ALTERNATIVE DISPUTE RESOLUTION TECHNIQUES FOR CREDIT-GRANTING PROFESSIONALS

Speaking notes for an address to the Credit Career Group of Vancouver

by

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September 11, 2006

Alternative dispute resolution ("ADR") is a means of legally resolving conflicts outside the court system. There are three recognized processes:

- Negotiation,
- Mediation, and
- Arbitration.

NEGOTIATION

Negotiation, while not usually included within the definition of ADR, is nevertheless a critical starting point in conflict resolution. In fact, most disputes are actually solved this way. While not as obviously legally enforceable as mediation and arbitration, it should be remembered that agreements, whether oral or written, that arise from negotiation are in fact enforceable once proven. Some of the techniques appropriate to mediation have application to negotiation as well. Courses offered through the British Columbia Justice Institute and books on negotiating techniques are invaluable sources of information.

MEDIATION

Mediation is a process by which disputing parties can solve their own problems with the assistance of a neutral mediator. Mediations arise in one of three ways:

- prior written agreement;
- current written or oral agreement; or
- court order.

The steps are normally as follows:

- A mediator is appointed, either by agreement or by third-party appointment through, for instance, the British Columbia International Commercial Arbitration Centre (the "BCICAC") or the British Columbia Arbitration and Mediation Institute (the "BCAMI"). The two organizations have common administration and can be contacted at 604-736-6614.
- Both parties and the mediator enter into a three-way agreement that contains at least the following elements:

1. agreement to participate in a mediation in good faith;
2. confirmation that they have the power to enter into a binding agreement;
3. agreement that no part of the mediation process will be included in future court proceedings and that the mediator will not be called as a witness;
4. agreement as to responsibility for fees.

- The mediation convenes at a time and place upon which the parties have agreed. Ideally, the mediator will be able to provide neutral premises. Absent such arrangements, a hotel meeting room or the BCICAC's boardroom may be rented.

- The proceedings start with the mediator giving a short description of the process, including a statement that there is no compulsion for anyone to come to an agreement and a summary of the object of the process. He or she then invites both parties to tell their side of the story—emphasizing their respective needs and interests and, hopefully, de-emphasizing the roots of the conflict.

- The mediator then meets separately with the parties and their advisers, attempting to help the parties understand one another's needs and interests.

- The next step is for the group to get together again in order for the mediator to identify points of agreement or parts of the dispute that he or she considers resolvable.

- Any outstanding issues are then discussed among the group and, if the parties are able to reach agreement, the mediator drafts a "heads of agreement" that may be subject to legal review but is, in and of itself, legally binding.

Either party, or the mediator, can terminate the proceedings at any time and at any stage; there is no requirement to provide reasons for doing so.

Lawyers who understand the process and agree to participate in the spirit of mediation can play an important advisory role. Their presence is essential when mediation precedes litigation. Other advisors should be welcomed, but their active participation should generally be greatest in the private meeting with their client and the mediator, at least until an agreement is in the offing. Any attempt by a lawyer or other advisor to turn the mediation into a practice trial will guarantee the failure of the mediation process. The mediation of major commercial disputes is somewhat less successful than other types of conflict resolution, largely due to the aggressive participation of counsel.

Mediation is particularly suited to situations in which the parties must, or want to, continue a business relationship and in which they know that the dispute must be resolved. Labour disputes, family relations matters, and disputes with major customers

are all ideal candidates for a mediated solution. The success rate is said to be over 85% when the situation is appropriate.

Mediation is less successful when there is no expectation or need for the parties to continue in a business or personal relationship; then there may be deep-seated antagonism, usually accompanied by a wish to punish or hurt the other side. Mediations do not work when one or both parties fail to understand that they cannot "win" everything they want.

Most mediations are concluded within one day; exceptions are complex labour problems and some family issues. I expect that the disputes in which the members of this audience would likely be involved would be solved in one day or not at all.

As with all professional services, the parties should have a clear understanding of the fees that they will face. Some mediators charge a flat rate while others charge on an hourly basis—generally $200-$400 per hour.

