

EMPLOYMENT LAW CONFERENCE—2013

PAPER 2.1

## Arbitration Clauses in Employment Contracts

These materials were prepared by Jennifer D. Wiegele of Kent Employment Law, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, May 2013.

© Jennifer D. Wiegele



## **ARBITRATION CLAUSES IN EMPLOYMENT CONTRACTS**

<b>I.</b>	Introduction .....	2
<b>II.</b>	Are Arbitration Clauses in Employment Contracts Enforceable? .....	2
	A. Jurisprudence—Courts Deferential to Arbitration Agreements and Arbitrators’ Jurisdiction .....	2
<b>III.</b>	What is the Law Relating to the Enforcement of Arbitration Clauses? .....	3
	A. Applicable Legislation.....	3
<b>IV.</b>	Pre-Requisites to Determining whether to Stay Proceedings in Favour of Arbitration .....	4
	A. Legal Proceedings Initiated Against Another Party to the Arbitration Agreement .....	4
<b>V.</b>	Non-Parties to Arbitration Agreements and Stay Applications .....	4
	A. Legal Proceedings are in Respect of a Matter Agreed to be Submitted to Arbitration .....	6
	B. Timeliness of Stay Application .....	7
<b>VI.</b>	Section 15(2)—Void, Inoperative of Incapable of Being Performed.....	9
<b>VII.</b>	Validity of the Arbitration Agreement and the Doctrine of Separability .....	10
<b>VIII.</b>	Does the Doctrine of Separability Cover Fraud? .....	11
<b>IX.</b>	What is the Meaning of Void, Inoperative, or Incapable of Being Performed? .....	11
<b>X.</b>	Cases Where Arbitration Clauses May Not Be Enforceable .....	12
<b>XI.</b>	Pros and Cons of Including an Arbitration Clause in an Employment Contract.....	13
	A. Pros of Arbitration.....	14
	B. Cons of Arbitration .....	14
<b>XII.</b>	Drafting Arbitration Clauses.....	15
	A. Scope of Disputes to be Addressed by Arbitration.....	15
	B. Pre-Conditions to Arbitration .....	15
	C. Procedural Rules .....	16
	D. Administered versus Ad-Hoc Arbitration (or Institutional v. Non-Institutional) .....	16
	E. The Seat of Arbitration.....	17
	F. Confidentiality .....	17
	G. Remedies .....	17
<b>XIII.</b>	Sample Arbitration Clause.....	18
<b>XIV.</b>	Conclusion.....	18
<b>XV.</b>	Appendix A—BCICAC Domestic Commercial Arbitration Rules of Procedure.....	19

## I. Introduction

Arbitration clauses and issues relating to arbitration agreements do not arise very frequently in employment disputes. However, when these issues do arise, they can pose significant challenges because dealing with them requires familiarity with substantive law relating to their enforcement as well as their interpretation.

Further, in terms of deciding whether or not to include arbitration clauses in an employment contract, there are a number of factors to consider.

Finally, careful thought is required when a party is drafting an arbitration clause to ensure that the benefits of the arbitration process are maximized and that unnecessary difficulties or disadvantages are not being created as a result of poor drafting.

This paper will address these substantive issues as well as provide a review of the major considerations involved in deciding whether to include an arbitration clause in an employment and the issues to address and consider when drafting arbitration clauses.

## II. Are Arbitration Clauses in Employment Contracts Enforceable?

### A. Jurisprudence—Courts Deferential to Arbitration Agreements and Arbitrators' Jurisdiction

Courts are generally of the view that the terms of a commercial contract freely entered into should be given effect—this includes contracts of adhesion containing arbitration clauses. Further, in the absence of legislated restrictions on arbitration, courts generally take a deferential approach to the jurisdiction of arbitrators such that courts will generally order that any challenge to the validity of an arbitration clause or an arbitrator's jurisdiction should first be determined by the arbitrator: see *Seidel v. Telus Communications Inc.*, 2011 CarswellBC 553 at paras. 2 and 42; see also *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34 and *Rogers Wireless v. Muroff*, 2007 SCC 35.

The exception is in cases where the challenge to an arbitrator's jurisdiction involves a pure question of law, or one of mixed fact and law that requires for its disposition "only superficial consideration of the documentary evidence in the record." See *Seidel* at para. 29, and *Dell* at para. 85; see also *Unifund Assurance co. of Canada v. Insurance Corp. of British Columbia*, 2003 SCC 40 at paras. 37-38.

The Supreme Court of Canada has endorsed this deferential approach to an arbitrator's jurisdiction in *Seidel v. Telus Communications Inc.*, 2011 CarswellBC 553 at paras. 2 and 42; see also *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34 and *Rogers Wireless v. Muroff*, 2007 SCC 35.

An arbitrator is normally entitled to consider his or her jurisdiction at *first instance*. As Mr. Justice Binnie (speaking for the majority) explained in *Seidel v. Telus Communications Inc.*, 2011 SCC 15 at para. 28-29, that a challenge to an arbitrator's jurisdiction over a dispute should first be determined by the arbitrator.

Similarly, the BC Court of Appeal has also endorsed the deferential approach. The Court of Appeal made the following comments in *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 24:

It is useful in approaching this question to consider the principles appellate courts and the Supreme Court of Canada have developed in considering whether legal proceedings should be stayed in favour of arbitration.

Generally, the courts have taken a deferential approach to a challenge to an arbitrator's jurisdiction, giving precedence to the agreement between the parties to arbitrate and allowing the arbitrator to determine, at first instance, whether a particular dispute is arbitrable.

In *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), Southin J.A. wrote separate concurring reasons and expressed this view at para. 64:

... Once an arbitration agreement is shown to exist, the court ought not to construe it narrowly with a view to avoiding the operation of s. 8. Here, to adopt the appellant's submission on the word "performance" would be to undermine the Act. Whether anticipatory repudiation falls within that word, it not being plain that it does not, is for the arbitrator to determine. When it is not plain that the matters in dispute in the action fall outside the arbitration agreement, the question whether they fall within it is not, in the first instance, for the court but for the arbitrator.

### III. What is the Law Relating to the Enforcement of Arbitration Clauses?

#### A. Applicable Legislation

Section 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 provides that where a party to an arbitration agreement begins a legal action in court, the opposing party may apply to stay the proceedings:

##### Stay of proceedings

15(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

Sections 8(2) and 8(3) of the *Law and Equity Act*, 1996, R.S.B.C., c. 296 provide:

(2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.

(3) Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.

Further, s. 10 of the *Law and Equity Act*, 1996, R.S.B.C., c. 296 provides:

##### Avoidance of multiplicity of proceedings

10. In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

#### IV. Pre-Requisites to Determining whether to Stay Proceedings in Favour of Arbitration

In *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.), leave to appeal to S.C.C. refused: [1995] S.C.C.A. No. 467, the Court of Appeal determined (at para. 22) that the following three prerequisites had to be met in order to establish that a stay should be granted pursuant to s. 15 of the *Commercial Arbitration Act*:

- (i) that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- (ii) that the legal proceedings are in respect of a matter agreed to be submitted to arbitration; and
- (iii) that the application has been timely brought, *i.e.* before the applicant has taken a step in the proceeding.

Below, we review those three pre-requisites in turn.

##### A. Legal Proceedings Initiated Against Another Party to the Arbitration Agreement

This pre-requisite is easily met when the parties to the arbitration agreement are the only parties involved in the dispute. However, when a civil action is initiated against a non-party to the arbitration agreement, a question arises as to whether that party is entitled to apply for a stay of proceedings.

#### V. Non-Parties to Arbitration Agreements and Stay Applications

In *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 66 B.C.L.R. (2d) 225 (S.C.), Saunders J. (as she then was) dealt with multiple parties in the context of a stay application, some of which were not parties to an arbitration agreement but were defendants in the action. Regarding the entitlement of non-parties to a stay in situations where the issues involving the non-parties were intertwined with those issues which were the subject of the arbitration, Madam Justice Saunders quoted from an earlier Court of Appeal decision and stated (at 13 QL version):

In *Stancroft Trust Limited v. Can-Asia Capital* (1990), 43 B.C.L.R. (2d) 341 (B.C.C.A.), Madam Justice Southin said at 345:

The first of these questions is whether s. 8(1) means that if one of the defendants has a right to an order under s. 8 the order to which he is entitled is an order staying the proceeding against all the defendants or is only an order staying those proceedings against him.

In my opinion, the second is the proper construction.

However, the *Stancroft Trust Limited* case does not address the issue here. Here a second party to the legal proceedings, the President of the plaintiff, applies for a stay of the court proceedings involving him personally. The pleadings in the counterclaim repeat the allegations in the defence on the main action. The defendant by counterclaim has not filed a defence or taken a fresh step. He is entitled to a stay of the action against him under s. 15 of the *Commercial Arbitration Act*. I would also, in these circumstances in which the applicant is the President of the plaintiff and the issues are entwined, have issued a stay of the proceedings between the defendant and defendant by counterclaim under the *Law and Equity Act*.

## 2.1.5

In *Darby v. Lasko* (2003), 20 B.C.L.R. (4th) 289 (C.A.), the Court of Appeal held that by its plain wording, s. 15(1) of the *Commercial Arbitration Act* extends the right to apply for a stay to parties to the legal proceeding (i.e., the civil action). That right is not limited to parties to the arbitration agreement.

