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"YOU BE THE JUDGE"
Advantages of Arbitrating Subrogated Claims in Ontario

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1. INTRODUCTION

Arbitration should be a preferred method of resolving any subrogated dispute where both parties are cooperative and desire a quick resolution of the matter. For insurance companies pursuing subrogated claims, arbitration can offer a confidential, quicker and more reliably economical method of recovering amounts paid under a policy than litigation. This is the case regardless of whether the dispute is domestic or international in nature. However, in order to benefit from arbitration as a method of dispute resolution, insurance companies and their legal counsel must be alert to the advantages offered by Ontario's arbitration schemes.

2. WHAT IS ARBITRATION?

Arbitration is the submission of a dispute between two parties to an independent and neutral third party (the arbitrator). The arbitrator will hear the dispute and make a decision called an "award". An award is binding in the same way that a court order is binding, and can be enforced through the courts like a court order.

Arbitral proceedings are similar to court proceedings, but are heard in private. The parties are usually represented by lawyers who present evidence and legal argument to the arbitrator. However, unlike in a court, the parties can decide on the rules for how the arbitration will proceed. They can design a process that is informal, with few technical rules, or they can agree that formal, technical evidentiary rules should apply. The parties can also choose the law that the arbitrator should apply to the dispute.

3. ARBITRATION IN ONTARIO

Arbitration in Ontario is often referred to by sophisticated commercial lawyers as "a secret too well kept". In fact, Canadian provinces are currently regarded as having some of the most superior arbitration schemes in the world.[1]

However, this wasn't always the case. Under Ontario's old legislation, arbitration was expensive, ineffective and easily avoided.[2] As a result, in 1992, Ontario discarded its problematic old legislation and enacted the *Arbitration Act, 1991* (the "*Act*").[3] This new *Act* provides a code of rights and procedures for the parties, the arbitral tribunal and the courts. The new *Act* incorporates the following principles:

- Arbitration should proceed in confidence without substantial court interference.
- Parties who enter into arbitration agreements should be bound to those agreements.
- Parties should be free to design the process of arbitration as they see fit, so long as the process is fair to both parties.
- An arbitral award should be binding and readily enforceable, subject only to review by a court on a specified and limited basis.

However, in keeping with the principle that parties should be free to design the arbitration process as they see fit, parties can choose to contract out of many of the provisions of the *Act* in order to custom-design an arbitration process that is tailored to their dispute.[4] The result is that arbitration in Ontario now provides an efficient and practical alternative for parties to a dispute who do not wish to go though protracted and costly litigation.

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[1] E.C. Chiasson, (1986), "Canada: No Man's Land No More" 3:2 J'Int'l Arb. 67.
[2] See for example, J.J. Chapman, "Judicial Scrutiny of Domestic Commercial Awards" (1995), 74 Can. Bar Rev. 401 at 403-404.
[3] R.S.O. 1991, c. 17, repealing *Arbitrations Act,* R.S.O. 1990, c. A-24 [hereinafter *Act*].
[4] *Arbitration Act, supra* note 3, section 3.

Unfortunately, many Ontario lawyers have little familiarity with the arbitral process and the changes to Ontario's legislation. This has led to a reluctance of some lawyers to recommend arbitration as a way to resolve disputes, much to the disservice of their clients.

4. WHY ARBITRATE?

A. Choose Your Own Arbitrator

Parties to arbitration have the ability to choose their own judge in a way that is not possible in court proceedings. Arbitrators can be selected for their skill and expertise in matters such as insurance law, civil engineering, or other relevant disciplines. There are a growing number of well-qualified, specialized arbitrators in Canada, and particularly in Ontario.

