



NEW CHARACTER ALERT: THE RISE OF ARBITRATION

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MEDIATION AND ARBITRATION: TRANSFORMING ESTATES LAW

New Character Alert: The Rise of Arbitration

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¹ The appended sample arbitration agreement was drafted by Suzana Popovic-Montag with assistance of other members of the bar in 2020. The need for a precedent agreement was spearheaded by Ms. Popovic-Montag in response to the additional strain on the court system due to the COVID-19 pandemic.

Introduction

Arbitration has become an increasingly important method of dispute resolution in various legal contexts, and estate litigation is no exception. As part of the ongoing trend towards collaborative law and alternative dispute resolution (“ADR”) methods, arbitration is one of several options available to parties wanting to resolve a matter outside the traditional court system. As the complexity of family dynamics and asset distribution has increased during recent years, disputes regarding estates have become more frequent and contentious. Traditional court litigation, with its time-consuming processes, high costs, and public nature, often exacerbates tensions among family members. As an alternative, arbitration can offer a more flexible, private, and efficient means of resolving estate disputes.

Arbitration, governed by both provincial legislations,² and the parties’ agreement, allows for the appointment of neutral third-party arbitrators with expertise in estate law to make binding decisions. This ADR mechanism holds significant potential for parties involved in estate disputes, but it also raises unique challenges and considerations, such as the scope of arbitrability, the enforceability of arbitration agreements, and the potential impact on substantive legal rights. While arbitration has traditionally been used more extensively in the areas of family and commercial law, it is an adaptable and effective method of ADR. Lawyers practicing in estate litigation should consider arbitration in addition to more common avenues of mediation and negotiation. There are also nuanced and specific issues to consider when arbitrating an estate matter including the lack of existing agreement for arbitration (as in commercial contract disputes) and that the key witness – the testator – is no longer able to provide evidence.

Arbitration is not the only form of ADR available to parties engaged in an estate dispute. Mediation has become a widespread practice in part due to the mandatory requirements in the *Rules of Civil Procedure*,³ but also due to the very effective, successful, and often less costly (though in itself not inexpensive), alternative, or addition to the adversarial litigation process. However, mediation may not always be the best form

² *Arbitration Act, 1991*, SO 1991 c. 17.

³ *Rules of Civil Procedure*, RRO 1990, Reg. 194, s. 75.2.

of ADR. For example, mediation can also be an expensive process and does not have a guaranteed result, nor does it provide finality. It also requires a high level of engagement and participation from the clients/participants. Based on such considerations, alternatives such as arbitration, judicial dispute resolution, and mediation-arbitration (“med-arb”), a hybrid form of ADR, should be explored.

This paper introduces the role of arbitration in estate litigation matters within Ontario, provides an overview of the legal framework and processes, including issues to consider, and an examination of its advantages and challenges. Finally, it will provide tips and guidance for lawyers to consider in achieving a successful arbitration.

Overview

i. Legal Framework in Ontario

The *Arbitration Act, 1991*, SO 1991, c. 17 (the “*Arbitration Act*”) applies to estate arbitrations in Ontario. While there are statutes enacted for arbitration in some specific areas (such as the *Commercial Arbitration Act*, RSC 1985, c 17 (2nd Supp)), there is no specific legislation enacted for estate arbitration to date. The *Arbitration Act* is comprehensive and provides for how the arbitration will be conducted, governs court intervention, composition and appointment of the arbitral tribunal, jurisdiction, and enforceability among other provisions.

The relevant rules and processes for any arbitration will vary, perhaps significantly, depending on the case. It is up to the parties and the arbitrator to craft the agreement to ensure all procedural issues are properly addressed and set out prior to the arbitration. Of course, all other relevant statutes and laws apply, and should be noted in the arbitration agreement including, but not limited to, the *Courts of Justice Act*, RSO 1990, c C. 43 and the *Rules of Civil Procedure*, RRO 1990, Reg 194.

The ADR Institute of Canada (“ADRIC”) is a professional organization for ADR professionals in Canada.⁴ The ADRIC aims to set standards for best practices, education,

⁴ See <https://adric.ca/>

and certification of ADR professionals including Chartered Arbitrator (C.Arb.), and Qualified Arbitrator (Q. Arb) designations. Each province also has its own chapter (i.e. the ADR Institute of Ontario) which provides continuing professional development courses and other membership benefits. Notably, the ADRIIC also provides Arbitration Rules, Code of Conduct for Mediators, and a National Code of Ethics ADR Designations in Canada. Notably, the ADRIIC's Arbitration Rules are to be updated and released in early 2025.⁵ The new rules have been drafted in response to the increased and evolving practice of arbitration in Canada and provide an excellent resource for parties engaging in arbitration. The current rules (effective December 2016) are available online and provide a thorough framework for conducting an arbitration.⁶

ii. Types of Estate Disputes Suitable for Arbitration

Arbitration is an effective, private, and flexible method of resolving many types of estate-related disputes. However, arbitration may not be suitable in all cases. Each case should be evaluated individually. Estate cases where the dispute arises after death involving issues such as will contests, administration, interpretation of trust terms, claims against executors, accounting issues, and validity of gifts are all generally issues appropriate for arbitration. Estate cases pre-death such as power of attorney disputes and matters under the *Substitute Decisions Act, 1992* may not be as appropriate since determinations of capacity are fluid and may require ongoing court intervention and supervision as the alleged incapable person's circumstances evolve. The need for court-approval of settlements under rule 7.08 of the *Rules of Civil Procedure* would also need to be considered by the parties and contemplated in the arbitration agreement.⁷

While there are no specific rules governing what types of estate cases may be appropriate for arbitration, the following list of considerations could be weighed:

⁵ <https://cjca.queenslaw.ca/news/unveiling-the-new-adric-arbitration-rules>

⁶ Rules available online at https://adric.ca/wp-content/uploads/2017/08/2016_ARBITRATION_RULES_Booklet_2016_Aug2017.pdf

⁷ *Rules of Civil Procedure*, RRO 1990, Reg 194, s 7.08.