In *Darby*, the plaintiffs brought an action against two defendants: Bartel Communications Inc. and its sole director, officer and shareholder, Barry Lasko, for relief related to a contract for purchase of telecommunication switching equipment. The arbitration clause in the agreement was between Bartel Communications Inc. and the plaintiffs.

The plaintiffs sought rescission of the agreement, re-payment of the purchase price, damages, interest and costs.

The personal defendant, Barry Lasko, applied pursuant to s. 15 of the *Commercial Arbitration Act* for a stay of proceedings as against him personally and against his company, Bartel Communications Inc.

The chambers judge stayed the action against Bartel Communications Inc., but refused to stay the action against Lasko personally because he was not a party to the arbitration agreement. Lasko appealed the decision.

The Court of Appeal concluded that s. 15 of the *Commercial Arbitration Act* allows *all parties* to the litigation to apply for a stay of the litigation proceedings regardless of whether they are also party to the arbitration agreement: at paras. 8-9.

In *James v. Thow*, 2005 CarswellBC 1405 (S.C.), Madam Justice Wedge considered whether a civil claim and a counterclaim should be allowed to proceed to trial when the issues raised in the claim and counterclaim were intertwined with matters properly subject to arbitral proceedings.

Ultimately, she concluded that the claim and counterclaim should be stayed on the basis that they were intertwined with the matters which were subject to arbitration. In arriving at her decision to order a stay, she cited concerns relating to multiple proceedings and inconsistent decisions and she relied on ss. 8 and 10 of the *Law and Equity Act*. She stated at para. 105:

I have also concluded that the James Action ought to be stayed as well. It involves substantially the same issues as those raised in the Counterclaim, and those to be decided by the Arbitrator in this case. At the very least, the issues are intertwined. To permit the James Action to proceed in the circumstances would be to endorse multiple proceedings and create the risk of inconsistent decisions: *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* (1992), 66 B.C.L.R. (2d) 225 (S.C.); *Law and Equity Act*, ss. 8 and 10.

Similarly, Mr. Justice Greycl considered this question in *Mercer Gold Corporation (Nevada) v. Mercer Gold Corp. (B.C.)*, 2012 BCSC 322. In that case, Mr. Justice Greycl considered whether to strike portions of a claim against third party defendants after referring the main action to arbitration in accordance with an arbitration agreement.

Mr. Justice Greycl decided that instead of striking portions of the remaining claims against third parties, he would adjourn the proceedings pending the arbitrator's decision. This balanced the interests of the parties to the arbitration in not having steps taken that might influence those proceedings, as well as the rights of the plaintiff to pursue its claims against third parties (at paras. 50-52).

The Court considered these cases and reached the same result in *Mussche v. Voortman Cookies Ltd.*, 2012 BCSC 953. In that case, the arbitration agreement provided for the resolution of disputes between the plaintiff and Voortman Cookies Ltd. ("Voortman") by arbitration. The plaintiff applied to the Court for leave to amend his Notice of Civil Claim to add two employees of the defendant as parties to his constructive dismissal claim against Voortman Cookies Ltd. and to add new allegations of various wrongs (e.g., defamation, interference with contractual relations) against the personal defendants.

Voortman applied for a stay of proceedings against Voortman and the two proposed personal defendants on the basis that the issues and the parties were so intertwined with one another and that to allow them to proceed separately would result in a multiplicity of proceedings and would give rise to the spectre of inconsistent results. The Court reviewed the cases outlined in the foregoing paragraphs and held that the issues were sufficiently intertwined that they should be dealt with together, if possible. The Court stated, at paras. 67-68 and 70 that:

In my view, given the nature of the pleadings and the role of each of the proposed individual defendants as employees of the defendant, the application by the plaintiff to amend his notice of civil claim should be allowed but I will order a stay of the proceedings against all defendants.

*I conclude that the issues against the new defendants are intertwined with the allegations against the defendant and might properly be advanced in the arbitration.* That issue was not argued on this application. If the new defendants consent to the hearing of the claims against them in the arbitration, then their participation will ensure that all matters are resolved consistently and in a timely fashion. I will not make that order until the new defendants have been served with the pleadings and all parties are given an opportunity to address the issue.

...

*I direct a stay of the action against the new defendants under the Law and Equity Act pending further submissions as to place for the resolution of those claims for damages, either in the arbitration proceedings, in this proceeding or as otherwise may be agreed between the parties.* [emphasis added]

What can be taken from the case law is that if a party initiates a civil proceeding in respect of a matter which is extensively intertwined with another matter that is properly the subject of arbitration and/or involves related parties to the arbitration, the courts will likely stay the proceeding. The issues to which the courts appear to be most sensitive are the possibility of multiple proceedings, inconsistent decisions and the statutory requirements around staying proceedings in favour of arbitration where the parties have chosen arbitration as their method of dispute resolution.

### **A. Legal Proceedings are in Respect of a Matter Agreed to be Submitted to Arbitration**

The second of three pre-requisites to succeeding on an application to stay proceedings under s. 15 of the *Commercial Arbitration Act* is that the legal proceeding must be in respect of a matter that the parties agreed would be submitted to arbitration.

The question that must be answered in the context of s. 15(1) of the *Commercial Arbitration Act* is whether the dispute falls, or arguably falls, within the scope of the arbitration agreement. In answering this question, the courts have held that the merits of the claim advanced in the action are not to be considered: see *James* and *Prince George (City)*.

Whether a dispute falls within the scope of an arbitration agreement must be determined by an analysis of the nature of the dispute, the words of the arbitration agreement, and the terms of the contract as a whole: see *St. Pierre*, *supra* at para. 21.

It is settled law that a stay of proceedings must be granted unless it is “clear” or “plain” that the plaintiff’s claims fall outside the arbitration agreement. If the issue is “arguable,” the question, in the first instance, is not for the court, but for the arbitrator: *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.) and *Prince George (City)*. See also *Nanaimo (City) v. Millennium Nanaimo Properties Ltd.*, 2010 CarswellBC 3239 (BCSC) at para. 20, *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 CarswellBC (BCCA), and *Padmawar v. Altig*, 2011 BCSC 692.

## 2.1.7

In *James*, the Court considered an arbitration agreement which stipulated that: “any dispute, difference or question that shall arise concerning the interpretation of this Agreement or the rights or liabilities of the General Partner or the Limited Partners or any one or more of them then every such dispute, difference or question shall be referred to a single arbitrator.”

The Court concluded that the provision was “very broad” (at para. 69), and, at para. 70, stated that:

As I read the provision, which is known as an “all disputes or differences” clause, its scope is not limited to disputes concerning the interpretation of the contract, but also encompasses the rights and liabilities of the parties under the contract.

The Court considered whether legal proceedings initiated by one of the parties, which alleged breaches of trust and fiduciary duty as well as fraud and fraudulent misrepresentation, fell within the scope of the arbitration agreement.

The Court concluded that these issues fell within the scope of the broad “all disputes or differences clause” and moreover, that the issues were “inextricably entwined with the issues that have already been remitted to arbitration.” (at para. 76)

Similarly, in *Padwamar*, the Court reviewed an “all disputes or differences” clause and concluded that it was a “broadly worded arbitration clause that would capture anything *relating to the contract*.” (at para. 39)

In *Cecrop Co. v. Kinetic Sciences Inc.*, [2001] B.C.J. No. 690 (S.C.), the arbitration clause at issue read as follows:

... “any dispute between the Parties arising out of the construction, meaning or effect of any Clause or matter contained in this agreement *or of the rights and liabilities of the Parties...*” [emphasis added] ... “failing an amicable settlement to any such dispute, the dispute shall be referred to arbitration ...”

The Court held that the clause was drafted “rather broadly” (at para. 12). Further, the Court went on to consider the meaning of the word “dispute.” It stated, at para. 13:

The word “dispute” is defined by J.B. Casey, *International and Domestic Commercial Arbitration* (Toronto: Carswell, 1999) as follows:

(a) “Disputes”, “Claims”, “Differences”, “Controversies”

Words such as these have been held to include tortious and statutory causes of action, as well as breaches of contract, so long as the disputes are so closely knitted together on the facts that the arbitration agreement can cover them all.

Based on the foregoing, it is evident that the courts will generally give broad application to language which appears to be intended to encompass the disputes between parties arising out of their agreement. Should there be a dispute about that language, courts will generally find that it is for the arbitrator to rule on whether the language properly encompasses the dispute before him or her.

### **B. Timeliness of Stay Application**

The third and final of three prerequisites to succeeding on a s. 15 application is that the stay application must be brought in a timely manner (i.e., before the applicant takes a step in the proceeding: *Prince George (City)*, para. 26).

Once a party takes step(s) in the proceeding which make it appear that the party has accepted the court’s jurisdiction, the party has generally given up the right to contest the court’s jurisdiction. Typically this occurs when a party asks the court to rule on matters or invokes the court’s procedures to advance that party’s position without following available procedures to preserve the right to contest the court’s jurisdiction.

## 2.1.8

The meaning of “step in the proceeding” for the purposes of s. 15 of the *Commercial Arbitration Act* requires a consideration of s. 15(4) which states:

It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.

