

## **ALTERNATIVE DISPUTE RESOLUTION**

### **An Address to the Central Ontario Export Club at the Toronto Board of Trade - October 23, 1996**

#### **INTRODUCTION**

Good evening Ladies and Gentlemen.

At a reception not very long ago, I had occasion to be talking with a well-known and reputable commercial real estate leasing broker from Toronto. When we began talking about ADR, he told me that he had recently conducted a mediation between a landlord and tenant. Moreover, he said he had been doing a lot of mediations. When I asked him how he had gone about helping the parties, he said it was pretty a standard procedure. They each made their pitch and the landlord "won", as they usually do. I was silently taken aback. I asked him where he did his mediation training. He said, "what training?" "I have been doing this for a long time." I winced but I hope I didn't shake my head too obviously.

On another occasion, I was in a Western Canadian city in a meeting with a senior partner of a significant law firm. The talk got around to the frustrations of the court system and the advent of alternative dispute resolution mechanisms. He confessed that he knew virtually nothing about these techniques, although he had some familiarity with arbitration. I began to suspect this was true for a lot of lawyers.

He also told me that he probably had little willingness to change, having regard to all the years he had spent in the existing system. But he was a very senior member of the bar and I understood his reluctance to embark on new ventures. I did ask him what was being done in his

firm to train lawyers in ADR, and his second confession was more troubling. He was one of the trendsetters for the firm and there was no plan.

On October 7, 1996, I read an article in the daily newspaper indicating that a survey just then released had said that manufacturers and exporters were expecting a significant increase in business in 1997. The survey had been conducted by the Alliance of Manufacturers and Exporters Canada. The survey indicated that member companies were forecasting expansion, increased profits, and increased hiring of workers in 1997. The survey was officially released at the Alliance's convention in Winnipeg, along with a representation that the Alliance comprised 3,500 companies, 55% of which indicated they expected to be expanding operations in the next year. With that type of increase expected in business, it can also be realistically expected that disagreements or disputes will be on the increase. I hope this address will, therefore, be timely.

### **ALTERNATIVE DISPUTE RESOLUTION**

The time has come for Alternative Dispute Resolution, more commonly known as ADR. ADR involves a series of procedures as an alternative to the courts for purposes of resolving disputes.

The types of disputes which can be resolved by Alternative Dispute Resolution are endless. These can involve a breakdown in family business relations, disputes between customer and supplier, disputes between franchisor and franchisee, partnerships, shareholder disputes, joint ventures, even international commercial transactions. There are a number of forms which an Alternative Dispute Resolution can take. Among these are principled negotiation, neutral case

evaluation, mediation, arbitration, combined med-arb, and mini trials. This list is not exhaustive. There are other procedures available, and some of these procedures can even be combined or acted upon one after the other, if one does not work. For the moment, I would like to concentrate on some of the common advantages they share.

Imagine having a dispute with a major supplier. This might be a dispute which is based on a product or service, but it is definitely between your companies and maybe even between individual personalities in the companies. You would have been doing business with this company for some time and you would expect to continue doing business with them were it not for the dispute. Should you sue? You know how long lawsuits take. The delays in the court are infamous. Everyone complains that the cost of lawsuits is too high. And after a lot of frustration and expense, people become even more entrenched in their positions and less willing to work out a settlement. The case can go to a trial with a Judge who is not attuned to the industry problem. The trial is public. After the long struggle most of us have seen during the recession, most people are no longer interested in getting into another struggle with a lawsuit.

The alternative is one of the forms of ADR. These share in common the willingness of the parties to try to resolve their difference. The case can be scheduled quickly, and since it is the only case, for example, the mediator or arbitrator will deal with, it will proceed when scheduled. The parties pick the neutral person who will assist in their process. The parties usually share the cost. The parties agree in advance on the issues to be submitted and the terms of reference by which the procedure will be governed. In other words, you make your own rules. You pick a facilitator, mediator or arbitrator who knows the field. The procedure is held in a confidential setting and the results are not published. There are no lengthy rules or court procedures to slow

down the process.

