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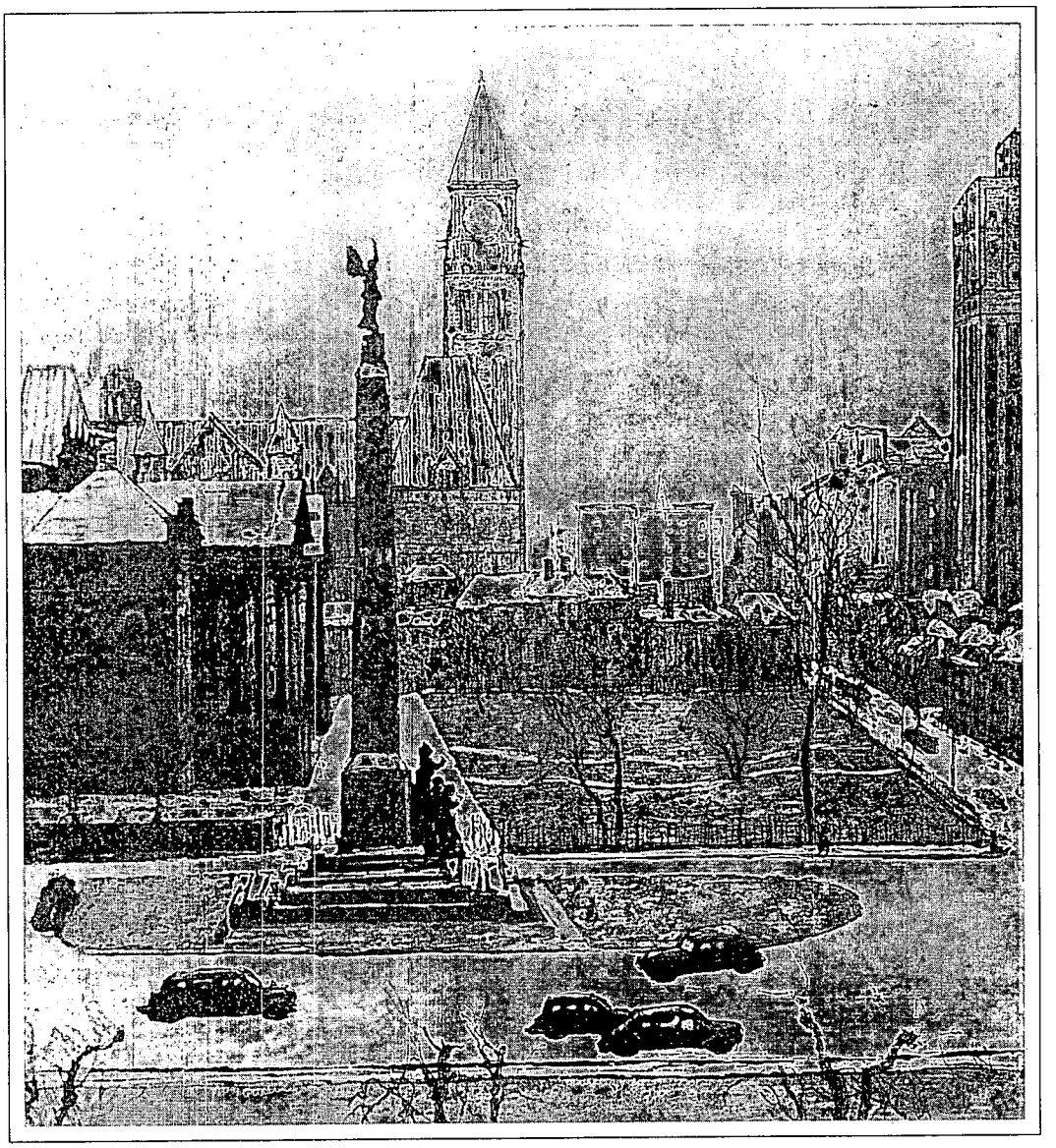

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ADR in Canada: Options for the *appropriate* resolution of business disputes

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In his famous novel *The Great Gatsby,* the American novelist F. Scott Fitzgerald made the observation that one sometimes reaches a better understanding by viewing the world through a single window. The revolution that has taken place in world-wide communications and the globalization of business since *The Great Gatsby* was published in 1925 casts doubt on the continuing validity of that observation. Certainly, the subjects of our conference, the "World Trade Organization and Legal Services," underscore the importance in today's world of being able to see the interactions of countries, businesses,. and individuals from multiple perspectives. Nevertheless, there is a stubborn truth in Fitzgerald's insight. Although I may travel halfway around the world to speak on the subject of alternative dispute resolution, my observations should be understood to do nothing more than describe the view from the window in my office at the corner of King Street and Bay Street in Toronto.

My main perspective on dispute resolution has been developed through my practice as a commercial litigation lawyer for a little over 25 years, a practice that has been based primarily in Toronto. However,_ my cases have involved legal proceedings in other provinces of Canada, in Europe, the United States, the Caribbean, and, to a lesser extent, Africa and Asia. Although I have not had any significant involvement in public international disputes or state sponsored dispute resolution procedures involving international trade, the work I have done with respect to transnational commercial disputes has given me some exposure to other common law and civil law legal systems. In addition, for the past 15 years or so, I have been very active in the International Litigation Committee (Committee "O") of the International Bar Association, and I am a past chair of that committee. As a result, I have been involved in organizing, chairing, and speaking at innumerable programs in which the perspectives of lawyers from all over the world on common issues relating to the litigation process have been discussed in great depth. If these experiences have led me to any simple conclusions, they are these:

- All legal systems that attempt to achieve reasoned, objective, and consistent justice based upon a process in which all parties have a fair and equal opportunity to present their case struggle with the issues of cost, delay, and abuse of process.
- The adaptations and compromises that each legal system makes in its dispute resolution process in order to achieve its objectives and minimize these problems are best understood in the context of the history, culture, and social expectations of that particular jurisdiction.

In other words, what is considered minimum due process in the United States may not be considered necessary at all to a fair dispute resolution process in France or Germany. A classic example of this is the scope of pre-trial disclosure that is mandated in American litigation compared with that which is required in continental Europe. Of course, this very tension between the universal goals of dispute resolution and the culturally based differences in the dispute resolution process of each country is the basis for the search for appropriate dispute resolution models in international contracts where the parties will, by definition, see the need for effective and fair dispute resolution from different windows.

What is ADR?

