Dispute management during COVID-19: Moving from litigation to arbitration

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The worldwide spread of the COVID-19 virus has affected commercial operations, logistics and finances across industry sectors. The social, health and economic uncertainty caused by the pandemic puts pressure on the limited resources and budgets of individuals and businesses alike. In such circumstances, we can expect the number of legal disputes to increase now and into the future.

Unfortunately, just as the number of legal disputes rises, the capacity of the court system to resolve those disputes has diminished. In virtually all Provinces and federally, courthouses are hearing only the most urgent and time-sensitive matters. Non-urgent matters may ultimately proceed “virtually”, but the necessary systems must first be developed, vetted and implemented. Once courts re-open fully, parties can expect a backlog of cases, in addition to a wave of new claims arising from the COVID-19-related closures, which may contribute to further delays.

Given these challenges, now may be the time to consider alternatives including the arbitration of disputes that are presently in court.

Referring part or all of an existing court dispute to arbitration can offer a number of opportunities:

- Timely hearing of pressing interlocutory or other procedural issues (*e.g.* injunctive relief or discovery issues);
- Hearing of key substantive issues, such as a limitations defence, to narrow the dispute;
- Immediate flexibility in hearing locations, virtual meetings, or “documents-only” procedures;
- A broad roster of arbitrators, many of whom may now have more availability; and
- The opportunity to return the dispute to courts when the crisis lifts.

Litigation vs. arbitration

Arbitration and litigation share many similarities. In both settings, a third-party adjudicator (the judge or the arbitrator) administers a structured legal process, considers submissions from all parties, and renders a binding decision on the issues in

dispute. Unlike mediation, these litigations and arbitrations result in binding judgments (or awards), rather than negotiated agreements. In the case of arbitration, these rulings are often final.

Arbitration is dissimilar from litigation because it is a form of private dispute resolution. Once parties consent to arbitration, the dispute moves to a private setting where parties can control the legal procedure, including timelines, submissions, confidentiality, exchange of evidence and meeting locations. Where parties are unable to agree on procedures, an arbitrator (or tribunal of arbitrators) selected by the parties determines the applicable process. In essence, the parties have greater control over their own proceedings, which take place before a dedicated tribunal and without requiring court resources.

The private nature of arbitration makes it attractive in the current circumstances. As set out below, arbitration offers parties the opportunity to move part or all of their disputes into a private setting, where they can more easily advance their disputes toward a timely resolution.

Role of arbitration during the COVID-19 crisis

How can arbitration help parties manage, or avoid entirely, the substantial delays currently facing courts?

a. **Resolve key procedural issues**: parties can use arbitration to resolve time-sensitive procedural issues. For example, if a party requires immediate injunctive relief, both the domestic and international arbitration acts of the Canadian provinces grants arbitrators the power to make such orders. In other words, if the broader substantive dispute is not urgent and can proceed in court notwithstanding the delays, but there is an immediate need for injunctive relief, an immediate and focused arbitration offers an option.
b. **Resolve key substantive issues**: while the parties wait for the courts to re-open and clear backlog, certain disputes may benefit from a prior narrowing or resolution of key substantive issues. For instance, an otherwise meritorious claim may be the subject of a limitations defence. In an effort to advance the dispute, the parties may choose to refer only that limitations issue to arbitration during the period of court closure. Having this issue determined immediately could determine whether litigation (once available) is even necessary.
c. **Ensure timely dispute resolution**: though dependent on party conduct, the nature of the claim, and tribunal orders, arbitration can result in a more streamlined and efficient legal process. Arbitrations typically involve narrowed discovery rights (and in the case of international arbitration, no oral discovery at all), flexible timelines, as well as dedicated and available tribunals. In the current conditions, many arbitrators likely have greater availability while judges and courts have less. As a result, parties may consider moving their entire dispute from litigation into arbitration in order to advance the proceedings and potentially set it onto an accelerated timeframe for resolution.
d. **Flexible forms of dispute resolution**: arbitral tribunals can render their decisions based on an evidentiary record that is proportionate to the nature of the proceedings. In *Desputeaux v Éditions Chouette (1987) Inc*, Supreme Court of Canada confirmed that, in arbitration:

> "[t]he methods by which evidence may be heard are flexible and are controlled by the arbitrator, subject to any agreements between the parties. It is therefore open to the parties, for example, to decide that a question will be decided having regard only to the contract, without testimony being heard or other evidence considered."

For smaller matters, and in circumstances where it is difficult for the parties to meet in person, a "documents-only" arbitration may be sensible. Alternatively, a tribunal may choose to hear certain key evidence "virtually", while treating less central issues or less valuable claims on a "documents-only" basis. In brief, the option to conduct hearings and hear witness evidence virtually (or not at all) has always been available in arbitration. With an experienced tribunal and cooperative counsel, parties can anticipate particular flexibility in the arbitral process.

Practical steps for considering arbitration

Any decision to proceed with a claim in arbitration requires an arbitration agreement between the relevant parties. Most arbitration agreements are "pre-dispute" agreements, found in underlying contracts. Few arbitration agreements arise "post-dispute" and fewer still are drafted "mid-dispute". However, preparing an arbitration agreement to move a dispute from litigation to arbitration is possible. Like a pre-dispute arbitration clause, a mid-dispute arbitration agreement should consider, at a minimum, (i) the scope of the intended arbitration; (ii) the seat (or legal situs) of the arbitration; (iii) the applicable procedural rules; and (iv) a method for selecting the arbitrator(s).

While the domestic and international arbitration acts of the Canadian provinces grant parties significant freedom to structure their arbitral proceedings, parties should also remain conscious of non-derogable terms of these Acts. In particular, parties are entitled to an equal opportunity to present their case. For this reason, any mid-dispute arbitration agreement should ensure that steps already taken by one party in litigation are equally available to the other party once in arbitration. Additionally, the selection of the arbitrator should involve party agreement or a fair and balanced process.

With these precautions in mind, arbitration should provide a viable alternative for many parties seeking to advance their dispute during the COVID-19 crisis.

BLG's Commercial Arbitration Group has considerable experience in drafting and reviewing arbitration agreements to ensure compliance with local arbitration statutes and a smooth transition into arbitration. For further information or to assess whether arbitration can assist in resolving your dispute, please contact a member of our team below.

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