B. Keep it Private

In arbitration, unlike in court proceedings, the dispute, the pleadings, the procedure and the outcome can be kept confidential and outside of media scrutiny. This may be especially important to insurance companies in an age when newspapers and journalists have become adept at scouring court files, looking behind the style-of-cause to find confidential details of corporate litigants and their battles.[5]

C. Make it Quick

Although the pace of arbitration compared to litigation may vary depending on the type of dispute and the co-operation of the parties, speed is often a significant advantage of arbitration. In Ontario, backlogs in the court system can result in delays of a year or more from when the matter is set down for trial to the pre-trial conference when the trial date is set. Conversely, a twelve-month delay for a hearing date before a tribunal of arbitrators would be highly unusual.[6]

D. Make it Final

Arbitration generally offers parties an award which is final and less subject to the delays and uncertainty that are inherent in the litigation appeal process.[7] Under Ontario's *Act*, an arbitral award may only be set aside on specified grounds, as follows:[8]

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[5] See R. Pepper (1998), "Why Arbitrate?: Ontario's Recent Experience with Commercial Arbitration", 36 Osgoode Hall L.J. 807 at p. 817.
[6] *Ibid.*
[7] *Ibid.*
[8] *Act, supra* note 3, ss. 46(1).

a) A party to the arbitration was under an incapacity;

b) The arbitration agreement was invalid;

c) A party was not given proper notice of the arbitration;

d) The tribunal's award exceeded the scope of the arbitration agreement;

e) The arbitration did not comply with the agreement to arbitrate;

f) The subject-matter of the dispute could not legally be arbitrated in Ontario;

g) The award conflicts with Canadian public policy.

An award may also be challenged if a party was not treated fairly, the arbitrator was corrupt or biased, or the award was obtained fraudulently.[9]

The result is that unlike the court system, a party to arbitration does not have the 'right' to appeal the decision to another arbitrator or to a court. Further, an arbitral award cannot be challenged on the basis that an arbitrator made an error of law, or an error of mixed law and fact, unless the parties agree to this in their arbitration agreement.[10]

E. Control the Rules of Procedure

Arbitration, as a dispute mechanism, allows parties the flexibility to design innovative arbitral procedures that suit the needs of the parties and the circumstances of the case. Parties can adopt measures to save time and money, and to minimize risk. For example, parties can agree to abbreviate oral discoveries, to submit evidence in writing, or to impose time limits on direct and cross-examinations.

Parties may also exercise control over the nature of an arbitrator's final award. For example, in the United States, commercial parties have adopted alternative forms of binding arbitration such as "Baseball" or "Final Offer" arbitration, in which each party submits a proposed monetary award to the arbitrator who, at the conclusion of the hearing, selects one monetary award or the other without modification. In "Bonded" or

[9] *Ibid.*
[10] Note that the *Arbitration Act, supra* note 3, s. 46 provides the caveat that where an arbitration agreement is silent on this issue, a party may be permitted to appeal an award on a question of law with leave of the court.

"High-Low" arbitration, parties agree privately that an arbitrator's final award will be adjusted to a pre-determined range.[11]

5. AGREEING TO ARBITRATE SUBROGATED CLAIMS

A. The Canadian Inter-Company Arbitration Agreement ("CICAA")

The benefits of arbitration are not new to the insurance industry, which has been using arbitration as a method of resolving disputes for hundreds of years. In fact, many Canadian insurance companies have currently agreed in advance to arbitrate certain subrogated property claims.

The best-known of these agreements is the CICAA, which was originally drafted in the 1950s by the Canadian Insurance Claims Manager's Association (CICMA). Since that time, this Agreement has undergone a series of revisions, most recently in 1995. By signing this Agreement, an insurer agrees that with respect to subrogated disputes involving physical damage claims less than $50,000.00, the insurer will forego litigation and submit to arbitration instead. If a subrogated property claim exceeds $50,000.00, or if there is a dispute over the interpretation of a contract, insurance companies may still agree to arbitrate the dispute. The Agreement is not applicable if an insurer defends that there is no coverage under a policy, and there are exclusions for Boiler and Machinery, Marine and Aviation policies.