The acronym ADR is usually thought to stand for "alternative dispute resolution." This definition gives rise to the question: "alternative to what?" In Canada, the expression ADR, when applied to civil disputes, was originally (and sometimes still is) taken to mean alternative to litigation before the courts. On this definition, ADR includes arbitration as one alternative to litigation. This is because arbitration has not been widely used for the resolution of civil or general business disputes in Canada until quite recently. In countries where the arbitration of business disputes is well established, the term ADR often refers to methods of dispute resolution that are alternatives to both litigation and arbitration.

Thus, the very term ADR raises the question of whether or not there is one "normal" or "usually preferred" approach to dispute resolution.

. There are still lawyers in Canada who, when drafting commercial agreements, adopt the view that litigation before the courts is and should remain the normal and preferred method for the resolution of business disputes resolution unless the client requests otherwise for some specific reason. If the parties to the agreement are from different jurisdictions, commercial lawyers

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will often focus their attention on negotiating a choice of law clause and a jurisdiction clause that will determine which system of law will govern the contract and in which jurisdiction(s) any dispute may be litigated. Often, apart from obtaining enforceability opinions from lawyers in jurisdictions where the agreement or any judgment based on it may have to be enforced, little research is done to determine how the differences in the laws of the various jurisdictions involved may affect the outcome of the types of disputes which are most likely to arise. The virtue of this approach is that it requires little thought and does not distract the parties to the transaction from the main elements of the business agreement. The difficulty with it is that, when disputes do arise, the ensuing litigation (particularly in the context of international transactions) can give rise to surprising complexities of a procedural nature, especially where litigation in more than one jurisdiction is not excluded by the terms of the agreement..

On the other hand, there are lawyers who will regularly include a short "pro forma" arbitration clause in virtually every commercial agreement they draft. The utility of such clauses, if they ever have to be used, may be seriously questioned if the parties subsequently become embroiled in court proceedings regarding the appointment of an arbitrator because of the lack of a simple appointment mechanism or are faced with an arbitration process that is far more expensive than is warranted by the issues or amounts in dispute.

Appropriate dispute resolution: The right tool for the job

In order to place ADR in its true perspective, it is preferable to think of the acronym as standing for appropriate dispute resolution rather than alternative dispute resolution. What is it that makes a particular form of dispute resolution appropriate?

In the context of business disputes, the best yardstick for measuring the appropriateness of a dispute resolution procedure is the procedure's likely effectiveness or ineffectiveness with respect to the enforcement of the business rights of the parties to a particular agreement. Every business transaction involves the creation of mutual rights and obligations between or among the parties. The ultimate test of any dispute resolution process must be the extent to which it protects and gives effect to the reasonable expectations that the parties had when they entered into the transaction. Where a party's reasonable expectations are defeated by factors that are inherent in the dispute resolution process itself, it is fair to say that the dispute resolution process is not appropriate. For example, if it is known to the parties to an agreement that one of the parties cannot risk publicizing a dispute with the other, it is not an appropriate dispute resolution procedure from the first party's point of view to require it to file a public lawsuit in.order to enforce its rights. It is easy to see from this and other examples I will discuss below that the absence of an appropriate dispute resolution procedure may weaken or destroy business rights that exist in legal theory and the basis on which a party entered into the agreement in the first place.

The close connection between appropriate dispute resolution procedures and the practical existence of business rights is a fact that is well understood in the international business context. Understanding dispute resolution procedures in this way, instead of placing the discussion in the context of political imperatives or legal norms, allows us to see clearly the relationship between appropriate dispute resolution procedures and the promotion of business activity and trade.

Litigation in Canada

The litigation of business disputes in Canada is carried out primarily in the courts of superior jurisdiction in each of the ten Canadian provinces. Only disputes with the federal government or disputes between private parties with respect to very specific types of cases (e.g., maritime disputes and trademark cases) are litigated in the federal court system.

The judges of the courts of superior jurisdiction in each province are appointed by the federal government after a consultation process that includes the provincial government, the chiefjustice of the court to which the appointment is made, the law society in the province, and other special interest groups, such as the Canadian Bar Association. However, the ultimate power of appointment rests with the federal minister ofjustice.

No judges in Canada are elected. Nor are there any public hearings into the qualifications of any candidate for judicial office. Although the system for the appointment of judges in Canada is essentially political, there is very little criticism of the courts for favouring the government position in lawsuits. Canadian courts regularly find against the federal government and in favour of individuals in criminal cases and in cases involving the *Canadian Charter of Rights and Freedoms.'* Recently, a single judge of the Ontario Superior Court of justice stopped a major commercial transaction whereby the Ontario government proposed to privatize a Crown corporation that is responsible for the generation of all electrical power in Ontario.' In addition, Canadian judges have an excellent record of enforcing the judgments of courts of other jurisdictions against Canadian entities and affirming the jurisdiction of foreign courts where appropriate. Indeed, the argument can be made that the Canadian courts have gone too far in enforcing foreign judgments without requiring any voluntary act of submission to the jurisdiction of the foreign court or any reciprocal treatment for the judgments of Canadian courts.

The Canadian court system is open to the public. The existence of legal proceedings is a matter of public record, since all initial pleadings of the parties must be filed with the court and are open for public inspection.' Similarly, all trials in Canadian courts must be open to the public. Some relief from the publication of particular details of a court proceeding may be obtained by applying to the court for a protective order if publication would violate the legal rights of a party to keep specific information confidential .[7] However, such orders are not guaranteed to be issued and may not be granted if the opposing party can demonstrate some prejudice to it in preparing or presenting its case.' Also, such orders are of little use if a party wishes to keep the very existence of the dispute confidential.

Canadian litigation requires extensive pre-trial disclosure from the parties. Every party to the litigation must automatically

and voluntarily produce all documents in its possession that relate to the issues in the action. In addition, the parties must submit to being questioned under oath by all opposing parties so that each parry to the action may, before the actual trial of the case, have available to it all the necessary information to present its case. Pre-trial examinations of witnesses who are not parties to the litigation are not as readily allowed in Canadian proceedings as in American litigation. Nevertheless, pre-trial proceedings can be extensive and are open to abuse by a party who wishes to delay the proceedings or add unnecessary costs.

Rules of civil procedure in Canada are revised from time to time to better serve the needs of parties to litigation and to address potential abuses.

In Toronto, a specialized panel of judges deals with commercial cases. Special procedures in this court, which is referred to as the Commercial List, are designed to allow a single judge to supervise complex cases and provide day-to-day direction so that potential abuses are prevented or curtailed and the matters are brought to a resolution on an expedited, businesslike basis.'

All civil cases in the Ontario Superior Court of justice that are not on the Commercial List are now subject to case management, in which a judicial officer known as a "master" regularly confers with the lawyers for all parties (usually in a telephone conference call) to ensure that timetables for the conduct of the litigation are established and met."

