TAB 5

Arbitrations In Ontario – A Primer

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Safeguarding Real Estate Transactions

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Continuing Legal Education

ARBITRATIONS IN ONTARIO – A PRIMER

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INTRODUCTION

"As a litigant, I should dread a lawsuit above all else, other than sickness and death."

Judge Learned Hand[1]

Litigation is not the only way to resolve conflicts. Private arbitration is another, and in some cases, superior dispute resolution forum. But if litigation is no tea party, neither is arbitration. Still, the creative lawyer can make arbitration a far better fate than, say, prolonged litigation, sickness, or death.

Many agreements involving real estate contain arbitration (or other dispute resolution) provisions. Solicitors engaged in the negotiation and drafting of real estate agreements should carefully consider whether arbitration provisions are to be included – and if so – the terms thereof. Arbitration – if well thought out – may be a preferred approach to secure the timely and efficient resolution of some or all of the potential disputes that may arise in many real estate transactions.

This paper is an introductory discussion of private arbitration in Ontario. We will:

1. give an overview of the *Arbitration Act, 1991;*
2. discuss factors to consider when deciding whether to enter into an arbitration agreement; and
3. discuss issues that arise in drafting such agreements.

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[1] "The Deficiencies of Trials to Reach the Heart of the Matter", in (1926) 3 *Lectures on Legal Topics* 89, James N. Rosenberg et al. (eds.), at p. 105.

ARBITRATION

Arbitration – like litigation – is an adversarial dispute resolution process determined and controlled by a neutral third party. However, in arbitration, the process is a creature of the parties (with limited exceptions) and disputes are resolved by a tribunal *chosen* by the parties[2].

In Ontario, arbitrations are governed by the *Arbitration Act, 1991* (the "***Act***")[3], which sets out both default and mandatory provisions for the conduct of arbitrations. The *Act* applies to any arbitration conducted under an arbitration agreement, except those to which the *International Commercial Arbitration Act* applies[4]. In addition, some matters are excluded by law from application of the *Act*.

An arbitration agreement is defined in the *Act* as an agreement, oral or written, between two or more persons to submit to arbitration of a dispute that has arisen[5]. Arbitration agreements are "independent contracts" – their validity is not tied to the fate of the "main" agreement.

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[2] Where the arbitration agreement does not provide for the appointment of an arbitrator and the parties cannot agree – the parties may seek the court's intervention.

[3] S.O. 1991, c. 17, as am.

[4] If the arbitration is international (because the parties are from different countries) it will be governed in Ontario by the *International Commercial Arbitration Act* r.s.o. 1990 C. I.9. Arbitrations involving the Federal Government are subject to the *Commercial Arbitrations Act* R.S. 1985, c. 17 (2nd suppl.), as am. This paper does not discuss such arbitrations.

[5] There are many cases where parties cannot agree whether a dispute must be determined by way of arbitration – often a result of a poorly drafted arbitration agreement.

If an arbitration agreement does not provide otherwise, the tribunal consists of a single arbitrator.[6] In the case of a multi-member tribunal, the members appoint a chair who, in the absence of a majority decision, determines the matters at issue.

The protocols and procedures of the arbitration need not parrot *in toto* the formalities of the courts. In fact, the freedom to pick and choose appropriate protocols and procedures is one of the most appealing features of arbitration. Subject to some exceptions in the *Act*, the parties may determine the format of the arbitration.

The arbitral tribunal may make interim orders, and render a final decision, called an "award". The *Act* makes arbitration awards legally enforceable and subject to limited appeal rights to, and review by, the courts.

While, in general, court processes and decisions are open to the public, arbitrations are conducted with only the parties and their privies present. The proceedings and award are confidential, as long as the arbitration agreement so provides.[7]

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[6] The *Act,* section 9.

[7] The confidentiality is compromised, however, where court intervention is sought (procedural relief or appeals, for example).