Under the Agreement, the CICMA is responsible for setting the rules, regulations and the procedure of the arbitration, overseeing membership, prescribing territorial jurisdictions for disputes and controlling financing. The CICMA appoints an Arbitration Chairman to administer the Agreement who then appoints a panel to arbitrate the matter in the jurisdiction of the dispute. The Arbitration Panel consists of a panel Chairman and two other CICMA members selected by him or her, unless the parties agree to less than three arbitrators. The panel members do not receive compensation for their services. If the amount in issue is less than $1000, then the Chairman can hear the matter alone.

Membership is available to all casualty and property insurers licensed to do business in Canada and the majority of Canadian insurance companies have already signed up. Importantly, the Agreement applies only to insurers; insureds and claimants are not bound or affected by this Agreement.

[11] Pepper, *supra* note 6 at p. 842.

B The Insured has Already Agreed to Arbitrate

Where an insured has entered into an arbitration agreement with a potential defendant, an insurer who attempts to subrogate the insured's claim against that defendant will likely also be bound by the arbitration clause. Although the issue of whether an insurer is bound by its insured's arbitration agreements has not yet been dealt with in Canada, it was recently considered in the English case of *West Tankers Inc. v. Ras Riunione Adriatica di Sicurta, "the Front Comor".*[12] Judge Colman held that if a claim fell within an arbitration clause, the subrogating insurer, as the transferee of the insured's rights, was also bound by the arbitration agreement. In these circumstances, an insurer was not permitted to litigate the claim in court and was obliged to proceed with the arbitration.

C. Parties Agree to Arbitrate Once a Dispute has Arisen

Finally, although commercial parties usually contract for arbitration at the outset of a business relationship, parties may agree to arbitrate a dispute at any time. The growing popularity of arbitration as a method of dispute resolution may promote the willingness of both parties to look to arbitration as the preferred method of adjudication.

6. OTHER ARBITRAL ORGANIZATIONS IN ONTARIO

There are many international organizations that provide arbitration services for arbitrations that are conducted in Ontario. These organizations act as secretariats, facilitating the arbitration process for the parties and providing the internal rules and procedures to govern the arbitration itself. The longest established of these institutions include the International Court of Arbitration (ICC)[13], the American Arbitration Association (AAA)[14] and the London Court of International Arbitration (LCIA).[15]

Within Ontario, there are now several arbitration organizations that provide domestic arbitration services, including assistance in selecting a suitable tribunal, fixing arbitrator's fees, coordinating the exchange of materials, and scheduling meetings and hearings. For example, the Arbitration and Mediation Institute of Ontario (AMIO)[16] is a non-profit organization that is designed to assist parties in designing and

[12] [2005] E.W.H.C. 454 (Comm.) (Q.B.).
[13] See http://www.iccwbo.org/index_court.asp.
[14] See http://www.adr.org.
[15] See http://www.lcia-arbitration.com.
[16] See http://www.amim.mb.ca/AMIO.html.

implementing arbitrations. Likewise, the ADR Chambers[17] is an alternative dispute resolution group comprised of retired judges, senior counsel and other dispute resolution experts.

7. CONCLUSION

There are a plethora of options available in Ontario and across Canada for parties who are willing to arbitrate their disputes. Arbitration can be faster, more economical and less uncertain than traditional litigation. The insurance industry could benefit in these ways by considering arbitration as a means to pursue recovery of subrogated claims. The key is to have all parties to the dispute agree to the process. Where the parties involved are represented by liability insurers, such an agreement may be fairly easy to obtain, especially given the obvious savings of time and money for all parties involved

In order to take full advantage of the potential benefits of arbitration, legal counsel must be alert to the possible time, cost-saving and risk-reduction measures. If parties are willing, legal counsel can be creative in custom-designing an appropriate arbitration process. Cozen O'Connor's expertise with arbitration and its experience with the arbitral process in Ontario is available to be deployed for the benefit of your company to assist in the recovery of subrogated claims.

For additional information concerning
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[17] See http://www.adrchambers.com.

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