Arbitration: Tips and Practical Considerations

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Discussion Topics

1. What is Arbitration? (BG)

2. Reasons to Consider Arbitration (WB)
   Potential advantages and disadvantages

3. The Arbitration Clause (DS)
   Essential elements and other considerations
1. What is Arbitration?

- **Consensual, private** system of dispute resolution, **to the exclusion of courts**
- Decision-maker(s) chosen by the parties
- Most instances: **final** and **binding** award

Art. 2638 *Civil Code of Québec* (“C.C.Q.”)

“An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts.”
Arbitration Agreement

• Arbitration agreement “shall be evidenced in writing”
  ➢ Deemed to be evidenced in writing if it is “contained in an exchange of communications which attest to its existence” (Art. 2640 C.C.Q.)

• Arbitration agreement contained in contract is considered separate from other clauses of contract (Art. 2642 C.C.Q.)
When Arbitration May Arise…

- **International context**: arbitration has become the norm in most international business transactions

- Unlikely that a party will accept the other’s national courts to settle disputes due to:
  - Unfamiliarity with other party’s court system (fear of other’s “home court advantage”)
  - Preference for neutral forum and decision-maker
  - Language issues

- Avoid “forum shopping” (possibility of bringing an action in more than one jurisdiction)

- **Inter-provincial context**

- Poses some of the same issues above
Matters That Cannot Be Subject To Arbitration

- Art. 2639 C.C.Q.:

- Status and capacity of persons
- Family matters
- Other matters of public order
  e.g. Consumer protection legislation (Article 11.1 Consumer Protection Act, since December 2006)
  - Annulling a notarial act by improbation
Reasons to Consider Arbitration

Can be an advantageous, effective dispute resolution method because of:

➢ **Costs:** can be (but not always) cheaper than traditional litigation

**Consider:**

- Hourly rate of arbitrators
- Administration expenses (e.g. travel, accommodations, venue, deliberations)
- Added costs associated with recourse to courts (e.g. injunctions, homologation of award, recognition and enforcement of foreign awards)
- Faster pace of arbitration
- Possible travel cost
Reasons to Consider Arbitration (cont.)

➢ **Speed**

- Time sensitive business disputes
- Generally, less discovery (resulting in shorter process)
- Witness statements in lieu of testimony
- Faster trial, and frequently shorter
- No, or limited, appeal

Consider:

- Arbitrators’ schedules and ensuing delays
- 3 vs. 1 arbitrator
Reasons to Consider Arbitration (cont.)

➢ **Identity of decision maker(s)**
  - Someone with industry or particular expertise, or a mixed panel

➢ **Flexibility**
  - Control over process, which can be tailored to parties’ needs
    - selection of governing rules – Institutional vs. Ad Hoc – advantages and disadvantages
    - forum
    - limited discovery and document production etc.
    - live witnesses or examination-in-chief vs. affidavit evidence
Reasons to Consider Arbitration (cont.)

• **No appeal** (arrive at final determination more quickly)

• **Private** and, if parties agree, **confidential**
  
  • Avoid media coverage and scrutiny, protect sensitive commercial information, trade secrets etc.

  
  − **Note:** “private” arbitration (only parties to the agreement participate) is not necessarily “confidential” (non-disclosure of information to third parties)

  
  • If a party is forced to bring Court action to enforce arbitration award, possibility of award becoming public

• **Avoid setting legal precedent in industry**

• **Neutrality and flexibility**
Potential Disadvantages of Arbitration

- **No Appeal** (Article 646 and 647 C.C.P)
  - Annulment (article 648 *C.C.P*) only available in very limited circumstances
  - Endorecherche inc. c. Endoceutics inc. (2015 QCCA 1347)
  - Nearctic Nickel Mines Inc. c. Canadian Royalties Inc. (2012 QCCA 385)

- **Homologation**

- **Limited discovery**

- **Lack of coercive powers**
  - No control over non-parties (i.e. witnesses): court intervention may be required (i.e. Article 634 *C.C.P*).