ROLE AND POWERS OF THE ARBITRAL TRIBUNAL AND POWERS, AND COURT INTERVENTION

The courts (subject to the provisions of the *Act*) generally, will not get involved in a dispute that is subject to an arbitration agreement – leaving arbitration as the medium for dispute resolution.[8]. Faced with an application by one party to an arbitration agreement to permit a dispute to proceed before the courts, where the other party asserts arbitration as the appropriate forum, the courts determine, first, the nature of the dispute, and then whether the parties have agreed to have the matter decided outside the court[9].

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[8] *Ontario Hydro v. Dennison Mines Ltd.*, [1992] O.J. No. 2948, (Ont. Gen. Div.) *per* Blair J. (as he then was), at page 3:

> "The Arbitration Act 1991. . . is designed, in my view, to encourage parties to resort to arbitration as a method of resolving their disputes in commercial and other matters and to require them to hold to that course once they have agreed to do so.
>
> In this latter respect, the new Act entrenches the primacy of arbitration proceedings over judicial proceedings once the parties have entered into an arbitration agreement by directing the court generally not to intervene and by establishing a "presumptive" stay of court proceedings in favour of arbitration."

[9] In *Ontario v. Abilities Frontier Co-operative Homes Inc.*, [1996] O.J. No. 2586 (Gen. Div.), Sharpe J. (as he then was) stated:

> The authorities establish that a two-step test is to be applied where a party seeks a stay or similar relief on the ground that the arbitration agreement does not apply to the dispute raised by the proposed arbitration. First, the court should ascertain the precise nature of the dispute which has arisen. Second, the court should determine whether the dispute is one which falls within the terms of the arbitration clause: see *Heyman v. Darwin Ltd. [1942] A.C. 356 at 370; T1T2 Limited Partnership v. Canada* (1994) 23 O.R. (3d) 66 at 73.

If a party to an arbitration agreement begins a court proceeding regarding the subject matter of the agreement, the court must stay the proceeding upon the motion of another party, subject to the following enumerated grounds[10]:

i. a party entered into the arbitration agreement while under a legal incapacity;

ii. the arbitration agreement is invalid;

iii. the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario Law;

iv. the motion was brought with undue delay; or

v. the matter is a proper one for default or summary judgment.

The *Act* provides that an arbitration of the dispute may be commenced and continued while the motion is before the court.

A number of provisions of the *Act*, demonstrate arbitrators are to determine the disputes before them in a quasi-judicial manner, including:

i. arbitrators are to decide disputes in accordance with principles of law and equity (s. 31);

ii. the arbitrator's decision must be in accordance with the arbitration agreement and the contract (s. 33);

iii. the parties must be treated equally and fairly (s. 19(1)); and

iv. each party must be given an opportunity to present a case, and to respond to the other parties' case (s. 19 (2)).

The *Act* empowers the arbitral tribunal to govern its own process[11], and rule on its own jurisdiction.[12] An arbitrator may rule on his or her own jurisdiction to

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[10] The *Act*, section 7.

conduct the arbitration. She may also rule on objections with respect to the existence or validity of the arbitration agreement.[13] If a party does not comply with the arbitrator's ruling on her own authority, enforcement may be sought through the Superior Court of Justice. Where a party contests the tribunal's ruling, the party may apply to the Superior Court to decide the matter.[14]

Pursuant to the *Act* an arbitrator *shall* be independent of the parties and shall act impartially[15]. The *Act* further provides that, subject to a contrary agreement, an arbitral tribunal *shall* decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies[16].

An arbitrator has the power to make an order for the detention, preservation or inspection of property and documents that are the subject of the arbitration, or regarding which a question may arise in the arbitration, and may order a party to provide security[17]. If compliance is not forthcoming, the Superior Court may enforce such direction.

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[11] The *Act,* section 20.

[12] The standard of review of a tribunal's decision regarding its jurisdiction is correctness: *Dayco (Canada) Ltd. v. National Automobile, Aerospace & Agricultural Implement Workers Union*, [1993] 2 S.C.R. 230, 102 D.L.R. (4th) 609.

[13] The *Act,* section 17(1).

[14] The *Act,* section 17(8).

