



**This Thorn has Roses: Can Arbitration be Used to Resolve
Non-Union Employment Disputes?**

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Author: **Brenda Glover**
Osgoode Hall Law School, York University

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Author: Brenda Glover, Osgoode Hall Law School, York University

In the absence of statutory reform, and in light of the sluggishness of the common law to stimulate dramatic change, employees and employers have to resort to costly, acrimonious and lengthy litigation to resolve employment disputes in the nonunionized work setting. An option which has been attempted in the United States is to provide for mandatory binding arbitration of employment disputes. Some employers and employees in Canada have been attempting to use arbitration agreements to resolve disputes, although the experience has been significantly more limited than that in the United States. Clearly, given the backlog in Canadian courts, alternative forms of dispute resolution must be continually examined within an overarching goal to foster faster and less expensive access to justice.

The author analyzes the potential for arbitration of employment disputes in the nonunionized environment. The advantages and disadvantages of mandatory or voluntary agreements, both from the employer's and employee's perspective, are examined. This leads to a consideration of issues surrounding arbitration agreements through both the lens of the common law and employment legislation. Experience in both Canada and the United States is canvassed to determine the scope and appropriateness of remedies. Finally, the potential for judicial review and appeal of arbitration decisions is briefly explored.

In conclusion, the author establishes the appropriate elements of an effective and efficient arbitration agreement. She concludes that efficiency and effectiveness will be achieved through an agreement that protects both parties' interests to the extent possible, respects statutory entitlements and obligations, and conforms to the evolving common law jurisprudence. To aid employers and employees who are considering the use of arbitration, the author provides a template of questions to be examined in the context of developing an efficient, effective and legally binding agreement.

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In the wake of crowded judicial dockets and rising litigation costs, courts in Ontario have been attempting to use different methods and procedures to adjudicate claims.¹ Mandatory mediation has been introduced for most matters.² Simplified procedures have been expanded and the threshold for actions under small claims proceedings has been increased.³ Notwithstanding these valiant attempts to enhance the efficiency and cost-effectiveness of litigation, it still takes between three to five years to set a civil case down for trial.⁴ It is obvious that the judicial system, and those who are part of that system, must continue to find new ways of ensuring that those who need access to the system benefit from processes which deliver expedient, economical and effective justice.

Increasingly, parties in the commercial field are turning to third-party arbitration as a quick and relatively inexpensive method of resolving their disputes. In the United States, many employers are using arbitration as a way to settle disputes with their nonunionized employees. Though some detractors claim that arbitration is a poor substitute for litigation, arbitration agreements that are fair and reasonable have been upheld by American courts. There has been limited experience with this form of dispute resolution for nonunionized employees in Canada.

¹ See Robert A. Blair et al., “Ontario Civil Justice Review: First Report” (Toronto: March 1995) and “Ontario Civil Justice Review: Supplemental and Final Report” (Toronto: November 1996).

² Covered by Rule 24.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 [Rules] of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. It is interesting to note that in a review claiming that mandatory mediation in Ontario has achieved some success, wrongful dismissal claims in Toronto were settled through mediation 47% of the time. No information is given on what constitutes “success”, other than merely that the claim goes away (i.e. not whether the litigants were satisfied with the process or the fairness of the result). See Jan Weir, “Mandatory Mediation Meltdown” *The Lawyer’s Weekly* 24:21 (October 8, 2004) [Weir].

³ *Rules*, *ibid.* r.76.01. Simplified procedure is available for claims under \$50,000 exclusive of interest and costs. Under Ontario Regulation 626/00, s.1(1), of the *Courts of Justice Act*, *ibid.*, the maximum amount of a claim under small claims court is \$10,000.

⁴ Internal Memorandum from Regional Senior Justice Winkler to Superior Court of Justice Toronto Region Judges and Masters (23 August 2004) entitled “Court Processes”, in the appendix “Toronto Region Long Trials List Pilot” (dated 3 August 2004) at page 1. Note at page 2 the Regional Senior Justice’s conclusion that an ancillary negative effect of a “congested court system is evident in the decline of settlements. Pending trial dates have a salutary impact on the settlement rates.” An impending trial date induces the parties to discuss settlement; a congested court system removes that impetus. In another appendix to the memorandum, entitled “Court Processes Review Committee; Toronto Region”, the Regional Senior Justice indicates that simplified rule cases “more often than not turn into ordinary trial” and that “[a]ccess to justice, rather than being advanced, is denied, especially if one adds a pre-trial to the agenda”.

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Increasingly, parties in the commercial field are turning to third-party arbitration as a quick and relatively inexpensive method of resolving their disputes. In the United States, many employers are using arbitration as a way to settle disputes with their nonunionized employees. Though some detractors claim that arbitration is a poor substitute for litigation, arbitration agreements that are fair and reasonable have been upheld by American courts. There has been limited experience with this form of dispute resolution for nonunionized employees in Canada.

This paper will consider the viability and enforceability of nonunionized arbitration agreements from the Canadian perspective. The advantages and disadvantages of arbitration as a mode of dispute resolution will be canvassed. The nature of the employment relationship will be considered within the framework of the contract law principles. Common law doctrine will be used to explore the anticipated conflicts one might encounter when defending an arbitration agreement. The potential difficulties surrounding enforcement of statutory employment-related rights will be discussed particularly in light of public policy objectives which inspire employment legislation. The importance of prescribing the arbitrator's scope of powers and the available remedies in arbitration will be then be highlighted. Finally, the boundaries of judicial review, including appeal of an arbitration award, will be examined.

Although the scope of this paper will not allow me to canvass all of the various common law and statutory issues which might be engaged in the review of nonunionized arbitration agreements, I will attempt to point out areas which might require further study or advice.

Based on an examination of the legal questions and concerns which could be at issue in the application of an arbitration agreement for employment disputes, I will conclude that arbitration is a viable and useful alternative dispute resolution mechanism in defined circumstances. I will establish that arbitration is most appropriate in those circumstances where the employee is relatively sophisticated or knowledgeable about his or her rights, where the agreement provides benefits for both the employer and the employee, where there are process and procedures to ensure substantive and procedural justice, and where the employee's statutory employment rights are firmly safeguarded. It is inappropriate where the process, procedures, or limitations placed on the employee's rights and redress intensify the employee's potential vulnerability at the hands of an employer.

Equally important is a well-drafted arbitration agreement, one that will withstand judicial scrutiny if necessary. To that end, in the appendix to this paper, I will summarize the questions for consideration when contemplating and designing an arbitration agreement.

Before considering the benefits and disadvantages of arbitration, it is first necessary to provide a definition of arbitration as a dispute resolution procedure.

1. What is Arbitration?

Arbitration is a private dispute resolution procedure in which an impartial outsider is given authority by the parties to "hear the positions and evidence of the disputants and to make a decision that will be binding on them".⁵ The mechanism has a long and established history as a vehicle for addressing disputes between contracting parties in commercial and business contexts. In the field of labour relations, which encompasses the relationship between employers and unions, arbitration is a statutorily required

method for resolution of all disputes arising under a collective agreement. As one author states, “In the labour relations context, a system of dispute resolution that is quick, economical and effective is an absolute prerequisite, and historically arbitration has risen to the challenge of this mandate.”⁶

Although usually arbitration is a consensual process agreed to by the parties and designed to serve their particular needs, arbitration in the labour relations context is generally mandated by legislation.⁷ Whether by consensus or by mandate, it serves as a more informal, flexible and reasonably expeditious process for resolving disputes than the more traditional route of litigating claims. Since arbitration hearings are generally conducted in private, are presumed to be confidential, and are concerned with bi-partite rights (as opposed to public policy issues), this form of dispute resolution is often portrayed as “private justice”.⁸

⁵ George W. Adams, Q.C., *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH Canadian Limited, 2003) at 318 [Adams].

⁶ Lee Shouldice, “The Arbitration Process: Problems and Solutions, A Management Perspective” (2001 – 2002) *Labour Arbitration Yearbook* 175 at 175.

⁷ For example, under Ontario’s *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A, s.48(1), the parties to a collective agreement must “provide for the final and binding settlement by arbitration, without stoppage of work, of all differences between the parties arising from the interpretation, application, administration or alleged violation of the agreement, including any question as to whether a matter is arbitrable.” Arbitral decisions are public and published.

⁸ Lewis L. Maltby, “Private Justice: Employment Arbitration and Civil Rights” (Fall 1998) 30 *Colum. Hum. Rts. L. Rev.* 29; Katherine V.W. Stone, *Private Justice: The Law of Alternative Dispute Resolution* (New York, NY: Foundation Press, 2000) [Stone]; Ross Runkel, ed., *Arbitration of employment disputes: the new privatization of the judicial system* (Washington, D.C.: National Legal Center for the Public Interest, 2002).

2. The Advantages and Disadvantages of Arbitration

The benefits and drawbacks of arbitration in the employment context have been well canvassed in the literature.⁹ While it will be necessary to revisit some of the commendations and criticisms in the unique context of nonunion employment arbitration, the following are general advantages:

- a. Expediency – Currently in Ontario, the backlog in the court system to set a claim down for trial is approximately three years to five years. Conversely, even the busiest arbitrators have dates available for hearing within the current year.¹⁰ In addition, the parties can determine the timelines for hearings and for the receipt of the arbitrator's award, unlike in court where the parties can not dictate the judicial clock.
- b. Cost – The parties can determine which party will bear the cost of the arbitration and can more easily control those costs through the use of less formalized processes.
- c. Experience and Expertise – The parties are free to choose an impartial third party who has demonstrated experience and expertise in employment law. In a court system the parties can not choose their decision maker and not all judges have familiarity and practice in the increasingly complicated field of employment law.
- d. Informality – Although arbitration is similar to litigation in that it is adversarial in nature, the parties are free to set their own procedures and processes by which the

⁹ See Stone, *ibid.*, for an American perspective and Adams, *supra* note 5 for a Canadian perspective. Note that in the labour relations context, arbitration awards are public and published.

¹⁰ As an example, the number of arbitrators available for a hearing for the day after this sentence is being written (January 14, 2005) is no less than twelve. (Available through the Ontario Labour-Management Arbitrators Association at www.arbdates.com) The list includes such notable names as Bill Kaplan, Owen Shime, and Ted Weatherill, all giants in the labour arbitration world. Of course, not all arbitrators are members of the Association and hence the actual number could be higher.

- dispute will be adjudicated.¹¹ The use of less informal procedures yields a less daunting, less complex, less stressful, less costly, and conceivably less adversarial process. Lack of formality will also expedite the end result.
- e. Confidentiality – Arbitration awards are generally more confidential than court judgments, a potential advantage to either or both of the parties. Moreover, the parties can expressly agree to keep the decision confidential.
 - f. Finality – An arbitration award is typically more final than the decision of a trial court. There can be no right of appeal and judicial review of an arbitration decision is limited to questions of law. In general, courts have shown great deference to specialized dispute resolution forums which are chosen by the parties.¹²
 - g. Enforceability – Arbitration awards are enforceable through the courts. In addition, it can be assumed that if the parties have agreed to refer their dispute to *final and binding* arbitration, and appeal is limited, they are more likely (absent judicial review) to uphold and implement the arbitrator’s decision at the first instance.

