

A Model Arbitration Agreement for Civil Actions in Ontario

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INTRODUCTION

Up until very recently it was assumed that the only way in which a party to a civil dispute, like a wrongful dismissal action, could have his or her dispute adjudicated upon was either before a judge in a trial. However, there is another way in which the parties can proceed, which is by agreeing to arbitration. This process is as binding upon the parties as a court judgment.

Once the parties have decided to proceed by way of arbitration, rather than litigation, it is necessary to prepare a written Arbitration Agreement. This is applicable whether the arbitration procedure was agreed upon at the beginning of the dispute or where the parties commenced traditional litigation and decided at some stage in that process to switch to the arbitration model.

The purpose behind the Arbitration Agreement is to set forth the ground rules under which the arbitration will be held. It is important to understand that the arbitration process is an extremely flexible one and to a very large degree can be whatever the parties want it to be. The statutory framework for the Arbitration Agreement is The Arbitrations Act, 1991, S.O. 1991, C. 17. The Arbitrations Act sets a number of “default” provisions with respect to the terms and procedures of the arbitration; however, the parties can contract out of almost all of those provisions and create their own.

As most of the lawyers who practise civil litigation probably are not familiar with arbitrations in the first place, I felt that they would be most comfortable with an Arbitration Agreement that was modelled after the process they knew best, that is the litigation process as set out in the Rules of Civil Procedure. The Model Arbitration Agreement is therefore founded on Rules of Civil Procedure, but allows the parties to pick and choose which parts of the Rules apply and to create new procedures where the situation warrants.

The structure of The Model Arbitration Agreement allows the parties to choose between various options on a selected topic. For instance, the parties could choose to have discoveries just like in a lawsuit, dispense completely with discoveries or have limited discoveries. The choices provided in The Model Arbitration Agreement are only intended to give you some ideas. The options listed in this paper are not intended to be exhaustive, but simply put forth as examples .

ANALYSIS OF THE MODEL ARBITRATION AGREEMENT

APPLICABILITY OF ARBITRATIONS ACT, 1991

The provisions of Arbitrations Act, 1991, S.O. 1991, c. 17 apply to this arbitration except where a provision of the Agreement applies otherwise.

This is a standard provision, which simply sets forth the statutory framework. I do not suggest you change this provision.

MISCELLANEOUS PROVISIONS

Wherever the Rules refer to a "Judge", "Master", "Registrar" or "Court" it shall be read as if it read "the Arbitrator".

Wherever the Rules refer to "the Plaintiff" it shall be read as if it read "the Plaintiff".

Wherever the Rules refer to "the Defendant" it shall be read as if it read "the Defendant".

This Agreement may not be amended except by written document signed either by the parties or their counsel.

DEFINITIONS:

"Act" means the Arbitrations Act, 1991, S.O. 1991 c. 17.

"Rules" means the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, as amended.

These provisions incorporate the Rules of Civil Procedure into the Arbitration Agreement.

ISSUES IN DISPUTE

The Plaintiff and the Defendant agree to submit the following matters to binding arbitration on the terms set out in this Agreement:

1. The appropriate notice period to which the Plaintiff was entitled and a determination if the Plaintiff is entitled to a management bonus during that notice period.
2. The Plaintiff and the Defendant agree to submit to binding arbitration all matters arising from the cessation of the Plaintiff's employment with the Defendant on the terms set out in this Agreement.

If the parties desire, they could limit the arbitration to certain disputes only, in which case the first clause would be appropriate. If there is no such limitation, then the second clause could be used.

ACCEPTED FACTS AND LAW

The following will be taken as proven facts and/or law in the Arbitration.

1. The Plaintiff reasonably mitigated his/her damages.
2. If the Plaintiff is found by the Arbitrator to have stolen property of the Defendant, the dismissal was with just cause.

3. The Arbitrator is not to apply the doctrines of either near cause or ball park justice.

This clause allows the parties to either agree that certain facts will not need to be proven or to define what the law on a certain subject is agreed to be. It can also be used to limit the powers of the arbitrator, for instance by agreeing that the arbitrator cannot award punitive damages.