[15] It should be noted that the provisions of the *Act*, save and expect for certain provisions (discussed below) may be expressly contracted out by the parties.

[16] The *Act,* section 31.

[17] The *Act,* section 18(1).

The arbitrator may determine any question of law that arises during the arbitration, or may ask the court by way of application to determine it. A party may seek judicial determination of a question of law, if all parties to the arbitration consent.[18] The ruling may be appealed to the Court of Appeal, with leave.

The arbitration agreement and the *Act* will determine the types of awards that are granted. Under the *Act,* the Tribunal may make interim orders and final awards. An award binds the parties (subject to being set aside or varied: see below, "Appeal Rights and Setting Aside Awards"). Parties may empower the tribunal to determine matters under specified legal or other parameters. For example, a tribunal might be directed to determine the dispute on the basis of what it "deems just", even though this may not accord with the law or the winner-take-all nature of most court orders.

An arbitral tribunal should arrive at its award based upon the evidence before it.[19] Subject to the arbitration agreement, the formal rules of evidence are not as rigid in arbitration[20] as they are before the courts in a civil action.

An arbitrator has the power to award costs of the arbitration[21]. Unless the parties set out a process for awarding costs; the provisions of the *Act* apply. A cost

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[18] The *Act,* section 8(2).

[19] *Loblaw Groceterias Co. v. Toronto (Metropolitan)* [1970] O.J. No. 557 (C.A.)

[20] Section 21 incorporates, by reference, sections 14, 15 and 16 of the *Statutory Powers Procedure Act* R.S.O. 1990, c. S.22 as am – section 14 addresses the right against self incrimination, section 15 provides for, *inter alia*, the admission of hearsay evidence and section 16 provides for the ability of the tribunal to take "judicial" notice of certain facts.

award under the *Act* is arguably broader than one in litigation. As well as legal fees, it includes the fees and expenses of the arbitral tribunal, and any other expenses related to the arbitration[22].

Arbitrators also have the power to allow the pre- and post-award interest, in accordance with Sections 127 to 130 of the *Courts of Justice Act*[23], *mutatis mutandis*.

The *Act* does not wholly oust the court's jurisdiction. The Superior Court may intervene[24] in accordance with provisions of the *Act*:

i. to assist in the conducting of the arbitration;

ii. to ensure the arbitration is conducted in accordance with the arbitration agreement;

iii. to prevent unequal or unfair treatment of parties; and

iv. to enforce awards.

In addition, the Superior Court retains its usual powers for the detention, preservation and inspection of property, interim injunctions, and receiverships.[25] Subject to the arbitration agreement the courts will also hear appeals. Finally, the court may set aside or vary an arbitration award on certain enumerated grounds (see below "Appeal Rights and Setting Aside Awards").

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[21] The *Act,* section 54.

[22] The *Act,* section 54(2).

[23] R.S.O. 1990, c. C.43, as am.

[24] The *Act,* section 6.

[25] The *Act,* section 8(1).

An arbitration award may be enforced in Ontario under the *Act*[26]. A party seeking enforcement of an award must apply to the Superior Court. The court has limited discretion to refuse such an application – and may not so do unless:

i. the thirty-day period for commencing an appeal or an application to set the award aside has not yet elapsed;

ii. there is a pending appeal, application to set the award aside or application for a declaration of invalidity; or

iii. the award has been set aside, or the arbitration is the subject of a declaration of invalidity.

WHY ARBITRATE?

> "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser - in fees, expenses and waste of time." As a peacemaker, the lawyer has a superior opportunity of being a good man. There will still be business enough
>
> **Abraham Lincoln, US President and lawyer**

Lawyers cannot eliminate litigation as the primary dispute resolution forum. Arbitration however will provide an alternative way to resolve disputes in a timely, efficient, and economically sensible fashion. Arbitration is a process that may allow the *nominal* winner to be an *actual* winner.

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[26] The *Act*, section 50.