- **Multiparty disputes** : cannot join all relevant parties
  - Société québécoise des infrastructures c. WSP Canada inc. (2016 QCCA 1756)
  - ArcelorMittal Exploitation minière Canada c. SNC-Lavalin inc. (2017 QCCS 574)
Take Away: When to Consider Arbitration?

- Time is of the essence
- Parties are from different jurisdictions
- Technical matter where specific expertise is desirable
- Disputes requiring prompt resolution, including to preserve business relationship between parties
- Arbitrators can now order exceptional measures (art. 638 & seq. CCP), even provisionally or by safeguard order
- Privacy or confidentiality is important
- Not “bet the farm” litigation where appeal rights may be important
“It has been said that the time spent on arbitration clauses during negotiations usually amounts to no more than 15 minutes at the end of a long and grueling negotiation session. Of those 15 minutes, ten are spent on discussing whether or not a clause is needed, with the remaining five minutes spent on drafting.”

#1 MANDATORY REFERENCE

≠ Permissive or Optional

What to Say vs. What Not to Say

Dispute Escalation Procedures?
What disputes do you want to submit to arbitration?

Particular issues:
- Art. 2639 C.C.Q. (matters that may not be submitted to arbitration)
- Art. 3149 C.C.Q. (consumer contract, contract of employment)
- Shareholder oppression claims
#3 ARBITRAL BODY/RULES?

- Administered vs. Ad Hoc?
- Hybrid?
- Consider sample arbitration clause of institution

#4 PLACE OF ARBITRATION

- Seat = Deemed place where award is rendered
- Can impact validity of arbitration agreement; court intervention
- Choose seat that is signatory to “New York Arbitration Convention” (enforcement of awards)
#5 GOVERNING (SUBSTANTIVE) LAW

- Law Governing Merits of Dispute

#6 ARBITRATOR(S) SELECTION: NUMBER, QUALIFICATION, METHOD OF SELECTION

- Size (1 or 3?)
- Special Skills & Qualifications
- Appointment Method & Time Limits
#7 LANGUAGE

Factors to Consider:

- Arbitrators
- Parties
- Counsel

#8 CONFIDENTIALITY

- Private ≠ Confidential
- What elements do you want to be confidential?
#9 TIMEFRAME

- How Quickly will Dispute be Decided?
- How Long will Arbitrator(s) have to Render Award?

#10 COST & FEES

- What Costs or Fees are Recoverable? By Whom?
TAKEAWAYS

1. Arbitration clause is a contract in and of itself
2. Ensure that there are no inconsistencies/conflicts with other sections of contract
3. Be familiar with law of the seat
4. Avoid unrealistic deadlines
Appointment of Arbitrators

“Just as in real estate the three most important elements are location, location, location, so in private dispute resolution, the golden trilogy is arbitrator, arbitrator, arbitrator.”

Number of Arbitrators: 1 or 3?

1

- Where time and cost are considerations (scheduling is easier)

**Keep in mind:** Grounds for challenging award are limited. Don’t take decision to vest all decision-making powers with one person lightly

3

- Parties are from different legal and cultural backgrounds
- Issues in dispute are complex ("3 heads are better than 1")
- Amount in dispute is significant

**Keep in mind:** Difficulty coordinating schedules and hearing dates
Factors to Consider When Naming Arbitrator

- Arbitration experience
- Reputation
- Experience and training (substantive aspects of dispute, applicable law etc.)
- Time commitment and availability
- Age and health
- General inclinations, predispositions, known biases, etc.
- Personality traits (decisiveness, common sense, analytical mind etc.)
- Impartiality, independence (arbitrator should not be affiliated with a party, and should not take part in *ex parte* communications)
- Language (avoid cost and time of translation, interpretation)
Thank you

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