Sometime ago, IBM and Fujitsu submitted for arbitration a case that had been in the courts for many years. The case was resolved in a number of months even though it involved hundreds of millions of dollars. The parties were able to get on with their business.

## **MEDIATION**

Mediation is a process whereby two or more parties to a dispute use a neutral third party to assist them in reaching a settlement. The process is voluntary so that it only works if both parties are willing. It involves a negotiation where the parties themselves are present but the mediator works to facilitate settlement that the parties themselves have been unable to reach. The result does not bind the parties legally and if it does not work out, they can still take their dispute to an arbitration or to court.

The mediator is a person with special skills in resolving disputes and is knowledgeable in the subject matter of the dispute. The mediator helps the parties to identify the real issues between them and works at trying to find a settlement that mutually satisfies the interests of the parties.

By working with the parties on their underlying interests, a mediator can often achieve a result at settlement that no other form of dispute resolution can do. For example, in an arbitration, or a court proceeding, one party wins and the other party loses. Clearly, this is unsatisfactory in all cases to the loser. In a mediation there is no loser. It is a win win situation if the parties come to a

settlement.

The mediator achieves this by concentrating on the real interests of the parties and not on their positions or their rights in law. Often their rights in law are what entrench parties in opposite directions and lead to delays in the normal court system. By looking to the interests of the parties, the mediator can get right to the heart of the problems and work with the parties together and separately in the mediation process to achieve a mutually beneficial result.

Some of the obvious advantages to mediation include speed, cost savings, and confidentiality. When a mediator is appointed by the parties, time is scheduled for the mediation, and any relevant documents are exchanged in advance. There are no formalities to argue about concerning the relevance or admissibility of documents. The parties agree on their documentation or there cannot be a mediation. The appointed time is when the mediation is heard. There is no other mediation going on before the same mediator that day. In this way, there is no delay for hearing, and you do not waste your time.

From the point of view of cost, since procedures are very informal, there are no technical delays and no appointment backups. The parties share the cost of the mediation equally. Therefore, each has a commitment to a solution that works. In many cases, the parties have a need to continue doing business together and must put a dispute behind them quickly and with mutual satisfaction. Mediation achieves this result.

From the point of view of confidentiality, the parties set their own terms of reference for the mediation. Any discussions which go on at the mediation and any involvement by the

mediator are not capable of being repeated before a court in a later proceeding if the mediation fails. In this way neither party is prejudiced by what takes place in the mediation in the event of failure, and the parties have every reason to be fully frank in their negotiations.

Mediations also contain the issues in a case; that is, sometimes when a case is allowed to go on longer, additional disputes arise in the framework of the case and it becomes more complex, delayed, more lengthy and more expensive. Mediation avoids all of these problems.

Mediations are extremely flexible and may be available to almost any kind of dispute. The key is the willingness of the parties to work together creatively to find a settlement with the assistance of a skilled mediator. This person should have the trust of both parties involved and, of course, must be objective and neutral in order to facilitate settlement.

## **ARBITRATION**

Almost everyone has either heard or voiced a complaint about the cost, complexity, and time delay of court proceedings in the nineties. At present, it takes at least twelve months from the time that you place your case on the list for trial until the trial is finally heard. Delays of up to two and three years are not unheard of. This is, of course, in addition to the time required to go through the proceedings prior to the placing the case on the list for trial.

One of the reasons for the often unnecessary delay and expense is that in almost every lawsuit there is one party who is most anxious to get to trial (the plaintiff) and one party who would prefer if the trial never took place (the defendant). The Court Rules, in an effort to insure a fair

hearing on the merits, can have the unfortunate effect of allowing the defendant to make use of the Rules to delay the process. Every delay results in additional expense.

As the usefulness of the Court system as a method of resolving anything but major disputes declines, the prospect of turning to a modern variation of "pistols at dawn" comes to mind. However, there is a legal alternative to a regression to our earlier days. Many people are now turning to arbitration to resolve disputes in a quicker and less expensive fashion. Typically, costs are shared equally.