Fast-track procedures (with simplified pre-trial proceedings) are available for smaller cases." A party may also apply to the court for an early determination in cases in which there is no genuine issue for trial" or where the facts are not in dispute."

Nevertheless, litigation in Canada remains a cumbersome and expensive process. Every procedural dispute that cannot be resolved through the informal consultation processes provided in the Commercial List and through case management must be resolved by a formal application to the court. This requires the preparation of a notice of motion setting out the nature of the dispute and the relief claimed, supporting material often in the form of affidavits from the parties, and a form of written argument known as a factum. In addition, on a disputed motion, individuals who swear affidavits may be cross-examined under oath with a verbatim transcript of the examination being recorded. In this way, it is not unusual for a single procedural motion to cost each of the parties $10,000 or $20,000 in a significant commercial case. Motions have been known to cost many times those amounts, and several such motions may be brought in the course of a lawsuit.

It is easy to see that a case involving all of the stages and elements described above could be a lengthy and costly process.

Why an alternative to litigation is necessary

Unquestionably, the litigation process provides for the most thorough investigation by all parties of the facts relating to the lawsuit. Although time limits are now starting to be imposed by Canadian courts on the amount of time that parties may take in making presentations to the court, it is still the case that litigation allows ample opportunity for all sides of the case to be presented. In addition, the right to have the final determination in a case reviewed by at least one (and possibly more) levels of appeal provides reassurance to the parties that the "right" result will be achieved.

However, all of these features of the court system present potential problems in the context of business disputes. All businesses operate on a cost-benefit basis. There is no business sense in a dispute resolution system in which the costs may easily exceed the benefits of a favourable decision. Similarly, most businesses operate under constraints whereby their lenders or shareholders judge their performance and profitability within relatively short time frames, such as fiscal years or even quarter years. It is unusual for a lawsuit to be conducted in less than two or three years. Usually the time frame is much longer, and the possibility of an adverse result may cast a shadow over the busi-

ness while the lawsuit is pursued. The pace of the lawsuit is often dictated by the party who least desires to know the result.

There are other considerations as well. The necessarily public nature of litigation in Canada creates serious problems for the litigation of certain types of business disputes. For example, a distributor of a product may have a dispute with the manufacturer regarding the quality of a particular product or shipment. It may be highly detrimental for the distributor if it became widely known either that it has a dispute with the manufacturer or that there are issues regarding the quality of the product. A distributor who is forced to choose between unfair financial terms for the resolution of the dispute and a public fight with the manufacturer may have no choice but to choose the former.

Similarly, our open court system creates risks for any party who wishes to litigate its rights with reference to proprietary or confidential information."

The generosity of the Canadian court system towards proceedings in other jurisdictions creates another risk for Canadian businesses." The main exposure for Canadian businesses in this regard is the risk that business disputes with American entities will be decided by an American jury or will give rise to an excessive award of punitive damages by an American court. However, the same risk exists to varying degrees in business transactions with other countries, especially if there are concerns regarding the independence of the court system of that country from political and other influences.

It is rare (and usually very inconvenient) for the parties to agree that the dispute will be determined by the courts of a third jurisdiction that is unconnected to the transaction. Often, there are concerns regarding the enforceability of such a provision or the reception that a case will receive from the courts of a jurisdiction that has no connection whatsoever to the agreement. The usual result is that the parties agree that the case may be decided by the courts of *either* jurisdiction in which the parties carry on business. The stage is then set- for a multiplicity of proceedings and all of the resulting costs and delay.

Parties to business agreements may be willing to run all of these risks in return for the assurance that litigation is more likely to produce the "right" result. However, the very concept that there is only one "right" result in any given business dispute and that litigation is most likely to reach that result is increasingly open to question. Traditionally, contract disputes were decided primarily by measuring the objective behaviour of the parties against the contractual obligations they had undertaken. In recent years, many Canadian judges have been open to the idea that more subjective considerations should be taken into account, for example whether the parties were acting in "good faith" or whether the obligations they undertook gave rise to a "fiduciary" duty that required them to put the interests of the other party ahead of their own in the performance of their obligations.'[16] These views have not -found universal favour, particularly at the appellate level, when applied to business disputes."

However, litigation is increasingly conducted on the basis that such standards may well be applied by the courts in judging the conduct of the parties.'[$] And, indeed, such factors may well influence the outcome of the case even if they are not formally incorporated into the judge's reasons. There is a sense that our courts are seeking a greater flexibility in the legal principles they apply so that they can better achieve justice, or what may be perceived to be a morally correct result, in each individual case. Whatever the merits may be of reflecting more subjective considerations into the determination of business disputes, the undeniable result is a weakening of the notions of consistency and predictability, which have been the major selling points of litigation. While some businesses may be interested in achieving a public vindication of the morality of their own conduct or a public condemnation of the immorality of the other parry's conduct, most businesses are primarily interested in having the dispute resolved on a timely and cost-effective basis.

When litigation is unavoidable

The question arises whether litigation, with all of its faults, is ever the appropriate form of dispute resolution for business disputes. Obviously, where it is not based on a contract between the parties, litigation is the only available form of dispute resolution unless the parties can agree to some other process for the immediate dispute. The same is true of a dispute that arises in a contractual context but where the contract makes no provision for any dispute resolution process other than litigation.

It has been said, but is increasingly open to question, that alternatives to litigation are difficult to negotiate after a dispute has arisen. It is often true that, in the early stages of a dispute that is not governed by a pre-existing agreement to arbitrate, one or more of the parties will wish to test the resolve of the other in pursuing or opposing the claim. They may do so by refusing to agree to any form of ADR. However, when one considers that over 90 percent of all civil cases settle,[19] including non-contractual cases, it is evident that even the most adversarial opponents are almost always able ultimately to reach a consensus on the appropriate resolution of the case. Why then should it be unthinkable that the parties to all business disputes that arise from a contractual relationship should aim to determine, at an early stage, the appropriate methodology for the resolution of that dispute?

It once was a universal view and is probably still a widely held opinion that certain types of contracts involve absolute rights that can only be enforced through the litigation process. For example, credit agreements between financial institutions and their customers were thought to be contracts of this kind. The obvious argument is that the rights of banks to collect their loans to customers must be strictly enforced. No financial institution will remain in business long on the basis that the repayment of its loans is subject to sympathetic arguments that might be advanced in a mediation process or to the "whims" of an arbitrator. From this perspective, there can only be one right legal result, and a customer who wishes to dispute the matter should be expected to face an arduous litigation process that may be pursued through one or more levels of appeal to ensure that the legal rights of the financial institution prevail over any emotional appeal of the customer. The integrity of the financial system demands no less.

