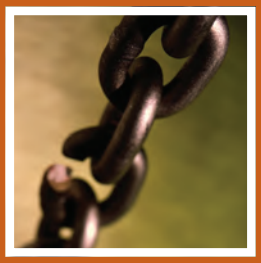
LITIGATION | MEDIATION | ADJUDICATION | ARBITRATION



A GUIDE FOR THE PERPLEXED

THE ABCs OF ADR

STEPHEN MORRISON

ALTERNATIVE DISPUTE RESOLUTION

"DISCOURAGE LITIGATION. PERSUADE YOUR NEIGHBOURS TO COMPROMISE WHENEVER YOU CAN. POINT OUT TO THEM HOW THE NOMINAL WINNER IS OFTEN A REAL LOSER — IN FEES, EXPENSES AND WASTE OF TIME."

- ABRAHAM LINCOLN

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STEPHEN MORRISON

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As a partner in the Advocacy Group at Cassels Brock & Blackwell LLP, Stephen is primarily involved in providing advice and advocacy, including litigation and other forms of dispute resolution, to the development industry. He provides legal counsel to all participants in the land development and construction industries, including governmental agencies, hospitals and other health care providers.

Stephen's legal career began in criminal law, which he practiced until 1981. His legal training and experience has been buttressed by an extensive involvement in the corporate world. In 1982, Stephen co-founded The Rose Corporation, a land development and investment company. Stephen served as president and in-house legal counsel to the company until 1999. The Rose Group diversified its activities and, at various times, owned or controlled private and publicly-traded enterprises in automotive parts manufacturing, telecommunications, general insurance, oil and gas exploration, carpet manufacturing, adult living facilities, hotels, film studios, mini-warehousing, and financial services.

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Stephen speaks regularly to industry and professional groups and serves regularly as a mediator and arbitrator. As a result of his combined business and legal background, Stephen has a unique ability to fashion practical resolutions to complex disputes. He understands that the parties prefer workable solutions to protracted litigation. As a mediator, Stephen brings a facilitative and imaginative approach to the resolution of difficult conflicts. A good listener, he helps each party to identify and rank its needs. A creative thinker, he assists the parties to find inventive ways of meeting those needs. A persistent facilitator, he is unrelenting in his pursuit of an agreement. And, as someone who loves a challenge, Stephen especially enjoys cases involving complex, multi-party disputes. In his role as an arbitrator, Stephen understands that the parties are entrusting to him the fair resolution of a dispute that they have been unable to settle themselves. Second only to his determination to render an equitable and legally correct decision is Stephen's commitment to ensuring that, regardless of the outcome, all parties feel confident that they have been heard and understood. He delivers clear, well-reasoned, and timely written decisions.

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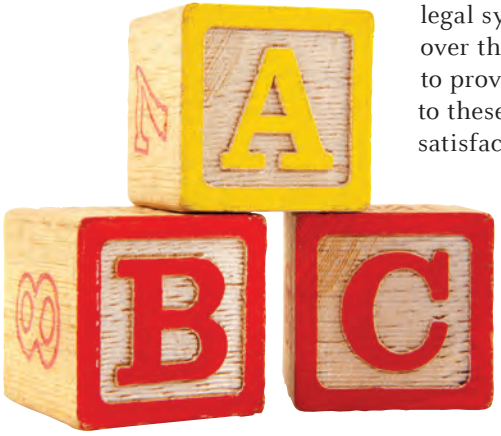
The writer wishes to acknowledge the assistance and contribution of Jennifer Sorge, who was a student-of-law at the University of Toronto Law School when an earlier version of this article was written.

INTRODUCTION

ADR is an acronym for "alternative dispute resolution." Dispute resolution refers to the settlement of conflict that may arise between people in a variety of situations. Conflicts, of course, can be settled in many different ways. In everyday life, people often try simple persuasion. In some cases, where power imbalances exist, persuasion can look a lot like intimidation. In extreme cases, people sometimes resort to violence. Indeed, at an earlier time in history, duelling was seen as a quick and effective method of resolving disputes, especially when honour was at stake. Even today, people sometimes take matters into their own hands when they feel that they have no other choice. Because violence and strife is generally seen as harmful to the well-being of society, legal systems have evolved over thousands of years to provide alternatives to these less than satisfactory approaches.



From quite an early point in human history, people have appreciated the benefit of involving neutral third parties to help them resolve their disputes. This appreciation ultimately resulted in the development of a system of courts, where people could go to assert their legal rights and remedies. Over time, procedures and rules of evidence were developed to ensure a degree of fairness and reliability in the process. The result was a system of dispute resolution that lawyers refer to as litigation. In this sense, taking someone to court was an early form of alternative dispute resolution — an alternative, that is, to pistols at dawn.

For reasons that will be looked at more carefully later, litigation has lately come to be seen as something to be avoided at all costs. In recent times, the fear of long delays, high costs, and unpredictable or unsatisfactory results has caused people to look more carefully at other methods for managing and resolving conflict. From its earliest days, the term ADR generally referred to an array of processes designed to divert disputes away from the courts. Today, however, it is more often recognized that litigation continues to occupy an important place in the spectrum of appropriate dispute resolution mechanisms and need not be the standard against which all other processes are considered to be "alternative." ADR, therefore, should be seen

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as the full range of approaches to conflict resolution, including litigation.

Negotiation, mediation, adjudication, arbitration, and litigation will be explored as the principal alternatives in the range, together with a few other less common methods that are used in special situations. Each method will be briefly explained, as will its main advantages. Different kinds of conflict call for different methods of resolution, and, often, the final resolution of a dispute requires the application of more than one method.

THE ADR SPECTRUM

Before the principal forms of ADR are examined in detail, it will be helpful to introduce certain terminology used to describe the methods and their place on the spectrum. Forms of dispute resolution that allow the parties to settle their own differences are often referred to as "consensual," as opposed to those that are more "adversarial" and involve the imposed ruling of a third party decision-maker. Methods that are flexible and have few fixed rules are referred to as "informal," as compared with methods that involve many "formal" procedural conventions and rules of evidence. Finally, some kinds of dispute resolution are described as "interests-based," where others are referred to as "rights-based." While the first two of these distinctions are straightforward, the third requires a little more explanation.

> **FROM AN EARLY AGE**, people tend to be very focused on their rights

Rights-Based vs. Interests-Based Solutions

From an early age, people tend to be very focused on their rights. Observe the complaint of a five-year-old child when his three-year-old sibling takes a toy off the shelf that the older child has not touched in months. Despite his lack of current "interest" in the toy, the older child may be outraged that his "rights" of ownership have been infringed. As much as people think that they grow out of these feelings as they mature, the difficulty in resolving many disputes is rooted in a way of looking at a situation based on an assessment of legal rights and entitlements, rather than from the perspective of interests and needs.

The difference between interests-based and rights-based approaches can be illustrated through the following example. Imagine two cooks fighting over possession of an orange. Each claims it as their own and demands exclusive possession. In methods of dispute

resolution that are rights-based, such as arbitration or litigation, the relevant question is, "Who has the stronger legal claim to the orange?" There will be a winner and loser. Only one cook will end up with the whole orange at the end of the process, regardless of why it is wanted or needed. In typical rights-based methods of dispute resolution, there is little to no room to explore the interests of each party or to craft creative solutions that will meet the needs of both parties.

Interests-based ADR processes, like negotiation and mediation, allow the parties to design creative solutions based on their individual best interests and needs. In this example, a creative solution could flow from an exploration of why each of the cooks wants the orange. It may be discovered that one wants to use the zest of the orange peel to make a carrot cake, while the other wants only the fruit for a salad. Obviously, the interests and needs of both parties can easily be met by giving one the peel and the fruit to the other. Unlike the win-lose outcome achieved through rights-based methods, interests-based solutions can result in win-win outcomes. Everyone goes home happy!

Other Considerations

In addition to the distinctions described above, methods of ADR are sometimes compared to each other by reference to the speed of the process, the level of cost involved, the degree of control that the parties have over the selection of a neutral third party to assist them, and the degree of privacy that can be achieved. Also, where parties to a conflict have or need to maintain an ongoing relationship, whether business or familial, the method of dispute resolution selected can have a significant impact on their ability to achieve this objective. Choosing the right method of dispute resolution will involve, in each case, a consideration of all of these factors.

Timely Solutions

» In most situations, parties will favour timely solutions. Disputes that are not resolved quickly tend to fester and become more difficult to settle in the future. As individuals invest more time and money in their conflict, they tend to become more entrenched and less flexible in their positions. The expression "justice delayed is justice denied" reflects the reality that, whether rights or interests are at stake, both sides suffer when a conflict cannot be resolved relatively quickly. Again, to use the example of the fight over the orange, both sides will lose if the orange turns rotten and mouldy while the dispute is being resolved. In addition, as time passes, memories may fade, important witnesses may die or move away, and critical documents may go missing. Sometimes, a quick result is to be preferred over a more perfect but slower outcome.

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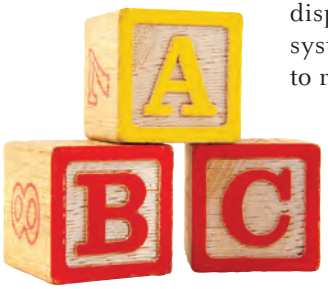

Cost Effectiveness

» Cost is, of course, a major consideration. In some methods of dispute resolution, such as litigation, it is not uncommon that the combined legal costs of the two parties can exceed the amount in dispute. And, even though the court system allows the victorious party to recover a portion of its legal costs from the losing party, this recovery rarely represents more than 60% of the actual costs incurred. Similarly, the winning party may discover, after the fact, that the loser does not have the financial means to satisfy the judgment. In other words, one can win, and still lose. It is sometimes said that, in these situations, only the lawyers win. Finally, as will be discussed later, the burden of legal costs can sometimes be used as a weapon by the more financially well-off party.

Selection of the Neutral

» The ability to select a third party neutral facilitator or decision-maker acceptable to both parties can also be very important in some kinds of dispute. In litigation, the parties rarely have any say in the selection of the judge that will hear the case. Judges are assigned by the court administration, often without specific regard to the type of case being tried. In some situations, it makes no difference. In others, where the dispute involves a specialized area of knowledge, it can be extremely helpful for the parties to be able to select an individual who is already knowledgeable in the field. Not only might they get a better result, but, also, the process can be quicker, if they do not have to provide this person with a lot of background information about the business or industry in which the conflict has arisen.

Privacy

» Privacy can be an important issue. Litigation occurs in courts that are open to the public and the media. Open access to the courts and to court records is a hallmark of the justice system, and judges almost never agree to bar the public or seal court records. Most other forms of ADR are conducted in private. Business disputes may involve trade secrets or otherwise sensitive proprietary information that one or both of the disputants may want to protect. In some cases, it may be damaging to a company's reputation with its customer base to have a conflict fought out in a public forum. In many disputes between individuals, sensitive or embarrassing information may be involved, and the parties may not want to air their dirty laundry in public. This may be especially true in the case of family law or estate disputes.

Maintaining Ongoing Relationships

» Finally, the need to maintain ongoing relationships can be a vital consideration. Anyone who has witnessed or experienced some of the more formal, rights-based, adversarial forms of dispute resolution, such as arbitration or litigation, can attest to the fact that parties often refuse to speak to each other after the case is over, much less do future business together. In the personal sphere, it can tear families apart, sometimes permanently. By contrast, some of the more informal, interests-based, facilitative forms of conflict resolution, such as negotiation or mediation, can result in a better understanding and appreciation of an opponent's perspective and end with a mutually acceptable settlement and a handshake.

In summary, those forms of ADR at one end of the spectrum tend to be more informal, interests-based, speedier, lower cost, private, and consensual. They also tend to allow the parties to select a mutually acceptable neutral third party to assist them and, when successful, are more likely to preserve existing relationships. As one moves along the spectrum, the approach becomes more formal, rights-based, slower, increasingly expensive, public, and adversarial, resulting in an imposed solution. The parties have less ability to control the selection of a decision-maker and are less likely to maintain any ongoing relationship.

THE ALTERNATIVES

Litigation

Litigation is the most formal, adversarial, and rights-based process available to parties in conflict. In litigation, following a series of procedural steps designed to allow the parties to better understand their opponent's case, each side presents legal arguments and admissible evidence before a judge or a judge and jury in court. Eventually, the court makes a decision, and the parties may have certain rights of appeal, if they disagree with the outcome. As noted above, the losing party usually pays a portion of the winner's legal costs and disbursements, in addition to the amount awarded in the judgment.

Legal rulings are almost invariably rights-based. Judges and juries have very little leeway to construct creative solutions that best meet the interests and needs of both parties. The party bringing the claim does not always win, and even when it does win, it does not always get everything that it claimed. The trial system is not geared towards finding win-win outcomes.

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Litigation rarely produces timely results. It can take several years to get to trial, and an appeal can add one to two additional years. Regrettably, some parties or their lawyers make the situation worse by trying to use a variety of procedural devices to cause delay as a tactic to wear the other side down. Most people's experience with litigation is that it is painfully slow.

Nor is litigation usually cost effective. It is very difficult for parties to access and understand the litigation process without the assistance of lawyers on both sides, and this makes it very expensive. Every step in the proceeding costs money and, again, this is sometimes used by one party to place an unbearable financial strain on the opponent. Just about the only way that litigation is less expensive than other forms of dispute resolution is that the parties do not have to pay for the use of the judge or the courtroom facilities. Those are provided by the state.

The parties in a litigation process have no control over the selection of the decision-maker; judges are appointed to cases. As a result, it is less likely that the parties will secure a judge with knowledge in the area of dispute.

Litigation proceedings are public. All of the documents filed in the court can be read and copied by any member of the public or the media, and anyone can come into the courtroom and watch the trial. Also, when the case is over, anyone can order a copy of the word-for-word transcript of the evidence of the witnesses, so long as they are prepared to pay the court reporter. Parties cannot maintain privacy over their private documents or information, or control the impact of the proceedings on their reputation.

Finally, litigation is extremely adversarial. To some, it is a game. To others, it is more like a war! Litigants often make terrible and exaggerated claims against each other. While people sometimes go into a lawsuit with great enthusiasm, they inevitably find that it takes a huge emotional toll on them. As a result, litigation usually negatively affects the relationships between the parties, and opposing litigants rarely do business or maintain relationships with each other in the future.

Yet, despite all of these drawbacks, in some situations, litigation may be the only realistic option available to parties. This is especially true when disputes involve complex legal issues or are concerned with an evolving area of the law. Sometimes, a claimant must go to the courts to obtain an urgent remedy, like an injunction, to prevent some immediate harm to them or their business. Finally, litigation may be the only option, if other forms of ADR have failed to resolve the issue.

When parties simply show up at the negotiating table without having done the necessary background work, **THE RESULTS ARE OFTEN A DISASTER**

When thinking about litigation, it is important to remember that there is a difference between the litigation process and the trial itself. Lots of litigation gets started. All it takes is the issuance of a relatively inexpensive statement of claim. Only a tiny percentage of litigation cases, however, go to trial — on average, fewer than 5%. Most claims that start out in the litigation process either are abandoned at some point along the way or get resolved through one of the other processes that will be described. The problem is that lots of time, money, and emotion are usually invested before the parties move the case to a quicker, cheaper and more congenial form of dispute resolution.

Negotiation

From a very early age, everybody has some experience with negotiation, and it is a regular feature of everyday human interaction. Children negotiate for a later bedtime or larger allowance. With teens, it may be the keys to the family car. For adults, it pervades almost every aspect of their lives. Despite all of this experience, however, few become very professional in the exercise of this skill set, especially when personally concerned with the outcome. In light of this, help is usually required in the resolution of serious disputes.

Negotiation of important legal disputes should be distinguished from the sort of everyday bargaining referred to above. Successful negotiation requires a degree of emotional detachment, the ability to see the problem from the other side's point of view, a realistic sense of potential outcomes, and a knack for identifying creative solutions that both sides can live with. For all these reasons, when the stakes are high, it is extremely difficult for parties to act as their own negotiators. Even if they have most of the skills outlined above, their emotional investment in the case usually interferes with their ability to exercise those skills. The use of trained and skilled negotiators can also go a long way to addressing the power imbalances that may exist between two disputing parties.

In addition to professional assistance, successful negotiations usually require a lot of thoughtful preparation. When parties simply show up at the negotiating table without having done the necessary background work, the results are often a disaster, and the parties leave the room further apart and angrier than when they started. If either or both parties are unwilling to make necessary concessions to reach a solution, negotiations will fail. Because the negotiation process can be tactical in nature, there are often feelings of distrust and unease amongst the parties that may impede creativity. The use of aggressive

and misleading tactics may also injure the relationship between the parties, and feelings of apprehension and anger may linger, even if settlements have been reluctantly achieved.

> Mediation can allow for the crafting of creative, mutually-acceptable, **WIN-WIN SOLUTIONS**

Proper preparation usually involves a careful evaluation of the strengths and weaknesses of one's own case and that of the opponent, gathering as much information as possible concerning an opponent's understanding or misconceptions about the matter, consideration of an opponent's ability to provide the desired outcome, and looking at what can be done for the opponent in this give-and-take process. If a party appoints someone to represent them with the negotiations, that individual must also be provided with a realistic range within which to settle the dispute.

In the case of legal disputes, negotiations can occur before or after a lawsuit is started. If the parties are willing to move from their initial positions to try to reach a resolution, almost any dispute can be successfully negotiated. The negotiation process is voluntary, informal, and can be the quickest and least expensive resolution method, if the parties are willing to make concessions. In negotiation, parties identify issues of concern, search for mutually acceptable resolution options, and bargain to try to bring about settlement directly with the other party. The negotiation process is not facilitated by a neutral third party, and any resolution reached between the parties is consensual, not imposed. Negotiations are usually conducted in private and are generally specifically stated to be "without prejudice," so that, if negotiations are unsuccessful, any admissions made or offers transmitted cannot be used in any subsequent proceedings. When skilfully handled, negotiations have tremendous potential to preserve important relationships.

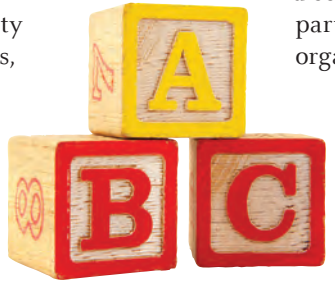
Mediation

Mediation, sometimes referred to as facilitation or conciliation, involves structured settlement negotiations led by a neutral third party who has been selected by agreement of the parties. The mediator's job is to skilfully guide and facilitate the negotiation process, but, unlike a judge in a courtroom, the mediator has no decision-making power. While the mediator may occasionally suggest a resolution, known as a mediator's proposal, the mediator may not impose a resolution on the parties.

A skilled mediator thoroughly understands the negotiating process. Parties sometimes select mediators who are also knowledgeable about the business or field in which the

dispute has arisen. While this can be helpful, it is rarely as important as the individual's mastery of mediation skills. A good mediator can assist the parties in evaluating the strengths and weaknesses of their own and their opponent's case, understand their opponent's perspective, develop creative solutions, and deliver difficult messages to the other side more effectively than they can sometimes be conveyed directly. When a party exhibits overconfidence in its position, the mediator can often administer a much-needed reality check. Skilled mediators use their understanding of human nature, together with a variety of techniques, including humour and highly-nuanced and selective communications, to gradually bring disputing parties around to a consensus.

The mediation process is flexible and usually quite informal. It can be designed around the needs of the parties, their individual circumstances, and the nature of the dispute. The mediation process might be set up and conducted differently in the case of a family or estate dispute than when dealing with a multi-party business conflict. In most cases, however, the mediator will spend some time meeting with the parties together in one room, followed by individual caucus meetings with each side in private. In some cases, the mediator will go back and forth between the parties exploring settlement options and carrying offers, until agreement is reached. Once a settlement is arrived at, the parties will commonly be brought back together to confirm the terms of the agreement, to be congratulated on their good efforts and, where appropriate, to exchange handshakes. The agreement itself will usually be recorded between the parties' lawyers by way of a handwritten memorandum and later documented in more formal minutes of settlement.



