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McLaren

Innovative Dispute Resolution: The Alternative

This comprehensive work offers a thorough analysis of available alternative dispute resolution techniques, including mediation, arbitration, fact-finding, mini-trial and private court. Extensive case histories illustrate practical applications of resolution techniques in actual fact situations and practical precedents to provide guidance on how best to structure and manage ADR agreements. Also included are techniques and tips on the selection of experts, timing considerations, the role of lawyers and the dispute resolution process itself.

What's New in this Update

This release features valuable case and commentary updates to Chapter 4 (Mediation), Chapter 5 (Arbitration) and 8 (International Commercial Arbitration).

Highlights

Arbitration — Introduction — Arbitration Compared with Litigation: Ontario case law has demonstrated potential conflicts in contracts containing both

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mandatory arbitration clauses and jurisdictional clauses. For example, in *Graves v. Correactology Health Care Group Inc.* (2018), 2018 ONSC 4263, 2018 CarswellOnt 11399 (Ont. S.C.J.). An arbitration clause stated that if the parties are unable to reach a solution within a specified time frame, the dispute shall be resolved by arbitration and an jurisdictional clause submitted each party to the exclusive jurisdiction of the courts of Ontario. The court found these clauses to be inconsistent and it followed that there was no clear intent to refer all disputes to arbitration. This signalled a warning to contract drafters to ensure that arbitration clauses and choices of form are not inconsistent nor create ambiguity. In contrast, in *Trade Finance Solutions Inc. v. Equinox Global Limited*, 2018 ONCA 12, 2018 CarswellOnt 145, 78 B.L.R. (5th) 20, 16 C.P.C. (8th) 29, 420 D.L.R. (4th) 273 (Ont. C.A.), the Court of Appeal of Ontario held that it is possible to give meaningful effect to both a mandatory arbitration provision and an Action Against Insurer clause. This suggests that when jurisdictional clauses are present among arbitration clauses, they can still have meaning. For example, the arbitration provision itself often gives a court jurisdiction to appoint an arbitrator if the parties cannot agree, and s. 46 of the Ontario *Arbitration Act, 1991* permits courts to set aside an arbitration award in certain circumstances.

Arbitration — Case Study Examples — Jurisdiction in Disputes Involving Shareholder Agreements — Shareholder Disputes: A similar situation arose in *Campaign for the Inclusion of People who are Deaf and Hard of Hearing v. Canadian Hearing Society (The)*, 2018 ONSC 5445, 2018 CarswellOnt 15475 (Ont. S.C.J.). The board of the respondent not-for-profit corporation had previously adopted new by-laws which had the effect of eliminating a class of members of the Canadian Hearing Society. In response, the applicants commenced an application for an oppression remedy seeking relief in the form of an order that the by-laws were invalid. The by-laws contained mandatory arbitration provisions and the respondent brought forward a motion to stay the application pending the arbitration of the claims. The by-laws stated that "a dispute or controversy among members, directors, officers or committee members of the Corporation arising out of or related to the articles or by-laws, or out of any aspect of the activities or affairs of the Corporation ... shall be settled by arbitration". The court granted an order staying the application and distinguished the proceedings from *Deluce Holdings* on the basis that the by-laws contained a general "resort to arbitration" clause and that the subject matter of the dispute fell within the arbitration provisions.

International Commercial Arbitration — The Technique — The Process: Domestic arbitrations may be consolidated with international arbitrations and approaches to this mechanism differ by province. In *Japan Canada Oil Sands Limited v Toyo Engineering Canada Ltd.*, 2018 ABQB 844, 2018 CarswellAlta

2286 (Alta. Q.B.), the Alberta Court of Queen's Bench allowed for a domestic arbitration to be consolidated with an international arbitration without the consent of all parties. The domestic arbitration was commenced by Toyo Engineering Canada Ltd ("Toyo Canada"), which was ordered to be consolidated with an international arbitration commenced by Japan Canada Oil Sands Limited ("JACOS") against Toyo Canada and its parent Japanese company, Toyo Japan. This resulted in a consolidated arbitration that would proceed as an international arbitration governed by UNCITRAL Rules. Although Toyo Japan did not consent to this consolidation, the Court interpreted s. 8(1) of the Alberta *International Commercial Arbitration Act* to find that the court had jurisdiction to consolidate a domestic arbitration into an international arbitration as long as it was on terms it considered just. Relying on factors in *Pricaspian Development Corp. v. BG International Ltd.*, 2016 ABQB 611, 2016 CarswellAlta 2297, [2016] A.J. No. 1253 (Alta. Q.B.), the court found that it would be "just" to consolidate these arbitrations, given that the two arbitrations involve similar questions of law and fact. This decision was met with criticism, as it does not follow the same conclusion found in a similar situation a few months earlier in *Alberta Motor Association Insurance Company v. Aspen Insurance UK Limited*, 2018 ABQB 207, 2018 CarswellAlta 538, 78 C.C.L.I. (5th) 270, 17 C.P.C. (8th) 81 (Alta. Q.B.), where it was found that all parties must consent to the consolidation of multiple international arbitral proceedings.

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