However, financial institutions are beginning to rethink this approach. In 1996, major Canadian banks established a "Canadian banking ombudsman" as an independent.organization to investigate complaints from individuals and small businesses." The ombudsman operates primarily as a mediator and facilitator within a process that is without prejudice to the legal rights of the parties if the dispute is not resolved. Nevertheless, the creation of the office of the ombudsman represents a recognition of the need to attempt to respond to disputes in a non-legalistic fashion before they escalate into litigation. Recently, the role of the Canadian banking ombudsman was expanded to include disputes regarding retail investment accounts in addition to retail banking transactions.

Some Canadian banks now have their own internal ADR processes to assist customers in pursuing complaints and explicitly promote the concept that disputes with customers may be resolved by mediation or arbitration." The ombudsman process is a recognition of the fact that customers of banks may sometimes have legitimate grounds to dispute the way in which they are being dealt with. It is also recognition of the fact that a third party (even one who is created by and serves the Canadian banking industry) may be able to mediate a resolution that is acceptable to both parties.

Perhaps more significantly, major corporations that deal with the public (including financial institutions) are becoming increasingly interested in incorporating mandatory dispute resolution procedures into their standard form consumer agreements. Possibly, this is a reflection of an increasingly mature ADR environment in Canada. However, an equally important consideration is the fact that recent judicial decisions have held that the existence of appropriate dispute resolution provisions in consumer contracts may form a basis for the courts refusing to certify a class action.[22]

Class actions, which have been a fixture in American litigation for decades, have only been introduced to Canadian common law provinces within the last ten years or so. The most serious litigation exposure that large corporations who deal with the public currently face is from class actions on behalf of large groups of their customers alleging that the corporation has committed some common or systematic wrong against them. However, one requirement as to which a court must be satisfied before it certifies a class action under the *Ontario Class Action Proceedings Act*[23] is that there is no "preferable procedure" to the certification of a class action. Some class action defendants have been able to successfully argue that, where they have provided for alternative dispute resolution procedures in their individual contracts with customers, a class action is not a preferable procedure. Clearly, a court would have robe satisfied that the *alternative* dispute resolution procedure is also an *appropriate* dispute resolution procedure for the particular claim before it comes to that conclusion. Nevertheless, the use that has already been made of ADR provisions in resisting class actions is likely to substantially increase their popularity in consumer contracts.

No doubt there will continue to be cases that "must be litigated." I have personally been involved in more than one lawsuit in which the amounts in issue were not substantial but in which the objective of the client went well beyond the case at hand. A party to the litigation may wish to have a judicial precedent that will clarify its rights within an entire category of contracts to which it is a party. For example, a company that provides financing through equipment leases may wish to have it established that defects in the equipment, no matter how serious, cannot be used as an excuse for non-payment of the lease." Or a company may wish to establish that obligations which senior executives have contracted to fulfil can be enforced after they have gone to work for a competitor." Such rulings may be sought either to establish the enforceability of agreements or to establish legal rules that will equally affect all competitors in a particular marketplace. Such rulings are not available through any form of dispute resolution other than the litigation process.

Itis also unlikely, in the absence of a pre-existing arbitration agreement, that parties will agree to submit a dispute to arbitration where the consequence of losing the case could financially destroy one of the parties or where the relationship between the parties is particularly hostile. In these situations parties will likely wish to preserve all rights of appeal as well as the ability to express their animosity and seek public vindication through the litigation process itself.

Having said that, old preconceptions regarding the "unavoidability" of certain types of litigation are changing in Canada.

Negotiated resolutions of litigation

It was previously mentioned that well over 90 percent of all cases that are litigated settle before any judicial determination of the merits. Indeed, this has always been the case, even before ADR techniques were introduced. Why, then, are ADR techniques required at all?

Although most cases are probably still resolved through direct negotiation, whether or not a mediation has occurred in the course of the litigation, concerns are still expressed in some quarters that settlements negotiated principally by the lawyers who are conducting the litigation do not occur early enough in the litigation. Anecdotally one hears complaints about lawyers who are optimistic about the prospects of the litigation in the early stages but who become more pessimistic as the trial date approaches. The familiar phenomenon of settlements occurring on the courthouse steps is sometimes explained in these terms. The obvious implication is that the adversarial process serves the interest of the lawyers more than it serves the interests of the clients. Recently, a specific rule was incorporated into the Rules of Professional Conduct of the Law Society of Upper Canada requiring lawyers to encourage clients to compromise or settle a dispute, to consider the use of alternative dispute resolution, and to advise the client of ADR options."

Lawyers argue in their own defence that they are retained to advise clients as to the *proper* resolution of the dispute and not just to obtain any resolution that might be readily available. Claims and defences need to be thoroughly investigated before an informed settlement value can be placed on the case.

It is also true that clients in the first flush of a dispute are in-

clined to choose counsel based on the level of confidence, even aggression, that he or she is able to display. A lawyer who has been chosen to act on the basis of those qualities may find it difficult to raise the possibility of settlement with a client too enthusiastically or too early in the litigation. Simply put, a lawyer whose interest in settling the case is much greater than that of the client risks losing both the brief and the client!

Compounding these dynamics are various theories espoused by some clients and lawyers as to the most effective negotiating posture. Often, it is thought to be a sign of weakness to display any interest whatever in the settlement of the dispute. Too keen an interest in alternative methods of resolving the dispute may be taken by the opposing party as a distaste for the litigation process - a distaste that might be exploited in any negotiations. Thus, litigation creates its own momentum and causes the parties to the dispute to focus more on what they need to do to win the action than what they need to do to resolve the dispute.

ADR annexed to litigation

Over the years, Canadian courts have tried various techniques to force the parties and their lawyers to address the possibility of settlement and to do so at an early stage of the litigation.

When I first started to practise law, such efforts by judges were sporadic and focused primarily on trying to get the parties to settle the case without having the court impose a decision in which one side would necessarily be the winner and the other side the loser. Judges would occasionally call counsel into a private conference in the middle of a trial to encourage them to settle the case and, perhaps, to offer them some preliminary views of the matter. However, the expression of "preliminary" views by a judge while a trial was in progress - even with the consent of all parties - was not universally accepted as a proper practice. If the case did not settle there would always be a lingering doubt as to whether the judge kept an open mind through the balance of the trial . [27]

A more systematic approach was subsequently adopted whereby every case would be "pre-tried by a judge different from the judge who would preside at the trial. The pre-trial judge would offer the parties and their lawyers his or her views as to the likely outcome of the case and would encourage them to settle the case in light of that opinion. The pre-trial system had the virtue of forcing the parties to focus on settlement after the completion of all pre-trial procedures (when the lawyers presumably had all the necessary information to advise their clients) but before serious trial preparation was undertaken by either side. It also had the benefit, in some cases, of helping a lawyer to deliver a negative opinion of the case to the client. No doubt, the pre-trial conference system also helped some younger lawyers to better anticipate what might happen at trial and to attempt to settle the case accordingly.