Custom Dispute Resolution

Subject only to the *Act*'s exclusions, arbitration agreements may be crafted to fit the dispute. This is an important feature (and potential advantage) of arbitration and contrasts significantly with the rules and procedures generally applicable to all civil actions[27].

Parties may structure the arbitration as they deem necessary subject to certain provisions in the *Act*[28], namely:

i. Subsection 5(4) ("*Scott v. Avery*" clauses[29]);
ii. Section 19 (equality and fairness);
iii. Section 39 (extension of time limits);
iv. Section 46 (setting aside award);
v. Section 48 (declaration of invalidity of arbitration); and
vi. Section 50 (enforcement of award).

Procedural Efficacy

Litigation by its very nature is adversarial. So too is arbitration[30]. Arbitration if conducted in a timely, orderly, and procedurally functional manner is an efficient dispute resolution mechanism.

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[27] Essentially, the *Courts of Justice Act,* and the *Rules of Civil Procedure.* There are exceptions to the general applicability of *Rules*, for example, the rules with respect to mortgage actions as set out in Rule 64 of the *Rules of Civil Procedure*

[28] The *Act,* section 3.

[29] An agreement requiring or whose effect is that a matter be adjudicated by arbitration before it may be dealt with by a court

A familiar complaint against litigation is the seemingly pointless interlocutory steps taken on the way to the courtroom for a final judgment. Litigation has a fixed set of rules that permit parties to engage in seemingly endless interlocutory battles[31]. Trial dates are often distant and do not always proceed as scheduled.

Careful drafting of the rules of the game and injecting timeliness and certainty into scheduling are at the core of a well-drafted arbitration agreement. Arbitration agreements may be drafted so as to limit, or even eliminate, many procedures that are permitted in litigation before the courts and their impact on the timely and efficient resolution of the dispute on a fixed and *certain* date. Moreover, arbitration offers the flexibility to empower the arbitrator to render timely and binding orders on interlocutory matters without costly motions

Costs and Time

Sometimes litigants or their counsel lose sight of the objective. The long road to trial can seem filled with unnecessary and costly pit-stops. This lack of focus is often at the root of parties' dissatisfaction, and the cause of delay-and-cost driven settlements, rather than merit driven settlements. By constraining the process and shortening the wait for the hearing on the merits, arbitration may provide the

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[30] Arbitration may be crafted so as to lessen parties' adversarial tactics; including mandatory but regulated mediation or non-binding arbitration.

[31] Litigation – by virtue of these regular and all too often marginal disputes – combined with an inordinately long time-frame to get to trial –tend to increase costs and engender a confrontational relationship, injecting emotion into the resolution of a *business* dispute. These costs and emotions often serve as obstacles to resolution. In other cases, they lead to settlements based on economics and the need for resolution intensified by a seemingly never-ending process.

necessary focus to allow the parties to secure a cheaper and faster resolution than litigation.

In litigation – unlike in arbitration – the parties do not directly pay for the judge, the courtroom, and court reporter[32]. For many disputes these additional costs might be well spent[33]. Arbitration is often a faster, and less expensive, means of resolving conflicts compared to litigation. The arbitration agreement may be drafted so as to limit costs and effect a speedy disposition.

Arbitrated disputes are usually resolved more quickly than litigated ones[34]. An arbitrated dispute can usually be resolved in a matter of months. Litigation involving lengthy trials may take an inordinate amount of time to get before a judge (be it for a motion or a trial) because of institutional delay. In the courts dates for interlocutory motions and even trials – although fixed – may not proceed due to a variety of reasons. In arbitration fixed dates tend to proceed on schedule.

Reducing arbitration costs may be achieved by eliminating or limiting certain procedures common to the litigation process. For example, eliminating or limiting examinations for discovery (including motions arising therefrom) will have a significant impact on cost. Of course, this is not without potential negative

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[32] These expenses are particularly onerous in lengthy proceedings

[33] Limiting procedures will reduce costs significantly in many arbitrations. A timely resolution by a party-selected tribunal familiar with the case from its inception is also a potential cost saver. The ability to select the venue of the arbitration and convenient scheduling are usually worth any added expenses.

