Lawyered – Episode 80
Arbitration Law ft. Alex Mitretodis
Episode Transcript

[00:02] HUSEIN: This is Episode 80 of Lawyered. I'm Husein Panju. And on the Season Eight finale, we are chatting with Alex Mitretodis, about what's new in the area of arbitration law. First up, we'll chat about the dynamics between arbitration clauses and consumer protection. A new series of case law is providing some new commentary about when these clauses will be deemed unconscionable, and we'll find out what the legal test is, and what this means for consumers and commercial entities.

[00:31] Next, we'll speak about a brand-new Arbitration Act out of British Columbia, and a new set of procedural rules for the Vancouver International Arbitration Center. We'll also dive into the unique use of predictive analytics and technology for those in the arbitration bar. And finally, in our Ask-Me-Anything segment, we will cover some arbitration questions submitted by members of our Lawyered Patreon community, including questions about access to justice, how one might decide whether or not to go the arbitration route, and Canada's status as an arbitration-friendly jurisdiction. All that and a lot more is coming up in just a bit. That's is Lawyered.

[Music Break]

[01:15] HUSEIN: Hello, there, and welcome to another episode of The Lawyered Podcast, and welcome to our Season Eight finale. I think this happens this time every year. I'm just filled with so much gratitude and appreciation for all of you for supporting the show all this time. Because, as much as I enjoy producing and hosting this show, it is a grind. Releasing these bi-weekly episodes is not easy, but I'm very pleased with how the last panelists on our last episodes have gone this season.

And as you may have noticed, I put an intentional emphasis on showcasing our professionals' diversity, whether that be ethnically or geographically and ideologically. It's taking a bit more effort in curating the show, but I do maintain that the show is better off for it. So, I want to give a lot of thanks as always to all of our patrons for both their financial and emotional support. And thanks to all of your help, we're able to release this episode regularly at our bi-weekly pace, with high-quality production, and full transcripts.

[02:23] And I'll note that I've been hearing a lot of great things about the transcripts from a lot of people some of them have been regular listeners, or a lot of them have not been, because there are some people, for whatever reasons prefer to read these transcripts in terms of understanding the concepts and being able to process it. And the whole point of this is to make this content more accessible to more people. So, fear not, we have a lot more transcripts coming up in our future seasons, as well.

[02:50] We have Season Nine coming next year, we've got bonus episodes queued up in the middle as well. And again, now that we have a lot of support, we still try to take the show to the next level as well. So, I have a few more ideas of things we can do with some more support to make the show even better. So, if you're interested in becoming a patreon, please consider doing that on our Patreon website. If you want to remain a regular listener, happy to have you in that capacity as well. And of course, if you have any suggestions about things you want to see, or hear to make the show better, or things you do not want to see or hear to make the show better, I really do want to hear them.

[03:30] The whole purpose of the show is to make the law more accessible to more people. So, any feedback you have about the show itself, or the rewards, or any other suggestions you may have about the law, generally, happy to hear it. And you can do that by email or social media and all the links are on our website as well. So, I wanted to just close this all by saying thank you, thank you to everybody who has been listening and sharing and guesting, helping with the production, and supporting in whatever ways available to you. It genuinely means the world to me that this show is providing value to so many people. And I just want to let you know that I'm so grateful to all of you for your support and looking forward to producing more content for you in the months and years to come.

[04:18] In our previous episode, we shared a very engaging episode about the area of Insurance Law with our guest, Dennis Ong. And I'm sure that when many of you think of the words "Insurance Law", the term engaging may not be the first thing that you think about. But trust me, this episode had a lot of punch to it. So, our guest Dennis has a lot of experience as a reputable litigator in the area of insurance defense. He's also a small claims court judge and the chair of the Ontario Bar Associations Insurance Law Section. So, he is someone who clearly knows what he's talking about.

[04:56] We spoke about the role that delays play in civil jury trials. We spoke about the tactical considerations of third-party litigation funding and a really interesting chat about the legal meaning of the term "physical damage". And one theme that emerged from the substantive segment and from the Ask-Me-Anything segment, is the whole concept of risk. So, risk is something that everybody deals with as part of pretty much any profession, whether you're a lawyer or not. And this term is especially central for those who work in Insurance and Insurance Law.

[05:32] And so Dennis provided some very thoughtful ideas. And we had a pretty deep conversation about how lawyers can manage both risks, and the expectations for risk when dealing with clients and with the courts as well. So, I give you my whole endorsement that the episode was well worth listening to, if only for that snippet alone. So, if you want to check that out on our website, or your Podcast app, that's Episode 79, about Insurance Law.

[05:59] And today's episode is about the area of Arbitration Law. And I would say that as a professional, I know that we talk a lot about alternative dispute resolution or ADR which can take many forms, in terms of resolving disputes and considerations when you're in litigation proper. And what I've learned is that the area of arbitration is a big part of this, but one that's quite specific in nature. And our guest today is someone who knows a lot about this area, inside and out and provides a very fresh take on some legal developments in this area and all the tactical realities as well. So, I'm really excited to share this episode with you. And without further ado, here's our chat with Alex Mitretodis.

