

Cassels

COVID-19 Impact: Courts Closed? Try Arbitration

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Courts across Canada have closed and nearly everything before them has been adjourned *sine die* (indefinitely). Only urgent matters can be brought before a judge. Commendably, some courts are now implementing email filing and exploring holding hearings by video or teleconference. But when our courts re-open, they will almost certainly prioritize criminal cases, because of the constitutional obligation to resolve criminal cases within a reasonable period of time.

Most commercial matters are not urgent enough to jump to the front of the courthouse queue in these circumstances, but that does not mean that parties can afford to wait until the courts have time to deal with them. Even in commercial matters, justice delayed is justice denied.

All of this makes arbitration an even more attractive option for resolving commercial disputes.

Like courts, arbitration hearing centres around the world have closed. But unlike courts, leading arbitral institutions and most arbitrators are open for business.

Leading arbitral institutions have always accepted new case filings electronically and are currently still doing so.

Most arbitrators already routinely accept materials by email, deal with parties by email and telephone, and conduct case conferences and hear procedural motions by telephone. In an arbitration, there is no need for counsel to hire process servers to serve printed documents on opposing parties and then file them with the court. Instead, they just hit "send."

Increasingly, arbitrators are becoming comfortable in a paperless environment, which means that counsel do not need to print up and deliver large books. This makes it possible for counsel to assemble materials while working from home, and to get more done through video or telephone conferences.

Indeed, while parties will often prefer to wait and hold any evidentiary hearings in person, it is possible to hold even these hearings by videoconference. Videoconferencing providers such as Cisco Webex and Zoom now even offer breakout rooms that allow teams to confer privately. These products also allow parties to refer to documentary evidence using screen sharing and document display features. As well, Toronto-based Arbitration Place is now marketing an eHearing platform called Arbitration Place Virtual.

Videoconferencing technology can also be used effectively for other steps in arbitration or litigation. Screen sharing features can help counsel review and revise witness statements and other materials with clients. Mediations or negotiating sessions between parties can be conducted effectively by videoconference.

There is also an emerging trend towards "online dispute resolution," or ODR. ODR is a form of alternative dispute resolution that seeks to make maximum use of online tools. One example of ODR is the process established by the Internet Corporation for Assigned Names and Numbers for resolving disputes over domain names.

Arbitration's traditional advantages of greater speed, lower costs, and greater flexibility as compared to litigation give it an even greater edge when courts are closed. Arbitral rules now typically even have provisions for emergency arbitrators to be appointed to deal with urgent matters within a very few weeks, which is faster than urgent commercial matters can typically be handled by a Canadian court.

Many commercial disputes are well-suited to being resolved through arbitration. While the best way to ensure that a dispute will be arbitrated is to include an arbitration clause in the contract well before the dispute arises, any dispute can be submitted to arbitration if the parties agree. Even disputes that are already before the courts can be moved to arbitration either in whole or in part.