In *Bodnar v. Payroll Loans Ltd.*, 2009 BCSC 1205, the Court reviewed the distinction between a step that will be construed as falling under s. 15(4) of the *Commercial Arbitration Act* and a step taken to advance a party’s interests, which will generally preclude a stay. The Court stated, at paras. 51-52 that:

... A step that has the purpose of advancing a party’s defence of the action is a step in the proceeding within the meaning of s. 15(1) of the *CAA*, whereas a step that is for the purpose of protecting a parties’ rights may be an “interim measure or protection” within the meaning of s. 15(4): *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.*, 31 B.C.A.C. 126, 81 B.C.L.R. (2d) 359 at para. 23 and *Globe Union Industrial Corp. v. G.A.P. Marketing Corporation*, [1995] 2 W.W.R. 696, 100 B.C.L.R. (2d) 41.

An “interim measure of protection” pursuant to s. 15(4) is a narrow exception to the bar on taking “any other step in the [legal] proceedings” other than an appearance, pursuant to s. 15(1). While an “interim measure of protection” is not defined, its plain meaning in context of the entire section is that it is a step “interim” to the parties’ dispute being decided by way of arbitration, and that is also “protective” of that party’s rights in the dispute, pending the outcome of the arbitration. This is not a step that on its face appears to accept the court’s jurisdiction and seeks to advance the party’s position in the litigation generally.

As an illustration of these principles, in *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.* (1993), 81 B.C.L.R. (2d) 359 (C.A.), the plaintiff had applied for an order freezing certain funds and the defendant served a demand for discovery of documents. The Court of Appeal held that in spite of its demand for discovery of documents, the defendant’s application for a stay was not barred since that step was not taken for the purpose of pursuing its defence, but rather, to protect its rights in relation to the *ex parte* order obtained by the plaintiff to freeze its funds. Delivering the judgment of the court, Hollinrake, J.A. stated at 363:

The respondent [defendant] now asserts before us that the demand for discovery of documents, even if it can be said to be a step in the proceedings within s. 15(1), was, on all the facts, clearly for the sole purpose of obtaining documents to be used on the motion to set aside the *ex parte* order that froze the joint venture funds. The respondent goes on to say that, this being so, s. 15(4) of the Act applies and the action should be stayed and this appeal dismissed.

In my opinion, if s. 15(4) is applicable on the facts before us then the respondent must succeed on this appeal. I say this whether or not the demand for discovery of documents can be said to be a step in the proceedings within s. 15(1). It is, in my opinion, arguable whether what could otherwise be taken as a step in the proceedings within s. 15(1) is, as a matter of interpretation, within that subsection where the facts bring the case within s. 15(4). The argument, as I see it, is that the demand for discovery of documents here was not served with a view to pursuing the defence of the action, but rather for the purpose of protecting the rights of the respondent in the face of the *ex parte* order obtained by the appellant freezing the funds in the bank. In my opinion, it is the pursuit of the defence itself that brings an activity within s. 15(1). I say this because s. 15(1) cannot be read in isolation but must be read together with the other subsections, and particularly subs. (4) of s. 15. However, I need not decide this point because, in my opinion, if the activity, here the demand for discovery of documents, is for a purpose which falls within s. 15(4) then, be it a step or not, it remains open to the respondent to assert the arbitration clause in the agreement.

## 2.1.9

I think the activity of the appellant in seeking this order freezing the funds clearly falls within s. 15(4). If that is so, I think it necessarily follows that anything done to oppose an activity that falls within s. 15(4) must itself fall within the subsection.

I think that on the facts before the Court in this case, viewed objectively, the service of the demand for discovery of documents falls within s. 15(4) and thus cannot be said to be incompatible with the arbitration clause. If it is not incompatible with the arbitration clause then, in my opinion, the condition to seeking a stay in s. 15(1) before taking any other step in the proceedings does not apply.

Courts have found that the approach to this issue is to determine whether a party's actions have affirmed a willingness to have the matter resolved by the court or in arbitration.

For instance, in *Commonwealth Insurance Co. v. Larc Developments Ltd.*, 2010 BCCA 18, the Court of Appeal cited the following passages from J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, looseleaf (Aurora, Ont.: Canada Law Book, 2004) with approval:

[21] The portions of the text said to be relevant to the application at bar are as follows. First under the heading 30.40.40, "Step in a Proceeding":

*Determining whether a step has been taken requires an objective approach. The court must ask itself whether on the facts the parties should be held impliedly to have affirmed the correctness of the proceedings and his or her willingness to go along with the determination by the courts of law instead of arbitration. In this regard "a step in the proceedings" means something in the nature of an application to the court and not mere talk between solicitors or solicitors' clerks nor the writing of letters but the taking of some step such as taking out a summons or something of that kind which is in a technical sense a step in the proceedings. [emphasis added]*

[22] However, the "writing of letters" exemption is not absolute. For example a letter by counsel suggesting that the other party commence an action in which his or her clients would file a defence and seek full discovery of facts and documents is held to be a waiver of any right to arbitration that existed prior to the letter. See also the discussion of demands for particulars in s. 3, 40.40.80 following.

[23] Under that heading the following is said to be of relevance:

The exchange of letters reflecting a demand for particulars has been held to be the taking of a step which amounts to a step in the proceedings such that an application for a stay is barred where the rules of court require a demand before the motion can be brought, as in British Columbia.

In this context but not under legislation where a prior application for particulars by letter is not mandatory, a demand for particulars appears to be a form of proceeding.

Courts will take an objective view of the circumstances to determine if a step that has been taken falls within the exception in s. 15(4) to preclude a stay.

## **VI. Section 15(2)—Void, Inoperative or Incapable of Being Performed**

Pursuant to s. 15(2) of the *Commercial Arbitration Act*, once it is determined that the dispute between the parties is "in respect of a matter agreed to be submitted to arbitration," the court must make an order staying the legal proceedings "unless it determines that the arbitration agreement is void, inoperative or incapable of being performed."

Granting a stay of proceedings no longer is discretionary if the court is satisfied the commitment to arbitrate is not void, inoperative or incapable of being performed: *Commonwealth Insurance Co.*, at para. 29.

As such, in order for the court to decline a stay, it must be clear that the arbitration agreement, as distinct from the contract containing it, is “void, inoperative or incapable of being performed”: *James*, at paras. 95 and 97.

Further, Madam Justice Wedge concluded at para. 99 of *James* that on an application to stay proceedings, there must be sufficient material before the Court on which to base a summary determination that the arbitration agreement itself is void.

## VII. Validity of the Arbitration Agreement and the Doctrine of Separability

Often, parties wishing to allege that arbitration clause is “void, operative, or incapable of being performed” will argue that the contract containing the arbitration clause is not enforceable for various reasons (e.g., repudiation, failure to reach consensus on essential terms, etc.). Courts have long held that the arbitration agreement is a contract that is separate from the main contract within which it is contained. As such, in order to establish that an arbitration agreement is void, inoperative or incapable of being performed, it is necessary that the arbitration clause *itself* be found “void, inoperative or incapable of being performed.” Consequently, an arbitration agreement will generally survive attacks on the invalidity of the substantive agreement. Further, even a successful attack on the substantive agreement will generally not vitiate the arbitration agreement if the arbitration agreement itself is not successfully attacked.

This was exemplified in *Roy v. Boyce* (1991), 57 B.C.L.R. (2d) 187 (S.C.), where an arbitration clause was held to be valid despite the possible absence of a condition precedent to the continuing existence of the contract.

Similarly, in *Hebdo Mag. Inc. v. 125646 Canada Inc.* (1995), 22 B.C.L.R. (2d) 72 (S.C.), the plaintiff argued the parties had not agreed on all the essential terms of the contract and that the arbitration proceedings initiated under the contract should be stayed while the Court determined whether the contract was *void ab initio*. Mr. Justice Blair stated at 78:

Clearly the legislature, in defining arbitration agreement, meant to include only those terms in an agreement relating to arbitration. Implicit within this interpretation is that the viability of the remainder of the agreement was not relevant to the functioning of s. 15 of the *Commercial Arbitration Act*.

The Court concluded that the arbitration clause should be considered separately from the overall agreement.

Finally, in *Cecrop Co. v. Kinetic Sciences Inc.*, [2001] B.C.J. No. 690 (S.C.) (QL), one of the plaintiff’s arguments against a stay of proceedings was that if the contract was in effect and it was terminated by the defendant, the arbitration clause could not survive that termination. The Court held at para. 28 that:

In my view the validity of the old agreement is not the relevant issue. What is important is whether the arbitration agreement is null and void, inoperative or incapable of being performed. The validity of the overall agreement is not relevant to that determination. In my view an arbitration agreement can exist even if the contract in which it appears is *void ab initio*. As a result, even if the defendant terminated the contract, the provisions of the contract itself are not relevant to determine the validity of the arbitration agreement.

## VIII. Does the Doctrine of Separability Cover Fraud?

The question is whether an arbitration agreement is still enforceable where fraud is alleged and rescission of the contract is sought. This issue was considered, but not resolved in *Darby*. While the central issue in that case was whether the court has discretion to refuse a stay of proceedings to an applicant who is a party to the litigation but not a party to the arbitration agreement, the case also involved an allegation that the contract was induced by fraud.

In referring the matter back to trial, Madam Justice Saunders noted that the case also engaged the issue of whether the arbitration agreement was “void, inoperative or incapable of being performed” in light of the fraud allegations which formed the basis for the rescission of the contract being sought. The case did not proceed to trial again.

In *James*, the Court considered this issue as there were allegations of fraud in the pleadings. The Court considered the decision in *Darby*, and stated (at para. 90):

The comments of the Court of Appeal in *Darby* invite consideration as to whether the doctrine of separability is engaged even where it is alleged that the contract was induced by fraud, and rescission is sought as a remedy.