[Music Break]

[06:45] HUSEIN: Alex is the Litigation and Dispute Resolution partner in Fasken's Vancouver office. With a practice in International and Domestic Commercial Arbitration and Class Action Defense. Alex is recognized as a "Future Leader" by Who's Who Legal Arbitration, and a "Rising Star" in Dispute Resolution by Legal 500. And as a "Rising Star" in Alternative Dispute Resolution by the International Institute for Conflict Prevention and Resolution.

[07:12] Alex is also a director of the Vancouver International Arbitration center and is on the advisory board as the past president of the Young Canadian Arbitration Practitioners, also known as YCAP. She also teaches Civil Procedure as an Adjunct Professor at the Peter A Allard School of Law at the University of British Columbia and has appeared as counsel before all levels of court in British Columbia, as well as the Federal Court and the Supreme Court of Canada. She's very knowledgeable in a variety of arbitration rules. And her expertise includes cases with most of the major international arbitral institutions. So, Alex, thanks for joining us on the show today.

[07:49] ALEX: Thanks for having me.

[07:50] HUSEIN: Yeah, of course. We were chatting a bit offline. I've become very interested and curious about lawyers' side hustles, or other hobbies. I remember when you were speaking at one of our old conversations about you having a dance background before going to law school. Tell us a bit more about that.

[08:07] ALEX: Yeah, I do. My mom was a professional dancer in ballet. And so she put me in dance at a young age. And so I competed in ballet, contemporary, and jazz growing up. And then started doing some internships and then eventually teaching and choreographing and put myself through university and law school paying that way.

[08:30] HUSEIN: That's very impressive. Do you find that there's any overlap in terms of your skill sets between you're dancing, and you're now arbitration or law practice?

[08:40] ALEX: It's funny, I actually think the reason I was drawn to litigation and arbitration is because there's a performative element. We're in court, you're performing and we call it the art of advocacy. And so from all the years of performing in dance, it actually drew me towards that area of law.

[08:59] HUSEIN: Yeah, I can see that. Especially in litigation, I feel like, it's almost like a metaphor. It's like, law is this dance and this litigation and navigating through different things and knowing your steps to be able to improvise. I'm sure that there's some of that crosses over.

[09:16] ALEX: Yeah, we've definitely joked at the firm that I should do an opening submission argument through contemporary interpretive dance at some point.

[09:24] HUSEIN: Yeah. I think there's room for that! Well, speaking of which, we have a bunch of interesting topics to speak about in this area of Arbitration Law, which is an area that, as I mentioned in the intro, you have a lot of background in, and one of the areas and the first one we're speaking about, is the area of consumer protection, and the enforceability of arbitration clauses. And over the past couple of years, there have been numerous high-profile cases dealing with the enforceability of arbitration clauses in the era of consumer protection.

[09:59] And these cases, typically relate to provisions in standard-form contracts, in which the consumer typically does not have the discretion to negotiate. And the new case from the British Columbia Court of Appeal adds this line of jurisprudence and provides some new guidance on what waiver clauses can be enforced and the role of unconscionability. Okay, so Alex, I know that there was this important case, where we're going to start from 2020, involving the case of Uber and Heller. And that this case spoke about the enforceability of an arbitration clause. Can you tell us briefly what happened in that case?

[10:34] ALEX: What often happens in arbitration is you have two commercial parties put in their contract, that if any disputes arise between the parties, they will go to arbitration instead of litigation. And the main benefit of that is, you want to keep your dispute private and confidential. You want to be able to pick your decision maker, and you want to have more control over the process and possibly a more efficient process.

[11:02] So, what we're seeing a rise of though, is some of these big corporations are including arbitration clauses in their standard form contracts, which of cours e, they're not negotiating with the

other side. So, the key takeaway from that case is the Supreme Court of Canada found an arbitration provision used by Uber in their standard form agreements with their drivers was invalid and unenforceable under the doctrine of unconscionability. And the reason for that was the upfront costs associated with commencing an arbitration, which effectively prevented drivers from pursuing their claims. So, really an access to justice issue.

[11:42] HUSEIN: In that Uber and Heller case dealing with that arbitration clause, what was the impact coming out of that decision?

[11:49] ALEX: So, what the Supreme Court of Canada did was they that they put a two simplified factor test for unconscionability. And so the first thing they said in the Uber case was that there was a clear inequality of bargaining power. And that the clause was in a standard form contract, the plaintiff was unable to negotiate, and that there was a gulf of sophistication between him and Uber, which is, of course, a large multinational corporation. And then the second factor in their test is that the agreement itself contains no information about the upfront costs.

[12:30] So, what typically happens in arbitration is you have to do a filing fee to commence your arbitration. We have those in court as well. But in court, they are a couple of hundred. Here, it was $14,500 in US dollars, and the arbitration was going to take place in the Netherlands. And so the upfront cost was not in the contract. And so in the court's view, the plaintiff could not have surpassed the significant hurdle to be able to get any kind of legal access to justice there.

