

Arbitrating Lien Claims

Arbitration and lien litigation co-exist comfortably. Even in those jurisdictions where the Lien Acts prohibit contracting out of the Act,¹ the statutory prohibition does not preclude arbitration² since provincial Arbitration Acts entrench the primacy of arbitration proceedings over judicial proceedings once the parties have entered into an arbitration agreement.³ No distinction should be made in this regard between domestic and international arbitration or, for that matter, between domestic and interprovincial arbitration.⁴ Having regard to international comity, and to the strong commitment made by all legislatures to the policy of international commercial arbitration through the adoption of the *International Commercial Arbitration Act*⁵ and the Model Law,⁶ it would require very clear language indeed to preclude arbitration, which Canada's provincial lien acts do not seem to contain.⁷ Accordingly, where parties to a lien action have agreed to have disputes arbitrated, an application for an order directing the parties to proceed with the arbitration should succeed and the issues incorporated into the lien action that are susceptible to arbitration will be stayed by the lien court until the completion of the arbitration.⁸

Notes:

1. Alberta *Builders' Lien Act*, R.S.A. 2000, c. B-7, s. 5; British Columbia *Builders Lien Act*, S.B.C. 1997, c. 45, s. 42(2); Manitoba *Builders' Lien Act*, R.S.M. 1987, c. B91, s. 11; Ontario *Construction Lien Act*, R.S.O. 1990, c. C.30, s. 4; Saskatchewan *Builders' Lien Act*; S.S. 1984-85-86, c. B-7.1, s. 99.

2. *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 50 C.L.R. 74 (B.C. S.C.); *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.); *BWV Investments Ltd. v. Saskferco Products Inc.* (1994), 17 C.L.R. (2d) 165 (Sask. C.A.).
3. *Cityscape Richmond Corp. v. Vanbots Construction Corp.* (2001), 8 C.L.R. (3d) 196 (Ont. S.C.J.); *Ontario Hydro v. Dennison Mines Limited*, [1992] O.J. No. 2948 (Gen. Div.).
4. *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.).
5. Alberta *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5; British Columbia *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233; Manitoba *International Commercial Arbitration Act*, C.C.S.M. c. C151; New Brunswick *International Commercial Arbitration Act*, S.N.B. 1986, c. I-12.2; Newfoundland *International Commercial Arbitration Act*, R.S.N.L. 1990, c. I-15; Northwest Territories *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6; Nova Scotia *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 23; Ontario *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9; Prince Edward Island *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5; Saskatchewan *International Commercial Arbitration Act*, S.S. 1988-89, c. I-10.2; Yukon Territory *International Commercial Arbitration Act*, R.S.Y. 2002, c. 123.
6. UNCITRAL Model Law on International Commercial Arbitration.
7. *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 (C.A.).

8. *Cityscape Richmond Corp. v. Vanbots Construction Corp.* (2001), 8 C.L.R. (3d) 196;
Kirsh's C.L.C.F. 32.17 (Ont. S.C.J.); *Brock University v. Stucor Construction Ltd.*,
[2002] O.J. No. 2300 (S.C.J.).