In *James*, the Court went on to consider a decision of *Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.*, [1993] 1 Lloyd’s Law Reports 455 in that the Court confirmed that allegations of illegality or fraud fall within an “all disputes or differences” arbitration agreement. In that case, there was an allegation of illegality, which, it was argued, rendered the contract *void ab initio* and consequently rendered the arbitration agreement *void ab initio* as well. The Court rejected that argument.

The Court also held that an allegation of fraud does not put the matter outside an arbitration agreement if the allegation does not directly impeach the arbitration agreement itself. The doctrine of separability requires that the arbitration clause be analyzed as a separate contract. That being the case, the allegation of fraud must relate directly and specifically to the arbitration agreement rather than to the contract as a whole.

It is likely, based on this that faced with deciding whether an arbitration agreement is void, a court would require the party making such an assertion to successfully attack the arbitration agreement itself and establish that the arbitration agreement was *void ab initio* independent of the validity of the main agreement.

## IX. What is the Meaning of Void, Inoperative, or Incapable of Being Performed?

In *Prince George*, Cumming J.A., delivering the judgment of the Court quoted with approval from J. Mustill and S.C. Boyd, *The Law and Practice of Commercial Arbitration in England* (1989, 2nd ed.), who wrote:

The expression ‘inoperative’ has no accepted meaning in English law, but it would seem apt to describe an agreement which, although not void *ab initio*, has for some reasons ceased to have effect for the future. *Three situations can be envisaged in which an arbitration agreement might be said to be ‘inoperative’.* First, *where the English Court has ordered that the arbitration agreement shall cease to have effect, or a foreign court has made a similar order which the English Court will recognise.* Second ... *there may be circumstances in which an arbitration agreement might become ‘inoperative’ by virtue of the common law doctrines of frustration, discharge by breach, etc.* Third, *the agreement may have ceased to operate by reason of some further agreement between the parties. But the fact that issues in the arbitration overlap issues in proceedings between the parties who are not bound by the arbitration agreement does not make the agreement ‘inoperative’.* [At 464-5; emphasis added.]

The Court also quoted from J.B. Casey, *International and Domestic Commercial Arbitration* (1993) as follows:

To find that an arbitration agreement is inoperative is again to deal with a situation in which there is an agreement, but for some reason it is no longer enforceable. For example, it may be alleged that the parties have by subsequent agreement or conduct determined to suspend the operation of the arbitration agreement, or another court has declared the agreement to unenforceable ... It is not sufficient to say that because the court action raises issues outside the scope of the arbitration agreement per se, or because the action involves some parties that are not parties to the arbitration agreement, that the agreement should be considered “inoperative”. [At 4-14.]

These authorities indicate that the meaning of the words “void, inoperative, or incapable of being performed” is narrow and will apply in very limited circumstances.

## **X. Cases Where Arbitration Clauses May Not Be Enforceable**

There is some authority to the effect that the courts reserve the jurisdiction to deal with certain legal matters even in the face of an arbitration clause which meets the three pre-requisites in s. 15(1) of the *Commercial Arbitration Act* and which is not void, inoperative or incapable of being performed.

These cases are rare, however, and the facts which lead a court to rule in favour of exercising its residual jurisdiction to deal with a matter in which there is a valid and subsisting arbitration clause are generally quite exceptional.

For instance, in *Houston v. Exigen (Canada) Inc.* (2006), 296 N.B.R. (2d) 112 (Q.B.), aff'd (2006), 300 N.B.R. (2d) 130 (C.A.), an employee signed a new employment offer letter when her employment with Aliant was transferred to another company, Exigen. The offer letter included the following provisions:

6. Your employment with the Company is on an “at-will” basis, which means that your employment relationship with the Company may be terminated at any time by either you or the Company, without prior notice, for any reason.

...

8. In the event of any dispute or claim relating to or arising out of your employment relationship with the Company, you and the Company agree that all such disputes shall be fully and finally resolved by binding arbitration conducted by the American Arbitration Association of Santa Clara County, California. However, we agree that this arbitration provision shall not apply to any disputes or claims relating to or arising out of a misuse or misappropriation of the Company’s trade secrets or proprietary information.

The plaintiff sued Exigen in court for wrongful dismissal and Exigen applied to have the proceeding stayed. The Court denied the stay application and held at para 12:

As I see it that [sic] paragraph 6 is so abusive of the rights of an employee in this jurisdiction that it taints the entire document, including the arbitration clause and the resulting reiteration of the arbitration clause subsequently in the employee handbook. In my view that [sic] paragraph 6 and paragraph 8 are void at law and unenforceable in this jurisdiction. With regard to paragraph 8, it is particularly offensive that Exigen would purport to bar its employees in this jurisdiction from suing in our courts with an arbitration clause for matters to be dealt with by an arbitration association in Santa Clara, California and then in the final sentence of that paragraph, purport to preserve its rights to pursue its employees or former employees under our law here in our courts here.

By contrast, in *Ross v. Christian and Timbers, Inc.* (2002), 18 C.C.E.L. (3d) 165 (Ont. Sup. Ct.), a stay was granted as the Court did not find that an arbitration clause, requiring disputes to be arbitrated in Ohio, was unfair or oppressive to the employee. At paras. 25 and 27, Mr. Justice Swinton made the following comments:

... this is not a case where a vulnerable employee is being unfairly treated by the inclusion of an arbitration clause with a choice of foreign law in order to undermine his rights. Mr. Ross is trained as a lawyer, and he had independent legal advice when he signed the offer letter, and he bargained over its terms. Therefore, I leave for another day whether such clauses may sometimes be unenforceable

...

The *Arbitration Act* makes it clear that the courts are to defer to arbitration where the parties have chosen to arbitrate their disputes, except in very limited circumstances. In my view, the arbitration agreement is not invalid because it chooses Ohio law to govern an employment dispute, and, therefore, a stay of this action must be ordered. However, if Mr. Ross's rights under the Ontario legislation are not respected in the arbitration proceedings, he may have further remedies to pursue in Ontario in order to enforce the minimum standards to which he is entitled.

In *Carrier Lumber Ltd. v. Joe Martin & Sons Ltd.* (2003), 16 B.C.L.R. (4th) 175 (S.C.), Chamberlist J. found that arbitration tribunals were without jurisdiction to award punitive damages. *Carrier Lumber Ltd. v. Joe Martin & Sons Ltd.*, [2006] B.C.J. No. 307, dealt with the question of whether an arbitrator had the exclusive jurisdiction to deal with matters which were in dispute between the parties and, in particular, whether the arbitrator was without jurisdiction to award punitive damages or whether the Court had concurrent or overlapping jurisdiction. The petitioner had initiated an action seeking general damages for abuse of process, breach of contract and punitive damages, claiming that it was an implied term of the contract that the respondent would act reasonably and in good faith setting rates to be paid under the contract. In regard to these arguments, Mr. Justice Morrison concluded that:

[50] In my view, this is not a matter within the exclusive jurisdiction of the Arbitrator. The Arbitrator and the court have concurrent or overlapping jurisdictions to determine certain disputes that have arisen between the parties pursuant to their logging contract relationship. However, only the court has the jurisdiction to award the remedy of punitive damages under the circumstances of this dispute. It is therefore a matter of jurisdiction for the court.

[56] Even in labour relations, the court retains its inherent jurisdiction to deal with, for example, injunctive matters. This also is a case where the court's inherent jurisdiction should prevail.

[57] To deny the jurisdiction of the courts in this case would be to deny the petitioner the right to pursue a remedy that is clearly not available under the arbitration process.

Based on this, there is some room for arguments in exceptional cases that the court retains or should exercise jurisdiction over a matter which may be governed by an arbitration clause.

## **XI. Pros and Cons of Including an Arbitration Clause in an Employment Contract**

Deciding to include an arbitration clause in an employment contract requires careful consideration as the advantages and disadvantages will differ according to each particular situation. The following considerations may be helpful in arriving at a decision.

## A. Pros of Arbitration

**Control:** Generally speaking, the parties have greater control over the procedure and can modify the procedural rules to more appropriately suit their needs and the nature of their dispute.

**Cost:** depending on the nature of the dispute and whether parties choose to forego some of the more time-consuming steps aspects of the process, arbitration may be a less expensive method of dispute resolution than litigation.

**Speed:** Foregoing some of the formalities and procedures of litigation generally leads to a more expeditious resolution of disputes.

**Expertise/Experience of the Arbitrator:** The parties may select an arbitrator with particular expertise relating to their dispute. Some parties also feel that being able to select a person by mutual agreement to arbitrate their dispute is a benefit.

**Finality:** For the most part, it is very difficult to appeal arbitration rulings, even if serious factual mistakes or errors of law have been made by an arbitrator. In BC, the *Commercial Arbitration Act* (ss. 30-32) provides for a limited right of appeal to the courts. In order to appeal an arbitral decision, the court must grant leave to appeal and may only do so in the following circumstances:

- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice;
- (b) the point of law is of importance to some class or body of persons of which the applicant is a member; or
- (c) the point of law is of general or public importance.

This finality can be a positive factor in relation to ending a dispute and allowing the parties to move on.

**Confidentiality:** Arbitration hearings do not take place in open court and generally decisions are not published. This can be very valuable for parties in some cases.