Like unassisted negotiations, mediation can allow for the crafting of creative, mutually-acceptable, win-win solutions. These interests-based solutions can include apologies, the return of property, or an agreement for an extended or expanded business relationship between the parties. The mediation process minimizes the atmosphere of conflict and creates a better chance that the relationships between the parties will be preserved. Mediation is also very cost- and time-efficient. When parties cooperate, mediation can be organized on relatively short notice and is usually conducted in as little as half a day and rarely more than three days. The parties typically split the cost of the mediator's fees. Even accounting for this and the cost for their own

lawyers, successful mediation is substantially less expensive than even the preliminary stages of litigation. The involvement of lawyers in mediation is not a requirement, but, in the case of most serious legal disputes, it is highly advisable.

Like negotiations, mediations are conducted in private, and, if the mediation fails to bring about a settlement, nothing said to the other side or to the mediator can be used in subsequent proceedings. For this reason, neither side can ever call the mediator as a witness, should the matter proceed to arbitration or trial.

Mediation enjoys a very high success rate. Skilled mediators are generally able to achieve settlement in over 85% of the cases referred to them, when the parties come willingly to the mediation session. As is the case with negotiations, careful individual preparation is required, and this is often reflected in written briefs exchanged between the parties and given to the mediator in advance. When properly done, these written briefs will not only state the party's position, but will also attempt to show an appreciation of the other side's perspective and a willingness to explore creative options for resolution.

Until recently, the rules surrounding the conduct of a mediation have evolved from a combination of (i) agreements worked out between legal counsel and the mediator; (ii) some input from the rules of civil procedure in jurisdictions where mediation has been incorporated as a stage in the litigation process; and (iii) a series of court decisions. Recently, however, the province of Ontario passed into law the *Commercial Mediation Act, 2010*, which enumerates a set of rules for the conduct of mediations to which the *Act* applies, including a procedure for enforcing a mediated settlement agreement. Although the legislation applies to disputes of a commercial nature, there is nothing to prevent parties from incorporating these rules by agreement into any other kind of mediation process. Although the *Commercial Mediation Act, 2010* does not break any real new ground and largely codifies rules surrounding fairness and confidentiality which have already become well-established, it is useful to have this legislation as a reference point, especially for cases where mediation occurs outside of the litigation process.

Other Informal Processes: Fact-Finding, Early Neutral Evaluation, Mini-Trial and Expert Determination

The broad ADR spectrum contains several other informal dispute resolution processes, including fact-finding, early neutral evaluation, mini-trials, and expert determination. They are used less frequently than the principal forms of dispute resolution, often in certain specialized kinds of disputes.

> The result of an early evaluation often provides a **VALUABLE REALITY CHECK** to one or both parties

In a fact-finding process, a neutral third party conducts an investigation into the cause of the disagreement between the parties, attempts to determine the facts in dispute, and presents findings and recommendations for possible solutions. Fact-finders do not generally concern themselves with the legal issues surrounding the dispute. Fact-finding can be useful in disputes involving complex scientific and factual issues. The fact-finding process offers a degree of flexibility in that the parties can choose to make the fact finder's decision binding or not. The fact-finding process is usually agreed to be entirely confidential. If the parties choose to accept the fact-finder's conclusions, they can save enormous amounts of time and money. Fact-finding is often used in the case of labour relations disputes.

Early neutral evaluation is a process by which the parties present facts and issues, either orally or, more often, in writing to a mutually acceptable neutral case evaluator who advises the parties on the strengths and weaknesses of their positions and provides a non-binding assessment of how the dispute is likely to be decided by an adjudicator, arbitrator, or judge. The early neutral evaluation process often takes place soon after a case has been filed in court and the neutral evaluator's assessment is often used to plan settlement or litigation strategies. The result of an early evaluation often provides a valuable reality check to one or both parties and encourages negotiation or mediation leading to settlement. As a result, early neutral evaluations often bring about time-effective negotiated or mediated settlement of the dispute along the lines recommended by the neutral evaluator, thereby saving substantial time, costs, and stress. Since the early neutral evaluation is non-binding, however, there is no prejudice to either parties' position, and they are free to escalate the dispute to another form of dispute resolution.

In a mini-trial, the parties select a mutually acceptable neutral who presides over an abbreviated hearing to render an opinion as to the likely outcome of the matter if it were to proceed to trial. As opposed to early neutral evaluation, mini-trials usually occur later in the pre-trial process and actually involve the oral testimony of some of the potential witnesses. The neutral may either render a non-binding decision or work with the parties in an attempt to reach a settlement. Mini-trials are more informal and flexible and follow more relaxed rules for discovery and case presentation than litigation. Just as in early neutral evaluations, mini-trials serve to better inform the parties as to the merits of their case and, as a result, the parties are better prepared to engage in negotiations

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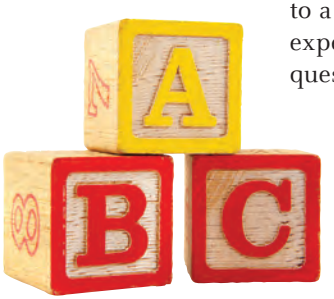
or mediation. Accordingly, mini-trials can contribute to a relatively cost- and time-effective resolution.

Finally, expert determination is the process by which parties present their cases to a mutually acceptable expert. The expert gathers information, asks questions, and provides an opinion on the issues presented and on their implications for each party's case. Expert determinations are highly effective where the dispute hinges, in whole or in part, on a specific type of technical or scientific issue.



Expert determinations can provide quicker and more cost-effective solutions than litigation or arbitration. Because they have selected an expert that they both have confidence in, the reality checks that follow expert opinions can have a major influence on the parties' beliefs and expectations and can be very influential in causing the parties to reconsider their positions.

Adjudication

Adjudication is an interim decision-making process that is suitable for resolving disputes during ongoing ventures, such as large construction projects. A neutral adjudicator is pre-appointed to resolve any disputes as they occur throughout the life of the project. The parties can select an adjudicator with expertise in the area of the potential disputes. In addition, the parties will agree in advance on a set of rules of procedure, disclosure, and evidence. Because decisions are made on a quick and informal basis, the result may be imperfect. The adjudicator's decisions, however, are binding, but only until the project has been completed. At the end of the project, if either party is dissatisfied with the adjudicator's decisions, they can reopen the disputes, as if the adjudication had never occurred. When this happens, no reference is made in any subsequent procedure to the fact that adjudication occurred or to the result.

The principal benefit of adjudication is timeliness. It allows a decision to be made before a dispute has had a chance to fester and infect the relationship between the parties with further ill will. In some situations, unresolved disputes may cause workers to put down their tools or owners to withhold payments from contractors. When this happens, the project is unnecessarily delayed and, in extreme cases, it can slide into insolvency. Adjudication allows determinations to be made when the facts are fresh in everyone's mind, while witnesses are still available, and before important documents have been lost or misplaced. Adjudication, when effectively used, helps to minimize work disruption and ensures continued cash flow.

Because they know that the adjudicator's rulings are ultimately non-binding and cannot be referred to in any future contest, the parties are usually willing to live temporarily with the imperfect outcomes that this quick, efficient, and relatively informal process may sometimes produce. In reality, however, experience shows that most adjudicated decisions are accepted on a permanent basis, making subsequent proceedings rare. Whether this is due to the quality of the decisions, or merely fatigue on the part of the parties, the result is the same. In appropriate circumstances, adjudication can represent a low-cost, quick, and effective way to resolve disputes in the case of ongoing ventures or projects.

Often, arbitration can be arranged within days or weeks and **CAN TAKE MUCH LESS TIME TO COMPLETE THAN LITIGATION**

Arbitration

Arbitration is a procedure for the resolution of disputes through the appointment of an independent arbitrator who considers the merits of a dispute and renders a final and binding decision called an award. In this sense, arbitration is sometimes referred to as "private court." In other words, it can be much like litigation, except that the parties have mutually agreed upon the selection of a judge.

Arbitration, however, can have significant advantages. It offers the parties a large measure of control over procedural processes, evidentiary rules, and, most importantly, choice of the decision-maker. The parties may select an arbitrator with knowledge in the area where disputes have arisen. In addition, parties can choose an arbitration process that is tailor-made to their particular needs and the nature of the dispute. Finally, arbitration proceedings are usually stipulated to be confidential and are conducted in private. Members of the press and public are excluded, and no one but the parties has access to the documents filed or a transcript of the proceedings.

Arbitration can be efficient in terms of time and money. Often, arbitration can be arranged within days or weeks and can take much less time to complete than litigation. If the arbitration process is kept simple, it can be relatively inexpensive. On the other hand, the services of the arbitrator are generally paid for by the parties, either equally or by the losing party. Similarly, the disputants have to arrange and pay for the facilities where the hearing will occur and a court reporter, if a transcript is to be available. In these cases, arbitration can actually be more expensive than litigation, where the judge, courtroom, and court reporter are paid for by the state from tax dollars. Finally, unless they have agreed

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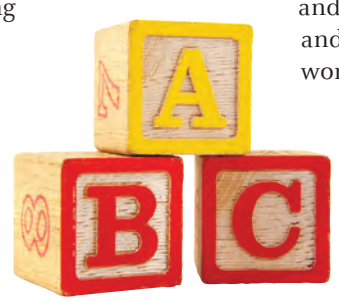
otherwise in advance, parties to arbitration have limited rights of appeal.

In addition to full arbitration proceedings, there are variations sometimes used in special situations where the ultimate issue in dispute simply involves the dollar amount that one side will pay to the other. These variations are sometimes referred to as final offer selection or "baseball" arbitration, after the way that some salaries are determined in the major leagues. In advance of the hearing, each party submits its best offer to the other party and to the arbitrator. After hearing the parties' cases, the arbitrator selects the offer considered the most reasonable as the binding award. The arbitrator cannot award an amount in between the two offers, so there is no splitting of the baby. This forces each party to think long and hard about its final offer, since each wants to been seen as most reasonable in the eyes of the arbitrator.



In another variation of this method, sometimes referred to as "night-time baseball" arbitration, the arbitrator is kept in the dark as to the final offers exchanged, until after a decision is rendered. Then, the final offer closest to the arbitrator's award is the amount paid. For example, if one party's final offer is to pay $500 and the other party agrees to accept no less than $1,000, and the arbitrator, without any knowledge of these final positions, makes an award of $650, the claimant will receive only $500, since that is the amount closest to the award. If the arbitrator's award is $751 or higher, the claimant will receive $1,000, since the award is at least $1 closer to the higher amount than to the lower. In another twist on this method, the parties sometimes agree, where neither wishes to take inordinate risk, that the high and low offers will constitute a cap and a collar on the result. In other words, if the arbitrator's award is $425, the claimant will still receive $500, but if the arbitrator awards $1,250, the maximum paid will still be only $1,000.

All of these methods encourage the parties to create reasonable final or best offers, and this often results in a convergence of the parties' positions to a point where they can actually resolve their dispute without having to complete the arbitration. These methods discourage unreasonable or inflated offers. Since both parties are trying to come up with final offers that are as close as possible to what they think an arbitrator, acting reasonably, will do, their two offers may be

close enough for them to say, "Let's just split the difference and not spend more money on the arbitration costs."

Mediation-Arbitration (Med-Arb)

Mediation-arbitration is a hybrid process that starts with a mediation of a dispute by a neutral third party and, by prior agreement, transforms into arbitration with the same neutral third party acting as an arbitrator, if the initial mediation is unsuccessful. If the dispute reaches the arbitration stage, the neutral third party arbitrator will impose a binding decision upon the parties.

Med-arb is advantageous in that it ensures that a final resolution will be reached, either through a successful mediation or through an imposed arbitration award. Med-arb is also advantageous in that it begins with a relatively informal and potentially time-efficient mediation process, which leaves the result in the hands of the disputants. If arbitration is necessary, med-arb is time- and cost-efficient, in that there is no loss of time or cost to acquaint a new independent third party with the facts of the dispute.

The participation of the same neutral in both the mediation and arbitration steps of med-arb, however, may cause parties to be less candid with the neutral during the mediation phase. One or both parties may hold back information if they believe that it will prejudice them, should the matter proceed to the arbitration phase. In other words, the mediation process may be undermined if the parties perceive that confidential information acquired during that phase might be used in the adjudicative phase. Similarly, it may be difficult for the arbitrator to ignore information that is learned during the mediation phase, even though that information may be technically inadmissible evidence in the arbitration. As a result, med-arb is rarely used in practice, except in the resolution of family law disputes, and it requires the highest level of skill and experience on the part of the mediator/arbitrator.

Who Gets to Choose?

So far, the discussion assumes that the parties to a dispute get to select the form of resolution best suited to them. Sometimes this is true, but not always. In some cases, specific legislation, such as the *Condominium Act* or the *Labour Relations Act*, requires that certain disputes be resolved in a particular way. In Ontario alone, dozens of pieces of legislation require some types of dispute to be arbitrated. In other situations, a contract entered into between two parties may dictate the method that any disputes under that contract are to be resolved. Sometimes, the contract will require escalating forms of dispute resolution, starting with negotiation, interposing mediation, and ending with arbitration or litigation. Even

where this is not required by legislation or a binding contract, the parties may choose to try one form of ADR in the hope that it will resolve their dispute, while reserving the right to escalate the matter to a more formal process, if they are unsuccessful. Finally, the rules of court in Ontario now require that the parties to most kinds of litigation attempt mediation as a condition of bringing their case to trial.

> Less formal processes can often be used to ensure that **THE INTERESTS OF BOTH PARTIES ARE MET**

When neither legislation nor a contract dictates the form of ADR to be used, the parties to the conflict get to choose. Except in the case of litigation, however, they must agree on the method to be used. While one party can always sue another, it is impossible to force another party to negotiate or mediate in good faith, to adjudicate, or to arbitrate a dispute. Often, the first negotiation that parties must engage in is the selection of a form of ADR acceptable to both, including the selection of a mutually acceptable neutral third party, where necessary. This is sometimes not as easy as it may seem. Parties in conflict will often evaluate their strategic and tactical advantages in bargaining for the ADR method that they determine to be most advantageous to them. For example, where the parties do not enjoy the same financial wherewithal, the wealthier party may wish to choose the most expensive process with a view to beating the less well-off opponent into submission. Or, when one disputant knows that the other has serious privacy concerns, he may insist on litigation to force his opponent to cave in to avoid public disclosure.

CONCLUSIONS AND OBSERVATIONS

In selecting the most appropriate dispute resolution process, parties must weigh the advantages and disadvantages of each method. While less formal ADR processes, such as negotiation and mediation, offer greater flexibility, cost, and time savings, and the possibility of creative win-win solutions that serve to maintain the goodwill between the parties, less formal processes do not provide a guarantee that the dispute will be resolved. More formal ADR methods, such as litigation or arbitration, sacrifice those advantages, but provide the parties with a greater degree of finality and certainty. Less formal processes are not suitable where parties require a court judgment or a remedy that a mediation or negotiation process cannot provide.

There is a common misconception that less formal methods of ADR, including

mediation and negotiation, inevitably involve compromising or meeting halfway. While some of the less formal dispute resolution processes may promote a degree of compromise, many creative outcomes are available that go beyond meeting halfway. Less formal processes that allow for the designing of creative solutions can often be used to ensure that the interests of both parties are met. Given the breadth and depth of human ingenuity, it is inevitable that the nature of the disputes that will arise between people will be many and varied. Accordingly, there will be no "one-size-fits-all" approach to settling those conflicts. This article has provided a brief overview of the most popular methods of alternative dispute resolution available. While each has its pros and cons, they all beat pistols at dawn!

WHY MEDIATIONS FAIL

Most mediations are successful in resolving disputes. Indeed, although there is no firm empirical data to support of this contention, there is anecdotal support for the belief that the overwhelming majority of mediation efforts are successful when the parties come to the process willingly, rather than as a result of mandatory mediation procedures required by court rules as a prerequisite for getting to trial. When mediation fails, however, the failure can usually be attributed to one or more of the six following causes, each of which is, fortunately, avoidable.

1. SELECTION OF THE WRONG MEDIATOR

For many years, the ranks of mediators were filled by retired judges looking for something to do on a part-time basis to keep themselves busy and supplement their incomes in their final working years. More recently, and especially since the adoption of mandatory mediation under the rules of court in many jurisdictions, the ranks have been further swelled by a great many lawyers at or nearing retirement age who have decided to hold themselves out as mediators with a view to supplementing their existing litigation practice and finding an activity that they can continue after they leave practice. As is the case with retired judges, some of these individuals make excellent mediators. Unfortunately, many lack the experience, training, and temperament to add much value to what is a demanding process.

Since mediation usually represents the last and best chance to avoid an expensive and stressful trial process, very careful consideration should go into the selection of an appropriate mediator. Because clients rarely have access to the necessary information to make this decision, this task is usually left to legal counsel. Clients, however, can ask relevant questions concerning the knowledge, experience, and training of the proposed mediator. Although it is not necessary to consider only individuals who have made a full-time commitment to this activity, great care should be taken before retaining a mediator that is merely dabbling in the area.

Do mediators need to have knowledge and experience in the area from which the dispute arises? Good mediators can generally mediate any kind of dispute, but familiarity with a

particular field of endeavour or enterprise can often facilitate a successful outcome. For example, mediators who have an in-depth knowledge and understanding of how a construction project runs, in addition to their legal training, may, as a result of that knowledge, be able to speak the language of the parties, and thereby gain their trust and confidence. This knowledge will often allow the mediator to get to the root of the issue without requiring a lot of time to be taken up with detailed explanation related to the factual matrix of the underlying dispute. Finally, industry knowledge may allow the mediator to come up with creative suggestions that might not occur to an individual lacking that familiarity. Again, however, acknowledged expertise in an area is no substitute for superb mediation skills.

Regrettably, too often, mediator selection is based on availability and cost. Given the importance of the exercise, this is a mistake. No one would choose a heart surgeon based on these criteria. It is worth waiting for the right mediator, and, since the cost is generally divided equally between the parties, a slightly higher hourly rate should not be seen as a significant impediment to hiring the right person for the job. Of all of the factors identified in this article, mediator selection is the most important.

2. FAILURE OF THE ULTIMATE DECISION MAKERS TO PARTICIPATE

It is of the utmost importance that individuals on each side of the dispute attend the mediation with full and unfettered authority to enter into a binding settlement. Attendance by an individual with limited authority will often be fatal to the process. When mediations fail, it is not uncommon that one of the party representatives in attendance has been given limited authority and cannot exceed that authority without obtaining further permission from someone who may or may not be accessible during the process. Even if the person with ultimate authority is available by telephone, this is rarely a substitute for that person's physical presence at the mediation session.

Mediation is a dynamic process, and it is essential that the mediator have direct face-to-face access to the ultimate decision-makers

on both sides of the dispute. Only in this way can the mediator ply his or her particular skill set on individuals who are critical to the settlement process. Doing this through the proxy of a party representative with limited authority is no substitute. The mediator has no opportunity to observe the personality of the ultimate decision-maker, and that person, in turn, has no opportunity to observe what he might be up against in terms of the credibility and resolve of the opposing party and its legal counsel. The mediator will have no opportunity to explore creative ideas with one or more of the people who might be in the very best position to turn those ideas into solutions. Nor will the mediator have an opportunity to impress directly on this person the enormous risks and costs of allowing the matter to go forward to trial.

When it is not possible for the ultimate authority to attend in person, it is imperative that the representative who does attend should have the full faith and confidence of the person he or she is representing. It is inappropriate to send a representative to a mediation with anchored positions such as, "We will not pay a penny higher than..." or "We won't accept a nickel less than..." Rather, the representative should be told:

> "I trust your judgment. Get the best deal that you can. Try to get the case settled on reasonable terms. Feel free to consult with me by telephone, if you are uncertain. Whatever you do, I will not second-guess you."

Although many mediation agreements require the attendance of an individual with authority, the mediator generally has little control over who attends a mediation session. Because of the importance of this issue, however, the lawyers representing each party should require from the other party a firm commitment that the appropriate individuals will attend in person as a condition of proceeding with the mediation. Too much time and money is invested in this exercise to leave this aspect of the process to chance. Clients also have a responsibility to ensure that they send the right representative and to require that the other disputant also be properly represented.

3. LACK OF COMMITMENT TO COMPROMISE

Other articles like this often refer to the need for a commitment to settle by both parties as a prerequisite to a successful mediation. This, however, is an oversimplification. Most parties to a dispute will say that they have come to the mediation with a view to reaching a

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settlement. They will say that they understand that the achievement of this objective will require compromise. But, when their initial positions are explored, either through the briefs that are filed on their behalf or in their opening statements to the mediator, it quickly becomes apparent that they intend most of the compromising to come from the other side. When both parties come to mediation with this attitude, the mediator's work becomes infinitely more challenging, and the opportunity for a successful outcome is often lost.