On the other hand, arbitration as a dispute mechanism has been criticized for its:

- a. Private Nature – Arbitration is not an appropriate forum to resolve public policy issues since the arbitrator is confined to adjudicating the dispute between two private parties. Hence, private arbitration does not advance public policy rights or initiatives which touch upon the employment relationship. It is, in the opinion of some, just one more unfortunate example of the privatization of the justice system.
- b. Inconsistency – Arbitration does not have a system and hierarchy of precedents as prescribed in the judicial system. This can lead to an inconsistency of approach as between arbitrators. As such, arbitral decisions can not be used as a standard against which employers and employees should operate in the future, unlike decisions of the courts which will be binding on future or lower courts.
- c. Bias – There is a risk of the “repeat player” bias in arbitration. Since the arbitrator is paid by the parties (in contrast to the courts, where the costs are borne

¹¹ Subject of course to common law and statutory rules governing procedural fairness and substantive due process.

¹² Adams, *supra* note 5 at 322.

by the taxpaying public), critics claim that the arbitrator will be biased in favour of the party who most often provides them with business.¹³ Thus, some contend, the arbitrator will be biased toward the party who is a repeat offender (most likely the employer) and an economic contributor to the arbitrator, as opposed to the other party who is at arbitration less often.¹⁴

- d. Risk – In the employment context, the employer is taking the risk that the arbitrator will “step into the shoes of management” and make decisions which are economically or operationally infeasible or inappropriate. However, that potential, I would argue, is as much a real and present danger were the employer subjected to a litigated outcome.

Some of these issues and risks will be revisited later in the paper within the specific

framework of the nonunionized employment relationship, particularly in the context of

the enforceability of arbitration agreements. Since the character and essence of

relationships is often critical to any discussion of enforcing agreements or obligations

¹³ For a fulsome explanation of the “repeat player” perception, see Colin P. Johnson, “Has Arbitration Become a Wolf in Sheep’s Clothing: A Comment Exploring the Incompatibility Between Pre-Dispute Mandatory Binding Arbitration Agreements in Employment Contracts and Statutorily Created Rights” (1999 – 2000) 23 Hamline L. Rev. 511 at 530 [Johnson].

¹⁴ But see Lisa B. Bingham, “Employment Arbitration: The Repeat Player Effect” (1997) 1 Employee Rts. & Employment Pol. J. 189. Professor Bingham's 1997 study of nonunion arbitration awards in the United States included a series of analyses to determine if arbitrators were biased in favor of employers. Bingham's first analysis compared how often employees won arbitration cases they filed against their employer with the rate at which employers won when they filed charges against the employee. If arbitrators are biased in favor of employers, one would expect employers to win more often. Bingham found, however, that employers won slightly less often. Employees won seventy-three percent of the cases they filed. Employers won only sixty-four percent of the cases they initiated. Bingham also examined the size of awards for evidence of employer bias. She examined the amount of damages employees received when they prevailed as a percentage of the amount demanded and compared the results to similar figures for employers. If arbitrators were biased in favor of employers, one would expect employers to receive a higher percentage of their demands. Again, however, employers fared slightly worse. Employees received forty-nine percent of their demands. Employers received only thirty-four percent.

within the common law, the fundamental nature of the employment relationship must first be acknowledged.

3. The Nature of the Employment Relationship

The relationship between an employer and its employees is governed by the principles of contract law. Though those principles are founded on the notion of freedom of contract, they do not however adequately embody or make allowance for the *nature* of the employment relationship as distinct from other commercial free market operations or relationships.¹⁵ The nature of the relationship in an employer setting, dissimilar from relationships one might find in a pure free market construct, is made more tenuous by the inequality of power between the parties.

It is well established in employment law that the relationship between an employer and employee is characterized by an inequality of bargaining power. An oft-cited quotation from the Supreme Court of Canada illustrates the nature and significance of the employer's dominance:

“Th[e] power imbalance is not limited to the employment contract itself. Rather, it informs virtually all facets of the employment relationship. In *Slaight Communications Inc. v. Davidson*...Dickson C.J. writing for the majority of the

¹⁵ Geoffrey England, *Individual Employment Law*, (Toronto: Irwin Law, 2000) at 3 [England] where the author goes further to state that “there exists a chasm between the theory of employment contract law, namely that freedom of contract is being effectuated, and the reality of the law, namely that the employment contract provides employers with a vehicle to effectuate their real-world dominance over the employee”.

Court, had occasion to comment on the nature of this relationship...[quoting from P. Davies and M. Freedland, *Kahn-Freund's Labour and the Law*]:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination. . . .

This unequal balance of power led the majority of the Court in *Slaight Communications*, supra, to describe employees as a vulnerable group in society...The vulnerability of employees is underscored by the level of importance which our society attaches to employment.¹⁶

Discussions about the enforceability of arbitration agreements within contract law principles must, therefore, take into account the significance of the employment relationship and this inequality of bargaining power.

As a consequence of the need to manage this relationship, particularly in times of dispute, an employer and employee may voluntarily agree to submit their disagreements to arbitration. Alternatively, the employer might unilaterally mandate that all employment disputes must be submitted to arbitration and require the employee to sign an agreement to that effect. Either approach will engage common law and statutory issues although the mandatory approach is likely to attract more judicial scrutiny and rigour. The next two sections will canvass the issues through the lens of the common law and then under relevant employment-related statutes.

¹⁶ *Wallace v. United Grain Growers Ltd. (c.o.b. Public Press)*, [1997] 3 S.C. R. 701 at 741, [1997] S.C.J. No. 94 [*Wallace* cited to S.C.R.]. [note: internal citations omitted from this quote]

4. Common Law Issues

a. Contract of Adhesion

An arbitration agreement imposed by the employer on an employee will be deemed a “contract of adhesion”. This term symbolizes a standardized contract which is drafted and imposed by a party of superior bargaining strength and which allows the inferior party only the opportunity to adhere to the contract or reject it. Colloquially, the contract has been called a “take it or leave it” contract. Although the term “adhesion contract” is used in a pejorative fashion, in fact, many contracts are between parties of unequal bargaining power. Examples are consumer contracts for credit cards and cell phones, insurance contracts, employee benefits contracts, and lease agreements. Increasingly, these agreements require disputes to be resolved through arbitration. “Take it or leave it” is a common substance of day to day life, governing many important daily transactions and significant relationships.¹⁷

In the related employment context of labour relations, the Supreme Court of Canada, in a recent case determining the legal nature of unions, considered the special characteristics of the union contract.¹⁸ The Court portrayed the collective agreement as a “contract of adhesion in which the individual has no opportunity to negotiate the content of the rules

¹⁷ But see the discussion below with respect to consumer protection and mandatory arbitration.

¹⁸ *Berry v. Pulley*, [2002] 2 S.C.R. 493, [2002] S.C.J. No. 41 [*Berry* cited to S.C.R.].

and sometimes has no choice but to join” the union.¹⁹ Practically speaking, the applicant employee has no bargaining power with the union. Though it would be argued that the union benefits the employee during the course of his employment relationship with the employer, the employee has no choice but to avert to the collective agreement and its dispute resolution mechanisms when initially securing a position with the employer. The Supreme Court appears not to be unduly concerned that the employee is required to adhere to a no-choice contract in exchange for a position with the employer. Consequently, the individual employee is allowed no recourse to a resolution of his disputes with the employer other than through the union-management negotiated collective agreement which, as indicated earlier, mandates binding arbitration.²⁰

This endorsement of an adhesion contract can, I believe, be extended to the nonunion context where *at the outset*, in exchange for a position with the employer, the employee is averting to a legally enforceable alternative dispute resolution mechanism. Without more, it can not be said that a contract of adhesion as between an employee and employer is legally abhorrent.

It is likely that a Canadian court would find that an arbitration agreement is presumptively valid, placing the onus on the employee to rebut that presumption on the

¹⁹ *Ibid* at 514.

²⁰ See *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, [1995] S.C.J. No. 59.

basis of unconscionability, fraud, undue influence, misrepresentation or other claims which would invalidate the agreement. As one author speculated:

“Because Canadian arbitration statutes do not specifically refer to employment arbitration agreements and their general policy is to compel the parties to an arbitration agreement to arbitrate their claims, there is no reason to expect that a court would hold that an arbitration agreement is invalid merely because it applied to employment related claims....Because employment arbitration agreements are likely presumptively valid, an employee who is seeking to proceed with a civil action in Ontario would be required to establish that the exceptional circumstances [exist]. One might expect that, as in the United States, a common tactic would be for an employee to assert that the arbitration agreement is invalid because it is unconscionable.”²¹

As such, the mere fact that a contract is one of adhesion does not make it unenforceable. In order to render an adhesion contract unenforceable (absent fraud, undue influence or misrepresentation), there must be some provision in the contract that is so one sided or oppressive as to be unfair. In legal parlance, one or more of its terms must be unconscionable before a court will intervene.

Given the dearth of experience with the forum, there is almost no jurisprudence in Canada with respect to the enforceability of arbitration agreements in the nonunion employment environment.²² Since it is rooted in contract law principles, it is constructive

²¹ John Paul Alexandrowicz, “A Comparative Analysis of the Law Regulating Employment Arbitration Agreements in the United States and Canada” (2001 – 2002) 23 Comp. Lab. L. & Pol’y J. 1007 at 1032 [Alexandrowicz]. Mr. Alexandrowicz’s thesis provides a good analysis of the differences between American and Canadian employment law.

²² One case which I later examine is *BearingPoint*, *infra* note 29. In that case the employee was asserting that the arbitration agreement he was required to sign was *inter*

to look to the tests governing validity of agreements and unconscionability in commercial cases.

Courts will generally apply contract law principles to determine the validity of the agreement to arbitrate, such as whether both parties manifested an intention to be bound, whether the agreement is supported by adequate consideration, whether the terms are sufficiently definite to be enforced, and whether there are grounds for revoking or otherwise refusing to enforce the agreement.

b. Manifest Intention

To determine whether there was a manifest intention to be bound by the arbitration agreement, the court could consider the parties' reasonable expectations. Obviously, if the employer drafted or mandated the agreement, the employer's intention to be bound is already established. Though not fully determinative of the issue, the court is more likely to presume the employee intended to be bound by the agreement if he or she voluntarily agreed to it as opposed to having it unilaterally imposed on him or her. Moreover, from the employee's perspective, the court would likely consider whether the employee had full knowledge of the content and implications of the arbitration agreement. The sophistication of the particular employee²³ and whether the employee had independent legal advice might be relevant factors to the Court's inquiry.²⁴

alia unconscionable, without pleading more. The court was not willing to find that the agreement was unconscionable without more than the mere fact that it was an adhesion contract.

²³ As in *BearingPoint*, *infra* note 29.

²⁴ See for example *Jones v. Consumers Packaging Inc.* [1995] O.J. No. 2954, 14 C.C.E.L. (2d) 273 (Ont. Ct. Gen. Div.).

The language of the particular arbitration provision will be important, an issue I will return to at various points in this paper. It is important that the parties stipulate clearly under what conditions and circumstances they will be obliged to arbitrate their disputes. For example, the employer will not want *every* disagreement that arises from the employment relationship to be arbitrated; else it may find itself tied up in dispute resolution on issues where the employee previously could not resort to litigation. The risk of an arbitrator interfering in the management rights²⁵ of the employer would, in that case, be too high and too frequent.

Hence, the employer may wish to confine arbitral challenges to particular types, such as for disputes on wrongful dismissal, or for disputes that would otherwise be actionable via litigation or under certain employment-related statutes. Similarly, the employee may wish to maintain access to any internal dispute channels, whether formal or informal, without resorting to external arbitration. A potential downside of an arbitration agreement is that the parties force each other to arbitration on issues where, in the absence of the agreement, they may have been able to resolve them on their own. Consequently, it is important to expressly state the circumstances under which the parties are agreeing to be bound to the arbitration agreement.

c. Consideration

²⁵ “Management rights” in the employment context refers to the unfettered right of management to hire and control its workforce and operations.