[13:05] HUSEIN: Okay. Now, I know that there are a number of cases dealing with this issue. And one of the most recent ones stemming from this issue you talked about is a case out of the British Columbia Court of Appeal, and this case is called Piers and Four Pillars Consulting Group, I will put all the links citations on our website in the show notes, but the citation here was 2021 BCA198. So, Alex can you talk to us about the facts of this Piers case?

[13:33] ALEX: So, Paul Pierce was the proposed representative plaintiff in a class action of consumers who paid the defendant, which was Four Pillars here for various insolvency-related services. And he sought to certify a class action alleging that Four Pillars business was in violation of the Bankruptcy and Insolvency Act and the Consumer Protection Act. So, he argued that consumers who had signed a standard form agreement were barred from being class members on the basis of the clause in the agreement that waive to the rights of customers to participate in a class proceeding.

[14:19] And so that's known as a class action waiver. So, it essentially prevents someone from coming together as a collective and bringing an action against the defendant, and they have to bring individual

actions through arbitration. And so, the lower courts, the BC Supreme Court, held that a class action waiver clause is unenforceable. They certified it as class action. And then Four Pillars appealed it to the BC Court of Appeal.

[14:46] HUSEIN: Got it. So, tell us what happened when it got all the way up to the Court of Appeal in terms of the court decision.

[14:52] ALEX: So, the Court of Appeal confirmed that what the contract did was limit the parties' access to a class action or to a representative action. And if it does that it will almost always be unenforceable. And if not due to unconscionability, due to public policy reasons. And so they unanimously upheld the judgment from the lower court and found that it was unenforceable, the arbitration clause and the waiver clause.

[15:24] They actually relied heavily on the Uber decision here. And again, they noticed this gulf of sophistication. And so when you have a nationwide franchise, and you have a nationwide customer base, who are all more vulnerable, and there's this gulf of sophistication in negotiating, and there isn't really even a negotiation, they're just reading the agreement, they're probably not getting legal advice on it, and then they're signing the agreement. There's no input in the drafting of this from the customer.

[15:57] And so that's what gives rise to unconscionability. And that really ties to what we were just talking about with Uber decision. And what ties into that on the unconscionability front, is Four Pillars, argued that the agreement was drafted in plain language. And so that was part of what they said in their submissions. But the court nevertheless found that the customers probably did not understand the unusual or onerous effects of what the clause did to limit their rights when they entered into the agreement.

[16:32] HUSEIN: For sure. And I imagine that from a public policy standpoint, there's some clear lack of access to justice issues, if they're going to force consumers who, again, you mentioned this, [Inaudible 00:16:41] to go this route. And I don't know personally too much about class action. But I know that part of this is that is not really cost-effective to go in and try to apply on your own. Sometimes it makes more sense to go in as a group. So, was that something that factored into the court's consideration?

[16:56] ALEX: Yeah. What the court actually did was, they noted three aspects of the class action that makes them critical to our judicial system. And they said that what class actions do is they preserve judicial resources by avoiding duplication of actions. They improve access to justice by sharing costs,

like you were just saying across the class, and they safeguard against widespread but individually minimal harm. And so what the Court of Appeals said was enforcing a class action waiver clause would encroach on the very purpose of what a class proceeding is.

[17:35] HUSEIN: So, we have this helpful guidance, you know, continuing on this chronology of these decisions, but I'm curious about what you think this means for lawyers going forward? Because I know that class action waivers are already a contentious issue. And there are some provinces like Ontario that explicitly prohibit these waivers from going into contracts. But I was curious whether this line of cases has any broader impacts, either in other provinces or nationwide.

[18:02] ALEX: So, what clearly is the trend that we're going to continue seeing is consumer protection class actions. We're seeing the growth of those in the US and in Canada. And so on the one side, we have the trend of more consumer class actions. On the other side, we have the trend of an increasing number of corporations seeking to resolve their disputes through arbitration, through binding arbitration clauses in their commercial contracts.

[16:32] But I think that the key takeaway to remember here is that in Canada, arbitration provisions are generally enforceable. And that comes from the Wellman vs TELUS case. So, they are by default enforceable. Unless there is a legislative override, or they are unconscionable. And where they're going to have the most enforceability issues and unconscionability issues is in a consumer context. So, if you're in a business context, it's likely to be enforceable. If you're in a consumer context, it won't be.

[Music Break]

[19:14] HUSEIN: As technology continues to evolve, we've seen a dramatic rise in the types of analytic tools that can provide for predictive methodologies in arbitration. These resources are of great help to practitioners and may see an eventual shift to eventually having decision-makers that are AI-based instead of humans. And although we're still several years from this specific reality, this scenario does present important legal, practical, and ethical questions. So, Alex, we're having this discussion in early November 2022. And I know that there was a recent report from the International Chamber of Commerce about this topic of leveraging technology for a national arbitration proceeding. So, can you tell us a bit more about this report and some of the key findings from that?