REAL COMPROMISE means taking less than you honestly believe you are owed or paying more than you think you are liable to pay

In many disputes, especially those that have progressed to the stage of litigation, the parties present exaggerated and unrealistic demands to each other. They hope that by asking for more than they truly expect to be awarded, they will end up with what they think they are entitled to receive. When it comes time to mediate, their idea of compromise is to give up the surplus demand and settle for what they hoped to achieve through litigation. Unfortunately, reality is rarely this convenient. The other party starts from a polar opposite position and is well aware of the "slush" in the other party's demands, just as their own position may represent an understatement of what they expect to pay. Real settlements rarely occur when parties are only prepared to give up that to which they were never entitled.

Real compromise means taking less than you honestly believe you are owed or paying more than you think you are liable to pay. Real compromise involves overpaying or under-receiving in exchange for buying peace and avoiding future legal costs, stress, and all of the risks inherent in the arbitration or litigation process. Real compromise is the cost of being able to close the book on a very unpleasant chapter in your business or personal life and to wake up the next morning realizing that this is a dispute that you no longer have to think about. Real compromise is difficult and can be excruciatingly painful, especially when parties have invested significant emotional capital in achieving a positive outcome.

A commitment to settlement is meaningless without a commitment to make real sacrifice. Parties involved in a dispute should come to the mediation table having thought carefully about the other side's point of view and determining truly how far they can go, if necessary, to achieve a settlement. Of course, each side's bottom line need not be communicated at too early a stage in the process, but it is essential that each party rid itself of unrealistic expectations before coming to mediation.

Not all mediation efforts are, in the truest sense, voluntary. Sometimes a provision in a contract or certain legislation requires the parties to attempt mediation before moving on to litigation or arbitration. In many jurisdictions, the rules of court require mediation before a matter can move on to the trial stage. Even in these situations, however, wise parties will recognize this as an opportunity to resolve the dispute without incurring enormous further legal costs, stress, and risk. Whether the mediation effort is truly a voluntary exercise or one mandated by law, essential to a successful outcome is a commitment by both parties to engage in a process of real compromise.

4. CONFUSION ABOUT THE PROCESS AND THE ROLE OF THE MEDIATOR

There are several areas of confusion in the minds of both legal counsel and their clients that often lead to failure in mediation. The first, and most important, mistake which frequently occurs, especially in the minds of the parties themselves, is to confuse the role of a mediator with that of an arbitrator. An arbitrator, like a judge in a courtroom, is empowered to make final and binding decisions regarding a dispute based on the evidence and argument presented. A mediator has no such power and is merely a facilitator selected by the parties to assist them in their process of negotiation. Despite this important difference, it is not uncommon to find parties, and sometimes their legal counsel, spending a great deal of time in their written materials and oral presentations at the mediation session attempting to persuade the mediator of the rightness of their position, based on the facts and the law as they see it.

This approach to mediation is either based on a misunderstanding of the mediator's role or arises from the misguided belief that, if one party to a dispute can persuade the mediator that their position is correct, the mediator will then persuade the other side on their behalf. It is important for the mediator to have an understanding of the issues in dispute and the basic positions of each party, together with some understanding of the evidence in support of those positions, so that he can point out to each side the strengths of the other side's case and the potential frailties of their own. But valuable time will be wasted if the parties lose sight of the fact that the mediator is not there in an adjudicative role. A far better use of the parties' time and energies would be to help the mediator do what mediators do best, that is to assist the parties in creatively exploring potential areas of mutual interest and compromise.

The other common mistake that often hinders successful mediation is the belief that the settlement process begins with the opening of the mediation session. It is ironic that parties facing a trial or arbitration date commonly negotiate around the clock to avoid the costs and risks of an adjudicative process, yet it is not uncommon that immediately after parties to a dispute schedule a mediation session, they stop negotiating. Instead of continuing with a process that most lawyers do extremely well on behalf of their clients, the lawyers discontinue settlement negotiations in the belief that they will leave that task to the mediator.

This is an unfortunate mistake and represents a missed opportunity. As noted above, there is usually a wide expectation gap between the parties in the early stages of a dispute. If the parties come to mediation with their expectations fully entrenched, the mediator's task is made all the more difficult, and success may be impossible. For example, if one party expects to receive $5 million and the other only intends to pay $500,000, the remaining $4.5 million gap may be too large to bridge at mediation. If, on the other hand, the parties have engaged in meaningful negotiations and have outstanding offers to settle on the table whereby the plaintiff has agreed to accept $3.5 million and the defendant has agreed to pay $1.5 million, the mediator will have a much greater chance of success in bridging the remaining $2 million gap.

5. INADEQUATE ATTENTION TO THE MEDIATION BRIEF

Confusion with respect to the nature of the process and the role of the mediator is often reflected in the mediation briefs themselves. If they are merely advocacy documents similar to what is filed with the court, they add almost nothing to the process. Parties that fail to properly understand the process, often produce mediation briefs that are indistinguishable from the pleadings in the case. They do not promote successful outcome.

A mediation brief should give the mediator an overview of what the case is about, set out the essential factual matrix, and provide a brief statement of the legal position that the party relies upon. A good mediation brief, however, will also attempt to communicate to the mediator and to the opposing party that there is an appreciation of the other side's case and perspective and give some indication of the range within which compromise may occur and settlement may be achieved. An

excellent mediation brief will also show a real appreciation of the below the surface issues and may explore those issues in a non-contentious or even helpful way. For example, if a plaintiff is aware that the defendant has no insurance or is inadequately insured, it can be helpful to acknowledge this fact and thereby demonstrate that you are aware of the limitations that may constrain the ultimate outcome. Finally, a superb mediation brief will do all of the above and may, in addition, make admissions against interest or acknowledge some of the weaknesses in your own case, before going on to propose some creative alternatives for resolving the case.

Parties may fear that admissions against interest or acknowledgements of weakness contained in a mediation brief may be counterintuitive or that they may be used against them in subsequent proceedings. Dealing with the second concern first, like everything else associated with the mediation process, mediation briefs are "without prejudice" documents and are protected from disclosure in subsequent proceedings. They may not be used for any purpose whatsoever outside of the mediation process. As to the practice being counterintuitive, it is important to remember that mediation is not an adversarial process. First of all, an opponent has probably already figured out the things that one might admit or acknowledge, but willingness to admit or acknowledge them may go a long way to encouraging the opponent to do the same. This is more likely to set the stage for a fruitful process than will be the case if both parties maintain intransigent positions.

Parties who misconceive the mediation process are often afraid to be creative in their mediation briefs for fear of showing weakness or lack of resolve. This is a mistake. While it is true that it is a waste of time trying to convince the mediator of the strength of a case, it is enormously helpful to let the mediator know that the party is coming to the mediation with the right attitude and approach. Mediators, being human, naturally want to help parties that are trying to help them do their job effectively. Accordingly, if one party comes to a mediation demonstrating a clear understanding of the process and a desire to compromise and the other comes presenting a belligerent and uncompromising attitude, most mediators will be naturally inclined to lean more heavily on the party that is seen to be a barrier to resolution.

Written mediation briefs exchanged several days or more before the scheduled mediation

date provide an excellent opportunity to let the other side know that you are coming to the process with the right attitude, an appreciation of your opponent's needs and interests, and a commitment to compromise. When both parties adopt this approach in their written materials, it can significantly enhance the likelihood of success.

6. BAD TIMING

There are many views regarding the right time to proceed to mediation. It is often said that parties are unwise if they mediate too early and before they have a clear understanding of the allegations against them and the evidence that they will have to face, if the matter goes to trial. Lawyers often say that it is too early to mediate, since the parties do not have a proper understanding of the other side's case. While in certain kinds of disputes this may be true, what is perhaps being said is that the lawyers themselves have not yet acquired a sufficient understanding of their own client's case, not to mention that of the other side, to be effective advocates for their client's position.

The parties themselves probably have an excellent understanding of the situation, since they have lived through it. While they may not have a comprehensive understanding of the governing law, they certainly know what happened and probably have a reasonably good command of the relevant facts. What the parties are looking for is a cost-effective method of resolving their dispute, and it is the lawyers' job to get them there at the earliest possible opportunity. It must be remembered that it is not always necessary to have the same comprehensive knowledge of the facts and evidence surrounding the case that is needed to take it to trial in order to conduct a very satisfactory and successful mediation.

Sometimes, mediations conducted too early fail because one or both of the parties are still too angry about the underlying cause of the dispute to consider meaningful compromise. In these situations, the aggrieved party may still be out for blood, while the offending party may not yet be prepared to own up to its own responsibility for what has occurred. Time may be necessary to allow for some degree of emotional resolution to occur. This process is often assisted when parties come to grips with the costs of the litigation process. Getting even feels good, but it is usually expensive. Some lawyers believe that mediation will not be effective until the parties have been softened up or worn down a little by the costs of the process, both in terms of financial and other resources.

GETTING EVEN FEELS GOOD, but it is usually expensive

The flipside of the coin are those mediations which occur too late in the process, after tens or even hundreds of thousands of dollars have already been spent by the parties on legal fees during the preliminary stages of litigation. It is, unfortunately, all too common that by the time parties get to mediation, the two sides have collectively spent in legal fees more than the amount originally in dispute, and far more than the amount that they would have been prepared to compromise at much earlier in the process. Regrettably, by this time, however, they are far too invested, both financially and emotionally, to find an effective zone of compromise. A common plaintiff's complaint heard at these late mediations is, "How can I accept that amount? It doesn't even cover my legal fees!" By contrast, the defendant says, "I wish I could offer you more, but I have already spent a fortune in legal fees."

In these situations the mediation fails, not because the amount offered was unreasonable or unrealistic, but rather because the parties' ability to settle has been eroded by their financial investments in the lawsuit and, in some cases, their emotional entrenchment in protecting that investment. The best time to mediate a dispute is as soon as possible after things have settled down a bit, the lawyers have a basic understanding of the underlying facts and evidence, the parties have a clear understanding of what lies ahead both in terms of cost and commitment if they take their case further, but well before the incurred costs have escalated beyond a perceived point of no return.

CONCLUSION

There are many other reasons why mediations fail, but they are often situation specific and not always predictable. There is not much point in devoting an article on causes of failure that little or nothing can be done about in the planning stages. The six causes identified above are all extremely common and very manageable, once they are understood. With the assistance of experienced legal counsel, parties can select a skilled mediator, ensure that all of the necessary parties participate, come to the mediation with the requisite readiness to compromise, have an accurate understanding of the process and the mediator's role, exchange helpful and informative materials, and schedule the mediation at an early enough stage in the process for it to be successful.

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PRE-LITIGATION MEDIATION OF CONSTRUCTION DISPUTES

This article first appeared in *Construction Canada Magazine*, January 2011

Over the past two decades, dispute resolution mechanisms such as partnering, adjudication, and dispute review boards have gained traction as methods for resolving disputes that arise during the course of a construction project. While each of these devices has certain advantages and some appeal, mediation continues to be the ideal means for resolving disputes both during the life of a project and after it has been completed. Especially when the parties take the trouble to select a standby project mediator at the outset of the project, it remains the most timely, cost-effective, and constructive method of settling disputes. Even after substantial performance has occurred, mediation should be considered as a prerequisite to the commencement of litigation, rather than merely as a step on the path to the courtroom door.

From quite an early point in human history, people have appreciated the benefit of involving neutral third parties to help them resolve their disputes. This appreciation ultimately resulted in the development of a system of courts, where people could go to assert their legal rights and remedies. Over time, procedures and rules of evidence were developed to ensure a degree of fairness and reliability in the process. The result was a system of dispute resolution that lawyers refer to as litigation. In this sense, taking someone to court was an early form of alternative dispute resolution -- an alternative, that is, to pistols at dawn. But, litigation has lately come to be seen as something to be avoided at all costs. The fear of long delays, high costs, and unpredictable or unsatisfactory results has caused people to look more carefully at other methods for managing and resolving conflict. Litigation has simply become too slow, too expensive, and too risky.

In most situations, parties will favour timely solutions. Disputes that are not resolved quickly tend to fester and become more difficult to settle in the future. As individuals invest more time and money in their conflict, they tend to become more entrenched and less flexible in their positions. The expression "justice delayed is justice denied" reflects the reality that both sides suffer when a conflict cannot be resolved relatively quickly. As time passes, memories may fade, important witnesses may die or move away, and critical documents may go missing. And, of course, while disputes are outstanding substantial amounts of cash may not flow. In extreme cases, money may be tied up in court proceedings for so many years that, by the

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time a judgment is obtained, the accumulated interest may approach the amount originally in dispute. For these reasons, sometimes a quick result is to be preferred over a more perfect but slower and far more expensive outcome.

All of this is especially the case with a construction project where the work is carried out over, at minimum, many months and, often, over several years. There is an unfortunate tendency, in many cases, for owners and contractors to agree that they will push all unresolved disputes involving claims for extra work, defective or incomplete work, deficiencies, and delay claims out to the end of the project. This is generally a very bad idea. A construction dispute can be like a splinter in the finger. It starts out as a minor irritant but, if not treated quickly, it can become seriously infected and spread to other parts of the body. In rare cases, serious illness and even death can result. Early resolution of a construction dispute can prevent the issue from festering and causing further ill-will between the parties. In many cases, with the help of a mediator, the parties can work out a permanent or interim solution that will either solve the problem completely or keep the project running while, at the same time, preserving each side's rights and interests in the ultimate resolution of the dispute. And, like negotiations, mediations are conducted in private and are "without prejudice." If the mediation fails to bring about a settlement, nothing said to the other side or to the mediator can be used in subsequent proceedings.

> "Mediation can allow for the crafting of creative, mutually-acceptable, **WIN-WIN SOLUTIONS**"

There is generally a direct correlation between time and cost. It is inevitably more costly to attempt to resolve disputes long after the triggering event has occurred. As noted above, memories fade, documents get lost, work gets covered over, and, with the passage of time, it is generally more difficult, time-consuming, and costly to reconstruct the factual matrix underlying the legal dispute. Confronting and settling construction disputes immediately or shortly after they arise will almost always be a more cost-effective approach. To facilitate this result, parties are well advised to appoint a neutral project mediator at the outset. This individual will remain on standby throughout the life of the project to step in quickly to assist the parties in resolving disputes in a timely fashion. Because they will have been appointed at the outset, they will have a general familiarity with the project and the players, thus enhancing their effectiveness when the need arises.

Mediation enjoys a very high success rate. Skilled mediators are generally able to achieve settlement more than 85% of the

time, when the parties come willingly to the mediation session. Mediation involves structured settlement negotiations led by a neutral third party who has been selected by agreement of the parties. The mediator's job is to skilfully guide and facilitate the negotiation process, but, unlike a judge in a courtroom, the mediator has no decision-making power. While the mediator may occasionally suggest a resolution, known as a mediator's proposal, the mediator may not impose a resolution on the parties. The mediator's only power is the power of persuasion. To exercise this power, the mediator must gain and keep the trust and confidence of both parties, even while delivering what may sometimes be unpalatable messages.

A skilled mediator thoroughly understands the negotiating process. A good mediator can assist the parties in evaluating the strengths and weaknesses of their own and their opponent's case, understand their opponent's perspective, develop creative solutions, and deliver difficult messages to the other side more effectively than they can sometimes be conveyed directly. When a party exhibits overconfidence in its position, the mediator can often administer a much-needed reality check. Skilled mediators use their understanding of human nature, together with a variety of techniques, including humour and highly-nuanced and selective communications, to gradually bring disputing parties around to a consensus.

Mediation can allow for the crafting of creative, mutually-acceptable, win-win solutions. The mediation process minimizes the atmosphere of conflict and creates a better chance that the relationship between the parties will be preserved. Mediation is also very cost- and time-efficient. When parties cooperate, mediation can be organized on relatively short notice and is usually conducted in as little as half a day and rarely more than three days. The parties typically split the cost of the mediator's fees. Even accounting for this and the cost for their own lawyers, successful mediation is enormously less expensive than even the preliminary stages of litigation. The involvement of lawyers in mediation is not a requirement, but, in the case of most serious legal disputes, it is highly advisable.

Critical to the success of this approach, however, is the selection of the right mediator. Parties sometimes select mediators who are also knowledgeable about the business or field in which the dispute has arisen. This is especially helpful in the case of construction disputes. It is important to select an individual who has, first and foremost, a mastery of mediation skills, but who also has an in-depth understanding of how a construction project runs. The mediator need not be an expert in every area of construction technology, but an individual who has the ability to read plans and specifications, who knows the difference between a change order and a change

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directive, who understands the role of the consultant, and who has a solid grasp of the terms and conditions of the standard industry contracts will generally in a better position to win that essential confidence and trust from the parties.

So far, the discussion has centered primarily on the use of mediation to resolve disputes during the life of the construction project. Most disputes that are not resolved during the life of or shortly after the completion of the project end up in litigation. Because mediation is now a mandatory step in the litigation process, the parties will eventually come together before a mediator at least once, and sometimes more often, before a case gets to trial. The vast majority of construction litigation is eventually resolved through settlement before trial, often with the assistance of a mediator. Unfortunately, by the time this occurs, each side has often spent a small fortune in legal costs related to the preparation of pleadings, documentary disclosure, examinations for discovery, the answering of undertakings, motions to compel answers to refusals, and the preparation of expert reports. This is in addition to the enormous dedication of personnel to a process that will generally drag on for many years. And, because of the substantial investment of time, money, and emotional capital that each side has poured into the dispute, the job of the mediator at this stage is all the more difficult.

While, in theory, this burdensome process is designed to inform each side with respect to the evidence relied upon by the other party and the strengths and weaknesses of the opponent's case, the benefits are often illusory. Generally speaking, parties that have lived together through a two- or three-year construction project and have staked out their positions in numerous pieces of correspondence surrounding the issues in dispute know what each other's case is about. While the above-noted procedural steps are essential to their respective lawyer's understanding of the case, clients generally find the process to be more frustrating than illuminating — lots of heat, but not much light!

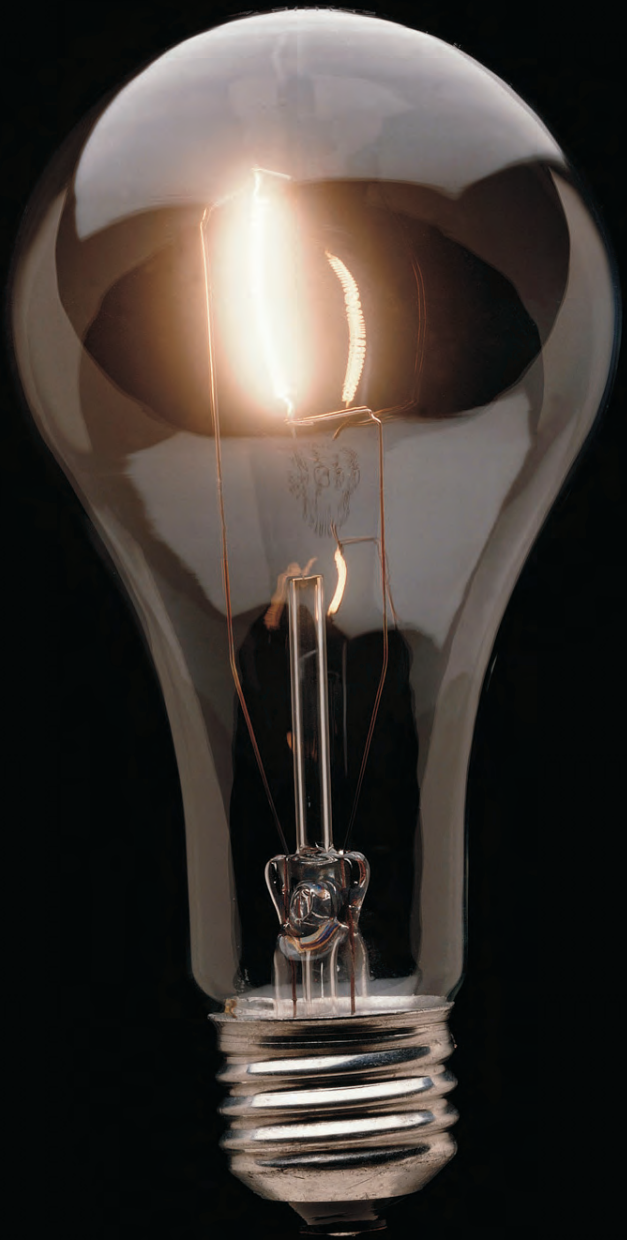
And, perhaps worst of all, the very adversarial, competitive and acrimonious nature of the process inevitably drives a deeper and deeper wedge between the parties, raising the emotional stakes and making amicable resolution more and more unlikely. While billed as a path to justice, litigation is often abused as a means for inflicting pain on one's enemy. When parties are unequally matched in terms of financial or other resources, it can become a war of attrition. In addition, parties that litigate against each other rarely do business with each other again in the future.