It is clear that at the initial stages of the employment relationship (e.g. upon hire), the “bargain” is that the employee relinquishes her rights to litigation in exchange for a job. On its face there is nothing wrong with this exchange; an individual employee signs on to many employment conditions absent additional consideration beyond attaining a position. For example, employees are required to accept the employer’s human resources policies and benefits and, unless the employee is a “hot” commodity, does not have the option to negotiate different or better remuneration or treatment. Similarly, the employer can require, as a condition of employment, the employee’s express agreement to opt out of the common law regime calling for reasonable notice on termination.²⁶

As such, the Courts are likely to find that there is adequate consideration at the outset of the employment relationship. Difficulty will ensue if the employer, after hiring the employee, insists upon an arbitration agreement. At that point, fresh consideration may be required to implement the new “bargain”.

The Ontario Court of Appeal recently validated the importance of consideration and the principle that significant changes in the conditions of employment for an employee, made after the date of hire, require that the change come with fresh consideration. Providing

²⁶ Aside from any statutory obligations, there is an implied duty in common law that the employer must give notice of termination to an employee, either in terms of a period of time before the employee is actually terminated or through money in lieu of that notice. If the parties do not factually express a particular notice period, the courts will imply a reasonable notice period according to what the court considers to be fair in the circumstances.

fresh consideration is particularly important if the conditions were not known to the employee upon commencing employment.²⁷ The principle was developed because of the inequality of bargaining power between the parties. In highlighting the significance when the change occurs after the relationship begins, the Court said:

“The requirement of consideration to support an amended agreement is especially important in the employment context where, generally, there is inequality of bargaining power between employees and employers. Some employees may enjoy a measure of bargaining power when negotiating the terms of prospective employment, but once they have been hired and are dependent on the remuneration of the new job, they become more vulnerable. The law recognizes this vulnerability...”²⁸

In the result, the Court of Appeal ruled that the post-hire requirement that the plaintiff sign an agreement which would significantly amend a pre-hire oral commission agreement was void for lack of consideration.

The law, however, may not be completely uniform on this point. In one of the few employment cases where an arbitration agreement was challenged, the plaintiff argued that additions of an arbitration clause and certain restrictive covenants post hire were invalid for lack of consideration. In *Craigon v. BearingPoint LP*²⁹, the plaintiff was hired

²⁷ *Hobbs v. TDI Canada Ltd.*, [2004] O.J. No. 4876, 246 D.L.R. (4th) 43 (C.A.) [*Hobbs* cited to D.L.R.]. In *Hobbs* the employee was required to sign an agreement which substantially affected his commission structure, significantly altering the terms which he had been promised when accepting employment with the company.

²⁸ *Ibid.* at 48.

²⁹ (July 18, 2003), British Columbia Docket S030400, leave to appeal solely on the cost order to the B.C. Court of Appeal granted [*BearingPoint*]. For a summary of the decision, see Barry R. Fraser & Michelle S. Lawrence “Keeping Wrongful Dismissal Out

in December 2000 and signed an employment agreement. On January 1, 2002 and again on July 1, 2002 he was required to sign further agreements, both of which contained a new arbitration clause and restrictive covenants. In addressing the issue of consideration, the British Columbia Supreme Court held:

“I cannot see how the addition of an arbitration clause and a restrictive covenant, which specifies his obligations under the common law in any event, are detrimental or adverse to the plaintiff. There is no change in the salary, there is no change in severance or the stock options. Therefore, the fact that the plaintiff continued to work for the company did amount to consideration for the contract.”³⁰

I would question whether the case was correctly decided on this point. The Court’s decision goes against precedent set by the British Columbia Court of Appeal in holding that continued employment, without more, could not amount to consideration.³¹ Perhaps the distinction turns on whether the Court determines that the new (or amended) provision is a substantial change in conditions. The *BearingPoint* case seems to stand for the questionable proposition that the addition of a post-hire employment condition mandating arbitration is not in itself a considerable amendment. Alternatively, and I

of the Courtroom” *Legal Update* (October 2, 2003) available at <<http://www.mccarthy.ca/pubs/publication>>.

³⁰ *BearingPoint*, *ibid.* at 6.

³¹ See for example *Singh v. Empire Life Insurance*, [2002] B.C.J. No. 1854, 19 C.C.E.L. (3d) 29 (C.A.).

believe more accurately, the employer *may be* required to provide fresh consideration if an arbitration agreement is imposed on the employee post hire.³²

For greater certainty the employer should communicate to the employee pre-hire (perhaps through the offer letter) that disputes will be subject to an arbitration agreement, even if the full agreement is not presented to the employee at the time of hire. Such was the case in *Ross v. Christian and Timbers, Inc.*³³ where the employee was advised through offer letter that his employment was contingent upon signing an employment agreement. The employer was an American company, having a head office in Ohio, with a branch office in Ontario. The draft agreement, provided to the employee prior to commencing employment, contained an arbitration clause specifying that arbitration would be governed by Ohio law. Post-hire the draft agreement was amended by the employer to specify that the employee's employment was "at will".³⁴ The plaintiff took the position at trial that the arbitration clause was void for lack of consideration.

Swinton J. rejected this argument, finding that the amendments made, which included the terms of the offer letter and the earlier draft contract, were merely incorporated into the

³² The issue of "fresh consideration" engages the doctrine of constructive dismissal, an area of employment law which is in a state of constant flux. For example, the employer may be permitted to simply provide reasonable notice of a change but this will depend on the nature and significance of the change. Detailed analysis is beyond the scope of this paper; this brief discussion should serve as a caution for the parties.

³³ [2002] O.J. No. 1069, 18 C.C.E.L. (3d) 165 (S.C.J.) (QL) [*Ross* cited to O.J.].

later signed agreement.³⁵ The plaintiff was aware of the arbitration condition and he commenced employment nevertheless; acceptance of the condition was “demonstrated by the commencement of work”.³⁶

d. Definite Terms

The terms of the arbitration agreement should be explicit and unambiguous. As indicated earlier, the parties would be wise to have a *consensus ad idem*³⁷ on the nature and scope of the agreement, on the specific disputes to be subjected to arbitration, and on each party’s obligations under the agreement. This is especially crucial for the employer since ambiguities or drafting errors will be construed against the drafter of the clause (usually the employer) under the principle of *contra proferentem*.³⁸

Where there is a dispute between the parties about the interpretation or application of the agreement, the courts would first examine the nature and character of the dispute to determine whether the subject matter comes within the scope and language of the agreement. The arbitration clause would be interpreted in the context of the contract,

³⁴ Unlike in Canadian employment law where the employer has an implied obligation to give reasonable notice of termination, there is no implied duty in American law. The employee’s position is at the “will” or at “the pleasure” of the employer.

³⁵ *Ross, supra* note 33 at para. 21.

³⁶ *Ibid.*

³⁷ This requires a meeting of the minds between the parties where both understand the commitments made by each. It is a basic requirement in contract law.

through the framework of the relationship between the parties, and in light of the circumstances under which the agreement was made. Absent other conditions of unenforceability, where the language of an arbitration clause is capable of bearing more than one interpretation, the interpretation which supports resolution by arbitration will be favoured by the court.

This interpretive approach was used in *Diamond & Diamond v. Shrebrolow*.³⁹ In that case, the two plaintiff lawyers had entered into minutes of settlement with the defendant, Diamond & Diamond, upon leaving the defendant's firm. The settlement called for referral of all disputes arising from the settlement to be adjudicated through arbitration. The defendant later attempted to sue the plaintiffs, claiming that the plaintiffs' non-disclosure of key client information during settlement discussions was, among other actionable claims, a breach of their fiduciary duty. The plaintiffs applied to have the litigation proceedings stayed and the dispute referred to arbitration. The Court considered the subject matter of the dispute and the intention of the parties at the time the parties entered into the arbitration agreement and found:

“The arbitration clause is broad in its scope and applies to ‘any breach of this agreement, or any controversy or claim arising out of or relating to a dispute between [the plaintiffs] and [the defendant]’. The clause does not specify that it applies to breaches of fiduciary relationships... [T]he agreement was not intended

³⁸ Where a contract is open to two different but equally probable interpretations, it is interpreted against the author, especially if there is a power imbalance between the parties.

³⁹ [2003] O.J. 5929 (S.C.J.), aff'd [2003] O.J. No. 4004 (C.A.) (QL) [*Diamond* cited to O.J.].

to deal with matters about which the parties were unaware. The premise of such an agreement is that there is full and frank disclosure and a meeting of the minds in the resolution of matters in dispute. If [the defendants] are able to establish that they could not agree, because the information was not disclosed despite being owed a duty to disclose, then the arbitration clause cannot apply... While the arbitration clause is broad in its language and makes reference to ‘any other controversy or claim arising out of ...’, in my view, the language cannot be said to contemplate allegations of fraud, conspiracy and breach of fiduciary duty.”⁴⁰

Notwithstanding the Court’s signal that policy considerations favoured arbitration, having considered the scope of the clause and of all of the circumstances in which it was negotiated the Court was not willing to grant the stay against the litigation proceedings.⁴¹

Similarly, the Ontario Court of Appeal considered “all of the circumstances” (context, scope and relationship) when interpreting an arbitration clause in a contract in *Huras v. Primerica Financial Services*.⁴² The plaintiff had successfully completed a mandatory training program with the defendant. On completion, she was hired under a standard form contract containing an arbitration provision. The plaintiff’s claim in the action at bar was that the defendant had not paid her the minimum wage required by law during the training session. The defendant unsuccessfully argued that the claim was subject to the arbitration provision.⁴³ The Court of Appeal affirmed the judgement of the motions

⁴⁰ *Ibid.* para. 14. The Court also noted that the claims were not ones which could be the subject of arbitration in Ontario. This is a questionable ruling given the broad powers of an arbitrator as I will outline later.

⁴¹ *Ibid.* para. 16.

⁴² [2001] O.J. No. 3318, 55 O.R. (3d) 449 (C.A.) [*Huras* cited to O.R.].

⁴³ Under the *Arbitration Act, 1991*, *infra* note 60, a party can move to stay a court proceeding. Section 7(1) states: “If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the

judge that the dispute arose out of the parties' pre-contractual relationship and not out of the relationship which arose under the standard form contract.⁴⁴

The importance of defining the context, scope and relationships within the arbitration agreement or clause is underscored by the Court of Appeal's strong statement encouraging arbitration where it is properly contemplated:

"I recognized that it is established policy that courts should encourage the resolution of disputes through arbitration. As this court recently reiterated, where the language of an arbitration clause is capable of bearing more than one interpretation, one of which provides for arbitral resolution, a court should favour that interpretation [citations omitted]. In this case, were there any doubt whether the arbitration clause reasonably contemplated the dispute in question, I would agree that the arbitration clause should be construed in favour of arbitration."⁴⁵

e. Unconscionability

The riskiest prospect that an arbitration agreement will be deemed unenforceable, absent allegations of fraud, misrepresentation or undue influence, is through a judicial finding of unconscionability. This will be the judicial equivalent of the "litmus" or "smell" test.

The doctrine essentially permits the court to rescind a contract if one party has exploited its dominant bargaining position to extract a manifestly improvident agreement from the other. In employment law, however, the doctrine is applied cautiously, as noted by employment law author, Geoffrey England:

arbitration agreement, stay the proceeding." The Court will refuse to stay a proceeding on several grounds, including legal incapacity, an invalid arbitration agreement, if the subject matter is not capable of being the subject of arbitration under Ontario law, delay, and where the matter is a proper one for default or summary judgement.

⁴⁴ *Huras, supra* note 42 at 453.