SELECTING AN ARBITRATOR

The Arbitrator shall be _____. However, if he/she is unable to accept the appointment the parties agree to _____ as the Arbitrator.

The parties shall endeavour to agree upon an Arbitrator within 30 days of the date upon which this Agreement is signed. If no such Agreement is forthcoming, either party may apply under Section 10 of the Act for the Court to select an Arbitrator.

Perhaps one of the biggest advantages to arbitration is that you get to choose your judge. Anyone that the parties agree upon can be an arbitrator; therefore, the parties could choose a lawyer who practices in the area, an established arbitrator, a retired judge or anyone else. The names and biographies of established arbitrators are available through the following sources:

Alternative Dispute Resolution Directory, published by the ADR Section of the Canadian Bar Association - Ontario, 20 Toronto St., Toronto, Ontario. Tel: (416) 869-1047. This directory is also available at The Alternate Dispute Resolution Centre of the Ontario Court (General Division), 77 Grenville St., Suite 800, Toronto, Ontario.

Arbitration & Mediation Institute of Ontario Inc., 234 Eglinton Ave. East, Suite 602, Toronto, Ontario Tel: (416) 487-4447.

Lancaster's Directory of Labour Arbitrators, published by Lancaster House, 20 Dundas St. West, Suite 1135, Toronto, Ontario, Tel: (416) 977-6618.

If for some reason you cannot agree on an arbitrator, the second clause allows you to apply to a court and have them choose the arbitrator. I strongly suggest that you agree on an arbitrator.

TIME AND LOCATION OF ARBITRATION HEARING

The Arbitration hearing shall take place in the City of Toronto, at a location to be selected by the Arbitrator.

The Arbitration shall be held on the following dates:

The Arbitrator shall set the dates for the hearing after consultation with the parties.

Agreeing on the city where the arbitration is to take place can be very important where the parties reside in different cities. Similarly, the timing of the arbitration can be very important to one or both of the parties. If you cannot agree on the dates, then I would suggest you leave this up to the arbitrator, as set out in the third clause.

PLEADINGS

The parties agree to not have pleadings of any sort.

The parties agree to not have pleadings as described in the Rules but do agree to exchange written statements which indicate their positions, the points at issue and the relief sought. These statements are to be exchanged by September 25, 1992.

The parties agree to exchange pleadings in accordance with Rules 25, 26, 27 and 28. The pleadings shall be filed with the Arbitrator rather than the Court.

The parties agree to exchange pleadings in accordance with Rules 25, 26, 27 and 28 subject to the following provisions:

The period for service for all pleadings shall be 10 days.

The parties agree that the pleadings already exchanged shall be used in the Arbitration.

This clause gives you five options to choose from with respect to pleadings. Only one of these options would be included in any Arbitration Agreement.

DOCUMENTS

The parties agree that Rule 30 shall apply.

The parties agree to exchange copies of all documents they wish to rely upon at the Arbitration no later than 30 days prior to the Arbitration hearing. Documents not produced within that time frame may only be used at the Arbitration hearing with leave of the Arbitrator.

The parties agree that neither party will exchange documents nor be obligated to advise the other party as to what documents it intends to rely upon at the Arbitration hearing.

The parties agree that Rule 30 shall apply subject to the following provisions:

Unless one party specifically requests the other party to produce the original of a document, each party may use photocopies.

This clause provides options regarding disclosure, ranging from the obligation to prepare an Affidavit of Documents as set forth in Rule 30 of the Rules of Civil Procedure to having no document disclosure requirements at all. Only one of these options would be included in any Arbitration Agreement.

MOTIONS AND INTERIM MATTERS

The parties agree that Rule 37 and 39 applies except that all Motions shall be heard at a location selected by the Arbitrator.

The parties agree that the Arbitrator shall rule on all procedural matters arising before the first hearing date. The Arbitrator shall set the procedure for the resolution of these matters.

The parties agree that the Arbitrator shall rule on all procedural matters arising before the first hearing date. All such matters shall be submitted to the Arbitrator in writing, who shall provide a brief written award within 10 days of the receipt of the parties' submissions. No hearing on these matters shall be permitted, unless specifically requested by the Arbitrator.