## B. Cons of Arbitration

**Cost:** Depending on several factors, arbitration can be more expensive than trial. Parties pay the arbitrator's fees directly and while they may pay hearing fees and other court-related fees, they do not pay directly for the use of the court in the same way that they pay the arbitrator. If there are a number of preliminary issues to be decided (e.g., issues around the appropriate parties to the dispute, the seat of arbitration, etc.), or if the agreement calls for more than one arbitrator, and/or if the dispute is complex and requires many of the same time-consuming steps to be taken as litigation, the costs can add up very quickly. In some cases these costs can well exceed the costs of proceeding through the courts.

**Fairness:** Since arbitrators are hired by and paid for by the parties, the more powerful party may have an unfair advantage in terms of selection and outcomes. This is referred to as the "repeat player" effect whereby the arbitrator has an incentive to reach a result favorable to the party that participates in numerous arbitrations so that the arbitrator can obtain future arbitration assignments. The "repeat player" effect is contested in the academic literature however, and accordingly, it is difficult to know the extent of the problem or if it is a problem at all.

**Speed:** As arbitration is not always less expensive, it is also true that arbitrations are not necessarily always faster than litigation. This is particularly true where a case is complex, involves multiple parties, and/or multiple arbitrators.

**Finality:** The downside here is that if the arbitrator issues a decision with a glaring legal or factual error, there is a limited right to appeal and the losing party may have to live with the decision despite the error.

## **XII. Drafting Arbitration Clauses**

A poorly drafted arbitration clause can result in added expense and delay arising from the preliminary resolution of the issues posed by the ambiguity or conflict in an arbitration clause. As such, if an employer chooses to include an arbitration clause in an employment agreement, care and diligence should go into its drafting.

As with deciding whether or not to include an arbitration clause, there is similarly no overriding correct approach to all situations. Different circumstances and parties are more appropriately served by different terms. In drafting an arbitration clause, the following issues should be considered and decided:

### **A. Scope of Disputes to be Addressed by Arbitration**

This is an important consideration as it goes directly to the jurisdiction of the arbitrator. Generally speaking, it is preferable to use broader and more comprehensive language. The reason for this is that using more limited language may require: (a) dealing with expensive and time-consuming preliminary disputes about the arbitrator's jurisdiction and/or (b) simultaneously litigating and arbitrating different aspects of their dispute.

That said, it is not uncommon for parties to exclude from the purview of an arbitration clause: disputes around restrictive covenants, intellectual property provisions, and requests for injunctive relief. Parties should consider carefully whether it is appropriate and/or necessary to carve out these types of disputes or not.

Some common and well established examples of comprehensive language for the scope of arbitration clauses are:

- any dispute between the parties arising out of the construction, meaning or effect of any clause or matter contained in this agreement or of the rights and liabilities of the parties to the dispute shall be referred to arbitration;
- all disputes and differences arising out of, or in relation to this agreement or its breach;
- all legal disputes, differences, controversies, or claims arising under, out of or relating to, this agreement and any subsequent amendments of this agreement, including without limitation, its formation, validity, binding effect, interpretation, breach or termination as well as any non-contractual claims.

A final consideration in relation to the scope of the arbitration clause is whether non-parties who may be likely parties to a dispute are included as parties to the arbitration agreement. This prevents applications to the court to make those determinations and thereby increases the efficiency, speed and cost-effectiveness of the arbitral process.

### **B. Pre-Conditions to Arbitration**

The parties may wish to consider whether they want mediation or negotiation to be a pre-requisite to invoking the arbitration clause. Should the parties decide they wish to do this, the parties should specify the time periods in which those steps will be deemed to have been completed in order to ensure that it is clear when the arbitration clause may be invoked.

In terms of deciding whether or not to include mediation or negotiation as a pre-requisite to arbitration, it is worth noting that these processes typically slow down the process and can give rise to further disputes around whether the steps have been appropriately completed—this is particularly a problem in agreements where the arbitration clause requires negotiation in “good faith” or “best efforts” to be made in resolving the dispute. Often if parties wish to settle a dispute, they will do so without being required to do so by a formal requirement in the arbitration agreement.

### **C. Procedural Rules**

The parties must select a set of procedural rules which will govern the arbitration process. This is known as the “*lex arbitri*.” There are many sets of procedural rules created by arbitral institutions throughout Canada as well as internationally. For instance, the major arbitral institutions in Canada are:

- (a) the BC International Commercial Arbitration Centre (“BCICAC”);
- (b) ADR Chambers;
- (c) the ADR Institute of Canada Inc.; and
- (d) the Canadian Commercial Arbitration Centre.

The BCICAC’s Domestic Commercial Arbitration Rules of Procedure are appended to this paper for review and consideration in drafting arbitration clauses.

When deciding on the procedural law to apply to the arbitration process, the parties may adopt a set of rules (e.g., the BCICAC’s Domestic Commercial Arbitration Rules of Procedure), they may create their own rules, or they may adopt a set of rules and modify them to suit their needs. This latter option is likely the most beneficial, as it allows the parties to use a set of tried and tested rules and to adapt them in such a way as to maximize the benefits of the arbitration process depending on the parties’ circumstances.

### **D. Administered versus Ad-Hoc Arbitration (or Institutional v. Non-Institutional)**

The issue to be decided here is whether the parties will have their arbitration administered by an institution (e.g., BC International Commercial Arbitration Centre) or not.

One of the considerations here is cost, efficiency and whether the rules of the administering centre are desirable to the parties. Generally, the administering institution charges fees for its services and acts as a form of registry for the steps taken in the process and the documents and correspondence that is exchanged between the parties.

Should the parties wish to dispense with this, they should understand that someone still needs to perform the administrative work and generally it will be the arbitrator, and inevitably, that cost will be passed on to the parties.

Further, if the parties decide that their administration is to be *ad hoc*, they must still specify a set of procedural rules that is to govern their dispute. Nevertheless, *ad hoc* (unadministered arbitration) can be advantageous in some cases as some disputes are better suited to some sets of procedural rules that differ from the set of rules that would govern their procedure if they were to have an administered arbitration. That said, for *ad hoc* arbitration to work well, some degree of cooperation between the parties is generally required.

An intermediary option is to amend the rules of the administering institution (e.g., in BC the BCICAC) and to do away with some of the administrative institutional steps and retain the ones the parties desire to keep.

In terms of drafting, if the arbitration is to be administered, the parties should state clearly which institution is administering the arbitration and indicate that the institution will have the responsibility for the administration of the process. If the parties choose an *ad hoc* arbitration, the parties should clearly state which set of procedural rules is to govern their process.

### **E. The Seat of Arbitration**

The “seat” of arbitration is the place whose procedural laws will govern the arbitration. The seat is not a physical location, but rather it is a juridical connection to a set of procedural rules (i.e., the “*lex arbitri*”) of the place (e.g., a country, province, state, area) where the “seat” is located.

Generally, the physical place of the arbitration hearing is the same as the seat, but it is possible that the parties may agree to hold the arbitration hearing, and any related deliberations or meetings, in a different geographic location for convenience if they so desire.

In terms of drafting, it is critical to specify the seat of arbitration in order to have clarity on the governing procedural rules and about which courts will have jurisdiction to exercise a supervisory role over the arbitration process.

### **F. Confidentiality**

If the parties want the process to be confidential, it may be worth stating clearly the extent to which the process is confidential in the arbitration clause. However, most institutional procedural rules will address confidentiality to some degree—for instance, s. 25 of the BCICAC’s Rules provides:

Unless otherwise agreed by the parties or required by law, all hearings, meetings, and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.

It is worth noting that this section does not say that the arbitrator’s decision is confidential.

Should the parties want further confidentiality protection, they may wish to incorporate a more extensive confidentiality agreement in their arbitration agreement.

### **G. Remedies**

Depending on the institutional rules a party has adopted, the issue of remedies may or may not be addressed. Section 29(1) of the BCICAC’s Rules provide, in material part, as follows regarding the arbitrator’s jurisdiction to award remedies:

29(1) Without limiting the generality of Rule 19 or any other Rule which confers jurisdiction or powers on the arbitration tribunal, and unless the parties at any time agree otherwise, the tribunal may:

- ...
- (k) make an award ordering specific performance, rectification, injunctions and other equitable remedies.

Parties may wish to amend or add to this provision to tailor the arbitrator’s power to award remedies to suit their needs.

### **XIII. Sample Arbitration Clause**

The clause below addresses many of the foregoing considerations and can be modified to suit the needs of the parties with regard to some of the considerations outlined above:

All disputes, differences or controversies arising out of or in connection with this agreement, or in respect of any defined legal relationship associated with it or derived from it, shall be referred to and finally resolved by arbitration under the International Commercial Arbitration Rules of Procedure of the British Columbia International Commercial Arbitration Centre.

The appointing authority shall be the British Columbia International Commercial Arbitration Centre.

The case shall be administered by the British Columbia International Commercial Arbitration Centre in accordance with its Rules.

The place of arbitration shall be Vancouver, British Columbia, Canada.

### **XIV. Conclusion**

This paper was not intended to be a comprehensive guide to arbitration, however, but to provide an overview of the main substantive issues that arise in relation to arbitrations in the employment context as well as to provide an outline of the considerations involved in choosing (or not choosing) arbitration and in drafting an arbitration clause. For further and more in-depth information on this topic, we recommend the following resource: J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations*, looseleaf (Aurora, Ont.: Canada Law Book, 2004).