“The courts are reluctant to substitute judicial fiat for market forces in setting the terms and conditions of employment contracts; and perhaps wisely so, since judicial over-exuberance in this area would augur badly for economic efficiency. At this juncture, most courts have applied the doctrine of unconscionability relatively cautiously to those situations where the employer has taken an unfair advantage of a clear vulnerability on the worker's part.”⁴⁶

In general terms, to find that a contract of adhesion is unconscionable the plaintiff must prove each of the following three elements:

- i. First, there must be an inequality of bargaining power;
- ii. Second, there must be some taking advantage of, or preying upon, the weaker party by the stronger party;
- iii. Third, there must be a resulting improvident agreement. It is not sufficient to simply show that one party extracted a better deal than the other.⁴⁷

A quote which succinctly summarizes the tests to be met for unconscionability, although in a case not dealing with employment rights but a commercial transaction, is found in

Harry v. Kreutziger (1978):

“Where a claim is made that a bargain is unconscionable, it must be shown for success that there was inequality in the position of the parties due to the ignorance, need or distress of the weaker, which would leave him in the power of the stronger, coupled with proof of substantial unfairness in the bargain. When this has been shown...the stronger party must, in order to preserve his bargain, convince the court that it was fair and reasonable.”⁴⁸

⁴⁵ *Ibid.* at 455-456.

⁴⁶ England, *supra* note 15 at 33. See for example *Waterman v. Frisby Tire Co. (1974) Ltd.*, [1995] O.J. No. 1877, (1995) 13 C.C.E.L. (2d) 184 (Ont. Ct. Gen. Div.).

⁴⁷ *Kanitz v. Rogers Cable Inc.*, 58 O.R. (3d) 299 at 311. [2002] O.J. No. 665 (S.C.J.) [*Kanitz* cited to O.R.].

⁴⁸ 95 D.L.R. (3d) 231 at 241 (B.C.C.A.) [*Harry* cited to D.L.R.].

In the circumstances of a nonunion employee, it will be relatively simple to rely on previous judicial pronouncements and raise the presumption of an inequality of bargaining power as between an employer and employee. In fact, relying upon leading Supreme Court of Canada decisions, the court may simply take judicial notice of the inequality of bargaining power.⁴⁹ The burden would likely fall to the employer to demonstrate that the agreement was freely bargained for and that adequate consideration was given. However, inequality of bargaining power, in itself, does not render the arbitration provision unconscionable. The court must continue with its enquiry into the precise dealings between the parties and the provisions of the specific agreement.

In terms of the second test – that the employer took advantage of or preyed upon the employee – much will turn on the experience and expertise of the particular employee. For example, in *Ross* the Court took into account that the plaintiff, by virtue of his training as a lawyer, was a “sophisticated party”.⁵⁰ Further, the plaintiff had received independent legal advice prior to signing the contract offer. Similarly, in *BearingPoint* a critical factor in defeating the claim that the agreement was unconscionable was that the

⁴⁹ As Cumming J. did in *Huras v. Primerica Financial Services Ltd*, [2000] O.J. No. 1474 at para. 38 (S.C.J.), aff’d [2001] O.J. No. 3318, 55 O.R. (3d) 449 (C.A.) (QL) [*Huras* cited to O.J.] relying upon *Machtiger v. HOJ Industries*, [1992] 1 S.C.R. 986, [1992] S.C.J. No. 41 and on *Wallace*, *supra* note 16.

⁵⁰ *Ross*, *supra* note 33, at para. 15.

plaintiff employee was a “sophisticated individual working at a management level at a significant salary”.⁵¹

An employer who imposes an agreement upon an employee will enhance the risk of unenforceability if the employee was unaware of or could not fully appreciate the nature and scope of the agreement. There is an implied obligation upon an employer to draw an employee’s attention to provisions which might limit employment rights and to explain those terms to the employee.⁵² Many employees are simply not aware of their rights and, given that, can not be expected to understand the consequences of relinquishing those rights. As the more knowledgeable (and thus more powerful) player, the employer may be required to ensure that the employee’s lack of knowledge or sophistication did not exacerbate the employee’s pre-existing weaker status.

The court would, as such, assess whether the employee’s vulnerability as the weaker party resulted in an agreement undermining her employment rights.⁵³ The assessment would likely be conducted on a subjective basis, given the findings in *Ross* and *BearingPoint*, where the court would consider the *individual and particular* employee in the circumstances of the *particular* employment relationship. The question the court might ask is, “Was this employee, in light of all the circumstances of this employment

⁵¹ *BearingPoint*, *supra* note 29, at para. 14.

⁵² *Huras*, *supra* note 49 at para. 37 and *Burden v. Eastgate Ford Sales & Service (82) Co.*, [1992] O.J. No. 2376 (Ont. Ct. Gen. Div.) at 3 cited in *Huras*.

⁵³ *Ross*, *supra* note 33 at para. 25.

relationship, vulnerable to this employer undercutting or weakening her individual rights through this agreement?”

The wise employer would make sure that the employee understands fully what rights she is relinquishing and what expectations she should have under the agreement. Further, if the employee is encouraged to obtain legal advice prior to signing the contract, the employer would be able to shield itself from a claim that it was attempting to take advantage of the employee's weaker bargaining position.

At the third stage of the inquiry, the court will gauge the terms of the agreement to determine whether one party was subject to an improvident arrangement. Though the terms of the precise agreement will be scrutinized, the standard against which the provisions are measured will be an objective one. The “bargain” will be assessed, as a whole, in light of the “standards of commercial reality”.⁵⁴ An objective standard would preserve the value of freedom of contract while protecting the weaker party against the imposition of terms that would offend a reasonable person in the market (in this case, the fictitious “reasonable person” would be a composite of employers and employees in the employment market).

No doubt the extent and character of the court's scrutiny at this juncture will be based on the facts of the given circumstances. Situations which will attract the court's unease include:

- i. A one-sided provision which takes away the rights of one party but preserves the corresponding rights of the other party. An example would be a provision which binds the employee to arbitration but allows the employer to choose between litigation and arbitration.⁵⁵
- ii. A condition which requires the employee to pay for all of the costs of the arbitration, particularly if coupled with a prohibition against the arbitrator awarding the employee his costs if successful at arbitration.
- iii. A provision which purports to contract out of minimum statutory employment rights. Indeed, subject to the discussion below, it is likely that such a provision would be *void ab initio* since an employer and employee can not contract out of rights endowed by statute. Similarly an agreement purporting to deny the right to have the arbitrator's award judicially reviewed will be void. The courts always maintain the right to judicially review an administrative body's decision, although the review is more limited than a review on appeal.
- iv. A clause stipulating that the selection of the arbitrator is in the sole discretion of the employer, potentially leading to a reasonable apprehension of bias on the part of the arbitrator. The court would want to ensure that the claim is adjudicated by an independent, impartial third party, not one who is controlled by or predisposed to the employer prior to hearing the case. If these minimum levels of integrity are not achieved, the employer's pledge of arbitration using an *impartial* decision maker "becomes essentially illusory".⁵⁶
- v. Conditions which limit or detract from a party's rights to fairness and procedural justice during the arbitration hearing. Examples of such would be prohibiting the employee from engaging legal counsel, setting out procedures which curb the substantive entitlement to full and frank disclosure of all matters relevant to the issues in the proceedings⁵⁷, or giving procedural rights to one party but not the other.⁵⁸

⁵⁴ *Huras*, *supra* note 49 at para. 36 citing *Harry*, *supra* note 48.

⁵⁵ See for example *Huras*, *supra* note 49 at para. 40.

⁵⁶ *Stone: Private Justice*, *supra* note 8 at 525.

⁵⁷ See *National Ballet v. Glasco et al.*, 49 O.R. (3d) 230 at 239-241, [2000] O.J. No. 2083 (S.C.J.) [*Glasco* cited to O.R.].

⁵⁸ *Hooters of America, Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999) at 938-939, although a U.S. case, provides examples of procedural limitations which might lead the court to

conclude that the arbitration agreement is a “sham system unworthy of the name of arbitration”.

5. Statutory Issues

Beyond the considerable common law issues surrounding arbitration agreements, the parties will have to consider and, as necessary, abide by relevant legislation or statutory provisions. The two most critical factors involve the jurisdiction of the arbitrator and the impact of employment related statutes on the arbitration agreement.

a. Jurisdiction of the Arbitrator

In conducting an arbitration hearing, the arbitrator will have to determine the procedures, rules, powers and remedies available to him or her when deciding on the dispute. It is important, both for the parties and to the administration of justice, that the arbitration be a fair, orderly, conclusive and legally binding resolution mechanism. While the parties will want to ensure that the decision can withstand judicial scrutiny (either through judicial review or through agreed upon appeal processes), it is equally critical that the process and procedures are not so onerous as to detract from the overall efficiency and cost-effectiveness of arbitration. As such, in providing guidance and direction for the arbitration, various jurisdictional options available and the benefits and limits to each option should be carefully considered.

To ground the arbitrator's jurisdiction, the parties would be required to provide the arbitrator with the "legal underpinnings and the tools available to complete [the] task"⁵⁹.

⁵⁹ *Doherty v. Loyalist College of Applied Arts and Technology* (October 13, 2004), unreported decision of arbitrator Richard MacDowell at 52 [*Loyalist*].

This requirement is magnified when one considers that, unlike labour or commercial arbitration, nonunion employment arbitration is not well established as a mechanism for dispute resolution in Canada. Hence, in the absence of statutory direction, the arbitrator will have to cast about blindly and perhaps ultimately incorrectly, to determine his sphere of power, procedure, process and remedial authority.

In Ontario, the *Arbitration Act, 1991*⁶⁰ can be used as the statutory underpinning for the arbitration agreement. The Act applies to an arbitration conducted under an arbitration agreement, unless otherwise excluded by law or by application of the *Commercial Arbitration Act, 1991*.⁶¹ The provisions of the Act cover procedural and substantive matters such as the jurisdiction and powers of the arbitrator, procedures and proceedings under the arbitration, fairness and due process, awards and remedies, and judicial review or court intervention. The parties can choose to contract out of most provisions of the Act, though not those dealing with procedural fairness, setting aside or enforcing awards, and the right to judicial review.⁶² Consequently, the parties can craft their own set of rules based on their particular circumstances or needs.

⁶⁰ S.O. 1991, c. 17 [*Arbitration Act, 1991*]. Note that the parties have to agree to submit their dispute to arbitration. It is questionable whether a mandatory arbitration program would, as such, fit the definition of "arbitration agreement" in the Act.

⁶¹ R.S. 1995, c. 17 (2nd Supp.).

⁶² *Arbitration Act, 1991*, *supra* note 60, s. 3 which states "The parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following: 1. Subsection 5 (4) ("Scott v. Avery" clauses); 2. Section 19 (equality and fairness); 3. Section 39 (extension of time limits); 4. Section 46 (setting

Two cases involving arbitration agreements will illustrate the importance of positioning and appreciating the arbitrator's jurisdiction. In *Loyalist* the dismissed employee was attempting to invoke the employer's policy which provided a choice between voluntary arbitration and litigation.⁶³ The voluntary arbitration provision contained a two-step process: first, the employee could seek redress through a meeting with the College President and if that failed, the employee could proceed to binding arbitration. The employee was required to make her choice between the two options within a certain time period otherwise the only recourse would be to sue the employer for wrongful dismissal through the courts. The employee launched a civil claim but then, seven and a half months after her discharge, sought to have her claim arbitrated.

The employer's policy specifically indicated that the provisions of the *Arbitration Act, 1991* and the *Statutory Powers Procedures Act*⁶⁴ did not apply to arbitrations conducted under the policy. Moreover, the policy provided limited guidance as to the arbitrator's powers, procedures or processes.

aside award); 5. Section 48 (declaration of invalidity of arbitration); 6. Section 50 (enforcement of award)".