The opposite is often true for parties that mediate their disputes at a very early stage,

before the wounds produced by the litigation process become greater than the injury arising from the original dispute. While the mediation may begin with a degree of acrimony, a capable mediator will usually be able to help the parties to see the dispute from the eyes of their opponent and identify the benefits of looking for constructive, mutually-beneficial solutions to their problem. While parties rarely walk away from the mediation table with everything that they want, the same can usually be said of the courtroom. The difference, however, is that, through mediation, the parties can craft their own solution, rather than having one imposed upon them, and with an infinitely smaller drain on their time and emotional and financial resources.

And, pre-litigation mediations are safe for the parties. Recently, the government of Ontario passed the *Commercial Mediation Act, 2010*, which pertains specifically to commercial mediation processes undertaken before the commencement of judicial or arbitral proceedings. Among other things, the legislation ensures the confidentiality of all information exchanged at any stage during the course of a commercial mediation process. It also provides for the enforcement of any settlement agreement reached at mediation, by allowing a party to apply to the court to have the agreement treated as a formal judgment of the court if it is not complied with voluntarily by the other party. Before this legislation, a party would have to start a lawsuit to enforce compliance with the settlement agreement.

Given this reality, there is much to be said for engaging the services of a mediator before — not after — commencing the litigation process. In comparison with the amounts usually in dispute and the crushing legal costs that will otherwise be spent by following along the traditional path, the costs of engaging a mediator are trifling, especially when divided equally between the parties. Moreover, in financial disputes, the money that would otherwise be spent initiating and pursuing the litigation process is available to facilitate a settlement. And, because the process is completely confidential and without prejudice, there is little chance that the parties will harm their positions by attempting this pre-emptive process. In other words, there is everything to gain, and little or nothing to lose!



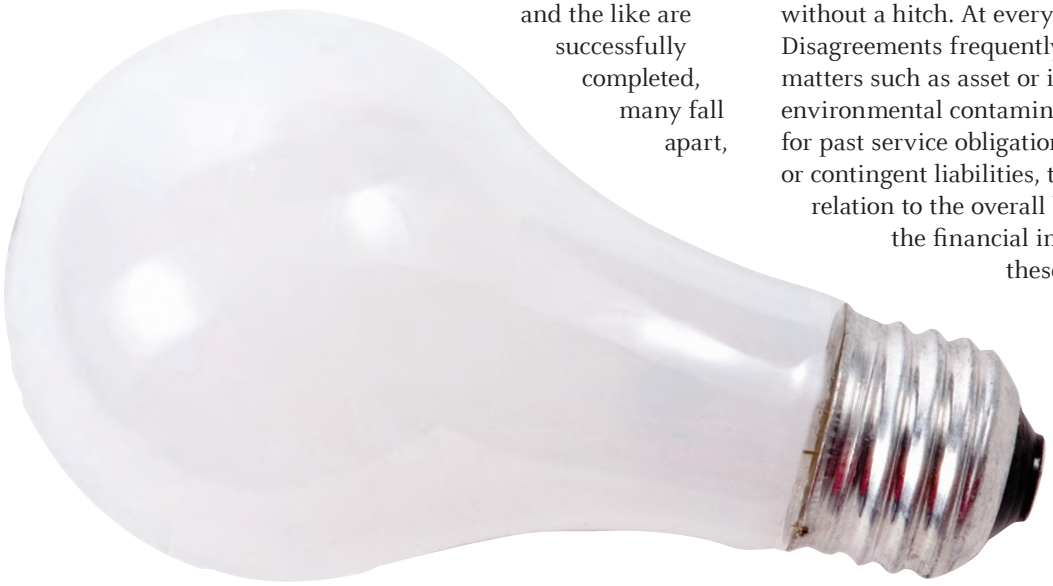
DEAL MEDIATION

AN IDEA WHOSE TIME HAS COME

This article first appeared in *CMA Magazine*, March/April 2011

Over the past two decades, business people and their professional advisers have come to appreciate the merits of alternative dispute resolution, and, in particular, mediation as an effective and efficient way of settling commercial disputes. Anecdotal evidence suggests that when parties come to the mediation table voluntarily, 80–90% of those cases are resolved without further litigation. Why then restrict such an effective tool to the resolution of litigious disputes?

Although most complex commercial transaction, such as mergers, acquisitions, distribution agreements, long-term leases, and the like are successfully completed, many fall apart, often for all the wrong reasons. While, in some cases, truly irreconcilable differences arise during the negotiation, due diligence, or closing phases of the transaction, often, the deal collapses merely because the parties lack the skills necessary to creatively resolve issues as they arise. In other cases, deals do eventually close, but only after months of unnecessary delay, with all of the attendant additional costs. It is in these situations that the involvement of a capable mediator can keep the deal on course by facilitating constructive discussions and by helping the parties to craft creative solutions.



Few complex transactions come off without a hitch. At every stage, issues arise. Disagreements frequently arise concerning matters such as asset or inventory valuations, environmental contamination, responsibility for past service obligations, union agreements, or contingent liabilities, to name a few. In relation to the overall benefits of the deal, the financial implications of the these issues may be relatively small, but they can easily escalate if not handled sensitively. The front line players in these transactions, being the lawyers

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for each side, are naturally inclined to try to get the best deal for their own client. While some lawyers are temperamentally well suited to the negotiation process, there are many sad tales of deals falling apart because the lawyers' egos got in the way. Similarly, the parties' investment bankers are so financially motivated to see the deal completed, that this may impair their judgment in the eyes of their own client and the other party.

A deal mediator is a neutral party retained at the early stages of a potential transaction and is paid equally by both sides to ensure continued neutrality. Probably, but not necessarily, a lawyer with training and experience as a mediator, this person will preferably have a background in transactional work and, possibly, in business. Early on in the process, the deal mediator will meet with the parties and their lawyers to establish a timetable for the various stages of the process and set the ground rules for dealing with disputes as they arise. The lawyers will agree to bring any significant issues to the attention of the mediator, as soon as it becomes apparent that disagreement exists. In other words, the mediator's services will be engaged before the issue has a chance to escalate. By prior agreement, the mediator will have access to the lawyers or the party representatives without restriction.

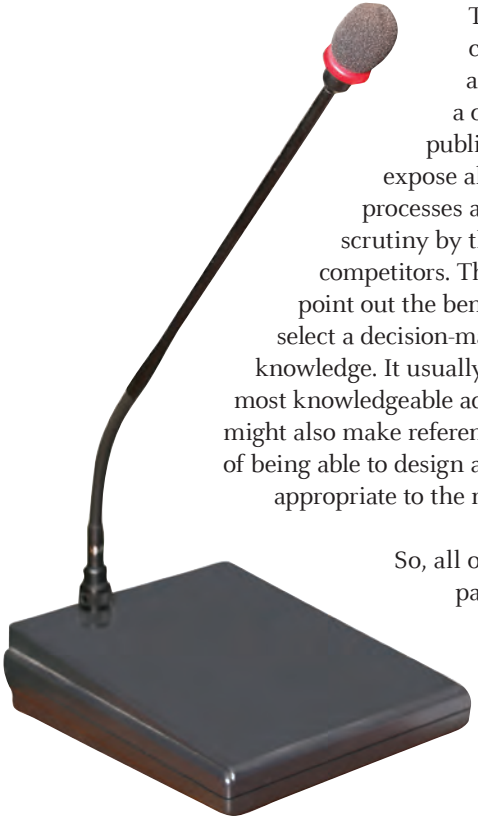
In addition to facilitating the resolution of disputes, the mediator will meet periodically with the party representatives and their lawyers to ensure that the timetable is being respected. In addition to resolving disputes, once familiar with the transaction, the mediator can also play a role in facilitating discussions between one or more of the parties and outside third parties such as auditors, investment bankers, securities regulators, commercial lenders, union representatives, and possibly even significant customers, all the while retaining a neutral stance between the contracting parties.

There is precedent for this in the world of large construction projects, where mediators are often appointed at the beginning of a project to ensure

that disputes are quickly resolved, so that construction and cash flow continues without interruption. While the appointment of a deal mediator in large commercial transactions will add another cost to the process, it will be insignificant in relation to the dollar value of most transactions and may pay for itself many times over.

CREATIVE ARBITRATION

This article is based on an Arbitrator of the Month presentation made by the writer on June 29, 2011 at ASAP Reporting Services.



If you ask most corporate counsel why they routinely include arbitration provisions in many of their commercial agreements, the first thing you will generally hear them say is that arbitration is quicker and cheaper than going to court. Far and away, that is the most common reason given. The next thing you might hear is that arbitration, unlike the courtroom, is private. The parties to the contract do not need to air their dirty laundry in a courtroom open to the public and the media and expose all of their proprietary processes and documents to scrutiny by their customers and competitors. Third, they might point out the benefits of being able to select a decision-maker with specialized knowledge. It usually stops there, but the most knowledgeable advocates of arbitration might also make reference to the advantages of being able to design a procedure most appropriate to the nature of the dispute.

So, all of that looks good on paper and sounds right, and, indeed, is reflected in most of the articles that you will find discussing the benefits of arbitration. Quicker, cheaper, private, knowledgeable decision maker of your choosing, and the ability to design a process to meet your needs. Because of this, business lawyers have been encouraged to routinely include arbitration clauses into their commercial agreements, in many instances, without a great deal of reflection. Most often, those clauses simply incorporate by reference the provisions of the Ontario *Arbitrations Act, 1991* or the rules of a private organization. Rarely do the contractual terms include provisions to ensure that the very real potential benefits of arbitration are realized.

And, it is not just commercial lawyers who have bought into the idea that arbitration trumps litigation as a method for resolving disputes — legislators apparently also believe that arbitration is a good thing. More than 130 statutes or regulations in Ontario alone provide for arbitration to resolve certain kinds of disputes, usually on a mandatory and binding basis.

As a result, most domestic arbitrations conducted are not the result of a voluntary decision on the part of the disputants to bypass the courts, but, rather, are compelled by contract or statute. While it is not unheard of, ask yourself how many arbitrations you have been involved in where the parties, unconstrained by any contractual requirement or legislation, have simply come together

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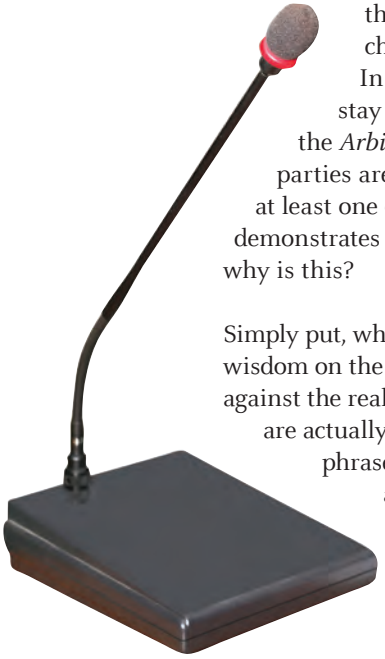
and said, "Let's go out and find an arbitrator to settle our dispute." In my experience and that of many advocacy lawyers that I have canvassed, despite all of the perceived advantages of this form of alternative dispute resolution, it is rarely the method of choice, absent contractual or legislative compulsion.

So there is an obvious disconnect here somewhere. Arbitration is so terrific that commercial lawyers routinely write it into contracts and legislators pass dozens of laws compelling its use, but when left to their own devices parties and their advocacy lawyers rarely choose it of their own volition. In fact, judging by the number of stay applications under section 7 of the *Arbitration Act, 1991*, even where parties are required to go to arbitration, at least one of the parties sometimes demonstrates a preference for the courts. So why is this?



Simply put, when evaluating the received wisdom on the advantages of arbitration against the reality of how most arbitrations are actually conducted, to borrow a phrase from Ira Gershwin, "It ain't necessarily so." "It ain't necessarily so," that arbitration is quicker or less expensive. And "It ain't necessarily so," that the parties end up with an arbitrator or arbitration panel with any special qualifications in the area under examination. And, while it may be harder to get access to evidence or documents, in the absence of an express agreement, arbitration is not necessarily private. And finally, while there may be enormous potential benefit in the ability to tailor make a process appropriate to the nature of the dispute, in practice, it is the exception, rather than the rule, that this occurs. In other words, when it comes to arbitration there is a mythology and a reality, and the two do not necessarily coincide.

Some of the responses that I frequently hear when, as counsel, I try to persuade my opponent to resolve a case by way of arbitration instead of litigation go as follows:

1. I don't like arbitration, because unlike a court proceeding, there is little discipline. Arbitrators are reluctant to chastise counsel for lateness, sloppiness, lack of preparedness, and, as a result, hearings drag on and on, and the arbitrator doesn't control the process effectively.

2. I prefer litigation, because I know the rules. Everything is set out in the *Rules of Civil Procedure*, so I always know where I stand. With arbitration, it often feels like we are making it up as we go along.

3. It is hard to get agreement on an arbitrator. If I put forward a name, the other side gets suspicious, and I feel the same when they put forward a name. After we have rejected all the really qualified people with specialized knowledge, we can end up with a compromise selection simply because we are finally persuaded of their neutrality, rather than getting the best person for the job.

4. Arbitrators don't like to make hard decisions and may be uncomfortable making a decision adverse to the interests of the party that put their name forward in the first place. Unlike judges, they are in business for themselves, and they depend on referrals. As a result, they are far more inclined to cut the baby in half, rather than make the really tough calls.

But, as much as there might be a grain of truth in each of these concerns, I do not believe that any of them are really at the root of the problem. Rather, I believe that the core issue is a fundamental failure to see arbitration as a completely different sort of animal than litigation. Too often, when compelled to arbitrate, parties elect, with the concurrence of their arbitrator, to conduct the proceedings exactly as if it was a trial, but conducted in a boardroom instead of a courtroom. I frequently see consensual provisions in the submission to arbitration stating that the arbitration will be conducted in accordance with the *Rules of Civil Procedure*. The parties want affidavits of documents and full rights of discovery. They may fear, perhaps, that they will open themselves to allegations of negligence, if they do not insist on these steps. And it is not uncommon that I am advised by parties that they want the standard rules of evidence to apply to the testimony and introduction of documentary evidence at the hearing itself.

And in fairness to lawyers involved, it's not just them. Running an arbitration just like a trial may also fit better into the comfort zone of many arbitrators for all of the same reasons. It is a forum that they are familiar with, they know the rules, and exactly how to conduct the proceedings. Especially if the arbitrator is a retired judge or senior practitioner, replicating the standard adversarial system in an arbitration room will feel like the most time tested and reliable method of resolving the dispute.

When this happens, with respect, most of the potential advantages of arbitration are lost, especially the idea that the process is more time and cost-efficient than the courtroom. In fact, in my experience, in the worst cases, it can take longer and be more expensive than litigation. In litigation, the state pays for the

judge, the place of the hearing, and provides a fully trained court reporter at no cost. In arbitration, the parties, usually the losing party, absorb 100% of these costs. In one 16-day arbitration that I was involved in, the cost for the arbitrator's time in preliminary conferences, at the hearing, and in preparing his award, coupled with the facility charges and a court reporter exceeded $175,000.

As far as timeliness is concerned, absent the discipline imposed by the court office, status hearings, and the like, getting to an arbitration hearing can drag on and on, and most arbitrators are willing to let the parties set the pace. The other potential cause for delay occurs when the parties underestimate how long the hearing will take. When a trial originally predicted to take only one week drags on, the judge can usually continue into the following week, as necessary, until it is completed. That 16-day arbitration that I referred to earlier was originally predicted to require three days of evidence. The arbitrator, the facility, and a court reporter were all booked for a three-day period. When it became apparent at the end of that first session that the evidence would not be completed, the lawyers said they would need another five days. Finding five consecutive days when three lawyers and an arbitrator would all be available caused the continuation of the hearing to be pushed out several months. Not surprisingly, the additional five days was not enough, and the same process was repeated two more times. As a result, the 16 days of evidence and argument was spread out over the better part of a year. Leaving aside the delay itself, as you will appreciate, the discontinuity in the presentation of evidence caused enormous duplication in preparation and other inefficiencies, not to mention the normous frustration experienced by the parties themselves.

Regarding privacy, there is nothing in the *Arbitration Act, 1991* itself that ensures the privacy or confidentiality of the process, other than in the case of a family arbitration. Similarly, I have read dozens of arbitration provisions in contracts and legislation, none of which provide for the proceedings to be kept private. While it is true that admission to the arbitration room may be restricted by agreement between the parties, there is nothing to ensure that one or both parties will not share the record or the documentary evidence during or after the process is complete. If parties wish to keep their dispute private, they need to provide for this by agreement.

But the area that I really want to focus on in the remaining time, is how we, whether as counsel or arbitrators, can facilitate processes that actually do have the ability to allow arbitration to fulfill its potential as a quicker, less expensive, and better method of resolving some disputes. The beauty of arbitration is that,

As far as timeliness is concerned... **GETTING TO AN ARBITRATION HEARING CAN DRAG ON AND ON**, and most arbitrators are willing to let the parties set the pace

unlike the court system, burdened as it is with procedural and evidentiary rules, the parties are able to craft a process capable of securing a fair and just result more expeditiously, less expensively, and more privately, than the litigation alternative. The *Arbitration Act, 1991* itself, provides for all kinds of flexibility.

The key to success, in this regard, in my view, rests primarily in the hands of the arbitrators themselves. While very experienced counsel will sometimes work together to develop streamlined procedures for dealing with issues, it will generally take the guidance of a skilled and experienced arbitrator to bring the parties and their counsel around to an understanding of the possible differences between arbitration and litigation and how those differences can be harnessed to advance their objectives. This brings me to my main point, and that is the importance of the pre-arbitration conference between the arbitrator and counsel.

At its worst, this can be nothing more than a 30 minute telephone conference call during which a schedule is established for the delivery of pleadings, affidavits of documents, examinations for discovery, pre-hearing motions, if any, and so on. This kind of pre-arbitration conference generally ensures that the process will become litigation by another name. On the other hand, a proper pre-arbitration conference will, whenever possible, be conducted in person with sufficient time to engage in a fulsome discussion of the nature of the case and to explore a variety of alternatives for pre-hearing procedures and for the conduct of the hearing itself. It is also important that the pre-arbitration conference be preceded by written communication from the arbitrator to counsel outlining all of the issues that will be discussed in a checklist format, so that counsel can be thinking about the issues in advance and, where necessary, confer with each other and with their clients.

The process will begin with a general discussion of what the case is about. It is impossible to design a process without a thorough understanding of what the case is about and the nature of the issues in dispute.

First, what is the case is about?

1. What is the underlying factual matrix from which the dispute arises?

2. Does the case primarily involve questions of fact or issues of law?

3. Does the dispute involved one big question or lots of little issues,

such as in the case of a multi-issue construction dispute?

4. Will the assessment of credibility be a significant factor in the outcome?

5. Or does the case really just involve the interpretation of a provision in a contract or other document?

6. Will the case involve expert evidence from one or both parties?

7. Are both liability and damages in dispute?

Second, what needs to occur before the hearing can proceed?

8. What form of pleadings are to be exchanged and when?

9. What level of documentary disclosure is required, and how will this occur?

10. How much and what kind of oral discovery is required, and when will this occur?

Third, what can be done to streamline the hearing?

11. Can the parties agree to an agreed statement of facts with respect to some, if not all, of the relevant facts?

12. Will there be a significant number of documents and, if so, what tools are being considered to manage them efficiently?

13. Are the parties prepared to present a joint document brief, and can they be presented electronically, where appropriate?

