

SORTING OUT THE DISPUTE – ARBITRATION VERSUS LITIGATION

by John B. Martens

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When entering into a contract it is important to consider what process will be followed if a dispute arises. Many contracts, particularly construction contracts, may contain arbitration clauses. What is the effect of these clauses and what is the difference between arbitration and civil litigation?

When an arbitration clause is contained in an agreement, it usually evidences the intention of the parties to resolve disputes using an arbitrator pursuant to Manitoba's Arbitration Act. In fact, if a party to a contract commences a legal proceeding, the other party to the contract may be able to have the Court stay the proceeding and force the dispute to be heard by an arbitrator. The determination of whether an arbitration clause governs will in part depend on the issues which are in dispute, the type of arbitration clause, and whether the issue is capable of being heard by an arbitrator. These determinations will usually dictate whether the parties proceed by way of court action or arbitration.

What is the difference between arbitration and litigation?

- *Expertise in subject matter:* the benefit of arbitration is that parties can appoint an arbitrator who is an expert in the field. In construction disputes, it can be very helpful to have an arbitrator who is familiar with the construction industry including standard construction clauses, subcontracts, the usual roles of consultants, payment certifiers, etc. Many judges will not have the same familiarity with the subject matter.
- *Public vs Private:* Litigation is a public process meaning that documents and decisions filed in the proceeding are open to the public. Arbitration, on the other hand, is a private process between the parties; documents and decisions are not available to the public.
- *Cost:* Although the court process is often considered costly because of the court fees and legal costs, it must be remembered that a judge does not charge for his or her time. In an arbitration however, the parties will often be represented by lawyers and will also be required to pay the arbitrator. The arbitrator will be a private individual who will often bill by the hour to hear the dispute, consider the issues, and render a decision.
- *Expediency:* Arbitration is usually considered to be a faster process, partly because the parties typically decide what procedures will be used. However, sometimes the defined procedures of a court process are helpful in moving matters along. For example, the court in Manitoba has instituted an "expedited process" for matters involving less than \$50,000 whereby a judge is assigned to the file and deadlines for procedural steps are set. As well, the court has instituted a process whereby parties may request a mediation to be held before a judge. Although the judge holding the mediation will not render a binding decision, he or she will usually give an opinion as to liability and encourage the parties to reach a fair settlement.

When a contractual dispute arises, remember that the express terms of the contract will most often dictate how the matter will proceed. Either way, both litigation and arbitration strive to have the dispute resolved expeditiously, inexpensively and fairly.

*John B. Martens is a litigation lawyer with the law firm
of Aikins, MacAulay & Thorvaldson LLP.*