⁶³ *Loyalist*, *supra* note 59.

⁶⁴ R.S.O. 1990, c. S.22. The Act "applies to a proceeding by a tribunal in the exercise of a statutory power of decision conferred by or under an Act of the Legislature, where the tribunal is required by or under such Act or otherwise by law to hold or to afford to the parties to the proceeding an opportunity for a hearing before making a decision". The Act does not apply to an arbitration conducted under the *Arbitration Act, 1991* or the Ontario *Labour Relations Act, 1995*.

Since the employee was attempting to choose the arbitration option well beyond the time limits contained in the policy, the arbitrator had to first determine whether he had the authority to relieve against time limits. The arbitrator noted that there was statutory authority to relieve against time breaches in other employment statutes, such as provided in the *Labour Relations Act, 1995*. There may also have been discretion within the *Arbitration Act, 1991* had the parties agreed to invoke application of that Act. However, in the absence of any statutory or other express authority (e.g. within the policy itself), the arbitrator in this case had no mandate to relieve against the time limits. In a comprehensive and cogent decision, the arbitrator concluded:

“This contract (either by its terms or by necessary implication) simply does not embrace the kind of authority given to arbitrators, by the Legislature, under section 48(16) of the *Labour Relations Act*. Nor does it confer upon an arbitrator the kinds of powers that a Superior Court Judge would have - or even the kind of powers that an arbitrator might have under the *Arbitration Act, 1991*. And I do not think that such authority can be “implied”. The contract does give me the power to determine what is “just and equitable” with respect to the discharge, but I do not think that I have that same power vis a vis the other provisions of the agreement.”⁶⁵

A disagreement about the breadth of the arbitrator’s powers was also a key issue in *Glasco*.⁶⁶ Here, the parties had agreed to arbitrate the employee’s dismissal under the rubric of the *Arbitration Act, 1991*. As a preliminary matter, the employee was seeking interim reinstatement to her position as a principle dancer with the National Ballet of Canada pending the hearing on the merits of the dismissal. The employee was a quasi-

⁶⁵ Loyalist, *supra* note 59 at 101.

⁶⁶ *Glasco v. National Ballet of Canada et. al.* (March 16, 2000), unreported decision of arbitrator Albertyn, aff’d 49 O.R. (3d) 230, [2000] O.J. No. 2083 (S.C.J.).

unionized employee, covered by a form of collective agreement under the umbrella of the Canadian Actors' Equity Association (CAEA), coupled with an individual contract of employment with the National Ballet. When the employer advised her that her contract would not be extended to the new season, the employee launched several actions, including a wrongful dismissal action in the courts, an unfair labour practice complaint to the Ontario Labour Relations Board and a human rights complaint. The CAEA launched a grievance under its collective agreement seeking reinstatement of Ms. Glasco. The parties agreed that, save for the human rights complaint, all claims would proceed to binding arbitration to be conducted under the *Arbitration Act, 1991*.

On the preliminary matter, the employer argued that the arbitrator had no jurisdiction to order reinstatement given that he would have no right to do so if he were adjudicating the claim under the *Labour Relations Act, 1995* or if he were sitting as a court judge.⁶⁷ After exhaustively reviewing the various statutory and common law issues, the arbitrator concluded:

“The parties to the arbitration agreement have agreed that I will act as arbitrator of all of the disputes referred to in the agreement. They have consolidated the various actions. They have decided that my decision will be final and binding. The process is to be expeditious. I am given various powers, but — and this is the

⁶⁷ Section 48(13) of the *Labour Relations Act, 1995*, *supra* note 4, prohibits an arbitrator to order interim reinstatement of an employee. It should be noted that the employer's somewhat bald assertion that a common law court would not order reinstatement of an employee was not accepted by the Ontario Court of Justice upon judicial review of the arbitrator award. Swinton J. indicated that although unusual for a court to order specific performance (i.e. interim or absolute reinstatement) of an employment or personal services contract, there is “no absolute rule” against it. See *National Ballet of Canada v. Glasco et al.*, *supra* note 57 at 247.

point I wish to stress — I have only one authority: that of an arbitrator under the *Arbitration Act*. I am not sitting as a court...I am not a court potentially taking jurisdiction from a statutorily mandated forum. I am the consensually mandated forum. I am also not sitting as a labour arbitrator, nor as the [Labour Relations] Board. Hence, whether I am restricted in granting interim reinstatement to Ms. Glasco — as I would be were I sitting as a labour arbitrator or the Board under the *Labour Relations Act, 1995* — depends not upon my powers as a court, but on the nature of my jurisdiction as an arbitrator under the *Arbitration Act*.⁶⁸

The arbitrator continued by canvassing his jurisdictional authority to order interim reinstatement under the *Arbitration Act, 1991*. Noting that the Act did confer *remedial and discretionary* jurisdiction, and based on the unique circumstances of the case, the arbitrator awarded interim reinstatement. The award was upheld on judicial review to the Superior Court of Justice.⁶⁹

These two cases demonstrate the importance of underpinning the arbitrator's jurisdiction through a statutory mechanism and highlight the magnitude of appreciating the level and breadth of the jurisdiction conferred.

The parties could conceivably mirror the arbitrator's jurisdiction under a nonunion arbitration scheme to that provided to an arbitrator acting under the authority of the *Labour Relations Act, 1995*. Whatever the statutory underpinning, it is imperative that the parties understand the scope, nature and limits of the arbitrator's jurisdiction.

Otherwise, they may end up protracting the dispute arguing about these matters, being subject to unanticipated results (such as in *Glasco*), or being unable to seek the necessary relief (such as in *Loyalist*).

⁶⁸ *Glasco*, *supra* note 66 at 61.

⁶⁹ *Glasco*, *supra* note 57.

Before leaving the topic of the arbitrator's jurisdiction, it is worth noting that the *Arbitration Act, 1991* may not provide sufficient guidance for a dispute within the employment context, given that the Act was designed for disputes in commercial settings. The parties and the arbitrator may desire more direction with respect to arbitration procedures and processes. As such, it would be useful to review guidelines and protocols which have been developed to assist parties in dispute. For example, the American Arbitration Association has produced various documents relating specifically to arbitration in the employment context.⁷⁰ The protocols which ensure due process (procedural fairness) are particularly relevant and can be incorporated into the arbitration agreement.

b. Employment Related Statutes

An employment dispute may arise from the employee's claim that the employer has failed to abide by obligations of various employment-related statutes. This can happen for example in a wrongful dismissal action if the employee is claiming that she was dismissed as a result of a prohibited ground of discrimination under the *Human Rights Code*.⁷¹ In the absence of an arbitration agreement, the employee could launch a civil action for wrongful dismissal and a concurrent discrimination complaint to the Ontario

⁷⁰ See for example "Resolving Employment Disputes - A Practical Guide" available at <<http://www.adr.org/sp.asp?id=22077>>. See also National Academy of Arbitrators. "A Due Process Protocol for Mediation and Arbitration of Statutory Disputes arising out of the Employment Relationship" available at <www.naarb.org/due_process/due_process.html>.

Human Rights Commission.⁷² Similarly, when an employee is discharged, statutory rights to severance and termination pay may arise under the *Employment Standards Act, 2000*.⁷³ Furthermore, there are circumstances under which a termination of employment may be found to be unlawful under various statutes.⁷⁴

A detailed and comprehensive review of the interaction between nonunion arbitration, the *Arbitration Act, 1991*, and employment-related statutes is necessary to ensure that the arbitration agreement is comprehensive and enforceable. An employer should canvass (with legal counsel) the various obligations and remedies available under statutes in order to determine how they will be handled within the arbitration agreement. This pre-determination is imperative since an arbitrator's decisions will be subject to judicial review on the question of whether the arbitrator has jurisdiction to resolve complaints otherwise covered by a statutory scheme. Further, unlike labour arbitration, nonunion employment arbitration is not a well-established and (as yet) respected mechanism of

⁷¹ R.S.O. 1990, c. H-10 [*Code*].

⁷² There may be different issues and remedies under either action. A discussion about remedies will occur in a later section of this paper.

⁷³ S.O. 2000, c. 41 [*Employment Standards Act* or ESA].

⁷⁴ Reinstatement be ordered in Ontario for example if an employer wrongfully and unlawfully: (1) breaches *Employment Standards Act, 2000* provisions which prohibit reprisals when an employee has exercised rights under the Act or is subject to a garnishment or court order from his wages; (2) infringes an employee's rights dictated by the *Human Rights Code*, including termination on a prohibited ground of discrimination; (3) retaliates against an employee for exercising rights under the *Occupational Health and Safety Act*; (4) dismisses an employee for exercising rights under the *Pay Equity Act*; (5) terminates an employee in the Provincial public service for whistleblowing; and (6) in contravention of the *Labour Relations Act, 1995* dismisses an employee for engaging in a unionization drive.

dispute resolution. Hence, the decisions of the arbitrator will be subject to elevated scrutiny by a reviewing court.

Some of the questions to be considered by the employer include:

1. Will the employee be able to access both the arbitration forum and the forum provided under the statute?
2. If the employer wants to restrict the employee's rights to enforcement under the statute, will that limitation be enforceable?
3. How will the arbitrator be directed to enforce, as a minimum, the rights conferred to the employee, or the obligations imposed on the employer, by statute?
4. Will the arbitrator be able to order different, the same, or superior remedies as would be bestowed by statute?
5. Under various options, on what basis and by what standards will be courts review the arbitration's jurisdiction?

To reap the cost and efficiency advantages of arbitration, the employer may wish the employee to relinquish her rights to pursue the claim under statutory mechanisms.⁷⁵

Otherwise, the employer will be spending time and resources defending the claim in various forums. It is also conceivable that the employer will be subject to contradictory decisions and will spend additional time and resources seeking judicial review should that occur.⁷⁶

⁷⁵ I will discuss and conclude whether this is legally permissible by analyzing two particular employment-related statutes. A review of all employment-related statutes is beyond the scope of this paper.

⁷⁶ See for example *Ford Motor Company v. Ontario (Human Rights Commission)*, [2001] O.J. No. 4937, 209 D.L.R. (4th) 465 (C.A.) [*Ford*] where the employee had filed both a grievance under the collective agreement and a human rights complaint. His discharge

It is not clear that the employer could curtail the employee's entitlement in pursuing a remedy under statute, even if the employee agrees to relinquish her rights to enforcement under the Act. For example, the *Employment Standards Act* prohibits an employer and employee from agreeing to contract out of or waive an employment standard conferred under the Act, unless it is for a greater benefit to the employee.⁷⁷ Any agreement to do so is void. However, this provision begs two questions: (1) Is the enforcement mechanism under the Act an "employment standard"? and (2) Could the access to binding arbitration be a greater benefit than the public enforcement mechanism?

The term "employment standard" is defined as "a requirement or prohibition under this Act that applies to an employer for the benefit of an employee".⁷⁸ It is plain that a "requirement" includes the obligation to pay minimum wage, vacation pay, etc. and a "prohibition" would include not intimidating, dismissing or otherwise penalizing the employee for asserting rights under the ESA.⁷⁹ It is not immediately apparent whether the complaint processes fall under the umbrella of a "requirement" which applies to the employer. Certainly the employer has obligations once a complaint is filed or an order is given; however, it is not obvious whether that obligation extends to not denying the

was upheld by the grievance arbitrator in February 1985. The Ontario Human Rights Commission re-instated the employee in a decision dated December 6, 1996, eleven years after the employee had been discharged. The Court of Appeal overturned the decision holding, *inter alia*, that the Commission, while not bound by the arbitrator's decision, should have given it more weight and consideration.

