

## Choosing Arbitration

Arbitration of construction industry disputes is:

- Based on contract. The power of an arbitrator, or arbitration panel, to decide your dispute must be granted to the arbitrator by the parties to the arbitration. You have to agree to arbitrate. You can agree before a dispute arises, or after a dispute arises, but you have to agree. Once you have agreed to arbitrate, there are laws in place throughout Canada that help the arbitrator do his or her job.
- Private. Unlike court decisions, arbitration decisions are not published. They are private. Arbitrations do not take place in public. They take place in private. Although evidence in an arbitration is often transcribed, just like it is at a trial, none of this evidence is available to the public.
- Adaptable. Although arbitration looks and feels a lot like litigation (there are still pleadings, hearings, rulings and evidence), your arbitrator and you have almost unlimited scope to shape the proceeding to your needs. As long as each party is given an equal opportunity to make their case and meet the case made against them, you can work with your arbitrator to make the proceedings as efficient as possible for the kind of dispute you have. You can choose an arbitrator, or arbitrators who have experience with your industry, or with your type of dispute.
- Well understood. There is nothing new about the idea of arbitration. People have been arbitrating disputes since Greek and Roman times, and

probably earlier. Arbitration is now the norm in all international commercial transactions. There are various well-recognized certification programmes for arbitrators. There is a large body of academic writing to help the parties and their counsel understand and best use the arbitration process.

- Binding. Many arbitration clauses are of the ‘final and binding’ type, which means that unless the arbitrator exceeds his or her jurisdiction, or does something very, very wrong, the arbitration “Award” is final and binding and enforceable without appeal. Some arbitration clauses allow for limited rights of appeal on errors of law. Basically, though, if the arbitrator sticks to his or her jurisdiction and does a reasonable job of determining and applying the applicable law to the facts as presented by the parties, the chances of overturning an Award on appeal are slim indeed.

#### Arbitration Questions and Answers:

1. Is arbitration cheaper than litigation?

Answer: It can be, but it doesn’t have to be. You have to work with the other side and your arbitrator to make it that way. Arbitration is much more adaptable than litigation. With a little co-operation from the other side and a little assistance from your arbitrator, you can make arbitration fit your case, instead of having to make your case fit the arbitration.

2. Is arbitration faster than litigation?

Answer: Arbitration cost and arbitration time are closely related. Usually the shorter the arbitration, the cheaper it is for the parties. Too short, and the parties may not feel they have had an opportunity to make their cases or respond to the case made against them; too long, and the parties will wonder why they chose arbitration over litigation in the first place. For a working example of an efficient process, see the heading for “100 Day Arbitration” in this website.

3. What are the rules of arbitration?

Answer: The parties are free to make their own rules, of course, but there are some very useful standard rules for arbitration. The Ontario *Arbitration Act* provides access to Ontario’s courts in aid of arbitrations. The Canadian Construction Documents Committee, or CCDC, publishes Document 40, which are their rules for Arbitrations and Mediations. These are useful as a guide. They are strictly proprietary though.

4. How do I find an arbitrator?

Answer: You want an arbitrator (or an arbitration panel) that is experienced. There are two types of experience that you are looking for: subject matter expertise and process expertise. Subject matter expertise means working knowledge about your industry and the sources of industry disputes. In the

construction industry this experience can be found in engineers, architects, business people, quantity surveyors and others. Process experience means having a good, demonstrated, practical working knowledge of dispute resolution, including how trials work, how pre-trial processes work, how evidence works, how counsel work, and, most importantly, how to write a good, binding Award based on the law and facts of the case that does justice among the parties. Process experience is easy to find in former judges and senior lawyers. This experience can also be found in senior engineers who can claim a number of completed, fully litigated high-end claims in their resumes. With a sole arbitrator, you need both kinds of experience together in one person. With a three person “arbitral tribunal”, the chair should have strong “process” experience, and the two other appointees can add the “subject matter” expertise as required.

5. Can I force someone to arbitrate if they don't want to?

Answer: Not unless they have agreed to arbitrate in some fashion and then changed their mind. Although the key to arbitration is party agreement, it does not take much to constitute an agreement to arbitrate. Courts in Ontario support arbitration and will consider all surrounding facts in deciding whether or not the parties have somehow agreed to arbitrate. Even a simple exchange of letters between lawyers has been found enough to require an unwilling party to arbitrate.

6. Can I arbitrate if I have a lien claim?

Answer: Yes. You should preserve and perfect your lien claim just as you would if you were not arbitrating. Then your lawyer can initiate arbitration proceedings and “stay” the lien proceedings until the arbitration is conducted. Once an Award is rendered in the arbitration, your lawyer can go back to the lien court and determine how that Award fits into the overall distribution scheme under the Ontario lien legislation. Arbitrating does not absolve you from complying with the two-year rule in s. 37 of the *Construction Lien Act*.

