

COURTS CONSIDER ARBITRATION CLAUSES

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Instead of resorting to the court process Canadian businesses are increasingly considering alternatives to the court process such as arbitration, which is being used by many commercial clients to resolve disputes. Contracts often contain clauses that require the parties to resolve their disagreements through recourse to arbitration rather than the courts. In turn, such clauses raise questions about when one party has recourse to the courts to either resolve a dispute or to hear an appeal from an arbitration decision.

In *Union des Consommateurs v. Dell Computer Corp.*, the Supreme Court of Canada has recently reaffirmed the deference that the courts will pay to arbitration clauses in commercial agreements. The case concerned a class action in Quebec brought by a number of customers of Dell who attempted to order computer equipment on line. Dell had mistakenly posted an incorrect price for the equipment in their on-line advertising. They soon discovered the error but not before nearly 500 customers had placed orders for the equipment at the lower price. When the orders were not honoured, the purchasers commenced legal proceedings as a class action claiming breach of contract against Dell. The on-line sales agreements contained a clause stating that any disagreements would be resolved by arbitration.

The Supreme Court of Canada held that the arbitration clause was enforceable and effectively excluded the courts from resolving disputes arising under the sales agreements. The contract language made arbitration mandatory and the court was not prepared to allow one party to unilaterally opt out of the arbitration in order to commence legal proceedings.

Class action proceedings are normally intended to allow individual litigants with small claims to band together in a suit against a single defendant. As a result of the *Dell* decision, each purchaser will have to

commence separate arbitration proceedings against Dell even if the amount of an individual claim does not warrant the expense of an arbitration.

In a decision closer to home, the British Columbia Supreme Court recently considered the extent to which parties who arbitrate disputes can seek to appeal the arbitration award to the court. In *Williston Navigation Inc. v. B.C. Rail Ltd.* the answer would appear to be only in very limited circumstances.

In *Williston* a commercial agreement involving the transport of logs was placed before an arbitrator for interpretation. At issue was a complex compensation mechanism under the contract. The arbitrator was asked to decide, among other things, whether one of the parties had taken “all commercially reasonable steps” in negotiations that impacted on the compensation mechanism. The arbitrator rendered a decision which one of the parties sought to have reviewed, alleging that the arbitrator had failed to properly interpret the contract.

The Court noted that its power to interfere with an arbitration award is very limited under the *British Columbia Commercial Arbitration Act*. An appeal as of right only lies where an arbitrator has committed an error of natural justice—essentially any matter of procedural unfairness. Beyond that, a party must seek permission from a court to appeal an error of law. Questions of fact, or mixed fact and law, are immune from review by the courts. Even where there is an appeal of a question of law, a court can refuse leave unless the applicant can demonstrate that intervention is required to prevent a miscarriage of justice or a point of law is important to a wide class of persons or the general public.

In *Williston*, the Court refused to reconsider the arbitrator’s findings. It held that an appeal that challenged the arbitrator’s findings that B.C. Rail had taken commercially reasonable steps involved findings of fact or at least a finding of mixed fact and law. In the alternative, the Court noted that if the appeal did raise a pure question of law, the court would not grant leave because the dispute concerned a unique contractual provision that was unlikely to arise again in the future. It was not, in the Court’s view, a matter of general public importance nor was it important to any class of persons.

These decisions reinforce the view that parties to contracts with arbitration clauses should expect courts generally to defer to the parties’ chosen method of dispute resolution, being arbitration. The courts will also

restrict any attempt to have them reconsider arbitration decisions unless the arbitrator has committed a reviewable error.