[20:00] ALEX: So, this report is the result of a survey of over 500 members of the international arbitration community. And what the report focuses on technology tools and practices that can make arbitrations more efficient, and effective, and ensure fairness of proceedings and equal treatment of the parties. And you see, some of these issues arise more in international arbitration than perhaps in

just domestic litigation in Canada, because you're dealing with parties from different countries, that may be from different parts of the world that have different access to things.

[20:38] And so the goal of this report is to help level the technological playing field. And so, I'm definitely not going to… it's a long report, I'm not going to cover all of it. But Husein, what I wanted to do was just highlight a couple of things, one in particular, just about technological competence when picking an arbitrator, because this is something people are increasingly talking about in the arbitration space. And so what that includes is awareness and attention to cybersecurity and data privacy issues.

[21:13] And the reason again, this becomes so much more prominent and important in the international arbitration space is because you have parties located in different jurisdictions, and there may be different privacy laws in each of those jurisdictions. One tip that I would give is, when you're nominating an arbitrator, you're often in communication with them about whether they have the right substantive background or technical background for the case. But you may also want to consider asking them about their familiarity and ability to use certain technological tools. So, I think if all things being equal, you may pick the arbitrator who has experience with certain technological tools.

[21:56] HUSEIN: Yeah, absolutely. Speaking of technological competency, I know that there are a lot of tools right now that lawyers are using, for their case prep and advising clients that are very analytics-based. Can you tell us a bit more about what these are and how those work?

[22:13] ALEX: So, yeah, the most common one that I think arbitration practitioners are going to be familiar with and so will litigation practitioners is predictive coding and electronic document production. And so what predictive coding is, it's a form of supervised machine learning AI, by which relevant documents or documents responsive to a document request or tribunal order are identified by an algorithm. And then the algorithm is trained by human-generated coding. What you would do is you would take a batch set of documents, and you would review them manually, and code them.

[22:57] And you're essentially training the system to understand what kinds of things you think as a human are relevant, not relevant privilege, not privilege, etc. And so the system will keep sending you batches of what it wants you to review to train it. And you're essentially just doing a very small percentage like it could be less than 10%, that you're training the system that you've done a manual review of. And then what the system will do is it will spit out to you and say, "I've done my review, I'm 100% certain about these ones. I'm 50% certain about these, and I'm 10% certain about these".

[23:34] And what you might then do, though, is then put human eyes on the ones that are under 50%, let's say. And that really just depends on the volume you have and what you've potentially disclosed or

negotiated with the other side on this. And what the potential benefits of this are cost savings, enhanced accuracy, and potentially enhance transparency. If you are sharing with the parties, the fact that you're using predictive coding and what parameters you use to disclose those documents to the other side. It's something that parties and tribunals may want to address during a case management conference right at the beginning of the arbitration.

[24:19] Because you can imagine that if you didn't know that the other side used machine learning for all their document review, there could be documents that are missed that are key documents or that are important. And so generally speaking, there are no guidelines and rules in arbitration about whether these are being used or not. So, it's something that either the parties should raise at the outset of the arbitration or that the arbitrator should consider asking about.

[24:47] HUSEIN: Decisions like using an AI program like this, as you say may have impacts on the outcome of the case. To that point. I was wondering about, as you mentioned, the abduction, there are some people who are speculating about this going one step beyond and actually having decision-makers who are not just using AI, but maybe mostly AI. I was just wondering if you have any thoughts on that situation, what that might mean for lawyers and clients, and so on.

[25:15] ALEX: So, I think, where we're going to see the kind of technology that's being used for predictive document review, we're starting to see that same kind of underlying technology used for predicting outcomes. And so there are different tools that do this using different predictive analytics. Two examples that come to mind for me, are the Blue J. Legal tool which can produce memos, and answers to basic legal questions. And another example is the data-driven decisions program, which can predict the chance of success of obtaining lean to the Supreme Court of Canada.

[25:59] The other space though, where I think we're going to see more of this, especially in international arbitration, is in relation to translations. Because you can imagine that where you have parties in different countries, your documents are in different countries, and your witnesses are in different countries. And so machine learning AI can be used to automatically generate a translation of documents and other languages. I think we're still a long way away from decisions being made by a robot or a computer, but I can see some of the appeal of it heading in that kind of direction.

[26:32] Human arbitrators are obviously biased. And even if you have a really strong case, you would never tell a client, they have more than an 80% chance of winning. And the reason for that is because of the human predictability element. You don't know how your witnesses are going to do on the stand. But you also don't know how the decision-maker is going to view things. And that's because human decision-makers, of course, especially in the arbitration space, they could be jet lagged during the

arbitration, which can impact their focus, and make them think rashly. Obviously, people have their own inherent biases with their own life experiences. So, in theory, having some kind of tool that assists arbitrators, even if you still have a human arbitrator, I think there's some appeal to that.