Arbitration is a process in which a neutral third party renders a decision that by operation of the law becomes enforceable at law.<sup>1</sup> Disputes can be referred to arbitration either before they arise by incorporating an arbitration clause into the contract that gave rise to the dispute, or by consensual submission to arbitration after the dispute has arisen. Provincial Arbitration Acts<sup>2</sup> encourage resort to arbitration and require the parties to hold to that course once they have agreed to do so.<sup>3</sup> Arbitration clauses are to be given a large, liberal and remedial interpretation to effectuate the dispute resolution goals of the parties.<sup>4</sup>

Usually one of the parties to a dispute will be required to initiate proceedings by serving a written notice to arbitrate with requisite substance and formality outlining the dispute and naming an arbitrator. If the arbitration agreement provides no procedure for appointing the arbitral tribunal and if the parties cannot agree on an arbitrator, the various provincial Arbitration Acts contemplate an application to the court.<sup>5</sup> Once appointed, the arbitrator

is clothed with wide jurisdiction over the parties, the issues, and the procedures to be followed. If institutional rules have been chosen,<sup>6</sup> the rules of that institution apply. Usually, documents are exchanged and productions occur, much like litigation in the public system of justice. The arbitrator decides all disputes including disputes about the arbitrator's own jurisdiction. Evidence is taken and witnesses are called, cross-examined and re-examined. The procedure in arbitration is often adapted to the nature of the dispute. Witnesses for both sides at an arbitration can be and now often are examined issue by issue or in panels. The arbitrator's decision is usually required to be reasoned and contained in a written award.

Arbitral awards are often final and binding.<sup>7</sup> Occasionally, the parties will provide for appeal on issues of pure law. When parties agree to submit to arbitration, they agree to be bound by the arbitrator's decision.<sup>8</sup> Courts have the same power with respect to the enforcement of arbitral awards as they have with respect to the enforcement of their own judgments.<sup>9</sup> Arbitration Acts govern the parties' right to appeal from an arbitral award. Most Acts provide that a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is 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,<sup>10</sup> or the point of law is of general or public importance.<sup>11</sup> Some Arbitration Acts provide that courts may set aside the award if a party entered into the arbitration agreement while under a legal incapacity; the arbitration agreement is invalid or has ceased to exist; the award deals with a matter in dispute that the arbitration agreement does not cover or contains a

decision on a matter in dispute that is beyond the scope of the agreement; the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with the matter, was not in accordance with this Act; the subject-matter of the arbitration is not capable of being the subject of arbitration; the applicant was treated manifestly unfairly and unequally, 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; the procedures followed in the arbitration did not comply with this Act or the arbitration agreement; an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias; or the award was obtained by fraud.<sup>12</sup> Other statutes provide that an award can be set aside by the courts if the arbitrator has misconducted himself or herself or if the arbitration or an award has been improperly procured.<sup>13</sup>

Where a contract provides that parties have to submit their dispute to arbitration before resorting to litigation, arbitration is a condition precedent to legal action.<sup>14</sup> This principle has now been incorporated in the various Arbitration Acts, which provide that if a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.<sup>15</sup> These stay provisions have been held to make arbitration a condition precedent to litigation.<sup>16</sup>

*Notes:*

1. Menkel-Meadow et al., *Dispute Resolution: Beyond the Adversarial Model* (New York: Aspen, 2005) at 448.
2. Alberta *Arbitration Act*, R.S.A. 2000, c. A-43; British Columbia *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55; Manitoba *Arbitration Act*, C.C.S.M. c. A120; New Brunswick *Arbitration Act*, S.N.B. 1992, c. A-10.1; Newfoundland *Arbitration Act*, R.S.N.L. 1990, c. A.14; Northwest Territories *Arbitration Act*, R.S.N.W.T. 1988, c. A-5; Nova Scotia *Arbitration Act*, R.S.N.S. 1989, c. 19; Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17; Prince Edward Island *Arbitration Act*, R.S.P.E.I. 1988, c. A-16; Saskatchewan *Arbitration Act, 1992*, S.S. 1992, c. A-24.1; Yukon Territory *Arbitration Act*, R.S.Y. 2002, c. 8.
3. *Cityscape Richmond Corp. v. Vanbots Construction Corp.* (2001), 8 C.L.R. (3d) 196 (Ont. S.C.J.); *Buck Brothers Limited v. Frontenac Builders Limited*, [\[1994\] O.J. No. 37](#) (Gen. Div.).
4. *Automatic Systems Inc. v. E.S. Fox Limited* (1995), [19 C.L.R. \(2d\) 35](#) (Ont. S.C.J.).
5. Alberta *Arbitration Act*, R.S.A. 2000, c. A-43, s. 10; British Columbia *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 17; Manitoba *Arbitration Act*, C.C.S.M. c. A120, s. 9; New Brunswick *Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 10; Newfoundland *Arbitration Act*, R.S.N.L. 1990, c. A.14, s. 5; Northwest Territories *Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 11; Nova Scotia *Arbitration Act*, R.S.N.S. 1989, c. 19, s. 8; Ontario *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 10; Prince Edward Island *Arbitration Act*, R.S.P.E.I. 1988, c. A-16, s. 11; Saskatchewan *Arbitration Act, 1992*, S.S. 1992, c. A-24.1, 11; Yukon Territory *Arbitration Act*, R.S.Y. 2002, c. 8, s. 10.