- If arbitration is appropriate, at what stage of the proceedings should the parties enter into the agreement? Is an initial application needed to determine the parties, obtain disclosure, etc.? Should the parties attend mediation first, or engage in med-arb?
- Is the Public Guardian and Trustee (“PGT”) and/or the Children’s Lawyer (“OCL”) involved? If so, can they/will they fairly participate in the arbitration and consent to the arbitration agreement?
- Is there an appropriate arbitrator available?
- Is there a significant power-imbalance between the parties?
- Is it the most cost-effective method of resolution?
- If it is a guardianship/power of attorney matter, is it appropriate? Is the person whose capacity is at issue able to participate? Is there a need for counsel appointed under section 3 of the *Substitute Decisions Act, 1992*? Or what if their situation changes, will it be better returned to court? What if an application is made under Rule 7.08 for approval of the “settlement,” and the Judge does not approve it?
- Are there clear issues of law, or is it a novel case?
- Is the evidence readily available, or will more probing be needed than is possible at arbitration?
- Does the case involve public policy concerns that are too important or inappropriate to be settled privately?

iii. Choosing an Arbitrator

The importance of thoughtfully and strategically selecting the arbitrator cannot be understated. The subject-matter expertise of the arbitrator is only one factor to consider, although an important one. The parties/participants and counsel should also consider the arbitrator’s experience generally, and specifically in arbitration, their impartiality and independence (see more on this topic below), their procedural preferences, fees, availability and timing, and their reputation. Other factors to consider are whether the

parties/participants require any accommodation or have language and/or cultural circumstances that need consideration.

iv. Procedural Overview

Before providing the procedural overview of an arbitration, it should be noted that another form of ADR known as “Med-Arb” is also available and should be considered for estate disputes. Med-Arb is a hybrid approach which combines elements of both mediation and arbitration. First, the parties attempt to reach a negotiated settlement with the assistance of a mediator. If they are unsuccessful, the parties then move on to arbitration, often with the same person acting first as mediator and then arbitrator. This is efficient as the work and time spent at mediation is not all wasted. The arbitrator can quickly make a binding decision as they are already familiar with the case.

Whether the parties are engaging in med-arb, or just arbitration, the following is an overview of the procedural process which follows very similar steps to preparing for a court proceeding. The following only serves as an example because, as noted above, all cases are different, and arbitration allows the parties flexibility to craft the process to their needs. Section 20(1) of the *Arbitration Act* simply stipulates that the arbitrator may determine the procedure to be followed, giving wide discretion to the arbitrator and the parties/participants.

Procedure:

1. Note limitation periods and proceed accordingly. Section 52(1) of the *Arbitration Act* provides that the “law with respect to limitation periods applies to an arbitration as if the arbitration were an action and the claim made in the arbitration were a cause of action.”⁸
2. Agree to timelines for submitting and exchanging evidence with the arbitrator and the parties/participants in the arbitration agreement. Note that while parties may agree to timelines in their arbitration agreement, parties do have a responsibility to move the matter forwards in a timely fashion.⁹

⁸ *Arbitration Act, 1991*, SO 1991, c. 17, s 52.

⁹ *Bank-Strox Renovation Inc. v Lugano View Limited*, 2024 ONSC 1901 ([CanLII](#))

3. Gather your evidence and develop a theory of the case. Note that as a common goal of arbitration is to be a cost-effective and faster forum, many arbitrators will not want to be presented with redundant evidence. A “leaner” case is advisable. Put forward only your strongest evidence for each issue. This could include procedures such as:
 - a. Joint statement of facts;
 - b. Joint document briefs;
 - c. Direct testimony filed via affidavit or report;
 - d. Limits to expert evidence; and,
 - e. Allowing testimony remotely.
4. Seek any interim awards as needed, including disclosure orders.¹⁰ Evidentiary issues should be addressed in advance of the arbitration.
5. Prepare and file your brief, statement of facts, and documentary evidence. Ensure all witnesses are available and willing to testify.
6. At the hearing, the following framework is generally followed:
 - a. Opening statements
 - b. Direct examinations and cross-examinations of witnesses
 - c. Redirect as necessary
 - d. Final argument and submissions

Enforcement

Although arbitration is presented as providing finality, many participants may be surprised to find out that once the decision is made, their only option for enforcement is to apply for a court order. Once the arbitrator issues an award, it can be enforced only in the same manner as a court judgment, meaning that the award has the same legal force as a decision made by a judge but must be recognized by the courts to be enforceable.

¹⁰ The arbitrator may make one or more interim awards as requested as per section 41 of the *Arbitration Act, 1991*, SO 1991, c 17.

The court has held it will not intervene to order disclosure against a party. See the family law case *Medjuck v Medjuck*, 2024 ONSC 2980 ([CanLII](#)).