**XV. Appendix A—BCICAC Domestic Commercial Arbitration  
Rules of Procedure**



**DOMESTIC COMMERCIAL ARBITRATION**

**Rules of Procedure**

*(As amended June 1, 1998)*

*as printed August 1998*

**THE BRITISH COLUMBIA INTERNATIONAL  
COMMERCIAL ARBITRATION CENTRE**

348 - 1275 West 6<sup>th</sup> Avenue  
Vancouver, B.C. Canada  
V6H 1A6  
Phone: 604-684-2821  
Fax: 604-736-9233  
Email: [admin@bcicac.com](mailto:admin@bcicac.com)

[www.bcicac.com](http://www.bcicac.com)

## **Model Arbitration Clause**

Parties who agree to arbitrate under the Centre's Rules, and to have the Centre act as appointing authority and to provide administrative services, may use the following clause in their agreement:

*All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre pursuant to its Rules.*

*The place of arbitration shall be Vancouver, British Columbia, Canada.*

## **Applicability of Rules**

Parties should examine the Centre's Rules to ensure that all the provisions are suitable and appropriate in the circumstances. Parties may agree to modify the Rules. Any necessary modifications of the Rules should be added to the model arbitration clause described above.

## **The Commercial Arbitration Act of British Columbia**

S. 22 of the *Commercial Arbitration Act* reads:

### **International Commercial Arbitration Centre Rules**

22. (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.
- (2) Where the rules referred to in subsection (1) are inconsistent with or contrary to the provisions in an enactment governing an arbitration to which this Act applies, the provisions of that enactment prevail.
- (3) Where the rules referred to in subsection (1) are inconsistent with or contrary to this Act, this Act prevails.

## **GENERAL**

Article #

1. Interpretation
2. Application
3. Time
4. Fees
5. Modification of Rules
6. Waiver of Rules
7. Communications

## **COMMENCEMENT OF ARBITRATION**

Article #

8. Arbitration by Agreement
9. Arbitration by Submission
10. Commencement Date

## **APPOINTMENT OF ARBITRATION TRIBUNAL**

Article #

11. Number
12. Appointment of Arbitrator(s)
13. Independence and Impartiality
14. Method of Appointment
15. Challenges
16. Substitution

## **CONDUCT OF THE PROCEEDING**

Article #

17. Place of Arbitration
18. Pre-Hearing Meeting
19. Conduct of the Arbitration
20. Jurisdiction
21. Exchange of Statements
22. Amendment of or Supplement to Claim
23. Production of Documents
24. Agreed Statement of Facts
25. Confidentiality
26. Hearings and Evidence
27. Experts
28. Default of a Party
29. General Powers of Arbitration Tribunal
30. Settlement Offers
31. Deposits Against Costs

32. Payment Out of Deposits

**MAKING THE AWARD AND TERMINATING THE PROCEEDINGS**

Article #

33. Legal Principles Apply

34. Closure of Hearings and Termination of the Proceedings

35. Settlement

36. Arbitral Award

37. Interest

38. Costs

39. Amendments and Corrections to the Award

## **GENERAL**

### **1. Interpretation**

- (1) “Rules” means these Domestic Commercial Arbitration Rules of Procedure of the Centre as amended from time to time.
- (2) In these Rules,
  - (a) terms and phrases have the same meanings as defined in or contemplated by the *Commercial Arbitration Act*, R.S.B.C., 1996, c.55;
  - (b) except as otherwise defined or contemplated in the *Commercial Arbitration Act*, terms and phrases have the same meanings as defined in the *Interpretation Act*, R.S.B.C. 1996, c. 238;
  - (c) “Centre” means the British Columbia International Commercial Arbitration Centre in Vancouver, British Columbia ;
  - (d) “Act” means the *Commercial Arbitration Act*, R.S.B.C., 1996, c.55;
  - (e) words signifying a male person include a female person; and
  - (f) words in the singular include the plural and words in the plural include the singular.

### **2. Application**

- (1) The Centre shall administer an arbitration if:
  - (a) the parties agree to arbitrate under the Rules of the Centre; or
  - (b) these Rules are deemed to apply by virtue of the provisions of the *Commercial Arbitration Act*.
- (2) These Rules do not apply to an international arbitration as defined in the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

### **3. Time**

- (1) In these Rules, where the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.
- (2) In these Rules, in the calculation of time, the first day shall be excluded and the last day included.
- (3) The Centre may, at any time, extend or abridge a period of time required in these Rules, other than a period of time fixed or determined by an arbitration tribunal.

### **4. Fees**

- (1) The commencement fees and administration fees for arbitrations conducted under these Rules are set out in the Centre’s *Fee Schedule for Domestic Commercial Arbitration* as amended from time to time.
- (2) The full amount of the commencement fee as set out in the *Fee Schedule for Domestic Commercial Arbitration* shall be paid to the Centre by the party presenting the claim or counter-claim.

- (3) An administration fee shall be paid to the Centre by each party as set out in the *Fee Schedule for Domestic Commercial Arbitration*.
- (4) In addition to the commencement and administration fees, the Centre shall be reimbursed for any expenses that it incurs on behalf of the parties.
- (5) Fees are non-refundable and subject to adjustment by the Centre. The allocation of fees between the parties shall be determined ultimately under Rule 38.
- (6) Where a party does not pay an administration fee or any other outstanding amount, any other party may pay that amount to ensure that the arbitration proceeds.
- (7) Outstanding fees and disbursements shall be paid prior to the release of the arbitration award.

## **5. Modification of Rules**

The parties shall notify the Centre of any agreement to modify the Rules upon commencement of the arbitration or as soon as any such agreement is made thereafter.

## **6. Waiver of Rules**

A party which knows of a failure to comply with these Rules and which proceeds with the arbitration without promptly stating its objection in writing shall be deemed to have waived the objection. The arbitration tribunal shall determine whether a party has waived an objection.

## **7. Communications**

- (1) Parties to an arbitration under these Rules may deliver any written communications required or permitted under these Rules personally, by mail, by facsimile or by other means of telecommunication which provide a record of delivery. Communications shall be considered received when delivered to a party's address for delivery.
- (2) The address for delivery shall be the party's address as stated in the Arbitration Notice or Submission to Arbitrate. A party may change its address for delivery by giving written notice to the other parties, the Centre, and the arbitration tribunal.
- (3) A copy of all written communications between a party and the arbitration tribunal must be delivered to the other party at the same time.
- (4) Information in regard to the substance of the dispute (i.e., matters other than administrative details) should only be communicated to the arbitration tribunal by a party while in the presence of the other party, or by way of documents where previously agreed to by the parties or as set out in these Rules.

## COMMENCEMENT OF ARBITRATION

### 8. Arbitration by Agreement

- (1) Where a dispute falls under an arbitration clause or agreement, a party, as claimant, may submit that dispute to arbitration by giving a written Arbitration Notice to the respondent and to the Centre. The Arbitration Notice shall contain:
  - (a) the names of the parties to the dispute and counsel, if represented, together with their addresses for delivery;
  - (b) a brief statement of the matter in dispute, and a request that it be referred to arbitration;
  - (c) the remedy sought including, where possible, a precise estimate of the amount claimed;
  - (d) the number and names of arbitrators proposed or agreed upon, if any;
  - (e) the required qualifications of the arbitrators as agreed to by the parties, if any; and
  - (f) any modification of these Rules which has been agreed to by the parties.
- (2) The required commencement fee as set out in the *Fee Schedule for Domestic Commercial Arbitration* must accompany the copy of the Arbitration Notice sent to the Centre.
- (3) A copy of the arbitration clause or agreement relied upon and a copy of the applicable contract(s), if any, must be appended to the Arbitration Notice.

### 9. Arbitration by Submission

- (1) Parties to a dispute may submit a dispute to arbitration by filing a Joint Submission to Arbitrate with the Centre. The Joint Submission to Arbitrate shall contain:
  - (a) the names of the parties to the dispute and counsel, if represented, together with their addresses for delivery;
  - (b) a statement of the matter to be arbitrated;
  - (c) the remedy sought and, where possible, a precise estimate of the amounts claimed and counter-claimed;
  - (d) the number and names of arbitrators proposed or agreed upon, if any;
  - (e) the required qualifications of the arbitrators as agreed to by the parties, if any; and
  - (f) any modification of these Rules which has been agreed to by the parties.
- (2) The required commencement fee as set out in the *Fee Schedule for Domestic Commercial Arbitration* must accompany the arbitration notice.
- (3) The Joint Submission to Arbitrate must be signed by the parties to the dispute. and a copy of the applicable contract(s), if any, must be appended.

### 10. Commencement Date

The arbitration is deemed to have commenced when the Arbitration Notice or Joint Submission has been filed with the Centre and the commencement fee paid. The Centre shall notify the parties when an arbitration has commenced.

## **APPOINTMENT OF ARBITRATION TRIBUNAL**

### **11. Number**

Unless the parties have agreed on the number of arbitrators before or within 15 days after the arbitration has commenced, the arbitration shall be before a single arbitrator.