6. AAA, AIC, CCDC 40, for example.

7. *Alberta Arbitration Act*, R.S.A. 2000, c. A-43, s. 37; *British Columbia Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 14; *Manitoba Arbitration Act*, C.C.S.M. c. A120, s. 37; *New Brunswick Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 37; *Newfoundland Arbitration Act*, R.S.N.L. 1990, c. A.14, s. 36; *Northwest Territories Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 26; *Nova Scotia Arbitration Act*, R.S.N.S. 1989, c. 19, s. 5; *Ontario Arbitration Act, 1991*, S.O. 1991, c. 17, s. 37; *Prince Edward Island Arbitration Act*, R.S.P.E.I. 1988, c. A-16, s. 8; *Saskatchewan Arbitration Act, 1992*, S.S. 1992, c. A-24.1, 38; *Yukon Territory Arbitration Act*, R.S.Y. 2002, c. 8, s. 25.

8. McLaren & Sanderson, *Innovative Dispute Resolution: The Alternative* (Toronto: Carswell, 2003) at 5-13; relying upon *Anderson Industrial Doors Ltd. v. Genstar Construction Ltd.* (1985), 16 C.L.R. 208 (B.C. S.C.).

9. *Alberta Arbitration Act*, R.S.A. 2000, c. A-43, s. 49(8); *British Columbia Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 29; *Manitoba Arbitration Act*, C.C.S.M. c. A120, s. 6; *New Brunswick Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 31; *Newfoundland Arbitration Act*, R.S.N.L. 1990, c. A.14, s. 15; *Northwest Territories Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 25; *Nova Scotia Arbitration Act*, R.S.N.S. 1989, c. 19, s. 17; *Ontario Arbitration Act, 1991*, S.O. 1991, c. 17, s. 50(8); *Prince Edward Island Arbitration Act*, R.S.P.E.I. 1988, c. A-16, s. 13; *Saskatchewan Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 50(8); *Yukon Territory Arbitration Act*, R.S.Y. 2002, c. 8, s. 24.

10. *Alberta Arbitration Act*, R.S.A. 2000, c. A-43, s. 44; *Manitoba Arbitration Act*, C.C.S.M. c. A120, s. 44(2); *New Brunswick Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 45(1); *Ontario Arbitration Act, 1991*, S.O. 1991, c. 17, s. 45(1); *Saskatchewan*

*Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 45(1); *Yukon Territory Arbitration Act*, R.S.Y. 2002, c. 8, s. 24.

11. *British Columbia Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 29;

12. *Alberta Arbitration Act*, R.S.A. 2000, c. A-43, s. 45; *Manitoba Arbitration Act*, C.C.S.M. c. A120, s. 44(5); *New Brunswick Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 46(1); *Ontario Arbitration Act, 1991*, S.O. 1991, c. 17, s. 46(1); *Saskatchewan Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 46(1); *Yukon Territory Arbitration Act*, R.S.Y. 2002, c. 8, s. 24.

13. *Newfoundland Arbitration Act*, R.S.N.L. 1990, c. A.14, s. 14; *Northwest Territories Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 28; *Nova Scotia Arbitration Act*, R.S.N.S. 1989, c. 19, s. 15(2); *Yukon Territory Arbitration Act*, R.S.Y. 2002, c. 8, s. 27(1).

14. *Deuterium of Canada Ltd. v. Burns & Roe Inc.*, [1975] 2 S.C.R. 124.

15. *Alberta Arbitration Act*, R.S.A. 2000, c. A-43, s. 7; *British Columbia Commercial Arbitration Act*, R.S.B.C. 1996, c. 55, s. 15; *Manitoba Arbitration Act*, C.C.S.M. c. A120, s. 7(1); *New Brunswick Arbitration Act*, S.N.B. 1992, c. A-10.1, s. 7; *Newfoundland Arbitration Act*, R.S.N.L. 1990, c. A.14, s. 4; *Northwest Territories Arbitration Act*, R.S.N.W.T. 1988, c. A-5, s. 10; *Nova Scotia Arbitration Act*, R.S.N.S. 1989, c. 19, s. 7; *Ontario Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7; *Prince Edward Island Arbitration Act*, R.S.P.E.I. 1988, c. A-16, s. 6; *Saskatchewan Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 8; *Yukon Territory Arbitration Act*, R.S.Y. 2002, c. 8, s. 9.

16. *Babcock and Wilcock Canada Ltd. v. Agrium Inc.* (2005), 42 C.L.R. (3d) 197 (Alta. C.A.).