[27:20] HUSEIN: I mentioned before an AI tool, the outputs are only as good as the inputs. I know that it's not quite what we're talking about right now. But I've read studies about trying something similar in the Criminal Law context where BIPOC people are disproportionately convicted. And if you were to, for example, use that data to inform future decisions, those biases may also come through using an AI format. I was wondering if you have any thoughts about the inputs impacting the outputs, in an arbitration context.

[27:54] ALEX: No, you're absolutely right. When you're transforming data into an asset, it's important to keep systemic bias in mind. So, if you're using historical data to train a system, you're potentially training bias into the system. And you can just potentially be repeating history in that sense. So, the type of training you have to do with the system has to include some kind of mindfulness about those biases. I think, in general, with all AI, we have ethical issues we need to grapple with. And when should we be using these tools to replace humans? And when do we still need humans involved in that?

[Music Break]

[28:46] HUSEIN: Now, in the last couple of years have been especially monumental for arbitrations in the province of British Columbia, thanks to a brand-new arbitration legislation, as well as a new set of rules and procedures. And this new Act will apply broadly to all domestic arbitrations within the province, if separate or otherwise stated. And these arbitrations are giving arbitration lawyers plenty to think about. Now, Alex, I know that the province of BC had an arbitration Act about three, or six years ago. And now there's a new arbitration Act that replaces that. So, can you tell us a bit more about some of the more important changes that have come out from the new Act as compared to the old one?

[28:22] ALEX: So, there are two big changes. One is with respect to appeals, and one is with respect to setting aside awards. So, on appeals, the appeals process has been significantly altered under the new Act. So, under the new Act, parties can appeal an arbitration award by seeking leave from the BC Court of Appeal, not the BC Supreme Court within 30 days of the award. Under the old Act, you would have 60 days, so for people who are practicing in this area, note you have a shorter timeframe to bring your appeal now. And you used to do it to the BC Supreme Court. Now you're bringing your appeal to the Court of Appeal.

[30:06] There is then the time difference that's changed that people should note that you now have 30 days to bring your appeal. The other thing to take note of is that the parties can opt out of appeal rights in their contract. And so when they draft their arbitration clause, they may have a line in there or a paragraph in there that either addresses appeal rights or say there are no appeal rights.

[30:30] HUSEIN: Do you think this will add greater transparency and more cooperation amongst parties if there's this thing that's now in the contract that wasn't there before?

[30:40] ALEX: Well, it's interesting, I think the concept of appeals and arbitration, is actually one that's a bit controversial. So, the general standard in arbitration was no appeals. And the reason being part of the sale of arbitration to commercial clients is to get a decision on the merits as soon as possible with no appeal rights so that you're not stuck in this never, never land potentially for years in appeals. The problem that arises though is if you get a decision in an arbitration that is poorly decided, and then you have no recourse in appeal, that sometimes frustrates the losing party.

[31:24] And so where I think you're going to see clauses providing for appeals, they're going to narrow it to appeals on questions of law only. And so really, it's only if the arbitrator or the arbitrators got something on the law wrong, rather than the facts. And there are options in your arbitration clause to actually send the matter rather to the Court of Appeal, but instead to an Arbitral Tribunal, so that you're still keeping that confidentiality and privacy around the arbitration.

[32:00] HUSEIN: Right, I guess, like upholding the spirit of this whole arbitration system as well. Okay. And then you mentioned, the other change about setting aside the award. Tell us more about that.

[32:08] ALEX: Yeah, so the setting aside of awards under the new Act, allows the BC Supreme Court to maintain its jurisdiction to set aside an award when an arbitration agreement is void. If the award deals with a dispute that is beyond the scope of an arbitration agreement, or if there's a lack of procedural fairness. And so the Act explicitly provides as to the arbitrators, independence or impartiality. And if there are doubts about that, the award can be set aside. And the time period to set that aside under the new Act is 30 days. So, if, for example, you felt like your client's procedural fairness was impacted. And let's say the arbitrator was not acting in a way that was impartial or independent, you could go to the BC Supreme Court to set aside the award on those grounds within 30 days of the award.

[33:08] HUSEIN: Okay. Now, I know that in addition to this legislation, there's also this relationship between this Act and this new set of rules. You were talking a few minutes ago about the Vancouver International Arbitration Center, also known as VanIAC. And also there's a new set of rules there. So, tell us more about what's going on.

[33:18] ALEX: So as I was mentioning, the new Act incorporated a lot of VanIAC's old domestic rules directly into the Act. So, then there was a lot of redundancy and duplication between VanIAC rules and the new Acts procedures. So, VanIAC redid its domestic rules and has made them streamlined with the Act. So, what the new rules do is they supplement procedure where the Act is silent on it, or doesn't address it. And so if you have a domestic arbitration now with VanIAC, you should read the Act and the rules hand in hand together.

[33:07] The one thing I want to just note about that though is if VanIAC also released new international rules, and when you think international, you would think a party from Canada and a party from another country. But here actually, if you have a party from a different province, and one from BC, and you're using VanIAC's rules, you should be using the international rules. The BC act now has lots of procedure in it. But most of the other provinces' Acts don't. And so if you were to take the domestic rules, they're not really the full picture of the procedure that you need for arbitration under another province.