### **12. Appointment of Arbitrator(s)**

- (1) Where a single arbitrator is to be appointed, and the parties have not yet agreed upon an arbitrator 21 days after the arbitration has commenced, a party may request the Centre to appoint the single arbitrator.
- (2) Where three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators so appointed shall choose a third arbitrator within 14 days of the date on which the second arbitrator was appointed. The third arbitrator will act as the presiding arbitrator of the tribunal.
- (3) Unless the parties have otherwise agreed, where three arbitrators are to be appointed and one party fails to appoint within the time specified in the agreement or, where no time is specified, within 14 days of receiving notice of appointment of the first arbitrator, the party which appoints the first arbitrator may establish the tribunal in accordance with either Rule 12(4) or 12(5) below.
- (4) (a) The Centre may appoint the second arbitrator upon request of either party.  
(b) The two appointed arbitrators shall choose a third arbitrator within 14 days of the date on which the second arbitrator was appointed. The third arbitrator shall act as the presiding arbitrator of the tribunal.  
(c) Where the appointed arbitrators have not agreed upon a presiding arbitrator within 14 days, either party may request the Centre to appoint the presiding arbitrator.
- (5) The party which appointed the first arbitrator may give the party in default of appointment written notice that, if the second arbitrator is not appointed within 14 days of receiving the notice, the first arbitrator shall be the sole arbitrator whose award shall be binding on both parties as if originally appointed sole arbitrator by agreement of the parties.
- (6) Anyone who appoints an arbitrator shall immediately notify the Centre, in writing, of the appointment.
- (7) The parties may agree to request that the Centre appoint an arbitrator at any time.

### **13. Independence and Impartiality**

- (1) An arbitrator shall be and remain at all times wholly independent and impartial.
- (2) Every person must, upon accepting an appointment as arbitrator, sign a statement declaring that he or she knows of no circumstance likely to give rise to justifiable doubts as to his or her independence or impartiality and that he or she will disclose any such circumstance to the parties should such arise after that time and before the

arbitration is concluded. A copy of the statement shall be filed with the Centre and a copy provided to all parties.

#### **14. Method of Appointment**

- (1) A party requesting the Centre to appoint an arbitrator shall provide the Centre with names previously considered by the parties to the arbitration.
- (2) Where the Centre is asked to appoint a sole or presiding arbitrator, it shall use the following procedure unless it determines the procedure to be inappropriate.
  - (a) The Centre shall communicate to each party an identical list of at least 4 names of proposed arbitrators, together with a brief description of each.
  - (b) Within 10 days of the listing each party shall advise the Centre as to its order of preference of the proposed names and delete any name to which it objects.
  - (c) Taking into consideration the responses of the parties, the Centre may appoint an arbitrator from among the names on the list, or communicate to each party a second list of at least 4 other names.
  - (d) In the event the Centre communicates a second list of names to the parties, each party shall respond with its preferences and objections within 10 days.
  - (e) The Centre will appoint an arbitrator within 14 days of communicating the second list.
- (3) A party seeking more information about a proposed arbitrator shall not communicate directly with the proposed arbitrator. On request, the Centre will endeavor to provide more information about a proposed arbitrator
- (4) When appointing an arbitrator, the Centre shall observe the qualifications agreed to by the parties and have regard to:
  - (a) the objections and preferences expressed by the parties in the appointment procedure, as well as any additional qualifications requested by a party;
  - (b) the nature of the contract;
  - (c) the nature and circumstances of the dispute; and
  - (d) any other consideration likely to secure the appointment of a qualified, independent and impartial arbitrator.

#### **15. Challenges**

- (1) A party may challenge any arbitrator where circumstances exist that give rise to a justifiable doubt as to his or her independence or impartiality, or whether he or she possesses the qualifications specifically agreed to by the parties.
- (2) A party who intends to challenge an arbitrator shall, no later than 14 days after the appointment of that arbitrator or 14 days after the circumstances giving rise to the challenge became known to that party, send a written statement of challenge to the arbitration tribunal and to the Centre. The statement of challenge shall set out detailed reasons for the challenge.
- (3) If the challenged arbitrator agrees to withdraw or all other parties to the arbitration agree to the challenge, the challenged arbitrator shall withdraw from the arbitration. In neither case shall the validity of the grounds for challenge be implied.
- (4) Where the challenged arbitrator does not withdraw pursuant to 15 (3):

- (a) where there is a single arbitrator, that arbitrator shall decide on the challenge;
  - (b) in the case of a three person panel where the presiding arbitrator is not challenged, the presiding arbitrator shall decide the challenge;
  - (c) where the presiding arbitrator is the challenged arbitrator, all of the arbitrators shall decide the challenge.
- (5) A party may appeal an arbitration tribunal's decision under 15 (4) to the Centre within 7 days.
- (6) The Centre shall decide the appeal from the tribunal's decision under 15(4) as soon as is reasonably possible after receiving the request and according to such procedures as the Centre considers appropriate. The decision of the Centre on this appeal shall be final and conclusive.

## **16. Substitution**

- (1) The Centre may declare the office of arbitrator to be vacant if, on the basis of evidence thought satisfactory by the Centre, it concludes that an arbitrator is unable to perform the duties of the office. A substitute arbitrator shall be appointed by the Centre.
- (2) Where a member of an arbitration tribunal is replaced, any hearings previously held may be repeated at the discretion of the tribunal. Where a single arbitrator is replaced, any hearing previously held shall be repeated.

## **CONDUCT OF THE PROCEEDING**

### **17. Place of Arbitration**

- (1) The place of arbitration shall be Vancouver, British Columbia, unless otherwise agreed by the parties.
- (2) The arbitration tribunal may meet at any other place it considers necessary for any purpose, including deliberation, to hear witnesses, experts or the parties, or for the inspection of documents, premises, goods or other property.

### **18. Pre-hearing Meeting**

- (1) The arbitration tribunal shall convene a pre-hearing meeting within 21 days of appointment.
- (2) The pre-hearing meeting agenda may include:
- (a) identification of the issues in dispute,
  - (b) procedure to be followed,
  - (c) fees, costs and deposits,
  - (d) time periods for steps to deal with any other matters that will assist the parties to settle their differences or to assist the arbitration to proceed in an efficient and expeditious manner.
- (3) The pre-hearing meeting may take place by conference telephone call.

- (4) The arbitration tribunal shall record any agreements or orders made at the pre-hearing meeting and shall, within 7 days of that meeting send a copy of that document to each of the parties and the Centre.

## **19. Conduct of the Arbitration**

- (1) Subject to these Rules, the arbitration tribunal may conduct the arbitration in the manner it considers appropriate but each party shall be treated fairly and shall be given full opportunity to present its case.
- (2) The arbitration tribunal shall strive to achieve a just, speedy and economical determination of the proceeding on its merits.

## **20. Jurisdiction**

- (1) The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement
- (2) A decision by the arbitration tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause unless specifically found to be so by the arbitration tribunal.
- (3) Any objection to the jurisdiction of the arbitration tribunal to consider a claim or counter-claim shall be raised in the statement of defense or statement of defense to counter-claim. The tribunal may consider a late objection if it regards the delay justified.
- (4) A party is not precluded from raising a jurisdictional plea by the fact that it has appointed or participated in the appointment of an arbitrator.

## **21. Exchange of Statements**

- (1) Within 21 days of the commencement of the arbitration, the claimant shall deliver a written statement to the respondent, the Centre, and the arbitration tribunal, if appointed. The statement should include:
  - (a) a description of all matters and amounts being claimed;
  - (b) the facts supporting the claim(s) made;
  - (c) the issues to be determined;
  - (d) the relief or remedy sought.
- (2) Within 15 days of receipt of the claimant's statement, the respondent shall deliver a written statement of defense.
- (3) At the time a respondent submits its statement of defense, it may make counterclaims or assert a set-off.
- (4) The claimant has 15 days from receipt of the respondent's counterclaim to deliver a written reply.
- (5) Subject to the direction of the arbitration tribunal, each party shall deliver the documents upon which it intends to rely with each of the above statements.

## **22. Amendment of or Supplement to Claim**

The arbitration tribunal may allow a party to amend or supplement its claim or counterclaim or defense during the course of the arbitration, unless the arbitration tribunal considers the delay in amending or supplementing the claim to be prejudicial to another party or considers that the amendment or supplement goes beyond the terms of the arbitration agreement.

## **23. Production of Documents**

The arbitration tribunal may order a party to produce any particular document or class of documents it considers relevant within a time it specifies. Where such an order is made the other party may inspect those documents and take copies of them.

## **24. Agreed Statement of Facts**

The parties shall, within a period of time specified by the arbitration tribunal, identify those facts which are not in dispute and submit to the tribunal an agreed statement of facts.

## **25. Confidentiality**

Unless otherwise agreed by the parties or required by law, all hearings, meetings, and communications shall be private and confidential as between the parties, the arbitration tribunal and the Centre.

## **26. Hearings and Evidence**

- (1) The arbitration tribunal shall, in consultation with the parties, set the dates for the hearings.
- (2) Each party shall prove the facts on which it relies.
- (3) In deciding issues of relevance and materiality of evidence, the arbitration tribunal shall not be required to apply the rules of evidence.
- (4) The arbitration tribunal may direct the order of proceeding, divide the proceedings into stages, exclude repetitive or irrelevant testimony, limit or refuse to receive the evidence of a witness of fact or opinion, or direct the parties to address specific issues the determination of which may dispose of some or all of the dispute.
- (5) Subject to the direction of the arbitration tribunal,
  - (a) the evidence of every witness shall be presented in written form;
  - (b) the written statement of each witness shall be signed by the witness and, if the tribunal so directs, duly sworn or declared;
  - (c) the parties shall exchange statements of witnesses no less than 5 days before the hearing, if any;
  - (d) a witness shall attend the hearing for oral examination if requested to do so no less than 2 days before the hearing;

- (e) if a witness is requested but fails to attend the hearing, the tribunal may refuse to receive the written statement as evidence or place such weight on the evidence as it considers appropriate; and
  - (f) subject to sub-rules 4 and 5 (e), each statement shall be received as the direct examination of the witness.
- (6) The arbitration tribunal, on such terms as are necessary to prevent prejudice, may allow a party to introduce into evidence a document not disclosed under Rule 21 (5), or introduce oral evidence of a witness not disclosed under this Rule.