In accordance with section 50 of the *Arbitration Act*, an application to court for enforcement of an arbitration award must be:

1. Made on notice to the other party(s);
2. After the 30-day appeal period has elapsed;
3. Where there is no pending appeal or application to set-aside the award;
4. The party is not seeking to enforce the award against a non-party;
5. The award has not been set aside, or the arbitration is not the subject of a declaration of invalidity; and
6. The award is not a family arbitration award.

Generally, the court will grant an enforcement order if all the above criteria have been met. Although there is a straightforward statutory scheme, terms of enforcement can also be contemplated in the arbitration agreement. The wording of the statutory provision states that the court “shall” enforce the order “unless” the above listed criteria are met. A party may also be entitled to costs of the enforcement proceedings as was the case in *Lapierre v Mavin*, 2024 ONSC 5402.¹¹ In *Lapierre*, the successful party at arbitration sought their costs of the subsequent court enforcement proceedings. The applicant was successful in recovering full indemnity costs against the respondent (and not from the estate). Applying the factors for cost decisions in section 131 of the *Courts of Justice Act* and Rule 57.01 of the *Rules of Civil Procedure*, the court held the respondent acted egregiously and the application should not have been necessary at all.

Appeal

The availability of appeals can again be dealt with between the parties in the arbitration agreement. If not, the statutory scheme in sections 45-49 of the *Arbitration Act* applies. The courts recognize the purpose of arbitration is to allow the parties to privately agree to a process and a forum. Unless stipulated otherwise in the arbitration agreement, a party may appeal an award to the Superior Court of Justice on a question of law, with leave, which the court *shall* grant only if it is satisfied that (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and (b) determination of the

¹¹ *Lapierre v Mavin*, 2024 ONSC 5402 ([CanLII](#))

question of law at issue will significantly affect the rights of the parties.¹² The court may only set aside an award on a question of fact or mixed fact and law if the arbitration agreement so provided.¹³

On an appeal application, the court may set aside an award on any of the following grounds in accordance with section 46 of the *Arbitration Act*:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid or has ceased to exist.
3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
4. The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.
5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case or was not given proper notice of the arbitration or of the appointment of an arbitrator.
7. The procedures followed in the arbitration did not comply with this Act.
8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.
9. The award was obtained by fraud.
10. The award is a family arbitration award that is not enforceable under the *Family Law Act*.¹⁴

v. *Benefits and Challenges of Arbitration of Estate Matters*

¹² *Arbitration Act, 1991*, SO 1991, c 17, s 45.

¹³ *Ibid*, s 45(3).

¹⁴ *Arbitration Act, 1991*, SO 1991, c 17, s 46.

When considering whether to recommend arbitration of an estate matter, the following non-exhaustive list of factors should also be considered:

Potential Benefits:

1. *Faster resolution and less costly*: Arbitration is often faster than traditional court proceedings since it provides a more streamlined process and is not limited by court scheduling and availability. A shorter process also means reduced legal fees.
2. *Confidentiality*¹⁵: Arbitration is a private forum which may be important for families who wish to keep financial and/or medical records and personal details out of the public domain.
3. *Expert decision-maker*: The arbitrator is chosen by the parties and can therefore have expertise in areas like estate planning, administration, tax, and estate litigation. This may result in an informed, relevant, even more practical decision compared to a generalist judge/retired judge.
4. *Flexibility*: The parties may agree to rules governing the arbitration, such as the scope of the dispute/issues to be decided, deadlines, evidence etc. This can be particularly helpful for very complex estates.
5. *Finality*: Generally, an arbitrator's decision is binding and final and is difficult to appeal. This will provide closure to the matter and avoid protracted legal battles. This may be of particular importance when the opposing party is highly litigious/vexatious. Further, an arbitrator's decision can be enforced like a judge's order (compared to mediated settlement agreements).¹⁶

Potential Challenges:

- *Limited appeal options*: Arbitration decisions are usually final, with very limited grounds for appeal. This is a risk that must be carefully reviewed with the client. Once an arbitration agreement is entered into, the court will be reluctant to interfere with the dispute.

¹⁵ Parties may agree that the proceedings and record are not confidential and may be filed in Court.

¹⁶ *Arbitration Act, 1991*, SO 1991, c. 17, s 50.

- *Potential costs:* While arbitration may be less expensive than traditional litigation, it still requires significant preparation and associated costs depending on the complexity of the issues.
- *Inclusion of all parties and participants:* Unlike contract disputes, estate disputes often include parties/participants that are not named in the will or trust and/or parties/participants that cannot consent to an arbitration agreement such as heirs-at-law, disinherited spouses, minor or incapable parties, or creditors. Arbitration is therefore in some circumstances not an appropriate forum unless parties/participants are confident that all interested parties are participating.
- *Unequal power dynamics:* As estate disputes are not commercial, consideration should be given to the family dynamics and any imbalance of power, resources, or knowledge. Such an imbalance may make the process unfair.
- *Lack of court oversight:* An arbitrator does not have the same authority as a judge to compel testimony or production of certain documents, which may potentially limit full investigation of a matter.
- *Adversarial and less flexibility:* Arbitration does not provide the same opportunity for reconciliation amongst families compared to mediation. It is still an adversarial process with a “winner” and a “loser.” There is also not the same opportunity to deal with personal matters that may be of high importance to the client such as personal effects, memorabilia, photos, family emotions and personal animosity etc.