[34] Litigation need not always be resolved by way of an action and a trial. Proceeding by way of application under Rule 14 of the *Rules of Civil Procedure* – for example, where there are no material facts in dispute – is very efficient. One should consider including only matters that are not properly determinable by way of Application, drafting an arbitration agreement.

impacts as the primary function of discovery is to learn the other sides' case. Thus eliminating or limiting discovery may make it more expensive and difficult to prepare for the arbitration hearing.

Proper drafting combined with the absence of institutional delay, make arbitration the friend of those who seek a speedy resolution, and who make their motto "justice delayed is justice denied." Generally speaking, arbitration is not the route for those who would rather see a file collect dust on a shelf before any resolution is secured.

Special Expertise – Choice and Continuity

> I don't want to know what the law is, I want to know who the judge is.
>
> **Roy Cohn**[35]

The parties cannot control the outcome, but they choose their tribunal[36]. Parties to an arbitration agreement thus have far more control than in litigation, where the judges are for the most part *arbitrarily* assigned, and may not have expertise in the subject matter of the dispute. Parties will often deal with several Masters and Judges over the course of a dispute. In arbitration the tribunal will determine all matters and be well-versed in the case.

Arbitration agreements without appointment provisions usually end up in court, where the parties cannot agree on their own. This adds to the uncertainty of the

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[35] *New York Times Book Review*, 3 April 1988, at 24.

[36] A provision should be inserted that provides for a crystal clear appointment process both with respect to the identity of the arbitrator and the timeframe for so selecting. \

process, not to mention greater time and expense. If an agreement to arbitrate is made, the provisions governing the arbitration – including the appointment of an arbitrator, or the process for appointing one – should be expressly set out.

A well-drafted arbitration agreement will provide for the appointment of a tribunal with the requisite skills to resolve the matter. The tribunal might be populated by experts in the relevant field[37] or former members of the judiciary or counsel of high repute. A specialized tribunal familiar with the issues saves time and expense in resolving disputes.

Of course, for some disputes, the courts will be the best forum. For example, litigation may be preferred to determine conflicts that are based on the interpretation of statutes or law. In addition, arbitration may be superior in situations where mandatory or prohibitive orders may be required – not because arbitrators are not (or cannot be) so empowered – but because the courts may possess greater expertise. Finally, disputes where one party is expected to be difficult to govern might be better served by way of a civil action.

Single Arbitrator or a Panel?

Certain disputes may be better suited to a tribunal of three, rather than a single arbitrator. If cost is an issue, one arbitrator is cheaper than three. Scheduling is often easier with one arbitrator. Of course, where one arbitrator is selected there may be a difficulty in agreeing to the arbitrator or even the process to so select. A three-member tribunal is often a solution to these problems.

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[37] For example, valuators, real estate agents, engineers, architects, and quantity surveyors

A panel of three may be preferable if the matters in dispute are complex, as such a tribunal may be better able to bring a broad range of expertise. In addition, where the stakes are high, financial or otherwise, parties might feel more confident in a three-member tribunal.

There are various permutations of the three arbitrator panel. A properly drafted agreement will have the number of arbitrators determined, *and* the method of selection. Too often arbitrations grind to a halt at the outset, because of the parties' inability to select the tribunal. A common method for avoiding such deadlock is to have each side choose one member of arbitration panel. The two nominees then choose a third. Another way is to empower an agreed upon third party (or parties) to select the arbitrator. If clear appointment provisions are not set out, the courts may be called upon to appoint the arbitrator.

ARBITRATION AGREEMENTS

The decision to arbitrate or litigate a dispute is a significant one and – if possible – should be addressed during negotiations by the parties at the time the main agreement is drafted (when tensions are low) rather than at the onset of the dispute (when tensions are high)[38]. In addition, counsel should consider the types of disputes that may arise when the arbitration agreement is drafted. A uniform arbitration provision for "any and all disputes" may be appropriate for certain

[38] Parties might also find it easier to determine the appointment provisions, procedures, and appeal rights in the absence of an actual dispute.

relationships but it usually is better to tailor the dispute resolution process to specific disputes[39].