⁷⁷ ESA, *supra* note 73, s.5.

⁷⁸ *Ibid.* s.1.

⁷⁹ *Ibid.* s.74.

employee (or to seeking the employee's waiver of) the right to access the complaint process.

In *Huras* the motions judge, in addition to finding that the dispute did not fall within the arbitration clause, found that the clause was unconscionable in that it was unenforceable under the *Employment Standards Act, 2000* as a contracting out of the ESA. The Court of Appeal in discussing this aspect of the judgement indicated that:

“The Motions judge appreciated that his findings regarding unconscionability and the violation of [the Act] were unnecessary to the result... These findings are clearly obiter dicta and, therefore, not binding as a precedent. Because these findings are obiter dicta, it is not necessary to review their correctness, as request by counsel for [the defendant].”⁸⁰

Hence, the Court of Appeal left open the question about whether an arbitration clause which requires the employee the sole option of pursuing her rights through arbitration is, in its nature, a contracting out of the ESA and is, as such, unconscionable.

The mere fact that it is an *arbitrator* who is *applying* minimum employment standards benefits does not render arbitration unconscionable as a dispute resolution mechanism.

The Court in *Ross* did not question that the employee's ESA rights would be the subject of the arbitration to be conducted in Ohio. The employee in that case had argued that the term specifying that his employment was “at will” would contravene the ESA since in Ontario, unlike in the United States, a dismissed employee is entitled to minimum notice of termination. The arbitration clause required the dispute to be resolved in accordance

⁸⁰ *Huras, supra* note 42 at 456.

with Ohio law. The employee asserted that by enforcing the clause and the stipulation of foreign law, the employer would be doing an “end-run” around the Ontario legislation.⁸¹ The Court was not provided with any evidence of “Ohio conflicts rules with respect to public policy” and was not able to determine how Ontario law would be treated under the arbitration.⁸² Nevertheless the Court concluded that the agreement was not invalid merely because it chose Ohio law to govern the employment dispute. Further, the Court noted that the employee “may have further remedies to pursue in Ontario to enforce the minimum standards to which he is entitled”⁸³ if his rights under Ontario legislation were not respected in the arbitration proceedings.

In the result, the Court ordered a stay of the employee’s wrongful dismissal action pending the Ohio arbitration. The effect of the stay would permit the employee to return to the court if his statutory rights were not protected.

Unquestionably, an arbitrator conducting an arbitration in Ontario would have to respect the employee’s rights to minimum statutory entitlements, including reinstatement when the employer is in breach of certain provisions of any applicable employment-related legislation. This happens regularly and routinely in labour arbitrations, although primarily because a unionized employee has no access to the complaint system under, for example, the ESA. For greater certainty, it would be prudent to include a “comfort”

⁸¹ *Ross, supra* note 33 at para. 25.

⁸² *Ibid.* at para 27.

⁸³ *Ibid.* at para. 28.

clause in the arbitration agreement stipulating that any rights and remedies under the ESA, and indeed under any applicable employment-related statute, will be honoured in the arbitration decision.

In terms of the second query – would an arbitration agreement be considered a “greater benefit” to the employee – much will turn on the nature and scope of the agreement.

Assuming the employee’s minimum rights under the ESA are protected, if there is a potential for the employee to receive greater damages under the arbitration agreement, for example, than through an ESA complaint, it could be argued that arbitration confers a greater benefit. This could be analogous to the situation where an employee chooses to issue which might otherwise be a wrongful dismissal claim pursuable under the ESA through a civil action. Having instigated a civil action, the employee is prohibited from making a complaint under the ESA.⁸⁴

However, if the employee has to pay for all or part of the costs of the arbitrator and the hearing, it could be argued that denial of access to a *publicly-funded* complaint resolution system is a diminution of the employee’s rights. The costs consideration is

⁸⁴ ESA, *supra* note 73, s.98 which states: “An employee who files a complaint under this Act alleging an entitlement to termination pay or severance pay may not commence a civil proceeding for wrongful dismissal if the complaint and the proceeding would relate to the same termination or severance of employment.” If the employee has already launched an ESA complaint, it must be withdrawn within two weeks of filing in order to commence a civil action. This is true for complaints related to non-payment of wages or denial of the benefit provisions to which the employee would be entitled under the ESA. It matters not that the employee’s claim in the civil action is for damages in excess of the \$10,000 maximum claimable under the ESA.

distinguishable from the current options the employee has for choice of forum under the ESA. Though the employee has an option to pursue his complaint either through the ESA mechanism or via civil action, both are *publicly-funded* forums.

The fact that the ESA, like other employment-related statutes, has a public policy function can not be disregarded. Further, the Act confers a wide range of powers on the Director of Employment Standards relating to investigations, inspections and compliance orders.⁸⁵ An ESA officer can go beyond the bounds of the one complaint. If he finds during his investigation that the employer is generally not complying with the provisions of the ESA, the officer can order the employer to pay other affected employees in addition to the original complainant. An arbitrator would not have the same wide ranging powers; she would only be able to deal with the individual complaint and with only the evidence adduced by the parties. The arbitrator could not, for example, compel additional parties to testify or conduct a wider scale investigation of the employer's practices. Of course, that is also true in the context of labour arbitration where the arbitrator adjudicates within the four corners of the grievance at issue. No doubt the public policy concerns are yielded in the unionized context because there is a union who can watchdog the employer's compliance with minimum standards. That is not the case in the nonunion environment.

⁸⁵ *Ibid.* see Part XXI and Part XXII of the Act.

These policy considerations would be engaged by a reviewing court in assessing the viability, applicability and enforceability of nonunion arbitration agreements which purport to deny the employee recourse to statutory enforcement provisions. However, they are likely to be a bigger issue in the context of human rights complaints, given the “quasi-constitutional” status of human rights legislation. Enforcement of human rights statutes not only protects individuals against discrimination, but also penalizes those who discriminate against others.⁸⁶ Investigations can be launched by the Ontario Human Rights Commission on its own volition; that is, it is not merely a complaint-based investigation system.⁸⁷ The Commission can decide for various reasons not to investigate a complaint.⁸⁸ If the matter is referred to the Ontario Human Rights Tribunal for a hearing, the Commission – not the complainant - will take carriage of the complaint.⁸⁹ Thus, the complainant does not require legal assistance and does not incur any costs of the hearing.

The Ontario Human Rights Tribunal has the authority to extend the reach of enforcement against others who knew or ought to have known that an individual was being discriminated against in employment and who, although having authority to penalize or

⁸⁶ See *Human Rights Code*, *supra* note 71, s.41(1)(b) where the Tribunal has the authority to award damages of up to \$10,000 for mental anguish where the infringement has been engaged in wilfully or recklessly.

⁸⁷ *Ibid.* s.32(2).

⁸⁸ *Ibid.* s.34(1).

⁸⁹ *Ibid.* s.39(2)(a); note in s.39(2)(b) that the complainant is a party to the hearing.

prevent the conduct, did nothing.⁹⁰ Moreover, where an infringement has been found, the Tribunal may direct “the party to do anything that, in the opinion of the Tribunal, the party ought to do to achieve compliance with [the] Act, both in respect of the complaint and *in respect of future practices*.”⁹¹

The breadth of these powers illustrates that procedures and remedies under the *Code* surpass those available to an arbitrator who is deciding on a particularized dispute between an employer and an employee. The consequences of the enforcement mechanisms and remedial powers conferred by the *Code* could have a direct influence on current *and future* conduct of employers in relation to basic social values. Further, the employer is held up to public scrutiny of its practices relating to discrimination, and thus is motivated to comply with important public policy issues eradicating discrimination.

While an individual arbitrator may be just as competent as the Tribunal to adjudicate a human rights complaint, the arbitration system itself can be criticized for being a poor cousin of the enforcement scheme under the *Code*. Dissatisfaction with private arbitration as a substitute for public enforcement of discrimination claims led the U.S. Equal Employment Opportunity Commission (EEOC) to issue a policy statement condemning mandatory arbitration agreements for discrimination disputes.⁹² The

⁹⁰ *Ibid.* s.39(2).

⁹¹ *Ibid.* s.41(1)(a). [emphasis added]

⁹² See The U.S. Equal Employment Opportunity Commission, EEOC NOTICE Number 915.002 (July 10, 1997) “Policy Statement on Mandatory Binding Arbitration of

EEOC's claims relate to the private and confidential nature of the dispute resolution mechanism and the consequent loss of public scrutiny of corporate practices related to discrimination. Further, they assert that discrimination laws will not be advanced for *all* individuals since courts will no longer be setting precedents for *all* employers to follow. Moreover, employers will not be motivated to voluntarily comply with discrimination laws if those laws are only "secretly enforced".⁹³ As one American author who favours the EEOC policy concluded:

[P]rivate mandatory-arbitration systems literally squelch the development of the law, giving no guidance either to other companies or employees about standards of conduct. Privacy in arbitration decisions allows an offending employer to continue a reprehensible practice with much more assurance that it will never be assessed punitive damages due to public knowledge of prior bad actions."⁹⁴

Unlike the United States, there is no experience in Canada with an employer attempting to contract out of the enforcement mechanism of the *Code*. Similarly, and perhaps consequently, the *Code* is silent about this possibility and the OHRC does not have a published policy statement on the issue. Nevertheless, one can expect that the reaction of human rights proponents in Canada would be the same as their counterparts to the south.

Individuals who are the object of discrimination are particularly vulnerable to the already greater power of the employer in the relationship. Carriage of the complaint by the

Employment Disputes as a Condition of Employment" available at <
<http://www.eeoc.gov/policy/docs/mandarb.html>>.

⁹³ D. Garrison, "The employee's perspective: mandatory binding arbitration constitutes little more than a waiver of a worker's rights" (Fall 1997) 52 Disp. Resol. J. 15 at 17 [Garrison]. See also Johnson, *supra* note 13 at 533.

Commission seeks to redress that inequality: it is now the power of the Commission as against the employer. Further, given the important public policy goals underlying human rights legislation, the fact that the employee would have to pay the costs of legal assistance or share in the cost of the arbitration process is intuitively contrary to the aim of the publicly-funded legislative enforcement scheme.

Moreover, advocates would be disturbed by the private nature of the arbitration forum, particularly that judicial advancement of discrimination laws would be abandoned.

While human rights statute set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. As an example, absent the role of the courts, there might be no discrimination claims today based on the adverse impact of neutral practices not justified by occupational requirements. There is a danger that discrimination laws would be stultified.

Unquestionably, the OHRC has the authority to investigate and prosecute human rights violations even absent an individual complaint. However, this is a hollow alternative since it is unlikely a complaint would independently come to the Commission's attention.

Legislative silence on the issue of privately arbitrating statutory disputes should not be taken as consent. In terms of public policy, the aim of employment-related statutes is not only to provide for minimum or important statutory entitlements, but also to ensure that

⁹⁴ Garrison, *ibid.*

those entitlements are vigorously enforced. Enforcement is not only crucial for the individual whose rights are being denied or diminished; it is also squarely in the public interest.

The Supreme Court of Canada's statements in a case regarding human rights legislation in a labour relations setting illustrates the importance of preserving the public interest in enforcing human rights legislation. The particular case dealt with mandatory retirement of firefighters at the age of 60 where the terms of the collective agreement negotiated between the parties stipulated retirement at that age. The employer attempted to argue that the union and its members, in adopting the collective agreement clause which set out the retirement age, contracted out of provisions of the *Human Rights Code* prohibiting discrimination on the basis of age. The Supreme Court of Canada declared that such contracting out was void for public policy reasons:

“Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy...

