

# **Arbitration for Unanimous Shareholder Agreement Disputes**

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*Unanimous Shareholder Agreement Disputes*

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## ARBITRATION FOR UNANIMOUS SHAREHOLDER AGREEMENT DISPUTES

### I. CAN YOU AGREE TO ARBITRATE USA DISPUTES?

#### A. General Principles

1. Key distinction: arbitrability versus scope of arbitral clause
2. Arbitrability: claim capable of resolution by arbitration (need not be decided by a court)
3. Generally, all disputes are arbitrable:
  - (a) Party autonomy generally exists
  - (b) Few exceptions
4. For instance, the Quebec *Civil Code* excludes from arbitration only “[d]isputes over the status and capacity of persons, family members or other matters of public order”
5. *Desputeaux v. Éditions Chouette (1987) inc.*, 2003 SCC 17:
  - (a) The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding, subject to applicable statutory provisions (para. 22)
  - (b) Arbitral clauses are interpreted liberally, in favour of finding intention of the parties to submit disputes to arbitration (para. 35)
  - (c) This case involved a copyright dispute
  - (d) Even though the *Copyright Act* assigned exclusive jurisdiction to the Federal Court, concurrently with the provincial courts, to hear and determine all proceedings relating to the Act (para. 41), that was found:
    - (i) Merely to explain which courts had jurisdiction to decide copyright disputes (in the absence of an arbitral clause to the contrary) (para. 39)
    - (ii) Not to prohibit the determination of copyright disputes outside of the public judicial system, through arbitration (e.g., para. 40)
  - (e) A statute (in this case, the *Copyright Act*) “cannot be assumed to exclude arbitral jurisdiction unless it expressly so states” (para. 42)
    - (i) Potential tension between this statement in this decision, and the decision in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, that favoured consumer protection legislation over party autonomy to agree to arbitrate

- (f) Section 37 of the *Copyright Act* assigned shared jurisdiction in respect of copyright to the Federal Court and “provincial courts”
  - (i) SCC found that to be sufficiently general to include arbitration procedures created by a provincial statute (para. 46)
- 6. Classic examples of non-arbitrable subject matter:
  - (a) Criminal or other penal matters
  - (b) Tax (involving determination of amount payable to a government, as distinct from the resolution of tax issues ancillary to a dispute between private parties)
  - (c) A final order for divorce (as distinct from matrimonial property or support disputes)
- 7. Scope of arbitral clause:
  - (a) Arbitration is a creature of contract
  - (b) Courts are generally required to stay court proceedings about disputes covered by arbitral clauses (e.g., *Alberta Arbitration Act*, Section 7)
  - (c) Parties are generally required to honour their agreements to arbitrate, just like any other agreement
  - (d) Determining scope of the arbitral clause is governed by the usual rules of contractual interpretation
  - (e) Some clauses are all-encompassing, including any kind of dispute (whether arising from contract, tort, equity, or statute) that may in any way arise from or in connection with the “host” agreement
  - (f) Some clauses are not all-encompassing:
    - (i) Sometimes, poor drafting
    - (ii) Sometimes, intentional choice (e.g., choosing court or expert determination for some kinds of disputes under the “host” agreement)
- 8. Therefore, the scope of any arbitral clause:
  - (a) Is subject to few inherent limits
  - (b) Is to be interpreted liberally, in favour of arbitration versus the courts
  - (c) Depends on what it says