14. If there is to be expert testimony, is this an appropriate case for hot tubbing the experts?

15. Is it a case where some benefit would be derived by having the arbitrator retain a neutral expert instead of or in addition to the parties and, if so, what procedure will be followed to inform and instruct the expert and to ensure that both parties are guaranteed a fair opportunity to explore and challenge the findings?

16. Is it an appropriate case to consider bifurcating the hearing?

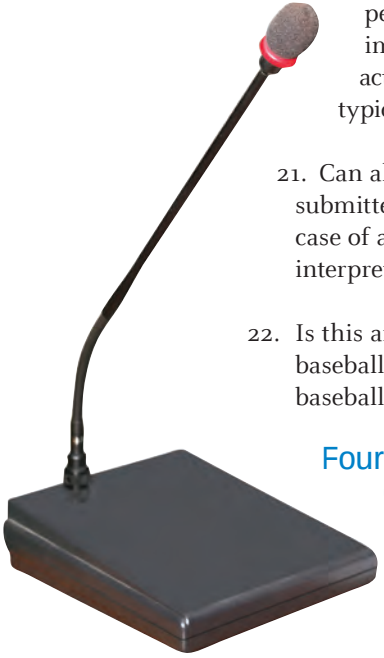
17. Is this an appropriate case for evidence-in-chief to be submitted by way of affidavit, as is provided for under the simplified procedure?

18. If there are many individual issues, should both sides present their evidence on each issue sequentially, or should the claimant present all of its evidence on all issues

first, to be followed by the defendant in the normal fashion that would be followed during a traditional trial?

19. If there are many issues, is this a case that would be assisted by the use of a Scott Schedule?

20. Is it a case that would benefit from a more inquisitorial approach to dealing with some or all of the evidence and the issues in dispute? After all, if you retain somebody with specialized knowledge, it could be helpful to have that person ask the questions that are important to him or her in a more active way than might occur in a typical trial situation.



21. Can all or a part of the case be submitted in writing, such as in the case of a dispute surrounding the interpretation of a contract?

22. Is this an appropriate case for a baseball arbitration or night-time baseball arbitration?

Fourth, what are the ground rules?

23. Are all aspects of the proceedings to remain private and confidential?

24. What rights of appeal are contemplated?

25. Are costs to be divided equally or awarded in the cause? If in the cause, are they to be awarded in the discretion of the arbitrator using the partial and substantial indemnity model employed by the courts, or does loser pay all? Is the same principle to be applied to the costs of the arbitration tribunal itself, or does the loser pay these in full? It is useful to have clarity around this issue?

26. Are settlement offers to be considered in awarding costs? Does Rule 49 apply?

And finally, what about the logistics?

27. Where and when will the hearing take place?

28. What is a realistic estimate of the time required?

29. Are the parties prepared to sit beyond the usual courtroom hours?

30. Will a court reporter be required?

31. Will there be witnesses from outside of the jurisdiction? In the interests of cost saving and efficiency can their evidence be taken using Skype?

32. What audio-visual or computer equipment will be required?

33. Is lunch to be brought in to minimize the length of the lunch breaks?

34. Will final arguments be oral or in writing?

35. Establish an arbitration timetable.

> Left to their own devices, the parties and their counsel will rarely design as efficient a process as can be achieved with the guidance of a capable and experienced arbitrator

This is by no means an exhaustive list. These are just some of the questions that can be canvassed during a pre-arbitration case conference. Others will arise as you get into it. It is only after the arbitrator gains a thorough understanding of what the case is about that he or she can help to facilitate the design of the process that will get the case resolved in a timely and cost-effective manner, while at the same time ensuring adequate due process and safeguards to make certain that nobody walks away from the arbitration feeling that the process itself was unfair.

I cannot emphasize enough how important the leadership of the arbitrator is in this process. Many counsel, especially if they are young or have not been involved in many arbitrations will not even realize the options that are available. They may not know what a Scott Schedule is and have never heard the term "hot tubbing." They may not be familiar with various forms of final offer arbitration. Counsel may be reluctant to propose initiatives that may appear to be unorthodox or unconventional. Left to their own devices, the parties and their counsel will rarely design as efficient a process as can be achieved with the guidance of a capable and experienced arbitrator. Having said that, the arbitrator must always be extremely mindful of the fact that the parties and their lawyers know more about the case than he or she does, and should be very careful to float lots of ideas, but ultimately defer to the judgment of counsel. In my experience, a well-designed process can shave days and weeks off of a hearing without impairing the reliability and fairness of the outcome.

Once the pre-arbitration conference has occurred, all agreements reached with respect to the process must be incorporated into a memorandum to be reviewed and endorsed by the parties' counsel and the arbitrator. While this task can be delegated to counsel, I generally find that it works better if the arbitrator prepares the first draft of the memorandum and circulates it to counsel for comment and approval. This first pre-arbitration conference should occur well in advance of the hearing. In appropriate cases,

a second shorter conference should be held shortly before the commencement of the hearing to review the checklist and confirm that everything will be ready to proceed on the appointed date, or to deal with any issues that have arisen. The second conference can often be held by telephone conference call.

I would like to move on then and share with you two specific examples of arbitrations that I have been involved in both as counsel and arbitrator that illustrate extreme examples of what can be done with creativity. The first of those is what I refer to as the "no counsel arbitration."

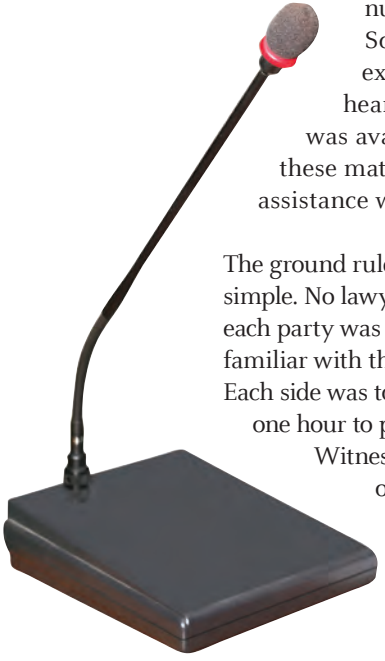
NO COUNSEL ARBITRATION

The title is a bit of a misnomer, since counsel were heavily involved in designing this process, but completely uninvolved in the hearing itself. In the case that I am referring to, there were two major issues arising out of a complex construction project. The first issue involved a contractor delay claim where the amount in dispute exceeded $10 million. This aspect of the case was to be dealt with through litigation, but was ultimately settled by the parties without a trial. The more troublesome part of the case, however, involved a series of claims by both sides involving extra work, deficiencies, and warranty items. The contractor had many claims for individual bits of extra work, each of which had nothing to do with any other claim. Similarly, the owner had numerous claims for deficiencies in the work and under various warranties. Again, each of the owner's claims were unrelated to any other claim. In total, there were between 50 and 60 stand-alone claims of this type, some of which were for amounts less than $1,000 and the largest of which was for approximately $85,000. The totality of all of the claims added up to a little over $1 million. To complicate matters, many of the contractor claims were really the claims of their subcontractors or suppliers and, as such, they could not be easily compromised or settled without the involvement of numerous other players.

It was immediately apparent to me and my opposing counsel that, if we were to try to deal with these 50 or 60 individual claims in the context of a traditional trial, we would be involved with 50 or 60 mini-trials within the context of a single trial, that the process would consume many weeks or months, and that the legal costs of each side alone would likely exceed the net payment to be awarded to the party that had the greatest number of successes. We had to come up with a better way.

...CREATIVE ARBITRATION

Here is what we did. We retained the services of a retired respected construction lawyer to act as arbitrator for a 10-day period. Because he was retired and had no overhead, he agreed to provide his services at a very reasonable daily rate. In advance of the hearing, the parties prepared a Scott Schedule setting out all of the items in dispute, listing them in descending order from the highest dollar value to the smallest. Each party then prepared binders with all of the documents that they would rely upon with respect to each item under separate numbered tabs correlated to the numbering system used in the Scott Schedule. The binders were exchanged well in advance of the hearing date. Counsel assistance was available in the preparation of these materials but, in fact, very little assistance was needed.



The ground rules for the hearing were quite simple. No lawyers were to be present, but each party was represented by a senior officer familiar with the project and the issues. Each side was to be allowed no more than one hour to present its case on each issue. Witnesses could be called on behalf of the claimant or defendant including representatives of a subcontractor or supplier, but all of the formal rules of evidence were set aside, and the arbitrator was to be given significant latitude to conduct a more inquisitorial mode of inquiry.

In fact, much less than one hour per party was required for many of the smaller issues, because all of the documents had been gathered together and the formalities with respect to the presentation of evidence were not applied. At the end of each day, the arbitrator delivered a decision with respect to the items covered that day. No formal reasons were expected or delivered. After eight days, approximately 2/3 of the items had been dealt with but, because the schedule was organized in descending dollar value order, those items represented approximately 85% of the dollars in dispute. At that point, the parties agreed to settle the remaining 15% of the amount in dispute by applying the same overall success ratio to those items as had been achieved over the eight-day period. At the end of the process, the owner paid the contractor a net amount of approximately $240,000. The feedback from both parties was entirely positive. Both had been through litigation before, and they found this process much more satisfying because they were able to play a more active role, explain their case in their own words with an absence of formality, achieve a quick result, and not spend a fortune in legal fees to resolve a large number of small disputes. At all times, they were satisfied that they were dealing with a neutral and knowledgeable decision-maker.

NO COUNSEL AND NO FORMAL HEARING

In another instance, I received an urgent call during a break in a mediation that I was conducting to ask if I would be prepared to serve as an arbitrator in a set of very unusual circumstances, such that the matter would have to be concluded within 30 days. I knew both of the lawyers well and accepted their assurances that they had worked out a methodology that would allow this to occur. I accepted.

The next day, I learned that the dispute involved a virtually completed construction project of a retirement home. As in the prior example, there were numerous claims and counterclaims for extra work and deficiencies going both ways. The claims of each party were roughly $1 million dollars, so the swing in the result could have been as much as $2 million in either direction. The contractor, however, was refusing to hand over the keys to the building in the absence of an agreement for dealing with the claims. Neither party wanted to go to court or incur significant legal fees.

The other unusual aspect of this case was that the relationship had broken down to the point where the parties' respective representatives could not be in a room together without significant risk of verbal and possibly physical violence. Accordingly, I was asked to first receive a substantial amount of contract documentation together with multiple binders setting out each party's position and supporting documents concerning each of the issues in dispute. I was then to be afforded an opportunity to meet for two consecutive days with representatives of the owner, without counsel present, and without any representative of the other side in attendance. The meetings were to occur on the premises, and I was to have an opportunity to inspect any of the disputed work. The third and fourth days were to be spent with representatives of the contractor, again without counsel or representation of the owner present. On the fifth day, I was to meet alone with the project architect, who was to provide me with a neutral perspective on the issues. The meetings were to be informal discussions — no oaths, no examinations or cross-examinations, and no formal record.

Finally, I was to have the balance of the 30 days to deliver an award indicating a single dollar amount to flow in either direction after setting off each party's successful claims against the other. There were to be no reasons given with respect to the individual claims or the decision in its totality. In other words, nobody would ever know which claims I allowed on each side or in what amount,

thereby making an appeal impossible. Although I have done many normal course arbitrations, this was by far the most demanding because of the extent to which I had to find my way through the documents, conduct an essentially inquisitorial process, and the limited ability to test the input of each party against that of the other party.

Having said that, at the end of the process, the parties were delighted with the speedy resolution of the dispute and the cost efficiency. My final account was just over 50% of my original estimate. Was my final award the "right" amount? Almost by definition, it couldn't be. It was, at best, a form of "rough justice," but it was what the parties wanted and needed at the time. It took advantage of the flexibility afforded by the arbitration process by providing a procedure and a methodology that could never have been carried out in the court system.

SAMPLE AGREEMENTS

SAMPLE MEDIATION AGREEMENT

AGREEMENT TO MEDIATE

B E T W E E N:

●

-and-

●

-and-

STEPHEN RICHARD MORRISON
(the "mediator")

1. THE PROCESS:

The parties agree to attempt to settle their dispute as set out in Court File No. ● through mediation conducted in accordance with the express terms of this Agreement. Except were inconsistent with the express terms of this Agreement or any other agreement between the parties that is made known to the mediator, this mediation shall be conducted in accordance with the provisions of the *Commercial Mediation Act, 2010* of Ontario, as amended from time to time. The parties agree to conduct this mediation process (a) in good faith; (b) in an honest and forthright manner; and (c) to make a genuine, concerted attempt to comprehensively resolve their dispute.

2. PARTY CONFIDENTIALITY:

All written and oral communication at the mediation session shall be deemed to be without prejudice settlement discussions. For the purposes of this section, mediation communication shall also include all conduct, statements, promises, offers, views, opinions, admissions and communications for purposes of considering, initiating, continuing, or reconvening a mediation or retaining a mediator together with the delivery and exchange of any documents in the

course of the mediation made by any party, their agents, employees, representatives or other invitees and by the mediator.

The parties acknowledge and agree that:

a) the mediation is a settlement negotiation;

b) the mediation is confidential and no stenographic, visual, or audio recordings shall be made;

c) no mediation communication shall be discoverable or admissible for any purpose including impeachment in the action or in any other proceeding involving these parties and shall not be discussed with anyone, provided that communications otherwise admissible or subject to discovery do not become inadmissible or protected from discovery or admission by reason of their use in mediation;

d) the mediator has a privilege to refuse to disclose and to prevent any other person from disclosing the mediator's mediation communications in any proceeding. The mediator may also refuse to provide evidence of mediation communications in such a proceeding; and

e) except as permitted by law, the parties will not subpoena or otherwise require the mediator to testify or produce the records or notes in an action or in any other proceeding.

3. MEDIATOR CONFIDENTIALITY:

During the mediation process, the mediator may disclose to either party any information provided by either party, unless the disclosing party has specifically requested the mediator to keep the information confidential, in which case the mediator will attempt to keep that information in confidence.

The mediator will not disclose to anyone who is not a party to the mediation anything said or any materials submitted to the mediator except:

a) where applicable, to the lawyers or other professionals retained on behalf of the parties or to non-parties consented to in writing by the parties, as deemed appropriate or necessary by the mediator;

b) where ordered to do so by a judicial authority or where required to do so by law.

Except as noted above, the notes, records, statements made, and recollections of the mediator shall be confidential and protected from disclosure for all purposes.

4. PRE-MEDIATION INFORMATION:

Each party agrees to provide to the mediator and to each other a brief description of the facts and issues in dispute in order to facilitate a more complete understanding of the controversy and the issues to be mediated not less than seven (7) days prior to the mediation session which is scheduled to take place on the ● day of ●, **201●**, at **10 AM** in the offices of **Cassels Brock & Blackwell LLP, Scotia Plaza, Ste. 2100, 40 King Street West**, **Toronto, Ontario M5H 3C2**.

5. THE MEDIATOR'S ROLE:

The mediator's role is to assist the parties to negotiate a resolution of their dispute. The mediator will not make decisions for the parties about how the matter should or must be resolved. The mediator, in mediating the dispute, will not be acting as a lawyer. As such, as a general rule, in conducting the mediation, the mediator shall not (a) give legal advice to any party; (b) have any duty to assert or protect the legal rights of any party; (c) be obliged to raise any issue not raised by the parties; or (d) determine who should participate in the mediation.

6. AUTHORITY TO SETTLE:

The parties or those representing them at the mediation shall have full and unqualified authority to settle the controversy.

7. RIGHT TO WITHDRAW:

It is understood and agreed by all of the parties to this Agreement that each party's participation in the mediation is voluntary. While each party intends to participate in the mediation to attempt to reach settlement during or following the session, either party or the mediator may withdraw from the mediation at any time for any reason.

8. PARTIES' OWN LAWYERS:

The parties may seek legal representation or advice prior to or during the mediation, and they may have lawyers present at the mediation.

9. SETTLEMENT:

There shall be no settlement until the parties to the mediation obtain independent legal advice and execute minutes of settlement drafted or first reviewed by their legal advisers. The mediator shall not be responsible for recording the terms of any settlement agreed to between the parties at the mediation.

10. COSTS OF THE MEDIATION:

Each party shall pay an equal share of the mediator's fees and expenses, plus HST. The mediator's fees shall be based on an hourly rate of $● to be applied to time spent reviewing the mediation briefs submitted and in attendance at the mediation session. The mediator's fee shall be paid, as follows:

(a) upon entering into this agreement, each party to this agreement shall deposit with the mediator the sum of $●. **If the aforementioned deposits are not paid, counsel for any party that has not paid, by his signature below, accepts responsibility for the portion of the fee attributable to that party**;

(b) after the completion of the mediation, any balance due shall be paid equally by the parties, unless some other agreement is reached, and any overpayment shall be refunded to the parties by the mediator.

A cancellation fee of $●, plus HST, shall apply if the parties resolve the matter without the necessity of mediation later than ten (10) business days before the scheduled mediation date. The cancellation fee shall be in addition to any fees otherwise owing to the mediator as a result of services rendered in preparation for the mediation. If any party shall request that the mediation be rescheduled or adjourned less than ten (10) business days before the scheduled mediation date, that party alone shall be responsible for the payment of an adjournment fee of $●, plus HST, which payment will be made at the time of and as a condition of the adjournment.

11. NO CONFLICT:

The parties agree that in accepting this Agreement neither the mediator nor any person at the law firm of Cassels Brock & Blackwell LLP shall be estopped from acting for or against any party to this dispute in respect of any matter unrelated to the subject matter of the current proceeding.

12. MEDIATOR IMMUNITY

The mediator shall not be liable to any party or participant for any act or omission in connection with the mediation session and shall have the immunity of a judge of a superior court in Canada. The parties also agree to indemnify the mediator, on a joint and several basis, for all legal costs and disbursements incurred in responding to any proceeding of any kind brought against or involving the mediator arising out of the mediation.

13. CONSENT TO THIS AGREEMENT:

Each person present during all or any part of the mediation shall sign below. Each of the undersigned has read this Agreement and agrees to proceed with the mediation on the terms herein contained.

_____ Date:_____

_____ Date:_____

_____ Date:_____

_____ Date:_____

_____ Date:_____

_____ Date:_____

_____ Date:_____

_____ Date:_____

_____ Date:_____

_____ Date: ● , 201●
STEPHEN RICHARD MORRISON

SAMPLE SUBMISSION TO ARBITRATION AND RETAINER AGREEMENT

SUBMISSION TO ARBITRATION
AND RETAINER AGREEMENT

BETWEEN

●

- and -

●

- and -

Stephen Richard Morrison
(hereinafter called the **"Arbitrator")**

WHEREAS:

1. The parties are required or have agreed to arbitrate their differences to resolve the disagreement between them; and

2. The parties have agreed to submit their disagreement to a single arbitrator whose decision in this matter will be considered final and binding subject to the appeal rights as herein set out;

3. The parties confirm that the Arbitrator is qualified to decide the matter in dispute and is at arm's length from all parties.

ACCORDINGLY, THE PARTIES HERETO AGREE, AS FOLLOWS:

1. The issues in dispute between the parties, as set out in the materials to be filed by each party, shall be determined by the Arbitrator acting as the sole arbitrator, and by arbitration proceedings in accordance with the *Arbitration Act, 1991* (the *"Act"*), subject to any modification expressly set forth in this Agreement or as may be agreed upon, at any time, by the parties hereto in consultation with the Arbitrator.

2. The Arbitrator, by executing this Agreement, accepts the appointment of the parties and confirms to the parties that he has no knowledge of any current or past relationship of any kind with any of the parties that might otherwise give rise to justifiable doubts as to his impartiality or independence in hearing this arbitration.

3. This Agreement shall be considered to be a notice of submission to the Arbitrator by the parties to arbitrate their disagreement and to commence arbitration proceedings. An appointment date of ● ●**, 201**● at **10:00 a.m.**, at the offices of **Cassels, Brock & Blackwell LLP, Scotia Plaza, 2100-40 King Street West, Toronto, Ontario** has been established for the hearing of the arbitration.