In our experience it seems that consideration of arbitration and its mechanics are often an afterthought to many agreements – and in many cases – where arbitration clauses do find their way into agreements, they are merely an insert from an office "precedent". Proceeding in this fashion may end up with costly results – including litigation with respect to the arbitration clause itself[40].

If arbitration is the desired way to resolve all *or* certain disputes arising between the parties then the agreement should state so explicitly. For example, an appraisal or valuation process in a commercial lease may or may not be an arbitration clause[41]. Leaving this issue unclear may prolong the dispute on account of argument over whether or not the dispute is the *subject matter* of arbitration.

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[39] Binding arbitration might be appropriate for the following:

- Rent issues;
- Landlord's "reasonable" consent;
- Maintenance;
- Repairs;
- Tenant improvement issues;
- Use restrictions;
- Common area issues; and
- Operating covenants;

[40] For example, parties might dispute the scope of the arbitration; or the appointment of arbitrators; and appeal rights.

[41] The question of whether a submission to arbitration had been made in a valuation process was examined by the Supreme Court in Sport *Sport Maska Inc. v. Zittrer*, [1988] 1 S.C.R. 564, where the issue was whether the auditors, whose opinion of the valuation of the inventory of a bankrupt company was agreed to be final and binding, were acting as arbitrators. See also *Re Premier Trust Co. and Hoyt et al,* [1969 1 O.R. 625, CA.

As such, at the very minimum an "arbitration agreement" should provide the following terms:[42]

i. both parties engage the arbitrator;

ii. a defined dispute is submitted to the arbitrator;

iii. the arbitrator is not simply a 'fact finder' but evidence or submissions are put before him or her for examination and consideration; and

iv. the arbitrator thereupon will provide a decision which the parties have agreed to accept.

As the form of the arbitration is so much within the control of the parties, the parties have the ability of crafting an agreement that provides for as much or as little court-like procedure as they wish – provided such control is prescribed in the arbitration agreement. Consideration of the arbitration's process should be given when drafting arbitration agreements. Parties might incorporate none, some, or all of the process set out in the *Courts of Justice Act* and the *Rules of Civil Procedure*.

Protracted disputes that delay the securing of resolution may be avoided by a well-drafted arbitration agreement. Arbitration enables the resolution of disputes as soon as possible after they arise[43]. This would include rigid scheduling for both the appointment of the tribunal and the commencement of the arbitration.

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[42] See *Re Concord Pacific Developments Ltd. and British Columbia Pavilion Corp.* 85 D.L.R. (4th) 402; citing Russell on Arbitration

[43] This is usually the most efficient way to determine many disputes where there is not a complex and large factual matrix. Of course, some disputes, like fine wines, are better resolved with age.

Procedures allowing for abridged notice and reply periods to avoid delay may be added to provide expedited resolution of disputes. In addition, parties should limit interlocutory steps and agree that the award is binding.

For disputing parties who want an arbitration decision to follow the law or to possess some special expertise, some thought should be given to creating a process in the agreement for the selection of an arbitrator with the requisite skills. In Toronto, there are a variety of former members of the judiciary and distinguished counsel who possess the requisite legal expertise.

Under the *Act* a tribunal can assign arbitration costs to one party or the other as part of the award. An arbitration agreement should address the issue of costs of the arbitration (including legal fees and the tribunal's fees); failing which the default provisions of the *Act* will be applied. For instance, parties might wish to have costs payable on a full indemnity basis by the unsuccessful parties; or adopt a tailored version of the cost consequences set out in the *Rules of Civil Procedure* (including those with respect to offers to settle).

There are limited appeal rights under the *Act*. Arbitration agreements may be fashioned so as to curtail or expand rights of appeal. This will provide greater finality to disputes resolved by arbitration.