However, in my experience, the pre-trial system was not very helpful in substantial cases where senior lawyers were involved. The value of the pre-trial judge's opinion was reduced by the very limited exposure the judge had to the facts of the case. In a complex case, this could be a very serious handicap. An attempt to create a system of "intensive" pre-trials for significant cases in which the pre-trial judge would set aside two or more days for the pre-trial conference also had, in my experience, limited success. It is a rare case in which experienced counsel will change his or her opinion as to the likely outcome of a case based on a view expressed by a judge (however capable) who has had very limited exposure to the case. Indeed, it was my experience on more than one occasion that strongly expressed views of a pre-trial judge were proven wrong once the case was tried.

Pre-trials were of the greatest assistance where the particular judge who conducted the pre-trial was known to have a special expertise in the subject matter of the case at hand. For example, judges who had specialized in personal injury cases before their appointment to the bench were often extremely helpful to the parties in advising them as to an appropriate settlement. This aspect of the pre-trial system has survived informally within the court system itself and is also to be found within the ADR option known as "neutral evaluation," where an expert on the subject matter of the dispute is retained by both parties to provide a non-binding opinion on one or more of the issues and to assist the parties in settling the case.

Recently, Ontario courts have replaced the pre-trial system with a scheme of mandatory mediation whereby all civil cases must go before a mediator within 90 days of the statement of defence being filed." This period may be extended with the permission of the case management master. The mediator may be selected from a panel of mediators supplied by the court, or the parties are free to choose another mediator. In either case, the cost of the mediation is shared among the. parties to the litigation.

Unlike the pre-trial system in which pre-trials were conducted *after* most or all pre-trial procedures had been completed, mandatory mediation requires that a mediation proceed *before* most pre-trial procedures have been completed and before substantial costs have been incurred in the litigation. The theory is that the case may be more likely to settle before the parties have invested substantially in the litigation itself and before they become entrenched in their positions. Frequently, the costs of the litigation become an added point of aggravation and an additional impediment to the resolution of the dispute. Early, mandatory mediation attempts to avoid that problem.

The mandatory mediation rules require that the clients accompany their lawyers to the mediation. One objective of this requirement is to ensure that some attempt is made to establish communication between the principals to the dispute and that they receive assistance from a professional (i.e., the mediator) whose only function and objective is to attempt to achieve a resolution of the dispute.

The mandatory mediation program was adopted as a permanent feature of the civil litigation process in Ontario after a two-year trial period. The results of the trial period were found to have a "demonstrated positive impact on the pace, costs and outcomes of litigation" by an independent evaluator hired by the Civil Rules Committee . [29]

However, the mandatory mediation process has received some criticism. It has been said that the requirement for mediation within 90 days of the statement of defence being filed does not

provide adequate time for the parties to investigate the case or to test the strength and weaknesses of their respective positions in the litigation. It is said that the time and money spent in the mandatory mediation adds an extra and unnecessary cost to the litigation itself for the vast majority of cases which do not settle at or as a result of the mediation. It has also been suggested that the requirement that the parties pay for their own mandatory mediation is a method of privatizing the litigation process and transferring costs for the resolution of disputes away from the public treasury and onto the users of the judicial system."

Statistics maintained by the attorney general of Ontario indicate that 38 percent of cases that go through the mandatory mediation process settle at or immediately after the mandatory mediation session. However; they also suggest that without mandatory mediation, 23 percent of all cases filed settled within the first nine months."

It is conceivable that a similar number of cases might settle at the same stage of the proceedings that most cases are at when mandatory mediation is conducted, without the additional costs of a mediation having being incurred. The new regime of case management no longer allows cases to remain inactive after the exchange of pleadings. Rather, the case management process ensures that cases that are not settled move on to the succeeding stages of the litigation process. In a sense, mandatory mediation may simply be forcing cases to settle that might not have gone much further in the litigation process in any event. Undoubtedly, it also creates an opportunity for some cases which might otherwise have gone forward to settle at an earlier stage.

However, mandatory mediation has also had a broader, more pervasive impact. Mediation is now being established as a norm of the dispute resolution process. There is a growing acceptance of the utility of mediation generally. As a result, clients frequently raise the possibility of mediation with their lawyers (and vice-versa) even before litigation is launched. The increasing proliferation of a mediation mindset has, in my experience, also promoted the desirability of direct negotiations between the parties to a business arrangement before a dispute is submitted either to mediation or litigation. This approach is also reflected in the increasing use of multi-step dispute resolution clauses.

Multi-step dispute resolution clauses

The multi-step dispute resolution clause is becoming quite common in commercial agreements. It is very often found in agreements by which the parties enter into a serious and long-term commercial relationship. The parties recognize that in such relationships disputes are inevitable and that there is a need to address and resolve disputes before they endanger the business undertaking as a whole.

The usual multi-step dispute resolution clause provides for two or more of the following stages to the dispute resolution process:

- The senior executives of each company who are directly responsible for the matter to which the dispute relates must first communicate and attempt to resolve the dispute within a specified period of time.
- If the senior executives are unable to resolve the dispute, the dispute is "escalated" to a higher level of executive within each company (up to and including the chief executive officer of each of the companies) depending upon the seriousness of the dispute.
- If the dispute is not resolved by direct communications between the companies, the dispute is submitted to mediation that must be completed within a specified period of time.
- If the dispute is riot resolved through mediation, either party may initiate a court proceeding or an arbitration depending on what the parties have agreed to as the final method of resolution.

The multi-step dispute resolution clause recognizes that often it is difficult for those personnel in each business entity who are directly involved in the dispute to view the matter objectively and come to a fair resolution. Often, they are too concerned about how the dispute will reflect upon their own performance to admit that a compromise may be appropriate. The multi-step dispute resolution clause also recognizes that the success of direct negotiations may be inhibited by the personalities of the individuals involved, a reluctance to admit fault or to show weakness and/or an unwillingness to make the first serious offer. The mediation phase is intended to assist the parties in overcoming these obstacles.

It is rare in a multi-step dispute resolution clause for the final stage to be litigation. The parties usually recognize that, especially in a long-term and complex contractual relationship, a private arbitration is more conducive to preserving the relationship.