Addressing & Preventing Situations of Bias in Arbitration

Bias in arbitration is a critical concern, as it can undermine the fairness and integrity of the process. Arbitration relies on impartiality. As noted above, one of the limited grounds for appeal of an arbitration agreement is if there is reasonable apprehension of bias.¹⁷ The *Arbitration Act* requires that an arbitrator “shall be independent of the parties and shall act impartially.”¹⁸ The test for whether a reasonable apprehension of bias exists is whether “...in the eyes of a neutral third party, is there a reasonable apprehension of bias or

¹⁷ *Arbitration Act, 1991*, SO 1991, c. 17, s 46(1).

¹⁸ *Ibid.* s 11.

justifiable doubts as to a lack of impartiality or independence. There is no need to prove it actually exists.”¹⁹ Prior to the appointment, the arbitrator must disclose to all parties/participants any circumstances of which he or she is aware that may give rise to a reasonable apprehension of bias.²⁰ And further, the arbitrator must promptly disclose any circumstances they later become aware of that may give rise to a reasonable apprehension of bias.²¹ It is also important to note that section 13(3) of the *Arbitration Act* requires a party to initiate the challenge on the grounds of bias within fifteen days of becoming aware of them.

In *Aroma Franchise Company Inc et al v Armona Espresso Bar Canada Inc et al*, 2023 ONSC 1827, the court was asked to set-aside an arbitration award due to apprehension of bias.²² The applicants alleged that the arbitrator was biased as he was retained by counsel for the respondent for another arbitration while the first was still ongoing. Before making his award, the arbitrator sent an email inadvertently copying a lawyer from the same first who was not involved in arbitration. It was only after this event, and well into the first arbitration, that the arbitrator disclosed that he had been retained in respect of the second arbitration.

The court determined that the arbitrator was wrong not to have disclosed his appointment in the second arbitration and that in doing so, there was a reasonable apprehension of bias and set aside the award. In its analysis, the court found that the following principles were relevant:

- “The threshold for a finding of real or perceived bias is a high one since it calls into question both the personal integrity of the adjudicator and the integrity of the administration of justice. The grounds must be substantial,

¹⁹ *Arbitration Law of Canada: Practice and Procedures*, 4th ed. (Huntington: JurisNet LLC 2022), as cited in *Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al.*, 2023 ONSC 1827, at para 70.

²⁰ *Arbitration Act, 1991*, SO 1991, c. 17, s 11(2).

²¹ *Ibid.* s 11(3).

²² [Aroma Franchise Company Inc. et al. v Aroma Espresso Bar Canada Inc. et al., 2023 ONSC 1827 \(CanLII\)](#).

and the onus is on the party seeking to disqualify to bring forward evidence to satisfy the test (*A.T. Kearney Ltd. v. Harrison*, [2003] O.J. No. 438 (Ont. S.C.J.), at para. 7).

- The presumption of impartiality is high (*Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 SCR 259, at para. 59).
- The inquiry is objective and requires a realistic and practical review of all the circumstances from the perspective of a reasonable person (*Committee for Justice and Liberty et al. v. National Energy Board et al.*, 1976 CanLII 2 (SCC), [1978] 1 S.C.R. 369). The courts will not entertain the subjective views of the parties in making such determination (*Dufferin v. Morrison Hershfield*, 2022 ONSC 3485, at para. 163).
- A challenge based on reasonable apprehension of bias will not be successful unless there is evidence to support the allegation beyond a mere suspicion that the hearing officer would not bring an impartial mind to bear. Mere suspicion is insufficient (*G.W.L. Properties Lt. v. W.R. Grace & Co. of Canada Ltd.*, 1992 CanLII 934 (BC CA), 74 BCLR (2d) 283 (B.B.C.A.), at para. 13, cited in *Dufferin*, at para. 112).
- When considering bias, context matters (*Telesat Canada v. Boeing Satellite Systems International, Inc.*, 2010 ONSC 4023, cited in *Dufferin*, at para. 112). Any review of an arbitrator’s conduct must be considered in context and not through the review of selected excerpts or specifically chosen terms, phrases, or questions posed (*Dufferin*, at para. 11).²³

In contrast, the court refused to remove an arbitrator for reasonable apprehension of bias in the case *Dhaliwal v Richter International Ltd.*, 2024 ONSC 5103.²⁴ Here the court held that a lawyer acting in another arbitration before the same arbitrator was not, in and of itself, reason enough for a reasonable apprehension of bias in that context. Further, the court held that the application was not brought in a timely fashion in accordance with section 13(3) of the *Arbitration Act* and dismissed the

²³ *Ibid.* para 71.

²⁴ *Dhaliwal v Richter International Ltd.*, 2024 ONSC 5103 ([CanLII](#))

application. Contrast also with *Ballantry Construction Management Inc. v GR (CAN) Investment Co. Ltd.*, 2024 ONSC 2129, where the court held that the existence of a relationship between a party's lender and the arbitrator was characterized as only a business relationship and was insufficient grounds.²⁵

Ensuring the neutrality of arbitrators is essential to maintaining the credibility of arbitration as a fair and effective dispute resolution mechanism. Some practical steps that can be taken to minimize the risk of bias include:

- The arbitration agreement should:
 - lay-out the process for vetting and selection (which should be carefully reviewed with the client);
 - contemplate a process for challenging the appointment of the arbitrator and the process for removal;
- Being mindful of the connections between lawyers and lawyer-arbitrators;
- Avoid repeat appointments of arbitrators;
- Ensure the process remains transparent by providing all parties with the same access to information, and encourage discussion of any concerns;
- For very high-stakes disputes, the cost of a panel of arbitrators may be justifiable;
- As discussed above, clearly and thoroughly establishing the procedural rules in the arbitration agreement will also assist in avoiding bias; and,
- Ensure any experts testifying are also vetted and neutral.