Arbitration – as compared to litigation – is *intended* to be a less formal, faster and less expensive forum for dispute resolution. While these beliefs are true in some cases, they are not absolute. The best way to ensure that arbitration will reflect the expectations of the parties is to draft an arbitration agreement that specifically

sets out those expectations. There are many tactics that may be used by litigants *and* parties to arbitration to unduly delay and complicate matters and drive up costs. The arbitration agreement must provide specific terms to purge (or at least reduce) the use of such tactics.

APPEAL RIGHTS AND SETTING ASIDE AWARDS

Litigation affords parties an appeal as of right from all final orders of a judge[44]. Ordinarily, the loser will have no such right in arbitration. Parties in arbitration should assume that an arbitration award will be final. An arbitration award binds the parties, unless it is set aside or varied by way of appeal[45].

The *Act* provides that if an arbitration agreement does not specifically address appeal rights with respect to questions of law, a party may seek leave to appeal to the Superior Court of Justice on a question of law. Leave is not easily secured, as the court must be satisfied that 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. The arbitration agreement may provide for, or limit appeals with respect to questions of law. All other appeals – those involving questions of mixed fact and law and questions of fact – must be expressly provided for in the arbitration agreement.

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[44] In addition, parties may seek leave to appeal from interlocutory orders.

[45] The *Act,* sections 37, 45, and 46.

Accordingly, the arbitration agreement should be drafted to reflect the parties' intentions with respect to appeals. If parties wish finality then the agreement should provide for no right of appeal – conversely, if appeals are to be in play then the arbitration agreement should provide for the types of permitted appeals.

On appeal, the court may confirm, vary or set aside the award. The court may also remit the award to the arbitral tribunal with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration[46].

Section 46(1) provides for the following grounds to set aside an award:

1. A party entered into the arbitration agreement while under a legal incapacity;
2. The arbitration agreement is invalid or has ceased to exist.
3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
4. The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with the *Act*.
5. The subject matter of the dispute is not capable of being the subject of arbitration under Ontario law.
6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.
7. The procedures followed in the arbitration did not comply with the Act.
8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.

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[46] The *Act*, section 31.

9. The award was obtained by fraud.

Under Section 48, a non-party to the arbitration may seek the court's intervention to declare the arbitration is invalid on any one of four grounds:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid or has ceased to exist.
3. The subject matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The arbitration agreement does not apply to the dispute.

ARBITRATION AND MEDIATION

Although this paper does not address the pros and cons of mediation or the strategy to be used on mediation, some mention of the benefits of using both mediation and arbitration to resolve disputes.

The resolution of significant disputes is often achievable by way of a mediated settlement. As such when drafting dispute resolution provisions, solicitors should consider the insertion of mandatory mediation as part of the resolution process. Early mediation in conjunction with arbitration should a resolution (in whole or in part) not be achieved, may assist in avoiding a protracted dispute requiring third-party resolution.

CONCLUSION

In *American Almond Prod Co v. Consolidated Pecan S Co*[47], Judge Learned Hand made the following statement:

> Arbitration may or may not be a desirable substitute for trials in courts; as to that the parties must decide in each instance. But when they have adopted it, they must be content with its informalities; they may not hedge it about with those procedural limitations which it is precisely its purpose to avoid. They must content themselves with looser approximations to the enforcement of their rights than those that the law accords them, when they resort to its machinery.

If Arbitration is to be effective alternative to litigation then serious consideration of appointment provisions, timelines, procedures and appeal rights (amongst other things) must be addressed. Parties should, in appropriate cases – contract for, and embrace the freedom, from the formalities and constraints of civil litigation.

Litigation is often considered by many business people and solicitors to be a short-term strategy or a last resort to solve problems[48]. An arbitration agreement can ensure that the litigation process – often a lengthy, time consuming and expensive process – is not in and of itself used to leverage a resolution of a dispute. Arbitration will usually result in a speedier and more efficient resolution of a dispute.

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[47] 144 F.2d 448 (2d Cir. 1944)

[48] This view while accurate sometimes is often wrong. Litigation is part of a party's arsenal to resolve disputes and might be the "stick" that is needed to get results when the other side does not bite at the "carrot"