The Ontario Human Rights Code has been enacted by the Legislature of the Province of Ontario for the benefit of the community at large and of its individual members and clearly falls within that category of enactment which may not be waived or varied by private contract; therefore this argument cannot receive effect.”⁹⁵

⁹⁵ *Ontario (Human Rights Commission) v. Etobicoke (Borough)*, [1982] 1 S.C.R. 202 at 211, 13 D.L.R. (3d) 14 [*Etobicoke* cited to S.C.R.].

While this case is not about contracting out of the *enforcement* aspects of the Code, the same arguments could be used. Private resolution of important public policy rights would not be for the “benefit of the community at large”. As one author succinctly stated, “Public justice is obtained through sunshine, not darkness”.⁹⁶

Human rights legislation is intended to provide individual complainants with recourse to independent and powerful investigation and enforcement regimes. As such, it is unlikely that the Ontario Human Rights Commission will allow its authority to be ousted by a private arbitration agreement. Given the quasi-constitutional nature of the legislative instrument, the courts would be likely to support the Commission on this viewpoint.

In conclusion, employment-related statutes exist not only to provide a compendium of rights to employees but also to advance important public policy objectives. As a result, it is unlikely that courts will defer to private arbitration and allow the employer to preclude the employee from seeking redress through the publicly funded enforcement schemes.

Given the similar vulnerability of consumers to suppliers of certain goods and services (as to employees and employers), it is perhaps appropriate to draw an analogy between employment-related statutes and consumer protection legislation. The *Consumer Protection Act, 2002*⁹⁷ aims to protect consumers from certain predatory business practices and prices. In recent amendments, the *CPA* specifically states that the

⁹⁶ Garrison, *supra* note 93 at 18.

substantive and procedural rights given under the *CPA* apply “despite any agreement or waiver to the contrary”.⁹⁸ Further, a term in a consumer contract which stipulates that disputes be submitted to arbitration is “invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act”.⁹⁹ However, the consumer may agree to resolve the dispute using any procedure available at law, including arbitration.¹⁰⁰ Hence, though employment-related statutes are silent as to waiver of enforcement regimes, the court might draw a parallel between these two relationships (employer/employee and consumer/suppliers) in ruling that the employee must not be forced to waive their rights under employment-related statutes.¹⁰¹

The most the employer could seek is that the employee’s complaint under the applicable statute be stayed pending the decision of the private arbitrator. If the decision is ultimately to the benefit of the employee, there would be no need to expend time and resources arguing the case in more than one forum. This benefits both the employer and the employee. If the decision is not satisfactory to the employee, he would still have

⁹⁷ S.O. 2002, c.30, Sch..A. Note that this provision is to come into force on a day to be named by proclamation of the Lieutenant Governor. [*CPA*]

⁹⁸ *Ibid.* s.7(1).

⁹⁹ *Ibid.* s.7(2). Note that had this provision been in force at the time of the *Kanitz* dispute, *supra* note 47, it would likely have changed the result in *Kanitz*.

¹⁰⁰ *Ibid.* s.7(3).

¹⁰¹ Though class actions are outside the scope of this paper, it is likely that the same would be true for employees who wish to access class action proceedings. An example of such a case is *Webb v. K-Mart Canada Ltd.*, 45 O.R. (3d) 389, [1999] O.J. No. 2268 (S.C. J.), leave to appeal refused, 45 O.R. (3d) 638, [2002] O.J. No. 3268 (C.A.) and (same case) *Webb v. 3584747 Canada Inc.*, [2001] O.J. No. 608 (S.C.J.).

recourse to the statutory decision maker. Although the arbitrator's decision would not be binding on the statutory body, it may be given some weight and consideration.¹⁰²

6. Remedies

The parties will have to carefully consider the arbitrator's remedial powers under the arbitration agreement. Lack of attention to this element could lead to unanticipated and potentially undesirable results, as was apparent in the *Glasco* dispute where the employer did not contemplate giving the arbitrator power to reinstate Ms. Glasco in the interim. In addition, the scope of the arbitrator's power to award damages will be critical to both parties, since it will either add to or detract from the advantages and viability of arbitration. Clearly, the employee will not desire substantial limits on the amount of damages she could receive. Otherwise, she would prefer to litigate her claim in court where the jurisdiction to award damages is less constrained. On the other hand, the employer may wish to confine the arbitrator's remedial power, curbing the amount of damages that the employee can receive.

Obviously, as indicated earlier, the arbitrator would have the power to reinstate a discharged employee if the employer was found to have contravened provisions of employment statutes where the legislated remedy is reinstatement. Employment statutes are remedial; the employee must be fully compensated for the harm done. The arbitrator's decision must effectuate those remedial principles. This should come as no

¹⁰² Relying upon the Court of Appeal's decision in *Ford*, *supra* note 76.

surprise to the parties, since the employer should not be allowed to bypass their legislatively-imposed obligations by eliminating the employee's statutory rights. However, assuming the employer has not violated those statutory provisions mandating reinstatement, there would be nothing illegal in limiting the amount of damages that the employee could receive at arbitration, for example, to those they would receive under statute. It is quite legal for an employer and employee to agree that damages for termination are set at the statutory levels, thereby contracting out of the reasonable notice that the common law implies into the employment relationship. There is no compelling argument why they could not do so via an arbitration agreement.

In the absence of clear direction respecting damages in the arbitration agreement, the arbitrator will rely on the statutory scheme under which he is conducting the arbitration. For example, under the *Arbitration Act, 1991* the arbitrator must “decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies.”¹⁰³ The arbitrator can also make interim awards.¹⁰⁴ In rendering a decision, the arbitrator may award costs, including the costs of legal fees, the fees and expenses of the arbitration and other relevant expenses.¹⁰⁵ Further, the arbitrator can take into

¹⁰³ *Arbitration Act, supra* note 60, s.31.

¹⁰⁴ *Ibid.* s.41.

¹⁰⁵ *Ibid.* s.54.

consideration any prior offers to settle in determining the cost award.¹⁰⁶ These powers mirror or are similar to the powers of the court.¹⁰⁷

If the arbitrator's remedial powers are unpacked, it would appear that the arbitrator acting under the *Arbitration Act, 1991* could:

- Decide the dispute in accordance with common law principles in Ontario. Thus, he would be bound by jurisprudential precedent;
- Award equitable damages, including reasonable notice for wrongful dismissal in accordance with established equitable principles and punitive damages;
- Order specific performance, which could extend to an order to reinstate a wrongfully dismissed employee into his pre-dispute position;
- Grant injunctive relief, such as when an employee has breached a restrictive covenant (e.g. a non-compete clause);
- Award full or partial costs against a party.

Given the breadth of the arbitrator's powers, it is critical that the parties turn their mind to whether those powers should be limited or circumscribed in any way. The employer will likely not want the arbitrator to find jurisdiction to reinstate an employee into a position even if the employee is found to have been wrongfully dismissed (absent statutory breaches). As stated earlier in discussion of *Glasco*, the possibility of reinstatement is not firmly barred in the common law. Hence, the employee may wish to explicitly proscribe reinstatement from the arbitrator's remedial power. Since, despite *Glasco*, reinstatement

¹⁰⁶ *Ibid.* s.54(5).

¹⁰⁷ The powers of an arbitrator are more constrained under the *Labour Relations Act, 1995*, *supra* note 7. An arbitrator can not award payment of legal expenses against a party, nor can an arbitrator award interim reinstatement of an employee. Further, though

is rarely ordered in the common law, the employee is not in effect adversely impacted by this exclusion merely because her dispute is adjudicated rather than litigated. Similarly, the employer may wish to limit punitive damages.

The fact that the arbitrator must decide the dispute in accordance with common law principles should give comfort to the parties. Remedies will flow from established and presumably well reasoned jurisprudence and the arbitrator will act within that framework, subject to any agreed-upon and legally binding limitations to his powers.

7. Appeals and Judicial Review

Another important consideration for the parties relates to the level of review of the arbitrator's decision. The parties want a cost-effective, efficient, and *lawfully* final and binding decision otherwise either or both of them would not have chosen arbitration as a feasible dispute resolution forum. There is simply no point in submitting a dispute to arbitration and then having the results of the dispute subject to escalating appeals to the court. The benefits of arbitration are lost and the parties would have been better off to proceed through litigation in the first place. The choice lies in the degree to which the arbitrator's decision can be reviewed.

The *Arbitration Act, 1991* provides for various levels of review depending on the language of the arbitration agreement, as follows:

he can award costs of the arbitrator against a party, the arbitrator does not have explicit

1. *If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court 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 question of law at issue will significantly affect the rights of the parties.*
2. *If the arbitration agreement so provides, a party may appeal an award to the court on a question of law.*
3. *If the arbitration agreement so provides, a party may appeal an award to the court on a question of fact or on a question of mixed fact and law.*¹⁰⁸

Hence, the agreement can provide for review on a question of law or a question of mixed fact and law. In the absence of language, either party may apply for review to the court on a question of law but leave will be given by the court only under the stipulated circumstances. Where the agreement is silent, the parties should expect at minimum that leave will be granted on a question of law given the importance of employment rights. In addition, since arbitration agreements in a nonunion context are the exception, the court would likely want to establish some guiding principles for future disputes.

A separate but complimentary attack on the arbitrator's decision could be launched by an application to the court to set aside the arbitration award. Section 46 of the *Arbitrations Act, 1991* provides that a party may request an award be set aside if, *inter alia*, the agreement is legally invalid, the matter or the resulting decision is beyond the scope of

authority to take into consideration any prior settlement offers in the award.

¹⁰⁸ *Arbitration Act, supra* note 60, s.45.

the agreement, the issue in dispute is not capable of being the subject of arbitration under Ontario law, or if the hearing process was flawed through procedural unfairness, bias or fraud.

A party contesting an award, particularly where there is a restrictive right to judicial review, should attempt to position the application within both sections of the Act to ensure judicial attention. Once the court has decided to intervene, the next question is the standard of review that the court will employ to review the decision. This is founded in administrative law principles and requires a standard of review ranging from “patent unreasonableness” to “correctness”. On the one end of the spectrum, more deference is given to the decision maker and courts will only intervene when the decision is “clearly irrational” or “evidently not in accordance with reason” or “so flawed when no amount of curial deference can justify letting it stand”.¹⁰⁹ At the opposite end of the spectrum, less deference is accorded and the adjudicator will be required to have reached the correct decision. The latter standard dictates a more searching and intensive review and is usually employed when the decision maker is determining a question of law or a question of jurisdiction. The court will impose a standard of correctness particularly when it determines that the decision maker has no greater authority, expertise or experience than the court does in the issues and law in dispute. Somewhere in the middle of these two

¹⁰⁹ See *Law Society of New Brunswick v. Ryan*, [2003] 1. S.C.R. 247, [2003] S.C.J. No. 17 and cases cited therein.

extremes, correctness and patent unreasonableness, lays a test based on reasonableness simpliciter.¹¹⁰

Glasco involved both a request to set aside the award and a judicial review of the arbitrator's interim award. The employer in requesting that the court set aside the award claimed that the arbitrator had denied the employer fairness or natural justice by not allowing cross-examination of the employee during the interim arguments, thus engaging section 46 of the Act. Swinton J. determined that the standard of review on the issue of procedural justice was one of correctness. Consistent with decisions of the Supreme Court of Canada, she ruled that a breach of natural justice (in this case knowing the case to be met and being able to respond to that case) was an excess of jurisdiction. Hence, the employer had to prove that the arbitrator exceeded his jurisdiction by not permitting cross-examination of the employee. In the result, the employer was unable to do so.