4. The parties shall use their reasonable best efforts to complete and exchange documents, conduct examinations for discovery, and to file and exchange material, in accordance with the following, all of which is subject to change on the application of either party and in the discretion of the Arbitrator:

   (a) Each party shall deliver any written brief or other written materials on which it intends to rely to the other party by no later than ● (●) days prior to the date of the hearing;

   (b) There shall be no examinations for discovery, except by agreement between the parties or by leave of the Arbitrator;

   (c) The parties agree that they shall consult with each other to determine and, if possible, agree upon, at least fifteen (15) days prior to the commencement of the hearing, the number of witnesses to be called by each party to testify at the hearing, their names and addresses, the gist of their evidence, and whether or not their evidence can be given by affidavit;

   (d) The parties shall cooperate with each other to prepare a joint brief of relevant documents to be used at the hearing; and

   (e) No expert witnesses may testify with respect to any issue in dispute unless the substance of that expert's testimony with respect to that issue is set out in a report delivered to any other party not less than ● (●) days prior to the date of the hearing or, in the case of a responding report not less than ● (●) days prior to the date of the hearing.

5. If the parties desire that the taking of evidence or the making of submissions be recorded or transcribed, the parties shall arrange for the attendance of a court reporter, including any arrangements with respect to the sharing of the costs thereof, and shall notify the Arbitrator of those arrangements.

6. The Arbitrator shall endeavour to make his final written award not later than thirty (30) days following the completion of the hearing. The parties agree that the

Arbitrator's award shall be final and binding upon both parties, subject only to the appeal rights reserved in the *Act*.

7. The Arbitrator's fee is $● per hour, plus HST, and shall apply with respect to each of the following activities:

   (a) preliminary matters prior to the commencement of the hearing, inclusive of communicating with the parties, preparing the Submission to Arbitration and Retainer Agreement, and receiving and reviewing the pleadings, briefs, or other submissions of the parties;

   (b) conduct of the hearing;

   (c) considering the evidence, the law, submissions of counsel, and preparation and delivery of the Arbitrator's award.

8. A cancellation fee of $●, plus HST, shall apply if the parties resolve the matter without the necessity of a hearing later than ten (10) business days before the scheduled hearing date. This shall be in addition to the Arbitrator's fees for any services rendered prior to notification of cancellation. If either party shall request that the hearing be rescheduled or adjourned less than ten (10) business days before the scheduled hearing date, that party alone shall be responsible for the payment of an adjournment fee of $●, plus HST, which payment will be made at the time of and as a condition of the adjournment, if granted.

9. Costs of this arbitration shall be awarded by the Arbitrator in his discretion.

10. The Arbitrator's fee shall be paid, as follows:

   (a) upon entering into this Retainer Agreement, the parties shall each pay to the Arbitrator the sum of $●. (In the alternative, counsel may assume responsibility for the portion of the fee attributable to their client). This amount will be adjusted following completion of the hearing between the parties, according to the Arbitrator's final award of costs;

   (b) upon completion of the hearing and within seven (7) days after the delivery of the Arbitrator's award, the balance due in accordance with the final award of costs;

   (c) should either party not pay its full share of the Arbitrator's fees, or attend at the arbitration, the Arbitrator shall nevertheless proceed with the arbitration and make his award, after making arrangements for his fees with the remaining party.

11. The parties agree that in accepting this retainer, the Arbitrator shall not be estopped from providing advice to either party, nor shall the Arbitrator or any person at the law firm of Cassels Brock & Blackwell LLP be estopped from acting

for or against any party to this dispute, but only with respect to any matter unrelated to the subject matter of the arbitration.

12. The Arbitrator shall not be liable to any party or participant for any act or omission in connection with the arbitration and shall have the immunity of a judge of a superior court in Canada. The parties also agree to indemnify the Arbitrator, on an equal basis between them, for all legal costs and disbursements incurred in responding to any proceeding of any kind brought against or involving the Arbitrator arising out of the arbitration.

13. Each of us has read this Agreement and agrees to proceed with the arbitration on the terms herein contained.

Per: _____ Date: _____
●

_____ Date: _____
●

_____ Date: _____
Stephen Richard Morrison
Arbitrator

LEGISLATION

ARBITRATION ACT, 1991

S.O. 1991, CHAPTER 17 | CONTENTS

INTRODUCTORY MATTERS

Definitions

1. In this Act,

"arbitration agreement" means an agreement by which two or more persons agree to submit to arbitration a dispute that has arisen or may arise between them; ("convention d'arbitrage")

"arbitrator" includes an umpire; ("arbitre")

"court," except in sections 6 and 7, means the Family Court or the Superior Court of Justice; ("tribunal judiciaire")

"family arbitration" means an arbitration that,

(a) deals with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under Part IV of the *Family Law Act*, and

(b) is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction; ("arbitrage familial")

"family arbitration agreement" and "family arbitration award" have meanings that correspond to the meaning of "family arbitration." ("convention d'arbitrage familial," "sentence d'arbitrage familial") 1991, c. 17, s. 1; 2006, c. 1, s. 1 (1); 2006, c. 19, Sched. C, s. 1 (1); 2009, c. 33, Sched. 2, s. 5.

Application of Act

Arbitrations conducted under agreements

2. (1) This Act applies to an arbitration conducted under an arbitration agreement unless,

(a) the application of this Act is excluded by law; or

(b) the *International Commercial Arbitration Act* applies to the arbitration. 1991, c. 17, s. 2 (1).

Transition, existing agreements

(2) This Act applies to an arbitration conducted under an arbitration agreement made before the day this Act comes into force, if the arbitration is commenced after that day. 1991, c. 17, s. 2 (2).

Arbitrations conducted under statutes

(3) This Act applies, with necessary modifications, to an arbitration conducted in accordance with another Act, unless that Act provides otherwise; however, in the event of conflict between this Act and the other Act or regulations made under the other Act, the other Act or the regulations prevail. 1991, c. 17, s. 2 (3).

Transition, arbitrations already commenced

(4) Despite its repeal by section 58, the *Arbitrations Act*, as it read on the 31st day of December, 1991, continues to apply to arbitrations commenced on or before that day. 1991, c. 17, s. 2 (4).

Family arbitrations, agreements and awards

2.1 (1) Family arbitrations, family arbitration agreements and family arbitration awards are governed by this Act and by the *Family Law Act*. 2006, c. 1, s. 1 (2).

Conflict

(2) In the event of conflict between this Act and the *Family Law Act*, the *Family Law Act* prevails. 2006, c. 1, s. 1 (2).

...ARBITRATION ACT, 1991

Other third-party decision-making processes in family matters

2.2 (1) When a decision about a matter described in clause (a) of the definition of "family arbitration" in section 1 is made by a third person in a process that is not conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction,

(a) the process is not a family arbitration; and

(b) the decision is not a family arbitration award and has no legal effect. 2006, c. 1, s. 1 (2).

Advice

(2) Nothing in this section restricts a person's right to obtain advice from another person. 2006, c. 1, s. 1 (2).

Contracting out

3. 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. In the case of an arbitration agreement other than a family arbitration agreement,
   i. subsection 5 (4) ("*Scott v. Avery*" clauses),
   ii. section 19 (equality and fairness),
   iii. section 39 (extension of time limits),
   iv. section 46 (setting aside award),
   v. section 48 (declaration of invalidity of arbitration),
   vi. section 50 (enforcement of award).
2. In the case of a family arbitration agreement,
   i. the provisions listed in subparagraphs 1 i to vi,
   ii. subsection 4 (2) (no deemed waiver of right to object),
   iii. section 31 (application of law and equity),
   iv. subsections 32 (3) and (4) (substantive law of Ontario or other Canadian jurisdiction), and
   v. section 45 (appeals). 2006, c. 1, s. 1 (3).

Waiver of right to object

4. (1) A party who participates in an arbitration despite being aware of non-compliance with a provision of this Act, except one mentioned in section 3, or with the arbitration agreement, and does not object to the non-compliance within the time limit provided or, if none is provided, within a reasonable time, shall be deemed to have waived the right to object. 1991, c. 17, s. 4.

Exception, family arbitrations

(2) Subsection (1) does not apply to a family arbitration. 2006, c. 1, s. 1 (4).

Arbitration agreements

5. (1) An arbitration agreement may be an independent agreement or part of another agreement. 1991, c. 17, s. 5 (1).

Further agreements

(2) If the parties to an arbitration agreement make a further agreement in connection with the arbitration, it shall be deemed to form part of the arbitration agreement. 1991, c. 17, s. 5 (2).

Oral agreements

(3) An arbitration agreement need not be in writing. 1991, c. 17, s. 5 (3).

"*Scott v. Avery*" clauses

(4) An agreement requiring or having the effect of requiring that a matter be adjudicated by arbitration before it may be dealt with by a court has the same effect as an arbitration agreement. 1991, c. 17, s. 5 (4).

Revocation

(5) An arbitration agreement may be revoked only in accordance with the ordinary rules of contract law. 1991, c. 17, s. 5 (5).

COURT INTERVENTION

Court intervention limited

6. No court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act:

1. To assist the conducting of arbitrations.
2. To ensure that arbitrations are conducted in accordance with arbitration agreements.
3. To prevent unequal or unfair treatment of parties to arbitration agreements.
4. To enforce awards. 1991, c. 17, s. 6.

Stay

7. (1) 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 arbitration agreement, stay the proceeding. 1991, c. 17, s. 7 (1).

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
4. The motion was brought with undue delay.
5. The matter is a proper one for default or summary judgment. 1991, c. 17, s. 7 (2).

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court. 1991, c. 17, s. 7 (3).

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect. 1991, c. 17, s. 7 (4).

...ARBITRATION ACT, 1991

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters. 1991, c. 17, s. 7 (5).

No appeal

(6) There is no appeal from the court's decision. 1991, c. 17, s. 7 (6).

Powers of court

8. (1) The court's powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions. 1991, c. 17, s. 8 (1).

Questions of law

(2) The arbitral tribunal may determine any question of law that arises during the arbitration; the court may do so on the application of the arbitral tribunal, or on a party's application if the other parties or the arbitral tribunal consent. 1991, c. 17, s. 8 (2).

Appeal

(3) The court's determination of a question of law may be appealed to the Court of Appeal, with leave. 1991, c. 17, s. 8 (3).

More than one arbitration

(4) On the application of all the parties to more than one arbitration the court may order, on such terms as are just,

(a) that the arbitrations be consolidated;

(b) that the arbitrations be conducted simultaneously or consecutively; or

(c) that any of the arbitrations be stayed until any of the others are completed. 1991, c. 17, s. 8 (4).

Arbitral tribunal for consolidated arbitrations

(5) When the court orders that arbitrations be consolidated, it may appoint an arbitral tribunal for the consolidated arbitration; if all the parties agree as to the choice of arbitral tribunal, the court shall appoint it. 1991, c. 17, s. 8 (5).

Consolidation by agreement of parties

(6) Subsection (4) does not prevent the parties to more than one arbitration from agreeing to consolidate the arbitrations and doing everything necessary to effect the consolidation. 1991, c. 17, s. 8 (6).

COMPOSITION OF ARBITRAL TRIBUNAL

Number of arbitrators

9. If the arbitration agreement does not specify the number of arbitrators who are to form the arbitral tribunal, it shall be composed of one arbitrator. 1991, c. 17, s. 9.

Appointment of arbitral tribunal

10. (1) The court may appoint the arbitral tribunal, on a party's application, if,

(a) the arbitration agreement provides no procedure for appointing the arbitral tribunal; or

(b) a person with power to appoint the arbitral tribunal has not done so after a party has given the person seven days notice to do so. 1991, c. 17, s. 10 (1).

No appeal

(2) There is no appeal from the court's appointment of the arbitral tribunal. 1991, c. 17, s. 10 (2).

More than one arbitrator

(3) Subsections (1) and (2) apply, with necessary modifications, to the appointment of individual members of arbitral tribunals that are composed of more than one arbitrator. 1991, c. 17, s. 10 (3).

Chair

(4) If the arbitral tribunal is composed of three or more arbitrators, they shall elect a chair from among themselves; if it is composed of two arbitrators, they may do so. 1991, c. 17, s. 10 (4).

Duty of arbitrator

11. (1) An arbitrator shall be independent of the parties and shall act impartially. 1991, c. 17, s. 11 (1).

Disclosure before accepting appointment

(2) Before accepting an appointment as arbitrator, a person shall disclose to all parties to the arbitration any circumstances of which he or she is aware that may give rise to a reasonable apprehension of bias. 1991, c. 17, s. 11 (2).

Disclosure during arbitration

(3) An arbitrator who, during an arbitration, becomes aware of circumstances that may give rise to a reasonable apprehension of bias shall promptly disclose them to all the parties. 1991, c. 17, s. 11 (3).

No revocation

12. A party may not revoke the appointment of an arbitrator. 1991, c. 17, s. 12.

Challenge

13. (1) A party may challenge an arbitrator only on one of the following grounds:

1. Circumstances exist that may give rise to a reasonable apprehension of bias.
2. The arbitrator does not possess qualifications that the parties have agreed are necessary. 1991, c. 17, s. 13 (1).

Idem, arbitrator appointed by party

(2) A party who appointed an arbitrator or participated in his or her appointment may challenge the arbitrator

only for grounds of which the party was unaware at the time of the appointment. 1991, c. 17, s. 13 (2).

Procedure for challenge

(3) A party who wishes to challenge an arbitrator shall send the arbitral tribunal a statement of the grounds for the challenge, within fifteen days of becoming aware of them. 1991, c. 17, s. 13 (3).

Removal or resignation of challenged arbitrator

(4) The other parties may agree to remove the challenged arbitrator, or the arbitrator may resign. 1991, c. 17, s. 13 (4).

Decision of arbitral tribunal

(5) If the challenged arbitrator is not removed by the parties and does not resign, the arbitral tribunal, including the challenged arbitrator, shall decide the issue and shall notify the parties of its decision. 1991, c. 17, s. 13 (5).

Application to court

(6) Within ten days of being notified of the arbitral tribunal's decision, a party may make an application to the court to decide the issue and, in the case of the challenging party, to remove the arbitrator. 1991, c. 17, s. 13 (6).

Arbitration may continue

(7) While an application is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitration and make an award, unless the court orders otherwise. 1991, c. 17, s. 13 (7).

Termination of arbitrator's mandate

14. (1) An arbitrator's mandate terminates when,

(a) the arbitrator resigns or dies;

(b) the parties agree to terminate it;

(c) the arbitral tribunal upholds a challenge to the arbitrator, ten days elapse after all the parties are notified of the decision and no application is made to the court; or

(d) the court removes the arbitrator under subsection 15 (1). 1991, c. 17, s. 14 (1).

Significance of resignation or agreement to terminate

(2) An arbitrator's resignation or a party's agreement to terminate an arbitrator's mandate does not imply acceptance of the validity of any reason advanced for challenging or removing him or her. 1991, c. 17, s. 14 (2).

Removal of arbitrator by court

15. (1) The court may remove an arbitrator on a party's application under subsection 13 (6) (challenge), or may do so on a party's application if the arbitrator becomes unable to perform his or her functions, commits a corrupt or fraudulent act, delays unduly in conducting the arbitration or does not conduct it in accordance with section 19 (equality and fairness). 1991, c. 17, s. 15 (1).

Right of arbitrator

(2) The arbitrator is entitled to be heard by the court if the application is based on an allegation that he or she committed a corrupt or fraudulent

act or delayed unduly in conducting the arbitration. 1991, c. 17, s. 15 (2).

Directions

(3) When the court removes an arbitrator, it may give directions about the conduct of the arbitration. 1991, c. 17, s. 15 (3).

Penalty

(4) If the court removes an arbitrator for a corrupt or fraudulent act or for undue delay, it may order that the arbitrator receive no payment for his or her services and may order that he or she compensate the parties for all or part of the costs, as determined by the court, that they incurred in connection with the arbitration before his or her removal. 1991, c. 17, s. 15 (4).

Appeal re penalty

(5) The arbitrator or a party may, within thirty days after receiving the court's decision, appeal an order made under subsection (4) or the refusal to make such an order to the Court of Appeal, with leave of that court. 1991, c. 17, s. 15 (5).

No other appeal

(6) Except as provided in subsection (5), there is no appeal from the court's decision or from its directions. 1991, c. 17, s. 15 (6).

Appointment of substitute arbitrator

16. (1) When an arbitrator's mandate terminates, a substitute arbitrator shall be appointed, following the procedure that was used in the appointment of the arbitrator being replaced. 1991, c. 17, s. 16 (1).

Directions

(2) When the arbitrator's mandate terminates, the court may, on a party's application, give directions about the conduct of the arbitration. 1991, c. 17, s. 16 (2).

Court appointment

(3) The court may appoint the substitute arbitrator, on a party's application, if,

(a) the arbitration agreement provides no procedure for appointing the substitute arbitrator; or

(b) a person with power to appoint the substitute arbitrator has not done so after a party has given the person seven days notice to do so. 1991, c. 17, s. 16 (3).

No appeal

(4) There is no appeal from the court's decision or from its directions. 1991, c. 17, s. 16 (4).

Exception

(5) This section does not apply if the arbitration agreement provides that the arbitration is to be conducted only by a named arbitrator. 1991, c. 17, s. 16 (5).

JURISDICTION OF ARBITRAL TRIBUNAL

Rulings and objections re jurisdiction

Arbitral tribunal may rule on own jurisdiction

17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement. 1991, c. 17, s. 17 (1).

Independent agreement

(2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid. 1991, c. 17, s. 17 (2).

Time for objections to jurisdiction

(3) A party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration shall make the objection no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal. 1991, c. 17, s. 17 (3).

Party's appointment of arbitrator no bar to objection

(4) The fact that a party has appointed or participated in the appointment of an arbitrator does not prevent the party from making an objection to jurisdiction. 1991, c. 17, s. 17 (4).

Time for objections that tribunal is exceeding authority

(5) A party who has an objection that the arbitral tribunal is exceeding its authority shall make the objection as soon as the matter alleged to be beyond the tribunal's authority is raised during the arbitration. 1991, c. 17, s. 17 (5).

Later objections

(6) Despite section 4, if the arbitral tribunal considers the delay justified, a party may make an objection after the time limit referred to in subsection (3) or (5), as the case may be, has expired. 1991, c. 17, s. 17 (6).

Ruling

(7) The arbitral tribunal may rule on an objection as a preliminary question or may deal with it in an award. 1991, c. 17, s. 17 (7).

Review by court

(8) If the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter. 1991, c. 17, s. 17 (8).

No appeal

(9) There is no appeal from the court's decision. 1991, c. 17, s. 17 (9).

Arbitration may continue

(10) While an application is pending, the arbitral

tribunal may continue the arbitration and make an award. 1991, c. 17, s. 17 (10).

Detention, preservation and inspection of property and documents

18. (1) On a party's request, an arbitral tribunal may make an order for the detention, preservation or inspection of property and documents that are the subject of the arbitration or as to which a question may arise in the arbitration, and may order a party to provide security in that connection. 1991, c. 17, s. 18 (1).

Enforcement by court

(2) The court may enforce the direction of an arbitral tribunal as if it were a similar direction made by the court in an action. 1991, c. 17, s. 18 (2).

CONDUCT OF ARBITRATION

Equality and fairness

19. (1) In an arbitration, the parties shall be treated equally and fairly. 1991, c. 17, s. 19 (1).

Idem

(2) Each party shall be given an opportunity to present a case and to respond to the other parties' cases. 1991, c. 17, s. 19 (2).

Procedure

20. (1) The arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act. 1991, c. 17, s. 20 (1).

Idem

(2) An arbitral tribunal that is composed of more than one arbitrator may delegate the determination of questions of procedure to the chair. 1991, c. 17, s. 20 (2).

Evidence

21. Sections 14, 15 and 16 (protection of witnesses, evidence at hearings, notice of facts and opinions) of the *Statutory Powers Procedure Act* apply to the arbitration, with necessary modifications. 1991, c. 17, s. 21.

Time and place of arbitration

22. (1) The arbitral tribunal shall determine the time, date and place of arbitration, taking into consideration the parties' convenience and the other circumstances of the case. 1991, c. 17, s. 22 (1).

Meetings for special purposes

(2) The arbitral tribunal may meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or parties, or for inspecting property or documents. 1991, c. 17, s. 22 (2).

Commencement of arbitration

23. (1) An arbitration may be commenced in any way recognized by law, including the following:

1. A party to an arbitration agreement

serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement.

2. If the arbitration agreement gives a person who is not a party power to appoint an arbitrator, one party serves notice to exercise that power on the person and serves a copy of the notice on the other parties.
3. A party serves on the other parties a notice demanding arbitration under the agreement. 1991, c. 17, s. 23 (1).