Arbitration is the resolution of a dispute through a binding decision of one or more arbitrators. The role of the arbitrator is much like that of a Judge in that he/she or they try to resolve the dispute according to the law, rather than by way of compromise. The procedure, while less confrontational than court proceedings, is clearly adversarial. There is a winner and a loser. The awards made by arbitrators are, in the normal course final and enforceable in the same fashion as a judgment of the Court.

The advantages of arbitration are numerous. First and foremost, the process can, to a certain extent be dictated by the parties. The experience of agreeing on the process often brings the parties closer on the merits of the issue between them. And the more that is agreed upon, the lower the likely cost.

Arbitrators are usually persons with familiarity in the subject matter being arbitrated. For instance, in the arbitration of renewal rent under a commercial lease, arbitrators with knowledge of commercial leasing, and leasing rates are frequently chosen. This further simplifies the

procedure, as the decision maker is already educated as to the terminology of the field in question.

Another advantage of arbitration as opposed to litigation is the preservation of some degree of the relationship between the parties. If the dispute between the parties arises from their commercial dealings, both parties may wish to end the dispute and still preserve the nature of the relationship to their mutual benefit. Unfortunately, the litigation process, due to its length and expense, often pushes the parties farther apart, thereby destroying any possibility of a continuing relationship.

Unless there is a substantial amount of money involved, it is generally advisable to have only one arbitrator. The arbitrator is chosen by agreement between the parties. If no such agreement can be reached, a court application can be brought to name an arbitrator.

Once an arbitrator is named, the parties will describe his powers and duties in a jointly prepared document called a "submission." This submission will also provide that the arbitration award can be enforced by the Court, should one of the parties not comply with the decision of the arbitrator. The submission will also set forth whether or not the award of the arbitrator can be appealed. However, the courts have shown a very strong reluctance to interfere with the award of an arbitrator.

As the process of arbitration is not prescribed in any fashion, it can be tailored by the parties to their own needs. Location of the arbitration, method of hearing, rules of evidence, and other considerations can be discussed and agreed upon by the parties and included in their submission.

It should also be remembered that, by comparison with court proceedings, arbitrations are not public information. Therefore, when business issues which you would prefer to keep from your competition are involved, arbitration has the distinct advantage of allowing you confidentiality.

Finally, although lawyers often caution clients against this attitude, litigation can become all consuming for the client. It can take his or her attention away from far more important matters in the operation of business. The less complex and more expeditious resolution afforded by arbitration allows the business person to return to making profit, which is obviously to the benefit of all.

In order to take advantage of the benefits of arbitration, consideration should be given to inserting arbitration clauses in agreements being drafted today. Such clauses are most easily raised with the other party to the agreement when goodwill is at its highest; i.e. when the agreement is first being negotiated.

In Ontario arbitrations are subject to the **Arbitrations Act** unless the application of the statutes is excluded in some way by agreement between the parties.

### **FORMS OF ARBITRATION**

There are different forms of arbitration. Binding arbitration is very common and in this situation the decision rendered by the arbitrator, binds the parties.

Compare non-binding arbitration in which the process is the same, but the arbitrator makes only an advisory decision which is not binding on the parties.

Incentive arbitration is a form of non-binding arbitration in which the parties agree that if the party that does not accept the recommendation of the arbitrator, goes to court and does not improve its position, it has to pay a penalty which may include the legal fees of the opposing party.

Final offer arbitration is a process in which the parties each make their best offers to the arbitrator who must choose between the two offers but is not allowed to render a different decision.

In bounded arbitration or what some call "high-low" arbitration, the parties agree on a minimum and maximum award. The arbitrator is not informed. If the award made by the arbitrator is within this range, it is binding. If it is lower, then the minimum award is binding, and if it is higher, the maximum award is binding.