## **27. Experts**

- (1) An expert's report shall include a statement of the expert's opinion, the facts upon which the opinion is based, and a description of the qualifications of the expert.
- (2) Subject to the direction of the arbitration tribunal:
  - (a) A party intending to rely on the opinion of an expert shall deliver a copy of the expert's report to each party and the tribunal no less than 14 days before the hearing.
  - (b) A party which objects to the admissibility of all or any part of a report shall notify the party relying on the report no less than 7 days before the hearing.
  - (c) An expert whose report has been delivered under sub-rule 1 shall attend the hearing for oral examination, if requested no less than 7 days before the hearing.
- (3) The arbitration tribunal may direct the parties' experts to meet and to prepare a joint report identifying those matters which are not in dispute and those which are in dispute.
- (4) The arbitration tribunal may appoint one or more experts to report on specific issues and may direct a party to give an expert any relevant information or to provide access to any relevant documents, goods or property in its control or possession for inspection, subject to the following:
  - (a) The tribunal shall first notify the parties of its intention, and invite the parties' submissions in respect of the proposed terms of reference and identity of the expert.
  - (b) The tribunal shall deliver a copy of the expert's report to each party and give each party the opportunity to challenge all or any part of the report in a manner determined by the tribunal.
  - (c) At the request of a party, the expert shall make available for examination all documents, working papers, goods or other property in the expert's possession which the expert used in the preparation of the report.

## **28. Default of a Party**

- (1) If the claimant is properly notified but fails to attend the hearing, the arbitration tribunal may proceed to render a final award with or without a hearing.

- (2) If the respondent fails to deliver its statement of defense or is properly notified but fails to attend the hearing, the arbitration tribunal may proceed with the hearing. The final award shall be made on the basis of the evidence received.
- (3) If the claimant fails to comply with a requirement under these Rules or fails to comply with an order of the arbitration tribunal, the tribunal may issue an order for the termination of the arbitration. The tribunal must provide the claimant with not less than 14 days notice of its intention to terminate the arbitration and determine that the claimant has not provided sufficient cause for being in breach of the Rules or the order of the tribunal.

## **29. General Powers of the Arbitration Tribunal**

- (1) Without limiting the generality of Rule 19 or any other Rule which confers jurisdiction or powers on the arbitration tribunal, and unless the parties at any time agree otherwise, the tribunal may:
  - (a) order an adjournment of the proceedings from time to time;
  - (b) make a partial award;
  - (c) make an interim order or award on any matter with respect to which it may make a final award, including an order for costs, or any order for the protection or preservation of property that is the subject matter of the dispute;
  - (d) order inspection of documents, exhibits or other property, including a view or physical inspection of property;
  - (e) order the recording of any oral hearing;
  - (f) at any time extend or abridge a period of time fixed or determined by it, or any period of time required in these Rules;
  - (g) empower one member of the arbitration tribunal to make interim and other orders, including settling of matters at the pre-hearing meeting, that do not deal with the issues in dispute;
  - (h) order any party to provide security for the legal or other costs of any other party by way of a deposit or bank guarantee or in any other manner the arbitration tribunal thinks fit;
  - (i) order any party to provide security for all or part of any amount in dispute in the arbitration;
  - (j) order that any party or witness shall be examined on oath or affirmation, and may for that purpose administer any necessary oath or take any necessary affirmation;
  - (k) make an award ordering specific performance, rectification, injunctions and other equitable remedies.

## **30. Settlement Offers**

- (1) A party making a formal, written offer to settle shall deliver a copy to the Centre.
- (2) If the offer is not accepted, and subject to its terms, the Centre shall hold the offer without disclosing its terms to the arbitration tribunal until after the tribunal has decided the substantive issues in dispute.

- (3) The Centre shall provide the arbitration tribunal with a copy of the offer before the tribunal decides issues of cost.

### **31. Deposits Against Costs**

- (1) The arbitration tribunal may, from time to time, require each party to deposit with the Centre in trust an equal amount as an advance for the anticipated costs of the arbitration including the tribunal's fees.
- (2) If the required deposits are not made within 15 days after receipt of the request from the arbitration tribunal, the tribunal and/or the Centre shall inform the parties in order that another party may make the required payment.
- (3) If the required deposits are not made, the arbitration tribunal may order the suspension or termination of the proceeding.

### **32. Payment out of Deposits**

- (1) The Centre may, from time to time, pay to the arbitration tribunal from any deposit it holds under Rule 31, a reasonable and appropriate amount for fees earned or expenses incurred.
- (2) After the final award has been made, the claim withdrawn, a settlement reached or the arbitration abandoned, the Centre shall apply any deposits it holds to the costs of the arbitration, including any arbitration tribunal fees and disbursements, as well as administrative fees and expenses. The Centre will render an accounting to the parties and return any unexpended balance.

## **MAKING THE AWARD AND TERMINATING THE PROCEEDINGS**

### **33. Legal Principles Apply**

An arbitration tribunal shall decide the dispute in accordance with the law unless the parties agree in writing in accordance with section 23 of the *Commercial Arbitration Act* that the matter in dispute may be decided on equitable grounds, grounds of conscience or some other basis.

### **34. Closure of Hearings and Termination of the Proceedings**

- (1) Having received the evidence and the final submissions of the parties, the arbitration tribunal shall close the hearing.
- (2) After the hearings have been closed, the arbitration tribunal may, in exceptional circumstances, re-open the hearings at any time before the final award.
- (3) The arbitration tribunal may order the termination of the arbitration where it finds that the proceedings have become unnecessary or impossible.

### **35. Settlement**

- (1) The arbitration tribunal may encourage settlement of the dispute and, with the written agreement of the parties, may conduct mediation, conciliation, facilitation or other appropriate procedure(s).
- (2) If the parties settle the dispute during the arbitration proceedings, the arbitration tribunal shall terminate the proceedings and, if requested by the parties and acceptable to the tribunal, record the settlement in the form of an arbitration award.

### **36. Arbitral Award**

- (1) Pursuant to Section 12 of the Act, where the arbitration tribunal consists of three or more arbitrators, an award shall be made by a majority of the tribunal. Where there is no majority decision, the decision of the chair of the arbitration tribunal shall be the award.
- (2) The arbitration tribunal may make a partial award.
- (3) The arbitration tribunal may make an interim order that shall be merged or addressed in the award when all issues, including costs, have been determined.
- (4) The arbitration tribunal shall make its final award within 60 days after the hearings have been closed.
- (5) An award shall be in writing and include the reasons. The arbitration tribunal shall file a copy of each award with the Centre.
- (6) The Centre may withhold publication of an award to the parties on the basis of outstanding fees.

### **37. Interest**

On the basis of evidence presented, the arbitration tribunal may order simple or compound interest to be paid in an award.

### **38. Costs**

- (1) The arbitration tribunal shall determine liability for costs and may apportion costs between the parties.
- (2) In awarding costs, the arbitration tribunal shall take into account the principles set out in Rule 19(2), and the failure of any party to comply with these Rules or the orders of the tribunal. The tribunal shall provide reasons in the event it departs from the principle that costs follow the event.
- (3) In the event the arbitration tribunal awards costs, it shall specify the amounts of the fees and expenses so awarded or the method for the determination of those amounts.
- (4) Costs include:
  - (a) the fees of the arbitration tribunal which shall be separately determined and stated for each member of the tribunal, together with reasonable travel and other expenses incurred by the tribunal;

- (b) the fees of any expert appointed by the arbitration tribunal, including travel and other reasonable expenses incurred;
  - (c) the legal and other expenses reasonably incurred in relation to the arbitration by a party determined by the arbitration tribunal to be entitled to recover such costs; and
  - (d) the commencement fee, administration fees, and the expenses incurred by the Centre.
- (5) The liability of parties for the tribunal's fees and expenses is joint and several between the arbitration tribunal and the parties.

### **39. Amendments and Corrections to the Award**

- (1) On the application of a party or on the arbitrator's own initiative, an arbitrator may amend an award to correct
- (a) a clerical or typographical error,
  - (b) an accidental error, slip, omission or other similar mistake, or
  - (c) an arithmetical error made in a computation.
- (2) An application by a party under 39 (1) must be made within 15 days after the party is notified of the award.
- (3) An amendment under 39 (1) must not, without the consent of all parties, be made more than 30 days after all parties have been notified of the award.
- (4) Within 15 days after being notified of the award, a party may apply to the arbitrator for clarification of the award.
- (5) On an application under 39 (4), the arbitrator may amend the award if the arbitrator considers that the amendment will clarify it.
- (6) Within 30 days after receiving the award, a party may apply to the arbitrator to make an additional award with respect to claims presented in the proceedings but omitted from the award, unless otherwise agreed by the parties.