Multi-step dispute resolution clauses are useful particularly where the business entities involved have different cultures or nationalities. The contractually prescribed process avoids any resistance that may exist within either organization to having a dispute taken "above the head" of the employee who is most directly involved.

On the other hand, where there has been a complete breakdown in the business relationship between the entities, a multi-step dispute resolution clause can be quite inconvenient in that it may, by its terms, delay the ability of the wronged party to declare a default and seek appropriate relief. For this reason, my recommendation is usually that multi-step dispute resolution clauses should be permissive rather than mandatory in most cases.

Negotiation and mediation as appropriate dispute resolution techniques

Most business disputes are resolved through negotiation without the intervention of any professionals. Lawyers typically become involved only when either or both parties do not believe that a fair (or sufficiently favourable) result can be achieved without the intervention of lawyers and/or the implied threat of legal proceedings."

Where the parties to the negotiation are of equal strength and have equal access to an appropriate dispute resolution process, it may be assumed that a negotiated conclusion will approximate either the legally correct result or the result which is fair from a business standpoint, or both. However, where one parry can take advantage of the fact that the other party cannot pay for lengthy

litigation, or cannot wait until the matter is resolved through a lengthy litigation process, or does not wish to risk the determination of the dispute by an unfriendly court, the negotiated solution may not reflect either a correct solution in law or a fair business result.

Mediation changes none of these dynamics. Indeed, mediators generally take no responsibility for the quality or fairness of the resolution reached as a result of their mediation. If litigation proceeds on the dubious assumption that there is only one "right" result in every case, mediation runs the risk of proceeding on the equally dubious assumption that any result agreed to by the parties must, by definition, be right and fair. All that matters from a mediator's perspective is that the dispute is resolved by agreement.

Undeniably, mediation can and does play a vital role in the dispute resolution process. It facilitates communication between parties who may have difficulty speaking to each other because of the very existence of the dispute. It breaks down the impediments created by the negotiation postures adopted by the parties. It reduces the influence of lawyers and creates an opportunity for the clients to participate more directly in the process. Good mediators who are expert in the field of the dispute may be able to suggest creative resolutions that may not have previously occurred to the parties.

Having said all of this, the "appropriateness" of mediation (judged in the context of its ability to fulfil the reasonable business expectations of the parties to a commercial agreement) depends completely on the "appropriateness" of the overall adjudicative process within which the mediation takes place.

Arbitration as appropriate dispute resolution

In Canada, the use of binding arbitration for the resolution of disputes has a long and well-established history with respect to a number of specialized types of disputes, notably disputes relating to labour issues, construction contracts, and commercial leases. However, the widespread use of arbitration for resolution of general business disputes is more recent.

Understandably, when the arbitration of business disputes was in its infancy in Canada, lawyers who advised their clients to submit business disputes to arbitration tended to view arbitration as simply a private form of litigation. Arbitration was expected to duplicate all features of a normal litigation proceeding. The most popular choices for arbitrators were retired judges who could be counted on to be independent and to conduct an arbitration as much as possible as if it were a lawsuit in the courts. The parties expected to have full rights of pre-trial production and discovery. Indeed, one of the leading arbitration bodies in Canada, ADR Chambers in Toronto, provides the parties with the option of having an appeal to a three-member appeal panel (consisting of retired appellate judges) as well as access to mediation in the course of an arbitration proceeding, which has some similarities to the pre-trial conferences that used to be held in normal lawsuits: Needless to say, ADR Chambers also provides abbreviated and expedited procedures when that is what the parties require.

Arbitration conducted in exactly the same manner as litigation is subject to most of the same criticisms as the litigation process itself in terms of the resolution of business disputes. Where the only advantages that the parties seek in arbitration are privacy and, perhaps, the more ready availability of the adjudicative tribunal, it is quite possible to duplicate most of the features of normal litigation - but at an enormous cost. The parties themselves must pay for the time of the arbitrators and for the facilities that would be provided virtually free of charge in a normal lawsuit. This approach - full-scale litigation in the form of arbitration - may nevertheless be very appropriate in certain types of cases. One thinks, for example, of cases in which very large sums of money are involved and the parties wish to avoid publicity.

However, the great virtue of arbitration as an appropriate dispute resolution process is the flexibility it provides in allowing the parties to design a process that is most likely to meet their particular needs, a process that may bear little resemblance to a normal lawsuit."

It might be thought that the best opportunity the parties have to design an appropriate arbitration process exists after a specific dispute has actually arisen. However, if the parties do not have a general agreement to arbitrate before a dispute arises, negotiations relating to the dispute resolution process will be subject to all of the same pressures as negotiations with respect to the resolution of the dispute itself. The party that least desires the dispute to be resolved in a timely or cost-effective manner will insist on more complex and expensive procedures. Unless the dispute arises within the context of a contractual relationship that is generally quite positive or unless both parties are equally motivated to seek an expeditious resolution, the attempt to negotiate a specific arbitration process for a dispute after it has arisen may prove futile, even counterproductive.

There is no adequate substitute for an arbitration agreement that is inserted at the time the parties enter into the underlying business agreement. However, it is necessary to address the specific needs of one's client in designing an arbitration clause to ensure that it will be an appropriate form of dispute resolution from the client's perspective.

For example, where confidentiality is likely to be of great importance, it is not desirable to have an appointment mechanism that requires the court to appoint, replace, or remove an arbitrator if the parties cannot agree. A party to the agreement who has a lower concern as to confidentiality may simply force those issues to come before the court.

Similarly, inflexible time limits in an arbitration agreement will simply create an opportunity or necessity for one of the parties to apply to the court for relief.

Where confidentiality is essential, it is most important that the arbitration agreement contain specific provisions to ensure it. In such cases arbitration agreements should contain explicit provisions imposing obligations or confidentiality. The agreement should also provide that the arbitration will be administered by an arbitral institute such as the ICC, the AAA, ADR Chambers International, or the British Columbia International Commercial Arbitration Centre." The arbitral institution can provide ex-

pedited and inexpensive decisions on matters that might otherwise have to go to court during the course of the arbitration."

The parties may also provide in an arbitration agreement for the number of arbitrators to be appointed, the qualifications an arbitrator must possess, time limits within which the arbitration is to proceed, the extent to which pre-trial production and discovery procedures will be available, the extent to which an oral hearing will be necessary in addition to written evidence and submissions, and whether or not any appeal to the court will be permitted."