### **MED-ARB**

This technique is a combination of mediation and arbitration. The parties start out by trying to resolve their dispute through mediation but agree in advance that if they are unable to resolve all aspects of their dispute through mediation, the same third party neutral will continue to deal with the matter as an arbitrator. At the end of the arbitral part of the process, the neutral will render a binding decision on all the issues that have not been resolved by the mediation process.

### **EARLY NEUTRAL EVALUATION**

This ADR technique has similarities to Ontario's Pre-Trial system, except it is done very early on. In the U.S., the procedure occurs in some States within a few months after a suit has been filed. When a neutral is brought in to evaluate the claim at an early stage, one can appreciate the consequences very quickly. If the evaluation is favourable to the claimant, the defence has to start thinking about settlement immediately. If the reverse is true, the claimant has to reconsider whether it ought to proceed. Clearly, this is a technique which can be very useful in technical cases where the neutral must, of course, have expertise in the field.

### **NEUTRAL EVALUATION**

Neutral evaluation is a process in which a judge of the court, or a neutral evaluator, evaluates the relative strengths and weaknesses of the positions advanced by the parties, and the probable outcome at trial, and advises the parties accordingly.

If it is determined in the ADR session that neutral evaluation would be an appropriate step in resolving the dispute, counsel, with the assistance of the mediator, will set out the one or two issues to be referred to the neutral evaluator. The session before a judge or a neutral evaluator lasts approximately 45 minutes. The counsel present the core of the case in the presence of the parties. Afterwards, the neutral evaluator gives an assessment of the strengths and weaknesses of the cases.

If the parties do not reach a settlement, the case is returned to the litigation track.

### **MINI TRIAL**

Another available technique is the mini trial. This is a process in which opposing counsel present their best case to the parties and to a judge of the court who moderates the presentations and renders a non-binding opinion as to the probable resolution of the dispute after trial. One interesting feature of the mini trial is the fact that counsel are presenting the case to the other party as well as to a judge. This is an early opportunity to make an effective presentation to the other party in the case and clever counsel will realize what a great opportunity it is to be able to tune the other party to your client's interests on a more common ground basis than in an adversarial setting.

To divert momentarily, let me say the most common procedure is mediation. Let me only point out that as of September 1, 1995, eight out of ten cases in the commercial track in Toronto were being sidelined to the ADR Centre for mediation. This was up from one out of ten originally and then two out of ten. But because the load became too great, and the government would not increase funding for more mediators, only 4 out of 10 commercial cases are now being sent from court to the ADR Centre.

### **SUMMARY JURY TRIAL**

This is a procedure connected to the formal litigation process. It is available once the case is ready for trial. It is most typically advantageous in large complex matters that are expected to be very lengthy trials. The counsel for the parties present their best cases to a real jury. The jury is not advised that the trial is not a real one. However, the presentation is an abbreviated one so that

it lasts only one or two days. There are no outside witnesses called. The business principals with authorization to settle are the parties who attend the trial. A judge presides over the summary jury trial. The jury renders a non-binding verdict. This becomes a starting point for negotiations in order for the parties to achieve settlement without the need for the complex trial.

### **INTERNATIONAL ARBITRATION**

Prior to 1985, in Canada there was no special legislation with respect to international arbitration. The Provinces applied their Arbitration Acts generally (these were based upon the provisions of the U.K. Arbitration Act of 1889) to all kinds of arbitration whether it was domestic or international, commercial or non-commercial.

Although every Province had its own Arbitration Act, these Acts were all different; i.e. there was no Uniform Law. The reason for this was that the Canadian Constitution did not provide for uniformity of Acts on matters of provincial jurisdiction. In Canada, arbitration whether international or not, had always been a matter of provincial jurisdiction.

### **WHY DID CANADA NOT ACCEDE TO THE NEW YORK CONVENTION UNTIL 1986?**

Canada's major trading partners, the USA and the UK, did not accede until 1970 and 1975, respectively. So, the economic pressure was not very strong and this general apathy was combined with technical problems:

The Convention contained a "federal state clause" providing that where the national

government of a contracting state does not have the constitutional jurisdiction to implement **all** parts of the Convention, it must bring the terms of the Convention that it cannot implement to the attention of the governments in the country that can do so and recommend that they do implement those provisions.

