offer to settle made prior to the start of the trial was rejected, particularly when the offer was comparable to or better than the result obtained at trial.

In Québec, the successful party may claim reimbursement of court costs, but unless there was abuse in the conduct of the legal proceedings, solicitor-client costs may not be recovered.

Class Actions

The Federal Court of Canada and all Canadian provinces (with the exception of Prince Edward Island and the three territories) permit class actions. In all jurisdictions, the class action must be certified by the court ("authorized" in Québec) in order to proceed. It is usually easier for a class action to be certified in Canada than it is in the United States, although recent amendments to Ontario law have raised the standard for certification in that province. There has been an acceleration of claims being filed in British Columbia, which has a less onerous test for plaintiffs and a no-costs regime.

There is no equivalent process in Canada to what is known in the United States as "multi-district litigation." As a result, it is possible that a company could face class action suits in more than one jurisdiction. Until relatively recently, defendants had few options to deal with the costs and inefficiencies of duplicative class actions seeking the same or similar relief in multiple provinces. However, Ontario, British Columbia, Alberta, and Saskatchewan have now adopted provisions to give courts these tools. These laws require courts to consider the existence of overlapping multi-jurisdictional class actions and whether it would be preferable to have some or all of the claims resolved in another jurisdiction.

Best Practices

Canadian courts have published a number of practice directions and notices that govern how proceedings in the various courts are conducted. It is imperative for counsel to be aware of and understand these guidelines before filing documents or appearing before the court in a proceeding.

There is also a growing importance of technology in dispute resolution. Since the pandemic, the courts have adopted helpful digital tools to facilitate case proceedings. There is a corresponding and evolving duty of technological competence for both judges and counsel in most of Canada. Judges and counsel are expected to understand and utilize the various technologies available to them in conducting their role in the litigation process. For example, in Ontario, the Superior Court expects counsel and judges to be able to use Case Center, a secure, cloud-based e-hearing platform. There have been cases where a lawyer's unwillingness and/or inability to do so has resulted in negative cost consequences for their clients.

Alternative Dispute Resolution: Mediation and Arbitration

Although there are many different forms of alternative dispute resolution, mediation and arbitration tend to be the most common.

In both forums, a neutral third-party assists parties in settling a dispute. Parties can select the mediator/arbitrator. Finding the most suitable mediator/arbitrator is pivotal to the outcome of a case. Careful consideration should be given to, among other things, the mediator/arbitrator's experience in the subject matter or specific area of law raised by the case, and their ability to handle the specific case at hand in an efficient and economical way.

Mediation

In mediation, a neutral third-party mediator assists parties in settling a dispute. Mediation is a more amicable and co-operative process than other forms of dispute resolution, which are based on an adversarial model. In addition, mediation tends to focus on practical, as opposed to strictly legal, solutions to particular disputes.

Mediators do not decide cases or impose settlements. A mediation depends on the commitment and good faith of the parties involved in order to succeed. Following a successful mediation, parties generally enter into an agreement to resolve a dispute.

In certain Canadian courts, parties may be obligated to attend a mediation session as part of the litigation pretrial procedure – a requirement that is increasingly being implemented as caseloads continue to grow.

Upon request, Quebec courts can provide the parties involved in a litigation with the service of a judge-assisted mediation.

Arbitration

Arbitration can be a highly effective means of resolving disputes between two commercial parties. It is a more formal process than mediation because the tribunal considers evidence and legal arguments from the counsel of the respective parties.

In contrast to the mediation process, arbitration proceedings are legally binding and arbitration awards are enforceable.

Arbitration is generally confidential by nature with most jurisdictions requiring confidentiality unless otherwise agreed to by the parties. In certain jurisdictions, the only parties bound by a duty of confidentiality in an arbitration are the arbitrators, requiring the parties in a dispute to agree to a confidentiality agreement at the outset if desired. In any event, arbitration is private, taking the dispute out of the public eye because it is not held in the courts.

Arbitration can be faster and cheaper than litigation, depending on the nature of the dispute and the process agreed to by the parties. Arbitration offers:

- The ability to choose the adjudicator, including the ability to select industry experts as arbitrators
- Greater flexibility and control of the process (including over timelines)
- Private proceedings
- The potential for confidentiality
- Enhanced finality (usually with limited appeal rights)
- Global enforcement of arbitral awards

Parties can also choose a mutually agreeable procedural framework within which to conduct the arbitration, including:

- The scope of the dispute
- The place of arbitration
- The procedural rules which will govern the arbitration (institutionally administered or ad hoc), including timelines
- The number of arbitrators
- The language of the arbitration
- The preferred costs system
- Availability or limitations on review of the arbitrator's decision by the courts

Costs in arbitration usually fall into two broad categories: (i) costs of the arbitration (i.e. the costs of the tribunal and institution, if any, and (ii) legal costs. Unless the arbitration clause provides for how costs will be allocated, costs in arbitration are generally recoverable by the successful party. Commonly, the “costs of the arbitration” are awarded in full to the successful party, whereas the “legal costs” may be reduced on the grounds of reasonableness. In determining costs, the tribunal may take into account various aggravating or mitigating factors such as: the level of success of a claim, the behaviour of the parties towards the efficient conduct of the arbitration, or the pursuit of unfounded arguments.