Exercise of arbitral tribunal's powers

(2) The arbitral tribunal may exercise its powers when every member has accepted appointment. 1991, c. 17, s. 23 (2).

Matters referred to arbitration

24. A notice that commences an arbitration without identifying the dispute shall be deemed to refer to arbitration all disputes that the arbitration agreement entitles the party giving the notice to refer. 1991, c. 17, s. 24.

Procedural directions

25. (1) An arbitral tribunal may require that the parties submit their statements within a specified period of time. 1991, c. 17, s. 25 (1).

Contents of statements

(2) The parties' statements shall indicate the facts supporting their positions, the points at issue and the relief sought. 1991, c. 17, s. 25 (2).

Documents and other evidence

(3) The parties may submit with their statements the documents they consider relevant, or may refer to the documents or other evidence they intend to submit. 1991, c. 17, s. 25 (3).

Changes to statements

(4) The parties may amend or supplement their statements during the arbitration; however, the arbitral tribunal may disallow a change that is unduly delayed. 1991, c. 17, s. 25 (4).

Oral statements

(5) With the arbitral tribunal's permission, the parties may submit their statements orally. 1991, c. 17, s. 25 (5).

Directions of arbitral tribunal

(6) The parties and persons claiming through or under them shall, subject to any legal objection, comply with the arbitral tribunal's directions, including directions to,

(a) submit to examination on oath or affirmation with respect to the dispute;
(b) produce records and documents that are in their possession or power. 1991, c. 17, s. 25 (6).

Enforcement by court

(7) The court may enforce the direction of an arbitral tribunal as if it were a similar direction made by the court in an action. 1991, c. 17, s. 25 (7).

Hearings and written proceedings

26. (1) The arbitral tribunal may conduct the

arbitration on the basis of documents or may hold hearings for the presentation of evidence and for oral argument; however, the tribunal shall hold a hearing if a party requests it. 1991, c. 17, s. 26 (1).

Notice

(2) The arbitral tribunal shall give the parties sufficient notice of hearings and of meetings of the tribunal for the purpose of inspection of property or documents. 1991, c. 17, s. 26 (2).

Communication to parties

(3) A party who submits a statement to the arbitral tribunal or supplies the tribunal with any other information shall also communicate it to the other parties. 1991, c. 17, s. 26 (3).

Idem

(4) The arbitral tribunal shall communicate to the parties any expert reports or other documents on which it may rely in making a decision. 1991, c. 17, s. 26 (4).

Party's failure to act

Failure to submit statement

27. (1) If the party who commenced the arbitration does not submit a statement within the period of time specified under subsection 25 (1), the arbitral tribunal may, unless the party offers a satisfactory explanation, make an award dismissing the claim. 1991, c. 17, s. 27 (1).

Idem

(2) If a party other than the one who commenced the arbitration does not submit a statement within the period of time specified under subsection 25 (1), the arbitral tribunal may, unless the party offers a satisfactory explanation, continue the arbitration, but shall not treat the failure to submit a statement as an admission of another party's allegations. 1991, c. 17, s. 27 (2).

Failure to appear or produce evidence

(3) If a party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may, unless the party offers a satisfactory explanation, continue the arbitration and make an award on the evidence before it. 1991, c. 17, s. 27 (3).

Delay

(4) In the case of delay by the party who commenced the arbitration, the arbitral tribunal may make an award dismissing the claim or give directions for the speedy determination of the arbitration, and may impose conditions on its decision. 1991, c. 17, s. 27 (4).

Jointly commenced arbitration

(5) If the arbitration was commenced jointly by all the parties, subsections (2) and (3) apply, with necessary modifications, but subsections (1) and (4) do not. 1991, c. 17, s. 27 (5).

Counterclaim

(6) This section applies in respect of a counterclaim as if the party making it were the party who commmenced the arbitration. 1991, c. 17, s. 27 (6).

Appointment of expert

28. (1) An arbitral tribunal may appoint an expert to report to it on specific issues. 1991, c. 17, s. 28 (1).

Information and documents

(2) The arbitral tribunal may require parties to give the expert any relevant information or to allow him or her to inspect property or documents. 1991, c. 17, s. 28 (2).

Hearing

(3) At the request of a party or of the arbitral tribunal, the expert shall, after making the report, participate in a hearing in which the parties may question the expert and present the testimony of another expert on the subject-matter of the report. 1991, c. 17, s. 28 (3).

Witnesses and taking of evidence
Notice to witness

29. (1) A party may serve a person with a notice, issued by the arbitral tribunal, requiring the person to attend and give evidence at the arbitration at the time and place named in the notice. 1991, c. 17, s. 29 (1).

Service of notice

(2) The notice has the same effect as a notice in a court proceeding requiring a witness to attend at a hearing or produce documents, and shall be served in the same way. 1991, c. 17, s. 29 (2).

Power of arbitral tribunal

(3) An arbitral tribunal has power to administer an oath or affirmation and power to require a witness to testify under oath or affirmation. 1991, c. 17, s. 29 (3).

Court orders and directions

(4) On the application of a party or of the arbitral tribunal, the court may make orders and give directions with respect to the taking of evidence for an arbitration as if it were a court proceeding. 1991, c. 17, s. 29 (4).

Restriction

30. No person shall be compelled to produce information, property or documents or to give evidence in an arbitration that the person could not be compelled to produce or give in a court proceeding. 1991, c. 17, s. 30.

AWARDS AND TERMINATION OF ARBITRATION

Application of law and equity

31. An arbitral tribunal shall decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies. 1991, c. 17, s. 31.

Conflict of laws

32. (1) In deciding a dispute, an arbitral tribunal shall apply the rules of law designated by the parties or, if none are designated, the rules of law it considers appropriate in the circumstances. 1991, c. 17, s. 32 (1).

Designation by parties

(2) A designation by the parties of the law of a jurisdiction refers to the jurisdiction's substantive law and not to its conflict of laws rules, unless the parties expressly indicate that the designation includes them. 1991, c. 17, s. 32 (2).

Exception, family arbitration

(3) Subsections (1) and (2) do not apply to a family arbitration. 2006, c. 1, s. 1 (5).

Same

(4) In a family arbitration, the arbitral tribunal shall apply the substantive law of Ontario, unless the parties expressly designate the substantive law of another Canadian jurisdiction, in which case that substantive law shall be applied. 2006, c. 1, s. 1 (5).

Application of arbitration agreement, contract and usages of trade

33. The arbitral tribunal shall decide the dispute in accordance with the arbitration agreement and the contract, if any, under which the dispute arose, and may also take into account any applicable usages of trade. 1991, c. 17, s. 33.

Decision of arbitral tribunal

34. If an arbitral tribunal is composed of more than one member, a decision of a majority of the members is the arbitral tribunal's decision; however, if there is no majority decision or unanimous decision, the chair's decision governs. 1991, c. 17, s. 34.

Mediation and conciliation

35. The members of an arbitral tribunal shall not conduct any part of the arbitration as a mediation or conciliation process or other similar process that might compromise or appear to compromise the arbitral tribunal's ability to decide the dispute impartially. 1991, c. 17, s. 35.

Settlement

36. If the parties settle the dispute during arbitration, the arbitral tribunal shall terminate the arbitration and, if a party so requests, may record the settlement in the form of an award. 1991, c. 17, s. 36.

Binding nature of award

37. An award binds the parties, unless it is set aside or varied under section 45 or 46 (appeal, setting aside award). 1991, c. 17, s. 37.

Form of award

38. (1) An award shall be made in writing and, except in the case of an award made on consent, shall state the reasons on which it is based. 1991, c. 17, s. 38 (1).

Idem

(2) The award shall indicate the place where and the date on which it is made. 1991, c. 17, s. 38 (2).

Formalities of execution

(3) The award shall be dated and shall be signed by all the members of the arbitral tribunal, or by a majority of them if an explanation of the omission of the other signatures is included. 1991, c. 17, s. 38 (3).

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Copies

(4) A copy of the award shall be delivered to each party. 1991, c. 17, s. 38 (4).

Extension of time limits

39. The court may extend the time within which the arbitral tribunal is required to make an award, even if the time has expired. 1991, c. 17, s. 39.

Explanation

40. (1) A party may, within thirty days after receiving an award, request that the arbitral tribunal explain any matter. 1991, c. 17, s. 40 (1).

Court order

(2) If the arbitral tribunal does not give an explanation within fifteen days after receiving the request, the court may, on the party's application, order it to do so. 1991, c. 17, s. 40 (2).

Interim awards

41. The arbitral tribunal may make one or more interim awards. 1991, c. 17, s. 41.

More than one final award

42. The arbitral tribunal may make more than one final award, disposing of one or more matters referred to arbitration in each award. 1991, c. 17, s. 42.

Termination of arbitration

43. (1) An arbitration is terminated when,

(a) the arbitral tribunal makes a final award in accordance with this Act, disposing of all matters referred to arbitration;

(b) the arbitral tribunal terminates the arbitration under subsection (2), (3), 27 (1) (claimant's failure to submit statement) or 27 (4) (delay); or

(c) an arbitrator's mandate is terminated, if the arbitration agreement provides that the arbitration shall be conducted only by that arbitrator. 1991, c. 17, s. 43 (1).

Order by arbitral tribunal

(2) An arbitral tribunal shall make an order terminating the arbitration if the claimant withdraws the claim, unless the respondent objects to the termination and the arbitral tribunal agrees that the respondent is entitled to obtain a final settlement of the dispute. 1991, c. 17, s. 43 (2).

Idem

(3) An arbitral tribunal shall make an order terminating the arbitration if,

(a) the parties agree that the arbitration should be terminated; or

(b) the arbitral tribunal finds that continuation of the arbitration has become unnecessary or impossible. 1991, c. 17, s. 43 (3).

Revival

(4) The arbitration may be revived for the purposes of section 44 (corrections) or subsection 45 (5) (appeal), 46 (7), 46 (8) (setting aside award) or 54 (3) (costs). 1991, c. 17, s. 43 (4).

Death

(5) A party's death terminates the arbitration only

with respect to claims that are extinguished as a result of the death. 1991, c. 17, s. 43 (5).

Corrections and additional awards

Errors, injustices caused by oversights

44. (1) An arbitral tribunal may, on its own initiative within thirty days after making an award or at a party's request made within thirty days after receiving the award,

(a) correct typographical errors, errors of calculation and similar errors in the award; or

(b) amend the award so as to correct an injustice caused by an oversight on the part of the arbitral tribunal. 1991, c. 17, s. 44 (1).

Additional awards

(2) The arbitral tribunal may, on its own initiative at any time or at a party's request made within thirty days after receiving the award, make an additional award to deal with a claim that was presented in the arbitration but omitted from the earlier award. 1991, c. 17, s. 44 (2).

No hearing necessary

(3) The arbitral tribunal need not hold a hearing or meeting before rejecting a request made under this section. 1991, c. 17, s. 44 (3).

REMEDIES

Appeals

Appeal on question of law

45. (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. 1991, c. 17, s. 45 (1).

Idem

(2) If the arbitration agreement so provides, a party may appeal an award to the court on a question of law. 1991, c. 17, s. 45 (2).

Appeal on question of fact or mixed fact and 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. 1991, c. 17, s. 45 (3).

Powers of court

(4) The court may require the arbitral tribunal to explain any matter. 1991, c. 17, s. 45 (4).

Idem

(5) The court may confirm, vary or set aside the award or may remit the award to the arbitral tribunal with the court's opinion on the question of law, in the case of an appeal on a question of law, and give directions about the conduct of the arbitration. 1991, c. 17, s. 45 (5).

...ARBITRATION ACT, 1991

Family arbitration award

(6) Any appeal of a family arbitration award lies to,

(a) the Family Court, in the areas where it has jurisdiction under subsection 21.1 (4) of the *Courts of Justice Act*;

(b) the Superior Court of Justice, in the rest of Ontario. 2006, c. 1, s. 1 (6).

Setting aside award

46. (1) On a party's application, the court may set aside an award on any of the following grounds:

1. A party entered into the arbitration agreement while under a legal incapacity.
2. The arbitration agreement is invalid or has ceased to exist.
3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement.
4. The composition of the tribunal was not in accordance with the arbitration agreement or, if the agreement did not deal with that matter, was not in accordance with this Act.
5. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.
6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator.
7. The procedures followed in the arbitration did not comply with this Act.
8. An arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.
9. The award was obtained by fraud.
10. The award is a family arbitration award that is not enforceable under the *Family Law Act*. 1991, c. 17, s. 46 (1); 2006, c. 1, s. 1 (7).

Severable parts of award

(2) If paragraph 3 of subsection (1) applies and it is reasonable to separate the decisions on matters covered by the arbitration agreement from the impugned ones, the court shall set aside the impugned decisions and allow the others to stand. 1991, c. 17, s. 46 (2).

Restriction

(3) The court shall not set aside an award on grounds referred to in paragraph 3 of subsection (1) if the party has agreed to the inclusion of the dispute or matter, waived the right to object to its inclusion or agreed that the arbitral tribunal has power to decide what disputes have been referred to it. 1991, c. 17, s. 46 (3).

Idem

(4) The court shall not set aside an award on grounds referred to in paragraph 8 of subsection (1) if the party had an opportunity to challenge the arbitrator on those grounds under section 13 before the award was made and did not do so, or if those grounds were the subject of an unsuccessful challenge. 1991, c. 17, s. 46 (4).

Deemed waiver

(5) The court shall not set aside an award on a ground to which the applicant is deemed under section 4 to have waived the right to object. 1991, c. 17, s. 46 (5).

Exception

(6) If the ground alleged for setting aside the award could have been raised as an objection to the arbitral tribunal's jurisdiction to conduct the arbitration or as an objection that the arbitral tribunal was exceeding its authority, the court may set the award aside on that ground if it considers the applicant's failure to make an objection in accordance with section 17 justified. 1991, c. 17, s. 46 (6).

Connected matters

(7) When the court sets aside an award, it may remove the arbitral tribunal or an arbitrator and may give directions about the conduct of the arbitration. 1991, c. 17, s. 46 (7).

Court may remit award to arbitral tribunal

(8) Instead of setting aside an award, the court may remit it to the arbitral tribunal and give directions about the conduct of the arbitration. 1991, c. 17, s. 46 (8).

Time limit

47. (1) An appeal of an award or an application to set aside an award shall be commenced within thirty days after the appellant or applicant receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based. 1991, c. 17, s. 47 (1).

Exception

(2) Subsection (1) does not apply if the appellant or applicant alleges corruption or fraud. 1991, c. 17, s. 47 (2).

Declaration of invalidity of arbitration

48. (1) At any stage during or after an arbitration, on the application of a party who has not participated in the arbitration, the court may grant a declaration that the arbitration is invalid because,

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid or has ceased to exist;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law; or

(d) the arbitration agreement does not apply to the dispute. 1991, c. 17, s. 48 (1).

Injunction

(2) When the court grants the declaration, it may also grant an injunction against the commencement or continuation of the arbitration. 1991, c. 17, s. 48 (2).

Further appeal

49. An appeal from the court's decision in an appeal of an award, an application to set aside an award or an application for a declaration of

invalidity may be made to the Court of Appeal, with leave of that court. 1991, c. 17, s. 49.

Enforcement of award

Application

50. (1) A person who is entitled to enforcement of an award made in Ontario or elsewhere in Canada may make an application to the court to that effect. 1991, c. 17, s. 50 (1).

Formalities

(2) The application shall be made on notice to the person against whom enforcement is sought, in accordance with the rules of court, and shall be supported by the original award or a certified copy. 1991, c. 17, s. 50 (2).

Duty of court, award made in Ontario

(3) The court shall give a judgment enforcing an award made in Ontario unless,

(a) the thirty-day period for commencing an appeal or an application to set the award aside has not yet elapsed;
(b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity;
(c) the award has been set aside or the arbitration is the subject of a declaration of invalidity; or
(d) the award is a family arbitration award. 1991, c. 17, s. 50 (3); 2006, c. 1, s. 1 (8).

Duty of court, award made elsewhere in Canada

(4) The court shall give a judgment enforcing an award made elsewhere in Canada unless,

(a) the period for commencing an appeal or an application to set the award aside provided by the laws of the province or territory where the award was made has not yet elapsed;
(b) there is a pending appeal, application to set the award aside or application for a declaration of invalidity in the province or territory where the award was made;
(c) the award has been set aside in the province or territory where it was made or the arbitration is the subject of a declaration of invalidity granted there;
(d) the subject-matter of the award is not capable of being the subject of arbitration under Ontario law; or
(e) the award is a family arbitration award. 1991, c. 17, s. 50 (4); 2006, c. 1, s. 1 (9).

Pending proceeding

(5) If the period for commencing an appeal, application to set the award aside or application for a declaration of invalidity has not yet elapsed, or if such a proceeding is pending, the court may,

(a) enforce the award; or
(b) order, on such conditions as are just, that enforcement of the award is stayed until the period has elapsed without such a proceeding being commenced, or until the pending proceeding is finally disposed of. 1991, c. 17, s. 50 (5).

Speedy disposition of pending proceeding

(6) If the court stays the enforcement of an award made in Ontario until a pending

proceeding is finally disposed of, it may give directions for the speedy disposition of the proceeding. 1991, c. 17, s. 50 (6).

Unusual remedies

(7) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may,

(a) grant a different remedy requested by the applicant; or

(b) in the case of an award made in Ontario, remit it to the arbitral tribunal with the court's opinion, in which case the arbitral tribunal may award a different remedy. 1991, c. 17, s. 50 (7).

Powers of court

(8) The court has the same powers with respect to the enforcement of awards as with respect to the enforcement of its own judgments. 1991, c. 17, s. 50 (8).

Family arbitration awards

50.1 Family arbitration awards are enforceable only under the *Family Law Act*. 2006, c. 1, s. 1 (10).

GENERAL

Crown bound

51. This Act binds the Crown. 1991, c. 17, s. 51.

Limitation periods

52. (1) The law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action. 1991, c. 17, s. 52 (1).

Preservation of rights

(2) If the court sets aside an award, terminates an arbitration or declares an arbitration to be invalid, it may order that the period from the commencement of the arbitration to the date of the order shall be excluded from the computation of the time within which an action may be brought on a cause of action that was a claim in the arbitration. 1991, c. 17, s. 52 (2).

Enforcement of award

(3) An application for enforcement of an award may not be made more than two years after the day on which the applicant receives the award. 1991, c. 17, s. 52 (3).

Service

Personal service of notice or document on individual

53. (1) A notice or other document may be served on an individual by leaving it with him or her. 1991, c. 17, s. 53 (1).

Personal service on corporation

(2) A notice or other document may be served on a corporation by leaving it with an officer, director or agent of the corporation, or at a place of business of the corporation with a person who

appears to be in control or management of the place. 1991, c. 17, s. 53 (2).

Service by telephone transmission of facsimile

(3) A notice or other document may be served by sending it to the addressee by telephone transmission of a facsimile to the number that the addressee specified in the arbitration agreement or has furnished to the arbitral tribunal. 1991, c. 17, s. 53 (3).

Service by mail

(4) If a reasonable effort to serve a notice or other document under subsection (1) or (2) is not successful and it is not possible to serve it under subsection (3), it may be sent by prepaid registered mail to the mailing address that the addressee specified in the arbitration agreement or furnished to the arbitral tribunal or, if none was specified or furnished, to the addressee's last-known place of business or residence. 1991, c. 17, s. 53 (4).

Deemed time of receipt

(5) Unless the addressee establishes that the addressee, acting in good faith, through absence, illness or other cause beyond the addressee's control failed to receive the notice or other document until a later date, it shall be deemed to have been received,

(a) on the day it is given or transmitted, in the case of service under subsection (1), (2) or (3);

(b) on the fifth day after the day of mailing, in the case of service under subsection (4). 1991, c. 17, s. 53 (5).

Order for substituted service or dispensing with service

(6) The court may make an order for substituted service or an order dispensing with service, in the same manner as under the rules of court, if the court is satisfied that it is necessary to serve the notice or other document to commence an arbitration or proceed towards the appointment of an arbitral tribunal and that it is impractical for any reason to effect prompt service under subsection (1), (2), (3) or (4). 1991, c. 17, s. 53 (6).

Non-application to court proceedings

(7) This section does not apply to the service of documents in respect of court proceedings. 1991, c. 17, s. 53 (7).