This clause provides for three different approaches to having the arbitrator resolve interim or interlocutory disputes. Only one of these options would be included in any Arbitration Agreement.

EXAMINATION FOR DISCOVERIES

The parties agree to not have examinations for discovery.

The parties agree to have examinations for discovery in accordance with Rules 31, 32, 33, 34, 35 and 36.

The parties agree to have examinations for discovery in accordance with Rules 31, 32, 33, 34, 35 and 36 subject to the following provisions:

The discoveries shall be held in Toronto on October 15 and 16, 1992.

Each party to be entitled to a maximum of 5 hours to conduct their discovery.

The parties agree that the examinations for discovery already held can be used in the Arbitration.

Again, given the shopping list approach in The Model Arbitration Agreement, you are provided with four options to choose from, depending on how important the parties feel the discoveries are. The last clause is only applicable where discoveries have already been held as part of a traditional lawsuit and the parties decide, in the course of the lawsuit, that they want to switch to an arbitration procedure.

EVIDENCE AT THE ARBITRATION HEARING

The Arbitrator shall apply the laws of evidence as if the hearing was a trial in the Ontario Court of Justice, General Division, including the provisions of Rule 53.

The Arbitrator shall apply the laws of evidence as if the hearing was a labour arbitration under the Labour Relations Act.

The Arbitrator shall apply the laws of evidence as if the hearing was a trial in the Ontario Court of Justice, General Division, subject to the following provisions:

1. The hearsay rule shall be applied as if the hearing was a labour arbitration under the Labour Relations Act;
2. The parties may rely on photocopies of originals;
3. No notice under the Evidence Act is required for business records;
4. All expert reports shall be served on the other party at least 30 days prior to the date of the hearing.
5. The parties shall not be permitted to present oral evidence, rather they are restricted to presenting the following evidence:
 - Documents;
 - Expert Reports;
 - Transcripts of Examinations;
 - Witness Statements.

The parties are entitled to utilise the provisions of Rule 51 (Admissions).

There is a general misconception among many lawyers that the laws of evidence either do not apply to arbitrations or that they are interpreted in a manner much more loosely than they would be in a courtroom before a trial judge. This is simply not true, as the parties can tell the arbitrator whether he or she is to act like a trial judge with respect to the admission of evidence or whether some other standard is to apply. This clause provides a number of options to choose from. Again, only one clause should be chosen for any particular Arbitration Agreement, except with respect to the last clause on the use of Rule 51, Admissions, which can be combined with any of the other clauses.

REMEDIAL POWERS OF THE ARBITRATOR

The Arbitrator shall have all the remedial powers of a trial judge of the Ontario Court of Justice, General Division.

The Arbitrator shall have all the remedial powers of a labour arbitrator under the Labour Relations Act, including the power to order reinstatement of the Plaintiff, with or without compensation, or on terms the Arbitrator sees fit.

The Arbitrator shall be limited in his remedial powers to:

1. Awarding monetary damages for lost income and benefits during the appropriate notice period.
2. Awarding damages for mental distress to a maximum of \$5,000.
3. Awarding punitive damages to a maximum of \$10,000.
4. Awarding prejudgment interest.

Here is where you can restrict or expand the remedial powers of the arbitrator. Imagine telling a trial judge that he or she can or cannot do something just because the lawyers said so! The issue of costs is dealt with in another provision later on in this paper.

OFFERS TO SETTLE

Rule 49 applies to these proceedings.

Rule 49 applies to these proceedings subject to the following provisions:

(1) For an offer to be operative it must be served on the other party within 20 days of the first hearing date.

If you are giving the arbitrator the power to award costs, you may want to allow the parties to use Rule 49 offers. If you do not want the arbitrator to award costs, then delete this section.

REASONS OF THE ARBITRATOR

The Arbitrator is to give written reasons in his award.

The Arbitrator is not to give written reasons in his award.

The parties may not want written reasons for a number of reasons, including cost, timelines of decision, and the avoidance of a written record of embarrassing evidence or adverse findings of credibility. If you want written reasons, but not an opus on the law of dismissal, you could agree that the arbitrator is to give “short” written reasons.

