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COVID-19 has abruptly halted the administration of most legal disputes in Canada. With current court restrictions and shutdowns throughout the country, businesses and their lawyers are seeking alternate ways to resolve legal disputes. The purpose of this article is to provide an overview of how COVID-19 is affecting commercial matters in Saskatchewan courts, and present arbitration as a potential means of dealing with disputes in these uncertain times.

The Effect of COVID-19 on Commercial Disputes in Courts

Due to the COVID-19 pandemic, courts across Canada have restricted their operations. The court that decides most commercial disputes in Saskatchewan, the Saskatchewan Court of Queen's Bench, has effectively paused all civil matters (i.e., everything other than criminal and family). As of March 20, 2020, the Saskatchewan Court of Queen's Bench has indefinitely suspended regular operations in respect of civil matters and will only deal with "urgent and emergency civil matters" (e.g., applications related to COVID-19, preservation orders, urgent injunctions, certain landlord/tenant and foreclosure matters, etc.). Legal documents can still be filed at the Saskatchewan Court of Queen's Bench, but unless there is an imminent risk to health or property, its judges will not be making decisions on civil claims for the foreseeable future. The Saskatchewan courts have been changing their restrictions almost daily; for the most up-to-date information on these restrictions, please consult [this link](#).

This is an unprecedented situation. In recognition of the fact that COVID-19 has for practical purposes ground the justice system to a halt, [the Ontario government has used its emergency powers to suspend all limitation periods and deadlines indefinitely, effective March 16, 2020](#). Saskatchewan, which has also declared a state of emergency, could follow suit (but as of March 22, 2020, has not done so yet).

COVID-19 will continue to affect commercial disputes even after courts remove their restrictions. The restrictions are creating an enormous backlog in the court system, and not only in commercial disputes. Many criminal matters have been adjourned; dealing with these matters will likely be most courts' top priority when the pandemic subsides. Parties to commercial disputes should expect to encounter significant delays in the court system for the foreseeable future.

CONTINUED ON PAGE 2



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Arbitration as an Alternative to Courts

Courts are not the only way to get a decision on a commercial dispute. Parties can instead agree to use a private process known as arbitration, in which they appoint one or more people to decide the dispute. These people, known as arbitrators, are often lawyers but could be any impartial and independent person the parties believe has the appropriate expertise to resolve the dispute. For example, accountants may be appointed as arbitrators to resolve accounting disputes; engineers may be appointed to resolve construction disputes where the issues are technical in nature.

In Saskatchewan, if the arbitration complies with the basic requirements of the relevant legislation ([*The Arbitration Act, 1992*](#), or [*The International Commercial Arbitration Act*](#)), the arbitrator's decision binds the parties and can be enforced like a judgment from a court.

Arbitration provides a way to work around court restrictions to resolve commercial disputes. Also, in Saskatchewan parties have a significant degree of freedom to set the procedure for their arbitration (see section 27 of [*The Arbitration Act, 1992*](#) and article 24 of the UNCITRAL Model Law on International Commercial Arbitration, which is incorporated into Saskatchewan law by section 3 of [*The International Commercial Arbitration Act*](#)). Accordingly, arbitrations can be done in a way that does not require in-person attendance or the exchange of paper documents. For example, the parties can agree that the arbitrator will make his or her decision based only on written, electronic submissions and evidence, based on submissions and evidence delivered in a teleconference or videoconference, or a combination of the two. In these times of increasing reliance on videoconference as a substitute for in-person meetings to do one's part to "flatten the curve," the potential use of videoconference is attractive.

Parties should discuss the technological requirements for their arbitration. While beyond the scope of this blog post, some items for consideration include:

What teleconference or videoconference software should be leveraged for conducting the arbitration hearing (i.e., giving oral evidence and making oral argument)?

What technology does each party need to have to ensure the proper functioning of the arbitration? For example, desktops/laptops, video cameras, microphones, and suitable internet connections.

What programs are to be leveraged for the secure and efficient exchange of documents between parties? Depending on the volume and confidentiality of the documents, email may not be sufficient, and parties may wish to explore secure file sharing programs or joint use of cloud-based electronic document discovery software.

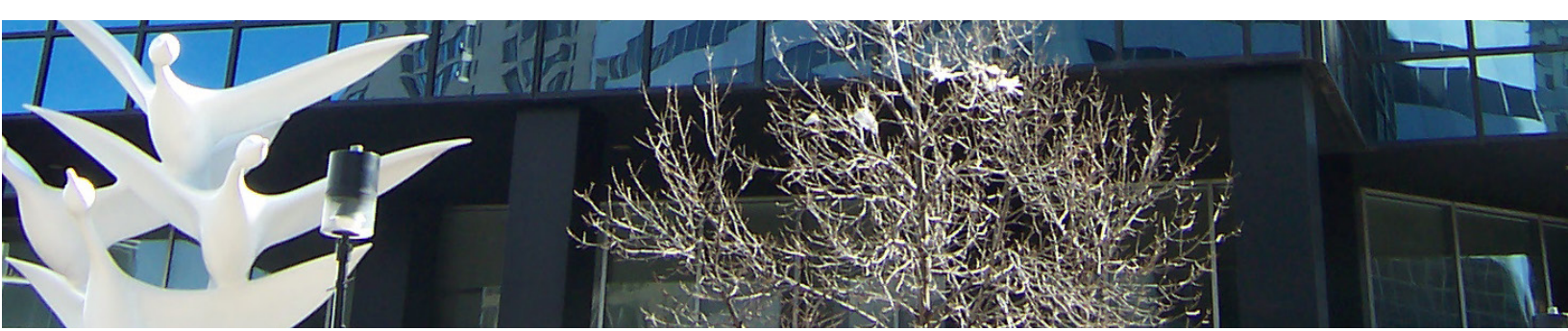
CONTINUED ON PAGE 3

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Agreeing to Arbitration

In order to use arbitration to resolve a dispute, all parties to the dispute must agree to submit it to arbitration (see sections 3 and 6 of [The Arbitration Act, 1992](#) and article 7 of the UNCITRAL Model Law on International Commercial Arbitration, which is incorporated into Saskatchewan law by section 3 of [The International Commercial Arbitration Act](#)). This is most commonly done before a dispute arises by including an “arbitration clause” in the agreement between the parties stating that any disputes under the agreement must be resolved by arbitration. One example of an arbitration clause can be found [on the website of the Canadian Arbitration Association](#). If a dispute arises and there is no pre-existing arbitration clause in any agreement between the parties, the parties can make a separate agreement to submit the dispute to arbitration.

It may also be possible to submit to arbitration discrete issues that have arisen in the context of a claim that is already being litigated in court. For example, parties to a court action might agree to submit a summary judgment application that would otherwise have been decided by a judge to be decided by an arbitrator instead. This could be a useful option for ensuring that such disputes continue to progress toward resolution despite the COVID-19-related court restrictions.

Conclusion

Arbitration is an effective and flexible way of deciding commercial disputes. Further, as a result of the COVID-19 pandemic, arbitration may be the only option available to decide most commercial disputes in the coming months. All businesses should seek legal advice on including arbitration clauses in their agreements going forward. Businesses that are currently engaged in commercial disputes should seek legal advice on whether to submit them to arbitration.

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About McKercher LLP:

McKercher LLP is one of Saskatchewan’s largest, most established law firms, with offices in Saskatoon and Regina. Our deep roots and client-first philosophy have helped our firm to rank in the top 5 in Saskatchewan by Canadian Lawyer magazine (2019/20). Integrity, experience, and capacity provide innovative solutions for our clients’ diverse legal issues and complex business transactions.



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