Enforceability of Arbitration Clauses in Testamentary and Trust Instruments

Enforcing arbitration clauses in wills presents unique challenges, as a will is generally considered a unilateral contract, meaning that it is a one-sided declaration of intent by the testator, typically with no mutual agreement from the beneficiaries. Despite this, many testators include arbitration clauses in wills hoping to compel beneficiaries to resolve disputes through arbitration rather than litigation. One hurdle to enforcing such clauses is the presence of "no contest" clauses, which are designed to disinherit any beneficiary

²⁵ *Ballantry Construction Management Inc. v GR (CAN) Investment Co. Ltd.*, 2024 ONSC 2129 ([CanLII](#))

who contests the will. The purpose of the clause is to incentivize the beneficiaries not to litigate as the beneficiary's gift is conditional on accepting the validity of the will. However, if the no contest clause is found to be an *in terrorem* clause, meaning that it is a conditional gift and there is no specified consequence for breaching it, it will be null and void. If a clause is *in terrorem*, it will not be enforced by the courts.²⁶

That said, some courts have ruled that by accepting a benefit under the will, the beneficiary's actions may be construed as "deemed acquiescence" to the terms, including the arbitration clause. In such cases, beneficiaries may be considered to have consented to the arbitration process as a condition of receiving their inheritance, thus making the enforcement of the clause more likely. Furthermore, a will may include a conditional transfer provision, whereby a beneficiary's right to inherit is contingent upon their compliance with the arbitration requirement. In such cases, the beneficiary's acceptance of the bequest is conditioned on their agreement to arbitrate, making the arbitration clause a prerequisite to receiving the inheritance. The combination of "deemed acquiescence" and conditional transfer may, therefore, provide a robust legal foundation for enforcing an arbitration clause in a will, though its enforceability will still depend on the clarity with which the clause is drafted and the specific facts of the case.

Comparative Law

Given the complexity and nuanced issues of estate litigation, some jurisdictions have enacted statutory provisions governing arbitration of estate and trust litigation. Outlined below are a few such provisions from other jurisdictions with commentary as to the benefits and potential pitfalls of the provisions.

The Bahamas

The provisions of interest from the *Trustee Act 1998*, as amended by the *Trustee Amendment Act 2011*²⁷ include the following:

²⁶ Joshua Cohen and Holly LeValliant, "No-Contest Clauses and the In Terrorem Doctrine" (2019) Law Society of Ontario Six Minute Estate Lawyer, online.

See also *Kent v McKay*, (1982), 139 DLR (3d) 318, [1982] 6 WWR 165, 38 BCLR 216. And *Bellinger v Fayers*, 2003 BCSC 563.

²⁷ See online at https://bfsb-bahamas.com/legislation/Trustee_Amend_2011.pdf.

“91A. Arbitration of trust disputes

....

(2) Where a written trust instrument provides that any dispute or administration question arising between any of the parties in relation to the trust shall be submitted to arbitration (‘a trust arbitration’), that provision shall, for all purposes under the Arbitration Act, have effect as between those parties as if it were an arbitration agreement and as if those parties were parties to that agreement.

....

91B Powers of the arbitral tribunal

...

(3) Without prejudice to subsection (2), and to any provisions made pursuant to subsection (4), the tribunal has the same powers to appoint one or more persons to represent the interests of any person (including a person unborn or unascertained) or class in a trust arbitration as the court has under Order 15 rule 14 of the Rules of the Supreme Court in relation to proceedings before the court.

....

(5) Where an appointment is made under subsection (3) or (4) -

(a) the approval of the tribunal is required in relation to a settlement affecting the person or class represented;

(b) the tribunal may approve a settlement where it is satisfied that the settlement is for the benefit of the person or class represented;

(c) any award given in the trust arbitration shall be binding on the person or class represented by the person or persons appointed.

(6) a person under a disability may not -

(a) bring or make a claim in a trust arbitration except by his next friend;

(b) defend, make a counterclaim or intervene in a trust arbitration except by his guardian *ad litem*; or

(c) take any step in a trust arbitration except by his next friend or guardian *ad litem*, unless otherwise ordered by the tribunal

....

The Bahamas provisions provide two important improvements:

(1) section 91A (2) removes any doubt as to whether an arbitration provision in a trust instrument will be enforceable. The beneficiaries are clearly bound by the clause. This would, however, change the nature of an arbitration from a process that both parties

voluntarily agree to, to a more traditional adversarial process where the parties have less control; and,

(2) sections 91B (3-6) ensures that incapable/vulnerable beneficiaries will be adequately protected and able to participate fairly.

Guernsey

Legislation in Guernsey has also been enacted, although in a much more limited way, specifically for trust arbitration.²⁸

“Settlement of action against trustee by alternative dispute resolution to be binding on beneficiaries.

63. (1) Where -

(a) the terms of a trust direct or authorise, or the Court so orders, that any claim against a trustee founded on breach of trust may be referred to alternative dispute resolution ("ADR"),

(b) such a claim arises and, in accordance with the terms of the trust or the Court's order, is referred to ADR, and

(c) the ADR results in a settlement of the claim which is recorded in a document signed by or on behalf of all parties,

the settlement is binding on all beneficiaries of the trust, whether or not yet ascertained or in existence, and whether or not minors or persons under legal disability.