The federal authority to implement the Convention was not clear, because the provisions of the Convention relate to administration of justice within the province, a matter of provincial jurisdiction under the **Constitution Act**. Since the Convention did not provide **partial** implementation by a contracting state, the federal government hesitated to accede to the Convention without unanimous provincial implementation.

Let me add that another factor in Canada's decision to act in the international arbitration field may also have been the fact that UNCITRAL adopted the Model Law of International Commercial Arbitration on June 21st, 1985. Canada had participated in drafting this Law. It was available to any jurisdiction that wanted it. It might have been the necessary "kick-start" needed to push the matter forward.

## **INSTITUTIONS FOR INTERNATIONAL COMMERCIAL ARBITRATION IN CANADA**

On May 12, 1986, the International Commercial Arbitration Centre in Vancouver was opened. On January 15, 1987, the second centre was opened in Quebec City. It is interesting to note that very few international arbitrations have gone on in Quebec City and that Vancouver has been averaging about one or two a year (although numerous domestic and private arbitrations are conducted there). While that was not unexpected in the immediate years following implementation of the Model Law in Canada, one begins to wonder in the 1990's why there has not been more activity. On a personal note I took notice back in 1986 that no centre was opened in Ontario. That was curious having regard to the fact that Toronto is the commercial heart of Canada and Ottawa is the national capital and both are in Ontario. One would have thought it logical that one of these cities would have been chosen as an international commercial arbitration centre. On the other hand, both cities had a reputation as being centres for significant aggressive commercial litigation and may be it was considered that the softer approach of ADR was not appropriate in such centres. If that is the case, a lot has changed in ten years. Toronto, in particular, has a very respectable number of well-trained arbitrators today.

As we speak, another centre was to be opening in Windsor, Ontario. This one is called the Dispute Resolution Institute of North America or DRINA. It was planned to offer mediation and conciliation services in connection with the University of Windsor and, of course, with a view to handling free trade related agreements. It is noted that Chrysler Canada has its national headquarters and major manufacturing plant in Windsor, Ontario, and, of course, this is immediately contiguous to Detroit. It was also established later than the Commercial Arbitration & Mediation Centre for the Americas (known as CAMCA), which was established by the

International Chamber of Commerce in Mexico City for similar purposes. The parties are, of course, free to select in their own agreements, the rules to be followed in arbitrations. These may include those of the International Bar Association, the International Chamber of Commerce or the American Arbitration Association.

### **CANADA AS A FORUM FOR INTERNATIONAL ARBITRATION**

I think it is fair to say that Canada is recognized in the international community as a stable country, one which has had a major peacekeeping role, and one which is in support of human rights both domestically and abroad. As such Canada has been seen as a source of impartiality and fairness.

From the point of view of dispute resolution more particularly, Canada and the United States share a common language, principles of common law, and similar cultures.

Recently, I had a call from a lawyer in San Francisco who is acting for a California company which had become embroiled in a dispute with an Irish company. He was speaking to me about the prospect of Toronto as a venue for an international arbitration. He recognized all of the considerations which I have just raised in addition to making reference to Canada's physical convenience and reputation for neutrality internationally. I know his views were correct and I hope that more of you will find that Canada's reputation for neutrality and justice will recommend it as the ideal candidate for ADR matters which arise in your business affairs.

## **CONCLUSION**

Try to keep in mind that most of these techniques do not have any statutory basis. Without four corners to bind them, the usual limitations of thinking go by the board. Creativity can become the order of the day. But have no doubt. These are the ways of the future; these and others that have yet to be developed. The times in which we now live are times for innovation. Changes in law in the last few years and in the next few years to come will definitely be more drastic and all embracing than those which have occurred in the last five hundred years. Don't get left behind. Understand these techniques and use them in your business, use them in your negotiations, use them in your agreements, and make them a part of your everyday thinking.

Thank you.

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