AWARD OF COSTS

The Arbitrator shall have no power to award costs.

The Arbitrator shall have all the power of a judge of the Ontario Court of Justice, General Division to award costs, including the determination of the quantum.

The Arbitrator shall have all the power of a judge of the Ontario Court of Justice, General Division, to award costs, including the determination of the quantum, subject to the following provisions:

1. The Arbitrator may order one party to reimburse the other party, either in whole or in part, for their share of the Arbitrator's fees and disbursements.
2. The maximum counsel fee at hearing shall be \$1,500 per full day of hearing.

Again here is where you can expand or limit the power of the arbitrator to award costs. This clause should be read in conjunction with the provision entitled **FEES OF THE ARBITRATOR**.

FEES OF THE ARBITRATOR

The parties agree to share equally the fees and disbursements of the Arbitrator, and that this responsibility shall not be the subject of any order for legal costs that the Arbitrator may award.

The parties acknowledge that each of them is directly liable to the Arbitrator to pay one half of his/her fees and disbursements; however, the Arbitrator may, in his/her award of costs, order one party to reimburse the other party for part or all of that party's share of the fees and disbursements of the Arbitrator.

One, but not both, of these clauses should be chosen. The second clause is designed to insure that the arbitrator will not be influenced in his or her decision by the issue as to whether or not their arbitration account will be paid.

TRANSCRIPTS OF HEARING

The evidence at the arbitration hearing is to be transcribed.

The evidence at the arbitration hearing is not to be transcribed.

Unless you are planning to allow either party to appeal the Arbitrator's decision (see below for that topic), it does not make sense to have the evidence transcribed. Remember that the parties will pay the full cost of a court reporter, unlike the situation in a trial where the Province picks up the cost of the reporter but the parties pay for the transcript.

RIGHTS OF APPEAL

The parties agree that the decision of the Arbitrator is final and binding upon the parties and no appeal to a Court is allowed.

The parties agree that an appeal from the Arbitrator's award is allowed only on a question of law.

The parties agree that an appeal from the Arbitrator's award is allowed only on a question of law or of mixed law and fact.

The parties agree that an appeal from the Arbitrator's award is allowed either on a question of fact and/or law.

A big advantage of an arbitration is that you can contract out of the right of appeal, which is obviously something you cannot do in a court case. Even if you decide there is no right of appeal, The Arbitrations Act provides that you cannot contract out the right of a party to bring an application for judicial review. However, the grounds for judicial review are quite limited, being generally limited to issues such as natural justice, exceeding jurisdiction and rendering a decision which is patently unreasonable. Only one of these clauses should be used in a particular agreement.

EXISTING LITIGATION

The parties agree to staying the present proceeding in the Ontario Court of Justice, General Division, until the Arbitration award is issued. At that time, the Arbitration award shall become a consent judgement in the Court action.

The parties agree to discontinue the present proceedings in the Ontario Court of Justice, General Division, pursuant to Rule 23.01 (c).

This clause is only applicable where there is an existing lawsuit and the parties wish to switch to an arbitration procedure. It provides for a choice of what to do with the existing lawsuit. If you chose the second clause, you would have to use the procedures of the Arbitration Act to convert the arbitration award into an enforceable court judgment.

CONFIDENTIALITY

The parties agree to keep the outcome of these arbitration proceedings strictly confidential, except as it may be necessary to implement or enforce the Arbitrator's award.

The parties agree that the Arbitration proceedings shall not be open to the public or the media.

Arbitrations can be completely private affairs, closed to the public and the media. This can be extremely important to one or both of the parties where confidential or embarrassing information must lead into evidence. Both of these clauses can be used in the same agreement, as they deal with different aspects of the issue.

CONCLUSION

Negotiating an Arbitration Agreement should not be a lengthy or complicated procedure if you use this model agreement as a guide. In my experience, a short meeting between lawyers can usually result in an Arbitration Agreement. The signatures of the clients are not necessary, as the lawyers can sign on their behalf. Once the Arbitration Agreement is signed, a copy should be forwarded to the arbitrator prior to the hearing.