(2) Subsection (1) applies in respect of a beneficiary only if -

(a) he was represented in the ADR proceedings (whether personally, or by his guardian, or as the member of a class, or otherwise), or

(b) if not so represented, he had notice of the ADR proceedings and a reasonable opportunity of being heard,

and only if, in the case of a beneficiary who is not yet ascertained or in existence, or who is a minor or person under legal disability, the person conducting the ADR proceedings certifies that he was independently represented by a person appointed for the purpose by a court of law.”

²⁸ See online <https://trusts.it/admincp/UploadedPDF/200803181151540.sGuernseyTrustLaw2007.pdf>

Although the Guernsey provisions also provide some measures for representation of incapable participants, it is not as thorough and clear as the provisions from The Bahamas. And the most notable distinction is the in section 63(1)(a) where the provisions are limited to claims “against a trustee founded on breach of trust.” This very narrow scope serves only a very few types of cases.

New Zealand

Finally, New Zealand has enacted comprehensive provisions similar to those of the Bahamas as found in the Trusts Act 2019.²⁹ Only the provisions relevant for the discussion of this paper are included below:

144 ADR process for internal matter if trust has beneficiaries who are unascertained or lack capacity

(1) If a trust has any beneficiaries who are unascertained or lack capacity, then, for a matter relating to that trust that is subject to an ADR process, —

(a) the court must appoint representatives for those beneficiaries; and

(b) those representatives may agree to an ADR settlement, or agree to be bound by an arbitration agreement and any arbitral award under that agreement, on behalf of the beneficiaries who are unascertained or lack capacity; and

(c) any ADR settlement must be approved by the court.

(2) If representatives have been appointed under subsection (1) for beneficiaries who are unascertained or lack capacity,—

(a) the representatives must act in the best interests of the beneficiaries on whose behalf they have been appointed; and

(b) the court may order that a representative’s costs be paid out of the trust property; and

(c) the court may make any order that it thinks fit regarding the terms of a representative’s appointment.

(3) This section applies only to internal matters.

Similar to The Bahamas, and lacking in Ontario, the above provisions deal with the important issue of representation of incapable parties. The lack of similar provisions in Ontario limits the use of arbitration in many estate cases. Even simple matters that would

²⁹ See online at <https://www.legislation.govt.nz/act/public/2019/0038/latest/DLM7383086.html>

otherwise be suitable for arbitration are forced to use court litigation as it is the only forum that ensures the protection and participation of incapable parties.³⁰

Concluding Comments & Observations

Arbitration is a growing and promising area of ADR of estate disputes in Ontario. It provides an efficient, private, and flexible mechanism for parties to settle a variety of matters. The Courts continue to be encouraging and supportive of parties using alternative methods of resolving disputes, particularly estate and family disputes that involve emotional issues and where family dynamics are heightened. As the trend continues, there may be more mandating and incentivizing ADR methods. However, for the practice of estate arbitration to continue to grow in Ontario, more precedents and trained estate arbitrators will be needed. As with the large number of cases currently settled by mediation, the lack of precedent created by more ADR resolutions also creates a challenge for counsel as the amount of new case law will decline. There are also important considerations when considering arbitration for matters involving capacity and substitute-decision making that may limit the use of arbitration to post-death matters unless a statutory framework is provided as in the above noted jurisdictions.

Arbitration is an excellent tool for estate litigators to be more familiar with it as it allows them to manage highly oppositional and costly litigation. However, to maximize its potential, counsel and participants should carefully consider the nature of their dispute, the expertise/availability of the arbitrator, costs, and their client's ultimate goals before proceeding to arbitration.

³⁰ As discussed in, and for further discussion, see Lucas Clover Alcolea, *Arbitration of Trust Disputes* (Edward Elgar Publishing, 2022).

Tips On Preparing for a Successful Arbitration

1. Continue to work towards a negotiated settlement (as you would for court proceedings). A negotiated settlement will still be in your client's interests.
2. Properly advise your client as to the risks and benefits of arbitration as well as how they (and their family) will be required to participate.
3. Carefully select the arbitrator. Ask for full details of the arbitrator including resume, education, and work history. Seek feedback from colleagues and read any articles or publications written by the arbitrator.
4. Identify, narrow, and properly articulate the issues to be decided.
5. Identify and deal with procedural issues in advance and consider the process as part of the arbitration agreement.
6. Prepare a winning brief, prepare your witnesses and evidence as though going to trial. Consider a statement of agree-upon facts and a joint book of exhibits.
7. Prepare your client. Explain the process, rules, and what to expect in terms of physical space, formality, and decorum.
8. Review and know evidentiary rules as you would for trial.
9. Review the procedural rules applicable to the arbitration **very** carefully.
10. Pay close attention to instructions and directions from the arbitrator and adapt as necessary.

This paper is intended for the purposes of providing information only and is to be used only for the purposes of guidance. This paper is not intended to be relied upon as the giving of legal advice and does not purport to be exhaustive.