Perhaps one of the most interesting and important options, particularly in international agreements, is the ability of the parties to empower the arbitrator to decide the dispute not in accordance with the law of any one jurisdiction but in accordance with internationally recognized legal principles *(lex mercatoria)* or even on the basis of what the arbitrator determines to be just and equitable *(lex aequo et bono).* Such an approach allows for business based as opposed to legalistic resolutions. This may be useful when the parties are based in countries with very different legal systems .[37] It should also be considered where the parties enter into a long-term relationship in which the original agreement may, over time, become outdated and even somewhat irrelevant as the relationship evolves.

In Canada, and under most international rules of arbitration such as the UNCITRAL Model Law, there are minimum standards for the arbitration from which the parties cannot deviate. These standards relate primarily to the duty of an arbitrator to be neutral and to provide all parties to the arbitration with equal treatment and an opportunity to be heard and to present their case."

It is not possible to design an arbitration clause properly without knowing something of the business relationship. within which it will operate and the types of disputes which are likely to arise under the agreement. However, my usual advice is to provide the arbitral tribunal itself with some flexibility to establish the procedures that will be followed for the resolution of each dispute that arises. On this approach, the parties are committed to the principle that their disputes will be arbitrated and have created the opportunity for appropriate dispute resolution measures to be implemented for each dispute that arises. Once the dispute has arisen, the parties have the flexibility (and the incentive) to negotiate an appropriate set of procedures for that dispute. If the parties cannot agree, the arbitrator will make the determination and can design a process with the specific dispute in mind after hearing the submissions of all parties.

Statutory and judicial support for the arbitration process

Although, in the first half of the last century, Canadian courts tended to jealously guard their) urisdiction and viewed unfavourably attempts by the parties to limit the role of the courts, Canadian courts have for some time been highly supportive of the institution of arbitration." Arbitration statutes governing domestic arbitrations in Canada consistently hold parties to their bargain to arbitrate rather than litigate disputes." Canadian courts have enthusiastically implemented that statutory policy." In addition, considerable leeway is given to the parties in fashioning the arbitration procedures to be followed. The only mandatory requirements relate to:

- the duty of an arbitral tribunal to treat the parties equally and fairly and give them an opportunity to present their case;
- the jurisdiction of the court to extend time limits that are prescribed by an agreement to arbitrate; and
- the jurisdiction of the court with respect to setting aside, invalidating, and enforcing awards."

In the absence of a specific agreement by the parties to the contrary, certain provisions will apply. For example, the parties must specifically so provide if they wish to have more than one arbitrator, to dispense with an oral hearing, or to eliminate any possibility of an appeal to the court from the decision of the arbitrator.

The Canadian legal system is similarly very supportive of international arbitration. In 1986, Canada acceded to and ratified the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention.

Most provinces have implemented the New York Convention either directly, by statute, or by adopting the UNCITRAL Model Law." Canadian courts have been as supportive of international arbitration as they have been of domestic arbitration."

It was my good fortune to be counsel in the case of *Corporation Transnacional de Inversiones, S.A. de C. VV v. STET Internationel, S.PA.,*[4]s in which an international commercial arbitration award made in Ottawa, Canada, was enforced by both the superior court judge who first heard the application and by the Ontario Court of Appeal. The parties to the arbitration were Italian and Mexican business entities, and the dispute related to an investment in the Cuban national telephone system. In her judgment at the trial level, Madame Justice Lax described the policy of the courts with respect to the enforcement of international arbitral awards by quoting the decision of Ontario Court of Appeal in *Automatic Systems Inc. v. Bracknell Corp.:"*

> The purpose of the United Nations Conventions and the legislation adopting them is to ensure that the method of resolving disputes in the forum and according to the rules chosen by the parties, is respected. Canadian courts have recognized that predictability in the enforcement of dispute resolution provisions is an indispensable precondition to any international business transaction and facilitates and encourages the pursuit of freer trade on an international scale: Kaverit Steel & Crane Ltd. v. Kone Corp. (1992), 87 D.L.R. (4th) 129 at p. 139, 85 Alta. L.R. (2d) 287 (C.A.).[47]

Conclusion

In his treatise *The Art of War,* the Chinese warrior-philosopher Sun Tzu taught that "to win without fighting is best." Clearly, he did not mean by this to promote a pacifist attitude towards life. Rather, his teaching reinforces the idea that victory is determined by that which precedes the battle rather than by the battle itself.

When considering alternative forms of dispute resolution as they are applied to business disputes, each party will inevitably try to create the conditions that will promote its own ultimate success. An even more basic objective of each party should be to ensure that the contractual rights for which it has bargained are not defeated

by the dispute resolution process itself. Many options are now available to create and adapt dispute resolution processes in keeping with the needs of the parties and the nature of the dispute. All that is necessary is for lawyers to familiarize themselves with these options and use them to their clients' best advantage.