In considering the motion for leave to appeal the decision, it is interesting to note that the court reviewed the language of the agreement as to the parties' intention on the right to appeal. The fact that the language called for "binding" arbitration but did not include "*final and binding arbitration*" indicated that the agreement did not "impliedly express[]

¹¹⁰ For a concise review of the factors that the court takes into consideration in reaching the appropriate standard of review, see *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at 238-242, [2003] S.C.J. No. 18 [*Dr. Q.* cited to S.C.R.].

the intention to exclude the right to appeal”.¹¹¹ Further, and in support of my earlier contention, Swinton J. concluded that appeal should be granted because the rights in dispute were important to the parties.¹¹²

The appeal of the arbitrator’s decision concerned a question of law – whether the arbitrator had jurisdiction under the *Arbitrations Act, 1991* to reinstate the employee, in effect banning the employer from not renewing the dancer’s contract. Swinton J. set the standard of review at one of correctness, noting that “there is no greater expertise in the arbitrator than the courts in the application of the law relating to interlocutory injunctions”.¹¹³

The scope of the court’s review function was emphasized as being limited to errors of law and not to the facts of the case or the reasonableness of the result. The court found that the arbitrator applied the correct principles of law to the facts as he found them. The following passage in the judgement underscores the need for the parties to settle the rights to appeal through express language in the arbitration agreement:

“The Ballet’s real quarrel is with the findings of fact made by the arbitrator, and his conclusions when he applied the legal principles to those facts and exercised his discretion to award interlocutory relief...The Ballet agreed to give him jurisdiction to make such findings of fact or mixed fact and law, and did not obtain an agreement to allow appeals on such questions of fact or mixed fact and law. Therefore, this ground of appeal fails.”¹¹⁴

¹¹¹ *Glasco, supra* note 57 at 244.

¹¹² *Ibid.*

¹¹³ *Ibid.* at 245.

¹¹⁴ *Ibid.* at 249.

It can be concluded that the standard of review on questions of law and on the scope of the arbitrator's jurisdiction will be on the basis of correctness. However, if the parties agree to permit appeals on mixed questions of fact and law or on findings of fact, the standard will be less obvious. It is relatively well settled that in a labour relations context, arbitrators are given wide deference and are generally held to a standard of patent unreasonableness on these questions.¹¹⁵ The jurisdictional powers conferred on these arbitrators by statute, the recognized experience and expertise of arbitrators in adjudicating labour relations disputes, and the overarching purpose of labour relations legislation are factors the courts rely upon to support this level of deference.

Arbitrators in a nonunion employment context would not be given the same amount of deference. There is no statute governing employment arbitration, unlike labour relations arbitration. Although the *Arbitration Act, 1991* is a valid statutory mechanism under which to adjudicate a dispute, its primary purpose was not for employment disputes.

While the parties may use an employment law expert as the impartial third party decision maker, the courts will not find that the individual has greater expertise. Nonunion employment disputes have been the purview of common law courts and, absent

¹¹⁵ See for example Laforest J.'s comments in *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 584, [1993] S.C.J. No. 20 [*Mossop* cited to S.C.R.] that labour boards and arbitration panels are given a considerable measure of deference even on questions of law falling within the area of expertise of these bodies because of their highly specialized function in the labour relations environment, along with the role and

legislative direction, it is unlikely that a court will easily oust its jurisdiction. Finally, an arbitrator making a decision pursuant to an arbitration agreement is not deciding within the context of a larger institutional policy setting, unlike labour relations arbitrators who are resolving disputes within a statutory labour relations regime (the overall scheme of the *Labour Relations Act* aims to foster labour/management relations).

Furthermore, the Supreme Court of Canada has signaled that less deference will be given to two-party disputes than to those which engage policy issues or involve the delicate balancing of multiple sets of interest or considerations. The Court has said: “The more the legislation approximates a conventional judicial paradigm involving a pure *lis inter partes* determined largely by the facts before the tribunal, the less deference the reviewing court will tend to show.”¹¹⁶

The three distinctions between labour and nonunion employment arbitration, together with this statement on two-party disputes, would support a conclusion that the court will apply a standard of review of correctness on questions of law, including the jurisdiction and scope of the arbitrator, in an appeal or judicial review of nonunion arbitration awards. If the agreement provides for appeal on questions of fact, or mixed questions of law and fact, the standard will be on the basis of whether the arbitrator’s decision was reasonable. Perhaps as more successful experience is gained with the use of arbitration agreements,

functions accorded to them by their constituent statute, such as the *Labour Relations Act*, in the operation of the legislation.

particularly if upheld on appeal or judicial review, the courts would gradually move toward using a more deferential standard.

The employer should not fear judicial intervention so much that it militates against using an arbitration agreement. After all, if the employee litigated his claim, he may have it appealed to a higher court. The caution remains, however, that the parties should decide the extent to which appeals will be permitted from an arbitrator's decision since that will impact on the potential cost and time implications of securing a final and binding decision. In addition, the arbitrator should be required to give substantive and comprehensive reasons for her decision in the event the court is required to review the award.

Conclusion

It should be apparent that judicial crowding will only be alleviated through the use of fresh approaches to dispute resolution. In Ontario, mediation, simplified procedures and a higher ceiling for small claims have all been attempted. Still the dockets are congested and litigants are waiting three to five years to have their day in court. Moreover, the costs of litigating a dispute are beyond the reach of most plaintiffs. While successful in employment disputes, such as for wrongful dismissal claims, mandatory mediation has added to the costs for those 53% of plaintiffs who do not, or can not, settle through

¹¹⁶ *Dr. Q.*, *supra* note 110 at 241.

mediation.¹¹⁷ And still they do not have a final resolution of their rights. Given these delays and the economic and psychological costs of litigation, it may be time for employers and employees to consider arbitration as a means to resolve nonunionized employment disputes.

Arbitration is a well-established mechanism for the determination of disputes outside of the usual trial processes. It has a long and venerable history in the labour relations arena and in commercial disputes. As such, it is not a novel notion. An arbitration agreement, if designed suitably and carefully, can pave the way toward a more informal, less expensive, and less cumbersome resolution of the dispute. There is no evidence that arbitration diminishes the quality of justice; in fact it may enhance it if the parties use an impartial decision maker who has an added degree of expertise in employment law.

Nonunion arbitration is, however, not a “one size fits all” proposition. Because of the power differential between an employer and an employee, it may be more appropriately used if the employee is a sophisticated, seasoned or senior level employee. It will not be suitable for an employee who does not otherwise have knowledge of her rights or can not appreciate what rights he or she will be relinquishing, particularly if arbitration is made mandatory, remedies are circumscribed, costs are shared, or procedural protections are curtailed through the language of the arbitration agreement. The prudent employer should ensure that there are benefits to the employee when the employee agrees to or is

¹¹⁷ Weir, *supra* note 2.

required to resort to arbitration, that the employee is aware of the condition pre-hire and that the employee is fully aware of her rights. Encouraging the employee to seek legal advice is preferable.

When crafting an arbitration clause or agreement, careful attention should be paid to what disputes are to be covered, the choice of arbitrator, procedures to be used, the scope of the arbitrator's powers, and the range of remedies available. The agreement should connect to existing statutes, such as the *Arbitration Act, 1991* or the *Labour Relations Act, 1995*, and to protocols which provide guidance in employment dispute matters, such as those offered by the American Arbitration Association or the National Academy of Arbitrators. Amendments can be made to better suit the needs and circumstances of the particular parties. The availability of various levels of appeal or judicial review should also be attentively deliberated and defined.

Of particular importance is the question of how the employee's rights and remedies under various employment-related statutes will be managed, both outside and within the arbitration forum. It is unlikely that the employee can agree to, or can be forced to waive her rights to the publicly funded enforcement schemes under statute. However, the employer can seek to stay the other proceedings pending determination of the merits of the employee's case at arbitration. Nevertheless, the arbitration agreement should expressly stipulate that the employee would continue through arbitration to be able to

receive her statutory rights and remedies, and that the employer will abide by statutory obligations.

Overall, for the agreement to be legally binding, the intent of the parties, and the language used to reflect that intent, should embody a fair, impartial, reliable and balanced process for both parties. The end result should be a final and binding decision that preserves as much as possible the rights, interests and relationship of the parties.

I have attempted to demonstrate through this paper that nonunionized arbitration can be an effective and efficient substitute for litigation of certain employment disputes. Not everyone will be convinced of its viability and efficacy as a worthy surrogate. There will still be detractors, those who believe, without the benefit of experience or empirical research, that arbitrators will be biased; that employees will be subjected to greater power imbalance; that arbitrators will step into the shoes of management and make unpalatable decisions; that it is not in the public interest to arbitrate employment claims privately; or that arbitration is generally unsuitable for other phantom reasons.

True, arbitration will have its downsides. However, condemning it without evidence, is like saying a rose is no good because it has thorns. There is a saying, "The pessimist scorns the fact that roses have thorns. The optimist gives thanks that thorns have roses". Arbitration, despite its thorns, has the potential to provide benefits which should not be discounted at first blush. In the appropriate circumstances, with the best of intent, and in

the shadow of a clogged and costly court system, it may offer greater access to justice than is available today.

**This Thorn has Roses: Can Arbitration be Used to Resolve
Non-Union Employment Disputes?**

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Arbitration Agreements: Questions to Consider

Following are questions that the parties may wish to consider when contemplating and designing an arbitration agreement.¹¹⁸ Note that some of the considerations will dictate the answer to another question. For example, if there is a right to appeal involving findings of fact, the parties will wish to have more comprehensive reasons for the award.

I. Considering an Arbitration Agreement:

- Will the agreement be mandatory or voluntary for the employee?
- If mandatory, is it supported by adequate consideration pre-hire or post-hire?
- Does the employee understand his rights under common law, statutes, and arbitration and appreciate how those rights might be affected?
- Has the employee been encouraged to seek legal advice?
- Will the employee be able to continue to access internal dispute resolution mechanisms?
- Are there deadlines under which the employee has to choose the arbitration option?

II. Designing the Arbitration Agreement:

- Which disputes will be covered by the arbitration agreement?
- How will the employee's rights and the employer's obligations under employment-related statutes be maintained?
- Will the employee agree to stay other proceedings pending the arbitration hearing?
- Which statute will be used to underpin the arbitrator's jurisdiction?
- Are there provisions of the statute which should be excluded?
- Who will be the arbitrator or how will the arbitrator be selected?
 - Is that individual independent, impartial and unbiased?

¹¹⁸ See also Barry Fisher, "Arbitrating a Wrongful Dismissal Action" (Paper presented to the Canadian Bar Association, Ontario. Alternative Dispute Resolution Section, September 23, 1992). Many of these points are drawn from that Paper.

- What procedures will the arbitrator use to ensure a fair and balanced hearing which will guarantee procedural protections but at the same time will expedite the process and lower costs?
 - Time and location of hearing
 - Pleadings and exchange of documents
 - Motions and interim matters
 - Examinations for discovery
 - Witnesses
 - Delays
 - Laws of Evidence to Apply or Not
 - Transcripts of Hearing
- Will the arbitration award be confidential?
- Will the arbitrator be given the power to consider offers to settle?
- Will the arbitrator be required to give written reasons in his award?
- How soon after the hearing will the arbitrator be required to give his reasons?
- How will costs of the arbitrator and arbitration process be handled?
 - Employer-paid? Shared?
- Will the arbitrator's remedial powers be limited in any way?
- Will the arbitrator retain jurisdiction to award costs, fees and interest against a party?

III. Appealing the Arbitration Award:

- Will the parties have a right to appeal the decision?
- Will the appeal be on questions of law, mixed questions of law and fact, or questions of fact?
- What are the time limits on appeal?