Kimberly A. Whaley, Whaley Estate Litigation Partners

November 2024

Appendix A: Sample Arbitration Agreement

IN THE MATTER OF THE ARBITRATION ACT S.O. 1991, c. 17 as amended

- and -

**the COURTS OF JUSTICE ACT, R.S.O. 1990, c. C.43, as amended;
the ESTATES ACT, R.S.O. 1990, c. E.21, as amended;
the ESTATES ADMINISTRATION ACT, R.S.O. 1990, c. E.22, as amended;
the FAMILY LAW ACT, R.S.O. 1990, c. F3, as amended;
the RULES OF CIVIL PROCEDURE, R.R.O. 1990, Reg. 194, as amended;
the SUBSTITUTE DECISIONS ACT, 1992, S.O. 1992, c. 30, as amended;
the SUCCESSION LAW REFORM ACT, R.S.O. 1990, c. S.26, as amended;
- and/or -
the TRUSTEE ACT, R.S.O. 1990, c. T.23, as amended**

IN THE MATTER OF THE ESTATE OF [DECEASED], deceased.

B E T W E E N:

[PARTY 1]

("Party 1")

- and -

[PARTY 2]

("Party 2")

ESTATE ARBITRATION and LITIGATION MANAGEMENT AGREEMENT

[Party 1] and [Party 2] (the "**Parties**") agree to arbitrate the issues set out below in an effort to move their litigation forward while the Courts are not operating in normal fashion on account of the COVID-19 pandemic. The Parties have agreed to submit these issues to [NAME] as Arbitrator, who has confirmed [his/her] impartiality and independence from the Parties.

SUBMISSION

6. This document constitutes a submission to arbitrate pursuant to the provisions of the *Arbitration Act*, S.O. 1991, c. 17 and may involve the application of, but not limited to, one or more of the following statutes: the *Courts of Justice Act*, R.S.O. 1990, c. C.43, the *Estates Act*, R.S.O. 1990, c. E.21, the *Estates Administration Act*, R.S.O. 1990, c. E.22, the *Family Law Act*, R.S.O. 1990, c. F3, the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, the *Succession Law Reform Act*, R.S.O. 1990, c. S.26, and/or the *Trustee Act*, R.S.O. 1990, c. T.23, and amendments thereto.

ISSUES SUBMITTED TO ARBITRATION

7. The following issues are submitted for determination:
 1. specific issues regarding the scheduling of examinations and related directions;
 2. specific undertakings and refusals;
 3. specific issues regarding the scheduling of mediation and related directions;
 4. specific scheduling and time-tabling issues, including any variation or enforcement of the timetable as set out in the [DATE] Order Giving Directions of The Honourable Justice [NAME] (the "**Order Giving Directions**");
 5. the enforcement of specific disclosure obligations of the Parties, their consent to the disclosure of the records of third parties, and/or the authority of the Parties or any one of them to direct production of records held by third parties;
 6. any issues to be determined on an interim basis as set out in the Order Giving Directions;
 7. any relief sought on an interim basis, as set out in the Notice of Application, Statement of Claim, or otherwise agreed upon by the Parties;
 8. interim support under section 64 of the *Succession Law Reform Act*;
 9. stays of distribution of the assets of the estate of [DECEASED], including any assets passing outside of the estate to a designated beneficiary or joint tenant who is one of the Parties;
 10. the appointment of interim/temporary guardians of property and/or personal care, Litigation Guardians, and/or Section 3 Counsel, subject to the position of the Public Guardian and Trustee and approval of the Court;

11. the appointment of Estate Trustees During Litigation, subject to confirmation by Court Order;
12. the commencement of new proceedings or claims as between the Parties in relation to the estate of [DECEASED] and directions as to the related procedure and/or any of the issues set out above;
13. the extension of any deadline to commence a proceeding under the statutes cited above or the tolling of any applicable limitation period;
14. the procedure and costs of any motion in writing necessary to give effect to the terms of any decision or ruling made pursuant to this Agreement;
15. costs of this arbitral proceeding;
16. any other issues as may be agreed upon by the Parties and that the Arbitrator is agreeable to determining pursuant to this Agreement; and
17. any other issues that are ancillary or otherwise closely related to any of items (a) through (p) listed above, which must also be determined in order to determine an issue set out in any of items (a) through (p).

NO CONFIDENTIALITY

8. The proceedings and the record thereof are not confidential. Materials used in the arbitration process may be filed in Court.
9. The Parties shall consent to a motion in writing for any Court Order(s) necessary to give formal effect to the terms of decisions or rulings made pursuant to this Agreement, subject to the position of the Public Guardian and Trustee and/or Office of the Children's Lawyer when applicable.

WAIVER OF RIGHTS TO LITIGATE IN COURTS

10. By submitting the specific issues designated in paragraph 2 above to arbitration, the Parties hereby waive any right to litigate those specific issues in Court.
11. Nothing in this Agreement shall be interpreted as limiting in any manner the role that the Public Guardian and Trustee and/or Office of the Children's Lawyer may have in the determination of the issues identified at paragraph 2 above, their right to service of a motion filed in accordance with paragraph 4 above, their ability to oppose such a motion, and/or to otherwise make submissions to the Court.

DECISIONS/RULINGS & APPEALS

12. The Parties agree that all decisions and rulings issued pursuant to this Agreement will become a Consent Order of the Ontario Courts upon the Court resuming regular operations, and are not subject to appeal. The Arbitrator's decision or ruling shall be binding upon the Parties.