[34:38] So, you need those international rules to actually give you the full meal deal of procedure you need to govern your arbitration. And so for people who practice litigation, but are dabbling in arbitration, what these procedural rules do is they're kind of like the rules of court, the civil procedure rules. And so it's really your Bible that dictates how you're going to do the procedure up to the hearing on the merits. So, if you have something between two different provinces use the international rules.

[35:18] HUSEIN: I'm curious because you're talking about the VanIAC's rules, which are international arbitration rules. But I'm curious about what international arbitrations are available for Canadians, regardless of whether they live in BC or not.

[35:35] ALEX: So, there's a difference between institutional arbitration and ad hoc arbitration. Ad hoc arbitration is where the parties decide to administer their own arbitration without the help of a center. And they will either craft their own procedural rules, or they'll just adopt the rules from another center, or the UNCITRAL rules. So, if you go with an institutional arbitration, you have a center that's administering your arbitration, they're overseeing some of the logistics around it, they're the ones dealing with payment, they can step in and assist with certain things like the appointment of an arbitrator if the parties can't agree.

[36:21] And so, VanIAC is obviously located in Vancouver. But we've purposely designed our rules to be able to be used across Canada. And in our view, we have the most modern set of rules for Canadian arbitration. But there are, of course, the other institutions whose rules you can use and whose centers

you can use. There is, of course, the International Chamber of Commerce. They are located though, however, in New York, Paris, and Latin America, and so they do tend to be more expensive, which isn't always cost-effective for Canadian arbitrations.

[37:00] And then you do have in Canada, the ability to do an ICDR arbitration, which is primarily an American-derived institution, but does have procedural rules that can be used in Canada. And then there's also the ADR Institute of Canada, which has a set of rules that you can use. But again, if you want on administered arbitration in Canada, that's based in the Canadian organization, in my view, VanIAC is your best bet for that. I think in general, most of the centers around the world have made the effort since the pandemic to modernize their rules, and they now even deal with things like expedited arbitrations and virtual hearings. And some of them even have things around cybersecurity. And so the rules are better equipped to deal with what we're seeing in the modern world today.

[37:51] HUSEIN: And we have this new Act, we have this new sets of rules, are there things that lawyers should be mindful of, in light of these new rules, like compliance or draft or anything like that?

[38:01] ALEX: So, beware of precedents, especially for solicitors that don't always include their litigation or arbitration practitioners in reviewing their dispute resolution clauses, beware. And the reason is, these boilerplate arbitration clauses may be drafted in a way that's no longer consistent with the new Act, or with VanIAC's new rules. And so one of the big takeaways in drafting is if you want VanIAC's rules to apply, you now have to specifically incorporate that into your arbitration clause. And that's a change where under the old act, VanIAC was the default administrator for it.

[38:47] And so, if you want VanIAC involved, you've got to put it in your clause directly now when you're drafting. And the only other thing I'll say is, to be mindful when you're going through the Act of where there are default provisions that apply unless you opt out of them. And other optional components you might want to include. I'll just give a couple of examples. One is the number of arbitrators by default is one, under the Act. The parties have the ability to contract into something different. So, if you want three, you have to put it in your contract. So, just be mindful when you're drafting what's the default provision and what you can opt in or out of.

[Music Break]

[39:33] HUSEIN: And for the last time for the season, we're going to do our Ask-Me-Anything segment, this time with Alex. And as our listeners will know, one of the bonus rewards to members of our Lawyered Patreon of our crowdfunding community is the opportunity to submit questions they want to hear answered on the show which can be about anything at all within the guest's area of expertise.

We always do a call for these questions a week or so before the recording. So, if you want to learn more about how we do this and how you can become a patreon, you can find out more information on our website, which is www.lawyeredpodcast.com/patreon.

[40:07] And even when we are off-season, we have a lot more bonus awards coming out there, so keep an eye out for all those. So, Alex, we have a bunch of questions in our mailbag about this area of Arbitration Law. And the first question is: What are some of the differences, if any, between litigating before an arbitrator and litigating before a "regular court"?

[40:27] ALEX: Yeah, so there's actually a significant amount of differences. So, it's a good question. The first thing to note is, to be able to do arbitration, you either need to have a clause in your contract that says your dispute is being resolved by arbitration. Or if you don't have that, and a dispute arises between parties, they can jointly agree to go to arbitration. But if you don't have a clause, and only one party wants arbitration, and the other party wants litigation, you're going to litigation in court.

[41:02] But let's say that you are then in arbitration, some of the key differences, you have the ability to choose your adjudicator. So, in court, especially in BC, we don't have specialized lists in British Columbia. So, we don't have commercial lists of judges, we don't have class action lists. So, if you have a commercial dispute, especially in British Columbia, arbitration may be more appealing to you, because you can pick your decision maker who has experience in commercial matters, as opposed to a family law judge or a criminal judge. So, that's one big difference.