Notes

1. R. Goode, "Dispute Resolution in the Twenty-First Century," 64 J.C.I. Arb. no. 1 (February 1998), at 9.
2. For example, see the recent cases argued *by my* partner Joe Wood (in British Columbia) and myself (in Ontario): *Law Society of British Columbia v. Canada (A.G.),* [2001] B.C.J. No. 2420 (S.C.) and *Federation of Law Societies of Canada v. Canada (A. G.)* (2001), 57 O.R. *(3d) 383* (Sup. CO. These are decisions of the superior courts of British Columbia and Ontario granting temporary exemptions to lawyers from federal legislation requiring lawyers to report suspicious transactions to the government. The applications for temporary exemptions (pending the hearing of applications for permanent exemptions) were vigorously opposed by the federal government in several provinces. The federal government lost in every province in which the motion for a temporary exemption was argued.
3. *Payne v. Ontario (Minister of Energy, Science and Technology),* [2002] O.J. No. 1450 (Sup. CO.
4. H.S. Fairley, "Enforcement of Foreign Judgments by Canadian Courts: A New Age of Uncertainty" (1996), 2 Can. Int'l Lawyer 1-8, 24.
5. *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 137.
6. Ibid., s. 135.
7. *Atomic Energy of Canada Ltd. v. Sierra Club of Canada and Canada (Minister of Finance)* (2002), 211 D.L.R. (4th) 193.
8. *Gas TOPS Ltd. v. Forsyth,* [2000] O.J. No. 5614 (Gen. Div.).
9. "Practice Direction: The Commercial List" (2002), 57 O.R. (3d) Part 2 at 97.
10. Ontario, *Rules of Civil Procedure,* r. 77. See also Ontario Ministry of the Attorney General, "Civil Case Management," http://www.attorneygeneral.jus.gov.on.ca/html/SERV/serccm.htm (last modified March 2, 2001).
11. Rules of Civil Procedure, ibid., r. 76.
12. Ibid., r. 20.
13. Ibid., r. 21.
14. *Buddy Love Consultants v. Williams,* [1999] A.J. 1232
15. *Beals v. Saldanha* (2001), 54 O.R. (3d) 641, 202 D.L.R. (4th) 630 (C.A.); leave to appeal to S.C.C. granted May 16, 2002, S.C.C. File No. 28829, S.C.C. Bulletin, 2002 at 781.
16. *Gateway Realty v. Arron Holdings* (1991), 106 N.S.R. (2d) 180 (TD.); affirmed at the Court of Appeal (1992), 112 N.S.R. (2d) 180.
17. *Downtown King West Development Corp. v. Massey Ferguson Industries Ltd.* (1996), 1 R.P.R. (3d) 1 (Ont. C.A.); leave to appeal refused [1996] S.C.C.A. No. 258.
18. *GA TX Corp. v. Hawker Siddeley Canada Inc.* (1996), 27 B.L.R. (2d) 251 (Ont. Gen. Div.).
19. M. Teplitsky, "Excessive Cost and Delay: Is There a Solution?" 19 Advocates' Soc. J. no. 2 (Autumn 2000) at 5.
20. Canadian Banking Ombudsman, HtmlResAnchor http://www.bankingombudsman.com. See also Insurance Ombudsman, Financial Services Commission of Ontario, http://www.ontarioinsurance.com.
21. See Royal Bank of Canada website, http://www.rbc.com/customercare/ complaint.
22. *Kanitz v. Rogers Cable Inc.* (2002), 58 O.R. (3d) 299 (Sup. Ct). Since the writing of this paper it has become clear that the approach in the *Rogers Cable* case is likely to be limited or eliminated, in the case of consumer contracts, by legislation that is currently pending in Ontario.
23. *Class Proceedings Act, S.O.* 1992, c. 6, in force January 1, 1993; amended *by Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 1.1 [en. S.O. 1996, c. 25, s. 9(1)].
24. *Canadian-Dominion Leasing Corp. v. George Welch 6- Co.* (1981), 33 O.R. (2d) 826, 125 D.L.R. (3d) 723 (C.A.).
25. *Nortel Networks Corp. v. Jervis,* [2002] O.J. No. 12 (Sup. Ct.).
26. Law Society Rules of Professional Conduct, adopted June *22, 2000,* Rule *2.02 (2)* and (3).
27. Similar doubts are often expressed regarding the ADR techniques of "med-arb" (mediation-arbitration), where the mediator attempts to facilitate a resolution by the parties before proceeding to make a binding decision.
28. Ontario, Rules of Civil Procedure, r. 24.1. See also Ontario Ministry of the Attorney General, Mandatory Mediation Program http://www.attorneygeneral.jus.gov.on.ca/html/SERV/sermed.htm (last modified March 5, 2002).
29. R.G. Hahn and Carl Baar, Evaluation of the Ontario Mandatory Mediation Program, Queen's Printer, March 12, 2001.
30. M. Teplitsky, supra note 19.
31. [bid.
32. Obviously, lawyers might also become involved in business negotiations for the purpose of advising on the implementation of complex agreements. However, I am speaking here specifically of the retention of lawyers to assist in negotiating a resolution to the dispute itself.
33. One arbitration in which I have been involved, with about $500,000 in dispute, has been conducted entirely by a short exchange of correspondence between the parties and the arbitrator.
34. ADR Institute of Canada has recently developed rules for administered arbitrations. However, the rules in their current form do not provide for the institute to rule on some of the issues I have mentioned.
35. Unfortunately, there is no effective substitute for having to go to one or more courts for the enforcement of an arbitral award in the event that it is not voluntarily complied with. However, confidentiality is less likely to be an issue in connection with the enforcement of the award itself if there is no voluntary compliance.
36. WG. Horton, "Arbitration Clauses: Points to Ponder," 19 Advocates' Soc. J. no. 2 (Autumn 2000) at 23.
37. W Kühn, "Choice of Substantive Law in the Practice of International Arbitration," 25 Int'l Bus. Lawyer no. *2* (April 1997) at 148.
38. *Arbitration Act, 1991,* S.O. 1991, c. 17; and *International Commercial Arbitration Act,* R.S.O. 1990, c. 1.9.
39. *Onex Corp. v. Ball Corp.* (1994), *12* B.L.R. (2d) 151 (Ont. Gen. Div.).
40. *Arbitration Act, 1991, S.O.* 1991, c. 17, s. 5. There are, however, some exceptions. See, for example, *Armstrong v. Northern Eyes, [2001]* O.J. no. 1085, which could (incorrectly in my view) be interpreted to hold that an arbitrator cannot award a statutory remedy where jurisdiction is explicitly conferred on a judge. Also see *Brown v. Murphy, [2002]* O.J. no. 1545, in which the Ontario Court of Appeal held that a court action may proceed where the dispute includes related issues, some of which are subject to the arbitration agreement and some of which are not.
41. *Canadian National Railway v. Lovat Tunnel Equipment Inc.* (1999), 174 D.L.R. (4th) 385 (Ont. C.A.). There are, however, some exceptions. See, for example, *Armstrong v. Northern Eyes, [2001]* O.J. no. 1085, which could (incorrectly in my view) be interpreted to hold that an arbitrator cannot award a statutory remedy where jurisdiction is explicitly conferred on a judge. Also see *Brown v. Murphy,* [2002] O.J. no. 1545, in which the Ontario Court of Appeal held that a court action may proceed where the dispute includes related issues, some of which are subject to the arbitration agreement and some of which are not.
42. *Arbitration Act, 1991, S.O.* 1991, c. 17, s. 3.
43. C.R. Thomson, "International Commercial Arbitration in Canada," 10 Can. Arb. & Mediation J. no. 2 (Fall 2001) at 3.
44. *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), 47 B.C.L.R. (2d) 201, 48 B.LR. 32 (S.C.); affirmed by the Court of Appeal (1990), 50 B.C.L.R. (2d) 207, [1991] 1 WWR. 219 (C.A.); leave to appeal to S.C.C. refused (1990), 50 B.C.L.R. (2d).xxviii.
45. *Corporation Transnational de Inversiones, S.A. de C. VV v. STET Internationel, S.PA.* (1999), 45 O. R. (3d) 183 at 191 (Sup. Ct.), Lax J.
46. *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257 at p. 264, 113 D.L.R. (4th) 449 at p. 456.
47. *Corporation Transnational de Inversiones, S.A. de C. VV v. STET Internationel, S.PA.,* supra note 45.