MEDIATION

13. The Parties agree that, if the Parties consent, the Arbitrator may mediate the issues set out above. If so, the participation of the Parties and/or their counsel and the Arbitrator in a mediation will not disqualify the Arbitrator from arbitrating the issues in dispute. The Parties waive the provisions of section 35 of the *Arbitration Act*, and agree that the arbitration may take place shortly after an attempted mediation, after taking a brief adjournment.
14. If the processes occur one after the other, to avoid confusion, the Arbitrator will clearly advise, in person and/or by way of email, when the mediation process has terminated, and the Arbitration process has commenced.

PROCEDURAL ISSUES IN RESPECT OF ARBITRATION HEARING

15. (1) **Time and Place:** The hearing shall take place either by teleconference or video conference as directed by the Arbitrator on advice from counsel. A hearing under this Litigation Management Mandate is expected to last no more than 1½ to 2 hours. On the consent of both/all Parties, the hearing may take place only in writing. The Parties agree that this form of hearing meets all the requirements of the Arbitration Act.
16. (2) **Applicable law:** The arbitration will be conducted in accordance with the law of Ontario, and the law of Canada as it applies in Ontario.
17. **Procedure on Hearing:** The procedure will be as summary as possible given the importance of the issues, as directed by the Arbitrator on advice from counsel. In determining procedural issues, the Arbitrator shall be guided by all usual rules for the admissibility of evidence in court proceedings will apply as will the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 and any applicable estate law statutes, including those cited above.
18. At least **three business days** before the scheduled date for arbitration, each party shall (by email) provide the other party and the Arbitrator with any sworn evidence and/or a Statement of Law or Position Statement of no more than ten (10) typewritten (double-spaced) pages setting out his/her position in respect of the above issues, including reference to all relevant documents and relevant case law.

By noon on the day before the Arbitration, each party shall provide (by email) the other party and the Arbitrator with any responding evidence and/or a Statement of Law or Position Statement of no more than five (5) typewritten (double-spaced) pages, including reference to all relevant document and relevant case law.

19. The Arbitrator may vary the timelines and procedures set out above, upon [his/her] own motion, or upon a motion of one of the Parties, where the circumstances so justify.
20. The arbitration proceedings shall not be transcribed.

REPORT OF ARBITRATOR FOLLOWING THE ARBITRATION HEARING

21. Within fourteen (14) days after the evidence has been received and submissions on the law have been made, or as soon as practicable thereafter, the Arbitrator shall deliver (by email) a decision or ruling in writing on all issues submitted for determination.

ARBITRATOR'S FEES AND DISBURSEMENTS

22. The Arbitrator's fees for this specific Litigation Management mandate shall be at a reduced rate of \$250.00 per hour for preparation, the hearing and preparing the decision or ruling, and any follow-up, plus disbursements and HST.
23. The Parties shall provide the Arbitrator with a total retainer of \$1,130.00, presumptively being \$565.00 each at least 4 business days before the arbitration is to be heard.

COSTS

24. The Arbitrator's discretion regarding costs shall include the power to require one party to pay more than one-half, or all of the Arbitrator's fees and disbursements.

WAIVER OF ARBITRATOR'S LIABILITY

25. The Parties hereby waive any claim or right of action against the Arbitrator arising out of these proceedings.

INDEPENDENT LEGAL ADVICE

- 26. Each of the Parties has received, or has been advised to and specifically declined to seek, independent advice as to the terms of this arbitration agreement: [NAME] from [NAME] and [NAME] from [NAME].
- 27. This Agreement may be signed electronically and in counterparts.

DATED:

Solicitor for	
Solicitor for	

INDEPENDENT LEGAL ADVICE

I, [NAME], confirm that I have received independent legal advice and have attached to this Agreement a copy of the certificate of independent legal advice that was provided to me.

- OR -

I, [NAME], confirm that I have been advised and provided with the opportunity to seek independent legal advice regarding the within Agreement and that I have specifically declined to do so.

Dated at Toronto, the _____ day of _____

[NAME]

INDEPENDENT LEGAL ADVICE

I, [NAME], confirm that I have received independent legal advice and have attached to this Agreement a copy of the certificate of independent legal advice that was provided to me.

- OR -

I, [NAME], confirm that I have been advised and provided with the opportunity to seek independent legal advice regarding the within Agreement and that I have specifically declined to do so.

Dated at Toronto, the _____ day of _____

[NAME]

SOLICITOR'S CERTIFICATE

I, [NAME], hereby certify

28. I am the solicitor for [NAME], one of the Parties to the attached Agreement.
29. I acknowledge that I explained the significant of this Agreement to [NAME].
30. In my judgement, I do verily believe that [NAME] understood the significance of the within Agreement and was under no incapacity of any nature when it was executed and explained to him/her/them.

Dated at _____, the _____ day of _____, 2020

Solicitor for [NAME]

SOLICITOR'S CERTIFICATE

I, [NAME], hereby certify

31. 1. I am the solicitor for [NAME], one of the Parties to the attached Agreement.
32. 2. I acknowledge that I explained the significant of this Agreement to [NAME].
33. 3. In my judgement, I do verily believe that [NAME] understood the significance of the within Agreement and was under no incapacity of any nature when it was executed and explained to him/her/them.

Dated at _____, the _____ day of _____, 2020

Solicitor for [NAME]

ARBITRATOR'S CERTIFICATE

I, _____, confirm the following matters:

i. I will treat the Parties equally and fairly in the arbitration, as subsection 19 (1) of the *Arbitration Act, 1991* requires.

.....

(Signature of Arbitrator)