[41:38] Another big difference is it's of course private, and potentially confidential if you add those provisions in as well. So, that's a big plus for arbitration, because it's not in the public, with the way courts are, there's no journalist that can get access to it. Another big difference is the ability to opt-out of any appeals. So, to have your enhanced finality right after the first decision. And then the final big difference is flexibility over the process and the procedures. The parties are really at liberty to craft the kinds of arbitration that they want.

[42:15] And the rules from all these various different institutions, will of course provide default rules, but the parties can craft those opt-in or out of certain ones that they like or don't like. And it just gives the parties much greater flexibility. And the idea behind arbitration is it's more efficient, because you're cutting out a lot of the procedures, you have in litigation. So, you're not going to be stuck in a bunch of discoveries, you're not going to be stuck in a bunch of motions before the merits decision. The idea is to try to do as much in writing as possible, rather than hearing time, and then get to that final decision on the merits as soon as possible.

[42:55] HUSEIN: I was speaking with someone last week and talked about how there was some procedure, one of the complaints about it is, it is very rules-heavy and kind of prevents you from getting into the meat of the issue. But imagine if you have more flexibility, kind of cuts out some of those technical issues that get in the way, and certainly in terms of costs as well.

[43:13] ALEX: Absolutely. I'll give you an example, I had a small expedited arbitration that was worth about $250,000. And from start to finish, we did the whole case in just about six months. Which you just wouldn't do in litigation, because you'd be in document production, then you'd have to do examinations for discovery. You often don't do examinations for discovery in arbitration. And you actually don't even do direct examinations. For witnesses at the oral hearing, you typically would just do crosses, and your closing submissions would be very short. In another example, I had a dispute that was in the hundreds of millions. We did it in four days. The oral hearing was four days from start to finish, the entire case was over in 12 months. And so you really see the efficiencies with that when you're cutting out a lot of the civil procedures that you have from litigation that happened before you get to trial.

[44:12] HUSEIN: Yeah. Interesting. The next question that we have is: Several legal commentators have promoted Canada as being an "arbitration-friendly jurisdiction". The question is, first, do you agree with this characterization? And also, what does it mean to be arbitration friendly?

[44:28] ALEX: Yeah, I definitely agree with that. And I think there are two main reasons for that. The first one is the legislative framework governing International Commercial Arbitration in Canada is friendly, and I'll explain that in a second. But also, it's the enforcement of foreign arbitral awards in Canada very closely mirrors, the Model law and the New York convention which allow for the enforcement of arbitrations. And most of our legislative framework limits the ability of courts to intervene with the decisions of arbitrators.

[45:05] And that relates back and ties back a bit to what we were talking about under the new Act. But essentially, the new Act in BC, for example, is designed to really minimize interfering with an arbitrator's decision. So, the only time you're doing it is really if there's been procedural unfairness or an impact on the impartiality and independence of the arbitrator. So, that makes Canada arbitration-friendly, because what do you want, if you're doing arbitration, you want your award enforceable. You don't want the courts re-analyzing the award and thinking about whether they thought it was arrived at the right decision or not, and potentially setting it aside. You really don't want to be arbitrating and enforcing awards in a jurisdiction that's doing that. Then the other reason that Canada is considered arbitration-friendly, is because our Canadian courts are supportive of arbitration, and they continue to

uphold the integrity of the process. And the big one is the TELUS vs Wellman case, from the SEC in 2019. That does talk about how arbitration clauses with businesses are enforceable.

[46:19] HUSEIN: Another question we have is: What are some considerations for lawyers who are considering whether to include an arbitration clause in their own contracts? I think we touched a bit about this earlier on. But I'm curious about what your thoughts are on this more general issue.

[46:33] ALEX: Yeah. So, as I mentioned earlier, just be mindful of what's automatically included in what's automatically not in there if you don't specifically provide for it in your contract. But what I would say is the best place to start if you're drafting an arbitration clause, and you haven't done one before, is to decide which center you want to administer your arbitration. So, let's say you want it to be VanIAC. Each center's website provides model arbitration clauses on their websites. So, each institution does this.

[46:48] So, let's say you wanted VanIAC you go to their website, they'll have a tab that says Model Arbitration clause, and it will have some suggested language, and then it will actually give you if you want an appeal, here's some language, if you want no appeal, here's some language. If you want an appeal, just on the law, here's some language. And so that's a really good starting place to start with drafting. And then the next thing you would want to do is if the Act that applies in whatever province you're in, and then read whatever centers rules that you're interested in picking, and make sure that that procedure lines up with what's in the best interest of your client. And if you don't like some of those things, that's where you try to carve some stuff out and opt-in or opt-out and negotiate that with the other side.

[47:57] HUSEIN: We've seen a lot of discussion about a lot of the advantages of arbitration in terms of flexibility and you can choose your arbitrator. Are there any situations in which, a lawyer or a client might prefer the conventional court route, as opposed to going the arbitration route?