Costs

Power to award costs

54. (1) An arbitral tribunal may award the costs of an arbitration. 1991, c. 17, s. 54 (1).

What constitutes costs

(2) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration. 1991, c. 17, s. 54 (2).

Request for award dealing with costs

(3) If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs. 1991, c. 17, s. 54 (3).

Absence of award dealing with costs

(4) In the absence of an award dealing with costs, each party is responsible for the party's own legal expenses and for an equal share of the fees and expenses of the arbitral tribunal and of any other expenses related to the arbitration. 1991, c. 17, s. 54 (4).

Costs consequences of failure to accept offer to settle

(5) If a party makes an offer to another party to settle the dispute or part of the dispute, the offer is not accepted and the arbitral tribunal's award is no more favourable to the second-named party than was the offer, the arbitral tribunal may take the fact into account in awarding costs in respect of the period from the making of the offer to the making of the award. 1991, c. 17, s. 54 (5).

Disclosure of offer to arbitral tribunal

(6) The fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than costs. 1991, c. 17, s. 54 (6).

Arbitrator's fees and expenses

55. The fees and expenses paid to an arbitrator shall not exceed the fair value of the services performed and the necessary and reasonable expenses actually incurred. 1991, c. 17, s. 55.

Assessment

Fees and expenses

56. (1) A party to an arbitration may have an arbitrator's account for fees and expenses assessed by an assessment officer in the same manner as a solicitor's bill under the *Solicitors Act. 1991*, c. 17, s. 56 (1).

Costs

(2) If an arbitral tribunal awards costs and directs that they be assessed, or awards costs without fixing the amount or indicating how it is to be ascertained, a party to the arbitration may have the costs assessed by an assessment officer in the same manner as costs under the rules of court. 1991, c. 17, s. 56 (2).

Idem

(3) In assessing the part of the costs represented by the fees and expenses of the arbitral tribunal, the assessment officer shall apply the same principles as in the assessment of an account under subsection (1). 1991, c. 17, s. 56 (3).

Account already paid

(4) Subsection (1) applies even if the account has been paid. 1991, c. 17, s. 56 (4).

Review by court

(5) On the application of a party to the arbitration, the court may review an assessment of costs or of an arbitrator's account for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c. 17, s. 56 (5).

Idem

(6) On the application of an arbitrator, the court may review an assessment of his or her account

for fees and expenses and may confirm the assessment, vary it, set it aside or remit it to the assessment officer with directions. 1991, c. 17, s. 56 (6).

Time for application for review

(7) The application for review may not be made after the period specified in the assessment officer's certificate has elapsed or, if no period is specified, more than thirty days after the date of the certificate, unless the court orders otherwise. 1991, c. 17, s. 56 (7).

Enforcement

(8) When the time during which an application for review may be made has expired and no application has been made, or when the court has reviewed the assessment and made a final determination, the certificate may be filed with the court and enforced as if it were a judgment of the court. 1991, c. 17, s. 56 (8).

Interest

57. Sections 127 to 130 (prejudgment and postjudgment interest) of the *Courts of Justice Act* apply to an arbitration, with necessary modifications. 1991, c. 17, s. 57.

Regulations

58. The Lieutenant Governor in Council may make regulations,

(a) requiring that every family arbitration agreement contain specified standard provisions;

(b) requiring that every arbitrator who conducts a family arbitration be a member of a specified dispute resolution organization or of a specified class of members of the organization;

(c) requiring every arbitrator who conducts a family arbitration to provide specified information about the award, not including the names of the parties or any other identifying information, to a specified person;

(d) requiring any arbitrator who conducts a family arbitration to have received training, approved by the Attorney General, that includes training in screening parties for power imbalances and domestic violence;

(e) requiring that every arbitrator who conducts a family arbitration shall,

  (i) ensure that the parties are separately screened for power imbalances and domestic violence, by someone other than the arbitrator, and

  (ii) review and consider the results of the screening before and during the family arbitration;

(f) requiring every arbitrator who conducts a family arbitration to create a record of the arbitration containing the specified matters, to keep the record for the specified period and to protect the confidentiality of the record;

(g) specifying standard provisions for the purpose of clause (a), dispute resolution

organizations and classes for the purpose of clause (b), information for the purpose of clause (c), persons for the purpose of clause (c), matters for the purpose of clause (f) and a period for the purpose of clause (f). 2006, c. 1, s. 1 (11).

59. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 1991, c. 17, s. 59.

60. OMITTED (ENACTS SHORT TITLE OF THIS ACT). 1991, c. 17, s. 60.

COMMERCIAL MEDIATION ACT, 2010

S.O. 2010, CHAPTER 16 | SCHEDULE 3

Purpose

1. The purpose of this Act is to facilitate the use of mediation to resolve commercial disputes. 2010, c. 16, Sched. 3, s. 1.

Application

2. (1) Subject to subsections (2), (4) and (5), this Act applies to a mediation of a commercial dispute if the mediation commences on or after the day this Act comes into force. 2010, c. 16, Sched. 3, s. 2 (1).

Agreement to opt out of or modify application of Act

(2) The parties to a mediation of a commercial dispute may,

(a) agree not to have this Act apply to the mediation; or

(b) subject to subsections 4 (4) and 7 (5), apply this Act with such modifications as the parties have agreed on. 2010, c. 16, Sched. 3, s. 2 (2).

Binds the Crown

(3) This Act binds Her Majesty in right of Ontario. 2010, c. 16, Sched. 3, s. 2 (3).

Exceptions

(4) This Act does not apply to,

(a) a mediation under or relating to the formation of a collective agreement;

(b) a computerized or other form of mediation in which the mediation is not conducted with an individual as the mediator;

(c) actions taken by a judge or arbitrator in the course of judicial or arbitral proceedings to promote settlement of a commercial dispute that is the subject of the proceedings; or

(d) mediations for which procedures are prescribed in the Rules of Civil Procedure made under the Courts of Justice Act. 2010, c. 16, Sched. 3, s. 2 (4).

Same, conflict of law, etc.

(5) This Act does not apply to the mediation of a commercial dispute to the extent that,

(a) this Act conflicts or is inconsistent with the requirements of another Act or a regulation made under another Act; or

(b) the application of this Act is excluded or modified by the regulations. 2010, c. 16, Sched. 3, s. 2 (5).

Definitions

3. In this Act,

"commercial dispute" means a dispute between parties relating to matters of a commercial nature, whether contractual or not, such as trade transactions for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements and concessions, joint ventures, other forms of industrial or business co-operation or the carriage of goods or passengers; ("différend commercial")

"mediation" means a collaborative process in which,

(a) the parties to a commercial dispute agree

to request a neutral person, referred to as a mediator, to assist them in their attempt to reach a settlement in their dispute, and

(b) the mediator does not have authority to impose a solution to the dispute on the parties. ("médiation") 2010, c. 16, Sched. 3, s. 3.

Interpretation

4. (1) This Act is based on the United Nations Commission on International Trade Law, (UNCITRAL) Model Law on International Commercial Conciliation (2002) and, in interpreting this Act, consideration must be given to its international origin, the need to promote uniformity in its application and the observance of good faith. 2010, c. 16, Sched. 3, s. 4 (1).

Same

(2) In interpreting this Act, recourse may be had to,

(a) the Report of the United Nations Commission on International Trade Law on its 35th session; and

(b) the UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use 2002. 2010, c. 16, Sched. 3, s. 4 (2).

Same

(3) If a question arises during a mediation that no provisions of this Act or the regulations expressly cover, the question is to be settled in conformity with the general principles on which the Model Law on International Conciliation is based. 2010, c. 16, Sched. 3, s. 4 (3).

Parties may not opt out of this section

(4) The parties to a mediation to which this Act applies may not exclude or modify the application of this section. 2010, c. 16, Sched. 3, s. 4 (4).

Mediation

Commencement

5. (1) A mediation commences on the day on which the parties to a commercial dispute agree to submit the dispute to mediation. 2010, c. 16, Sched. 3, s. 5 (1).

When invitation to mediate may be considered rejected

(2) A party who invites another party to mediate may consider its invitation rejected if the party does not receive acceptance within 30 days after the day on which the party sent its invitation, or within the period specified in the invitation. 2010, c. 16, Sched. 3, s. 5 (2).

Termination

(3) The mediation terminates on the earliest of,

(a) the day on which the parties reach a settlement agreement;

(b) the day on which the parties jointly declare to the mediator that the mediation is terminated;

(c) the day on which the mediator, after consultation with the parties, declares that further efforts at mediation are no longer justified and that the mediation is terminated; and

(d) the first day that a party whose

participation is necessary for the mediation to continue declares to the mediator and to the other party or parties that the mediation is terminated. 2010, c. 16, Sched. 3, s. 5 (3).

Termination of party's participation

(4) A mediation may continue after the termination of a party's participation in the mediation if the party's participation is not necessary in order for the other parties to continue the mediation with respect to issues that are still in dispute. 2010, c. 16, Sched. 3, s. 5 (4).

Appointment of mediator

6. (1) Subject to subsection (2), the mediation is to be conducted by a mediator appointed by agreement of the parties. 2010, c. 16, Sched. 3, s. 6 (1).

Same

(2) The parties may ask another person or entity to recommend or appoint a mediator and, if the person or entity agrees to do so, the person or entity shall make every effort to recommend or appoint a person who is impartial and independent. 2010, c. 16, Sched. 3, s. 6 (2).

Duty to disclose

(3) A person who is approached to be a mediator shall,

(a) make sufficient inquiries to determine if he or she may have a current or potential conflict of interest or if any circumstances exist that may give rise to a reasonable apprehension of bias; and

(b) without delay, disclose to the parties any such conflict of interest or circumstances. 2010, c. 16, Sched. 3, s. 6 (3).

Same, duty continues during mediation

(4) The mediator's duty to disclose under clause (3) (b) continues until the termination of the mediation. 2010, c. 16, Sched. 3, s. 6 (4).

Same

(5) A person who makes a disclosure under clause (3) (b) before or while acting as a mediator may subsequently act or continue to act as the mediator only with the consent of all parties given after full disclosure of the facts and circumstances. 2010, c. 16, Sched. 3, s. 6 (5).

Interpretation

(6) For the purposes of this section, a person is deemed to have a conflict of interest with respect to a mediation if,

(a) the person has a financial or personal interest in the outcome of the mediation; or

(b) the person has an existing or previous relationship with a party or a person related to a party to the mediation. 2010, c. 16, Sched. 3, s. 6 (6).

Conduct of mediation, by agreement

7. (1) The parties and the mediator may agree on the manner in which the mediation is to be conducted and may agree to follow a set of existing rules or procedures unless prohibited from doing so under another Act or any regulations under this or another Act. 2010, c. 16, Sched. 3, s. 7 (1).

...COMMERCIAL MEDIATION ACT, 2010

Same, as determined by mediator

(2) To the extent that the parties have not agreed on the manner in which the mediation is to be conducted, the mediator may conduct the mediation in the manner the mediator considers appropriate, taking into account any requests by the parties and the circumstances of the dispute, including any need for speedy settlement. 2010, c. 16, Sched. 3, s. 7 (2).

Mediator's authority

(3) The mediator may,

(a) meet or communicate with the parties together, separately or in any combination; and

(b) make proposals for settlement of the dispute at any stage of the mediation. 2010, c. 16, Sched. 3, s. 7 (3).

Obligation of fair treatment

(4) The mediator shall maintain fair treatment of the parties throughout the mediation, taking into account the circumstances of the dispute. 2010, c. 16, Sched. 3, s. 7 (4).

Parties may not opt out of subs. (4)

(5) The parties shall not modify the obligation of the mediator in subsection (4) nor relieve the mediator from the duty to comply with that subsection. 2010, c. 16, Sched. 3, s. 7 (5).

Disclosure of information between parties

8. (1) A mediator may disclose to a party any information relating to the mediation that the mediator receives from another party unless that other party expressly asks the mediator not to disclose the information. 2010, c. 16, Sched. 3, s. 8 (1).

Duty to keep confidential

(2) Information relating to the mediation must be kept confidential by the parties, the mediator and any other persons involved in the conduct of the mediation unless,

(a) all the parties agree to the disclosure and, if the information relates to the mediator, the mediator agrees to the disclosure;

(b) the disclosure is required by law;

(c) the disclosure is required for the purposes of carrying out or enforcing a settlement agreement;

(d) the disclosure is required for a mediator to respond to a claim of misconduct; or

(e) the disclosure is required to protect the health or safety of any person. 2010, c. 16, Sched. 3, s. 8 (2).

Exception

(3) The requirement to keep information relating to the mediation confidential does not apply to information,

(a) that is publicly available;

(b) that the parties, by their conduct, do not treat as confidential; or

(c) that is relevant in determining if the mediator has failed to make a disclosure required under subsection 6 (3). 2010, c. 16, Sched. 3, s. 8 (3).

Admissibility of information

9. (1) Subject to subsections (2) and (3), none of the following information, in any form, is discoverable or admissible in evidence in arbitral, judicial or administrative proceedings:

1. An invitation by a party to mediate a commercial dispute, a party's willingness or refusal to mediate the dispute, information exchanged between the parties before the mediation commences and any agreement to mediate the dispute.
2. A document prepared solely for the purposes of the mediation.
3. Views expressed or suggestions made by a party during the mediation concerning a possible settlement of the dispute.
4. Statements or admissions made by a party during the mediation.
5. Statements or proposals for settlement made by the mediator.
6. The fact that a party indicated a willingness to accept a proposal for settlement made by the mediator.
7. The fact that a party or the mediator terminated the mediation. 2010, c. 16, Sched. 3, s. 9 (1).

Exceptions

(2) The information referred to in subsection (1) may be admitted in evidence to the extent required,

(a) by law;

(b) for the purposes of carrying out or enforcing a settlement agreement;

(c) by a mediator to respond to a claim of misconduct; or

(d) if all of the parties to the mediation consent and, if the information relates to the mediator, the mediator consents. 2010, c. 16, Sched. 3, s. 9 (2).

Same, to determine costs

(3) Information about the conduct of a party to the mediation or the conduct of the mediator may be disclosed after the final resolution of the dispute to which the mediation relates for the purpose of determining costs of the mediation or of proceedings taken because the mediation did not succeed. 2010, c. 16, Sched. 3, s. 9 (3).

Other information used in a mediation

(4) Except for the limitations set out in subsection (1), information created for purposes other than a mediation does not become inadmissible only because it was used in the mediation. 2010, c. 16, Sched. 3, s. 9 (4).

Application of subss. (1) and (2)

(5) Subsections (1) and (2) apply whether or not the arbitral, judicial or administrative proceedings relate to a dispute that is or was the subject of the mediation. 2010, c. 16, Sched. 3, s. 9 (5).

Acting as mediator and arbitrator

10. Unless all parties to a mediation otherwise agree, a mediator shall not act as both a mediator and an arbitrator or as an arbitrator after acting as the mediator with respect to,

(a) the commercial dispute that is the subject of the mediation; or

(b) another dispute that arises from the same contract or legal relationship or from a related contract or legal relationship between the parties. 2010, c. 16, Sched. 3, s. 10.

Agreements respecting arbitral or judicial proceedings

11. (1) The parties may agree not to proceed with arbitral or judicial proceedings before the mediation is terminated. 2010, c. 16, Sched. 3, s. 11 (1).

Exception

(2) Despite subsection (1), an arbitrator or court may permit the proceedings to proceed and may make any order necessary if the arbitrator or court considers,

(a) that proceedings are necessary to preserve the rights of any party; or

(b) that proceedings are necessary in the interests of justice. 2010, c. 16, Sched. 3, s. 11 (2).

Mediation not terminated by commencement of arbitral proceedings, etc.

(3) The commencement of any arbitral or judicial proceedings is not of itself to be regarded as a termination of the agreement to mediate the commercial dispute or as the termination of the mediation. 2010, c. 16, Sched. 3, s. 11 (3).

Settlement agreement binding

12. A settlement agreement or minutes of settlement are binding on the parties to the mediation who sign them. 2010, c. 16, Sched. 3, s. 12.

Enforcement of settlement Definitions

13. (1) In this section,

"registrar" means the registrar of the Superior Court of Justice; ("greffier")

"settlement agreement" means an agreement signed by more than one party to the mediation, or minutes of settlement signed by more than one of the parties, that disposes of one or more issues in dispute in the mediation. ("accord issu d'un règlement amiable") 2010, c. 16, Sched. 3, s. 13 (1).

Application to judge or court

(2) If a party to a settlement agreement fails to comply with the terms of a settlement agreement, another party wishing to enforce the agreement may, on notice to all other parties who signed the agreement,

(a) apply to a judge of the Superior Court of Justice for judgment in the terms of the agreement; or

(b) apply to the Superior Court of Justice for an order authorizing the registration of the agreement with the court. 2010, c. 16, Sched. 3, s. 13 (2).

Application of the Rules of Civil Procedure

(3) The Rules of Civil Procedure made under the Courts of Justice Act apply with respect to an application under this section. 2010, c. 16, Sched. 3, s. 13 (3).

Judgment

(4) On an application under clause (2) (a), the judge may grant judgment in accordance with the terms of the agreement. 2010, c. 16, Sched. 3, s. 13 (4).

Order

(5) On an application under clause (2) (b), the registrar shall, subject to subsection (6), make an order authorizing the registration of the settlement agreement. 2010, c. 16, Sched. 3, s. 13 (5).

Same

(6) No judgment or order shall be granted or made if it is shown to the court that,

(a) a party to the mediation against whom the applicant is seeking to enforce the settlement agreement did not sign the agreement or otherwise consent to the terms of the agreement that the applicant is seeking to enforce;

(b) the settlement agreement was obtained by fraud; or

(c) the settlement agreement does not accurately reflect the terms agreed to by the parties in settlement of the dispute to which the agreement relates. 2010, c. 16, Sched. 3, s. 13 (6).

Effect of filing agreement

(7) On the filing of a true copy of the settlement agreement with the registrar pursuant to an order authorizing the registration of the agreement,

(a) the settlement agreement is registered with the court and has the same force and effect as if it were a judgment obtained and entered in the Superior Court of Justice on the date of the registration; and

(b) the costs of and incidental to the registration of the settlement agreement and the application for registration are recoverable as if they were sums payable under a judgment. 2010, c. 16, Sched. 3, s. 13 (7).

Costs

(8) The costs referred to in clause (7) (b) shall be in the amount,

(a) that is prescribed by the regulations or determined by the registrar in accordance with the regulations; or

(b) that is determined by the registrar, in his or her discretion, if no regulation under clause 15 (b) is in force at the time the settlement agreement is filed with the registrar. 2010, c. 16, Sched. 3, s. 13 (8).

Enforcement of mediator's fees, etc.

14. (1) This section applies if a settlement agreement, minutes of settlement or other written agreement or document signed by one or more parties to a mediation of a commercial dispute,

(a) contains an undertaking by one or more of the parties to pay the fees and expenses of the mediator for performing the functions of a mediator in the mediation; and

(b) sets out the amount of fees and expenses payable or the manner of calculating the fees and expenses, all the rates and other variables of which have been agreed to in

the agreement, minutes or other document. 2010, c. 16, Sched. 3, s. 14 (1).

Application of s. 13

(2) Section 13 applies with necessary modifications if a mediator is not paid his or her fees and expenses in accordance with the settlement agreement, minutes of settlement or other written agreement or document and wishes to enforce payment. 2010, c. 16, Sched. 3, s. 14 (2).

Regulations

15. The Lieutenant Governor in Council may make regulations,

(a) excluding or modifying the application of all or part of this Act;

(b) prescribing the amount of costs recoverable by a party under clause 13 (7) (b) or principles to be applied by the registrar to determine the amount of those costs;

(c) defining any word or expression used but not defined in this Act;

(d) respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out effectively the intent and purpose of this Act. 2010, c. 16, Sched. 3, s. 15.

16. OMITTED (PROVIDES FOR COMING INTO FORCE OF PROVISIONS OF THIS ACT). 2010, c. 16, Sched. 3, s. 16.

17. OMITTED (ENACTS SHORT TITLE OF THIS ACT). 2010, c. 16, Sched. 3, s. 17.

A GUIDE FOR THE **PERPLEXED**

THE ABCs OF ADR

Stephen Morrison

CASSELS BROCK
LAWYERS