# 17. Dispute Resolution

## General Considerations

Disputes can arise at any time. Frequently, they occur between co-contracting parties, employers and their employees, and 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. When it comes to doing business in Canada, it is always best to establish a rational approach to dispute resolution when 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.

Where parties have not included a forum clause, the courts may decline to take jurisdiction over matters if there is a forum better suited to hear the case.

### Treatment of Commercial Matters

Several Canadian jurisdictions have taken steps recently to reform and speed up the litigation process, particularly with respect to commercial matters. In certain cities of Ontario, for example, parties in a dispute are eligible to follow a "case management" process. This enforces a strict timetable that quickly moves cases to trial.

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.

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.

Most provinces have provisions for a simplified civil claim procedure, provided the value remains within a statutorily defined amount and the claim relates to disputes arising from money and/or property. In Ontario, for example, the simplified procedure rules apply where a claim is for more than $25,000 but no more than $100,000. Claims for $25,000 or less are handled by the Small Claims Court. The same is true in Québec, where claims relating to amounts between $15,000 and $84,999.99 are handled by the Civil Division of the Court of Québec. Claims below $15,000 fall under the jurisdiction of the province's Small Claims Court. Class actions are not subject to the simplified procedure rules. British Columbia has a number of rules to expedite certain cases, including Fast Track Litigation for many matters where the amount at issue is less than $100,000.

Moreover, 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 delivered, disclose the existence of all documents relevant to the litigation, whether or not those documents are favourable to their position. In Québec, however, 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. Opposing parties, however, also have the possibility to proceed to pre-trial examinations and/or to obtain the communication of various undertakings and documentation. This is commonly referred to as "examinations for discovery." If there is a dispute over a claim of privilege, a judge will make a determination on the issue. The term "document" has been defined broadly to include both hard copy and electronic communications, videos, tape recordings, and other sources of information.

Following the documentary discovery period, parties have the opportunity to 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). 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-monetary damages (i.e., pain and suffering), which is adjusted annually for inflation. Furthermore, awards of punitive damages are relatively rare and tend to be quite modest (usually 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 that which resulted from the 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.

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. However, parties will usually attempt to coordinate the proceedings in two or three provinces, including any measures being taken in the United States.

## 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.

### 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, Québec 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: The arbitrator(s) hear evidence and legal arguments from the counsel of the respective parties. In contrast to the mediation process, arbitration proceedings are legally binding. Indeed, Canadian courts have become increasingly deferential to arbitral awards. An additional benefit of arbitration is that arbitral awards are typically easier to enforce in a foreign country than the judgment of a domestic court.

Arbitration is not necessarily confidential by nature. It is, however, private. The key distinction here is that the dispute is out of the public eye because it is not held in the courts. In certain jurisdictions, the only parties bound by a duty of confidentiality in an arbitration are the arbitrators. If the parties in a dispute wish the arbitration to be confidential, they must sign a confidentiality agreement at the outset.

British Columbia, however, has recently become a more arbitration-friendly jurisdiction. The International *Commercial Arbitration Amendment Act,* which, among other things, adopts the UNCITRAL Model Law, makes arbitrations private and confidential and gives arbitrators jurisdiction to grant interim measures.

There are two major myths about arbitration: (a) that it is less expensive and (b) that it is faster than litigating through the courts.

The cost of an arbitration proceeding will be determined by the complexity of the dispute. Some factors that increase the cost of an arbitration proceeding are:

- When several arbitrators are required
- When witnesses need to be flown in from abroad
- When parties have to make on-site visits to international locations

In fact, international arbitration can be just as costly as any other cross-border dispute settlement.

Expediency in the arbitration process is also contingent on the complexity of the proceeding. Where several issues requiring substantial technical expertise arise, the arbitration will likely take just as long as litigating the same issues in court.

The main benefit to arbitration is flexibility. Parties are able to tailor the arbitration process to meet their needs.

A well-drafted arbitration clause can reflect parties' agreement to, for example:

- Shorten the time for the production of documents and examination of witnesses
- Limit the arbitrator's powers to award punitive and exemplary damages
- Impose their preferred costs system
- Exclude, to the fullest extent possible, a review of the arbitrator's decision by the courts

Parties can also choose a mutually agreeable procedural framework within which to conduct the arbitration. Alternatively, they may opt for the arbitration procedures outlined in provincial legislation or those created by other private and public arbitration institutions, like the ADR Institute of Canada or the United Nations Commission on International Trade Law.