[48:15] ALEX: Yeah, we actually do see that quite often, including large multinational corporations who prefer litigation. And so one of the downsides to arbitration is, there are some costs affiliated with it upfront that don't exist in litigation. So, you're paying a higher filing fee, often, you're paying the center, if it's an administered arbitration to administer your arbitration, and you're paying the arbitrators fees. And so if you have a three-person tribunal, that can get quite expensive. So, it's not going to work for smaller dollar value disputes all the time.

[48:59] And there are some instances where you don't want a decision super quickly. Sometimes you're the defendant and you are happy to watch something sit in court for two to five years or 10

years or 14 years if it's a big class action. The other thing you see is the reason in general, we have a bit less international arbitration in Canada and the US, than perhaps in Europe, or other countries is because we do generally have good trust in our court system. And so for the most part, people are fairly happy going to court compared to some other countries. And we are fairly happy litigating across border between US and Canada. Our laws are fairly similar. The procedures are fairly similar.

[49:44] So, even where you have a US party and a Canadian party, they will sometimes just choose to go through one of their court systems instead of going through arbitration. So, where you see arbitration more often is where you have parties from jurisdictions where it may be a civil law jurisdiction and a common law jurisdiction. So, you don't want to go through the courts of either system because it's unfamiliar. Or it may be a country that doesn't have… it may be from a different part of the world where their justice system is very different than North America.

[50:18] HUSEIN: Yeah. I think sometimes we forget about how privileged we are here in Canada to have a fairly reliable justice system compared to certainly some of these other countries.

[50:27] ALEX: Yeah, for sure.

[50:28] HUSEIN: Last question we have on our list actually dovetails nicely with what you were just speaking about. The question is: What role if any, do arbitrations play in terms of promoting access to justice?

[50:40] ALEX: So, what's really interesting and has been a trend recently is most institutions have now incorporated expedited arbitration rules into their rules. And these are typically for claims that are under a certain amount of money. You could opt into it for things that are over that amount of money, but typically, you're going to see it where they're under a certain amount of money. And so they're almost like fancy small claims courts in the arbitration space. And they are designed to promote access to justice.

[51:09] If you have a smaller dollar value claim, what is the advantage of an expedited arbitration? Well, one, the arbitrator has a flat fee amount that they're paid. So, you're not paying their hourly rate, typically, if it's under 250,000. So, that's going to help with access to justice. And then the other thing it does is, you know, we talk a lot about access to justice and can you get representation by lawyers? How much is it going to cost? But the other really big thing for access to justice is time, not being stuck and bogged down for years in the process.

[51:46] And so the expedited arbitrations are actually supposed to be dealt with. So, from the appointment of the arbitrator, within 120 days, you should have exchanged all your written materials. The parties can, of course, decide to alter that. So, for example, in the case I did recently, we did drag it out to six months for various different reasons, because we did a few multiple rounds of exchanges on things. But you're going to be dealing with a shorter timeframe, which gets you your decision sooner.

[52:16] And then the other thing is because you're doing an expedited arbitration, everything is in writing, and you have no oral hearing unless the arbitrator wants it, or one of the parties requests it or the parties agree to it. And then the other key thing is you get your decision if it's a domestic arbitration within 30 days of the final submission, or oral hearing, and 45 days if it's international. So, if you think about litigation, you could be waiting six months for a decision, or sometimes longer. Here, you're waiting a month, typically.

[52:50] HUSEIN: Right. And yeah, like you were saying, sometimes the time is more important than the money for a lot of clients or individuals who are going through this. Just having this weight over your head, not knowing what's going to happen, I'm sure it takes a toll.

[53:03] ALEX: Yeah, absolutely.

[53:05] HUSEIN: So, Alex, I want to thank you so much for taking the time to chat with us about these arbitration issues. I'll say, for myself, this is an area that I frankly knew a lot about beforehand. I think a lot of us who do more general litigation just have a very superficial understanding of Arbitration Law. But as we were speaking offline, sometimes arbitration is not so much about the law than the facts and the argument and it's something that is changing, both in terms of legislation, and the case law and technology as well. You did a great job of walking us through what's happening in this area, and also explaining how there's a lot that's evolving as well. So, we really appreciate your time and looking forward to staying in touch in the future as well.

[53:44] ALEX: Thank you so much for having me. It was such a joy to work with you on this, and you may convert me to listening to more podcasts now.

[53:52] HUSEIN: Perfect. That was the ancillary goal of all this…!

[Music Break]

[54:04] HUSEIN: And that's going to be a wrap on this episode and this season of Lawyered. Thanks for listening. On this episode, our guest was Alex Mitretodis, you can learn more about her practice at her

law firm's website, which is www.fasken.com. And for more about today's show, and for links to all the cases and issues that we spoke about today, you can find those on our website, which is www.lawyeredpodcast.com. And as we mentioned, if you want to help to make the show better and get some neat and affordable legal awards, we would be grateful if you can become a patreon of our show.

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