ARBITRATION

Arbitration is a quasi-judicial process conducted under the *Arbitration Act* (the "*Act*"). Like mediation, arbitration starts with an agreement between the parties. Most frequently, the agreement stems from the document formalizing arrangements by which the parties agreed to do business together. Such documents routinely contain a clause by which the parties agree that disputes arising from the agreement will be settled by arbitration. When that is the case, the parties have bound themselves to the arbitral process and can opt out of it in only very limited circumstances. The courts occasionally appoint arbitrators, usually only when it is necessary to replace those who have committed an arbitral error or are unable to conclude their mandate.

Arbitrations deciding larger issues usually track the legal court system fairly closely. Although the parties can determine their own rules of evidence, the default rules are the common-law rules of evidence, in the absence of specific exclusions. Likewise, the parties can set their own rules of procedure, but absent agreement as to that, the rules set out and published by the BCICAC will prevail by law.

Almost any dispute that is not illegal is capable of being arbitrated. An important exception is any that arise pursuant to the *Family Relations Act* (the "*FRA*"). The probable reason for that exception is that agreements made under the *FRA* are, unlike other arbitration awards, vulnerable to judicial amendment if a Supreme Court judge considers them to be unfair. Arbitration awards, generally, are very difficult to successfully appeal. Arbitration is a consensual process: the parties themselves have previously selected the means by which their future disputes will be resolved; they are, in the absence of gross error, required to accept the results of the process that they agreed to.

Because of the finality of the arbitration decision and the significant legal underpinnings of the entire arbitral process, it is critically important that the parties retain counsel in any

dispute that involves substantial issues and money. The arbitrator may or may not be a lawyer, a choice that is made on the basis of the most important skill that the parties expect from the arbitrator in conducting a hearing and preparing the award.

Unlike mediators, arbitrators never meet with one party in the absence of the other. They must decide the issues on the basis of the evidence placed before them, although they may call evidence on their own motion and direct that the parties address specific issues.

Arbitrators can only be removed for one of four reasons:

- exhibiting corrupt or fraudulent behavior;
- showing bias;
- exceeding arbitral powers; or
- failing to adhere to the rules of natural justice.

On application to the court by one or both parties, an arbitrator may also be removed for undue delay, either in the proceedings or in the handing down of his or her award.

Broadly speaking, natural justice means that

- both parties have an adequate opportunity to present their respective cases and to explore the underpinnings of their opponent's case, and

- the adjudicator must be free from bias.

Although there are important distinctions, the arbitrator has many judge-like powers. He or she can issue orders that, together with the final determination called an "award," are enforceable in court. The default rules and procedures of a commercial arbitration conducted in British Columbia are to be found at the BCICAC website www.bcicac.com: they are fairly extensive, so I will not list them here.

The benefits of arbitration are several:

- The parties control their own procedures and select their own adjudicator; the former is important when the question is narrow, when there are no credibility issues, and when there is cooperative agreement to minimize costs. The ability to select the parties' own adjudicator enables them to ensure that a person with specific talents will hear the matter; this is frequently more efficient than having to educate a person who is hearing the underlying principles for the first time.

- The parties are able to come to agreement on specific aspects of the dispute, and the arbitrator is bound by that agreement.

- Both the arbitral proceedings and the final award are private; only invited persons may attend the hearing, and the arbitrator may not publish the award or disclose any part of it.

- The speed with which the matter can be resolved is more in the hands of the parties than is the case with the conventional court system.

- It is within the power of the parties and the arbitrator to conduct the proceedings and hand down the award in a more economical fashion than would be the case with a court proceeding. There is, however, a tendency for parties and their counsel to impose all of the courtroom processes on an arbitration proceeding, with the inevitable delays and costs of procedural arguments, admissibility of evidence issues, and so on.

CONCLUSION

Arbitration and mediation provide parties to a commercial dispute with viable tools for the resolution of their disputes. In common with other useful tools: the right one must be applied to the appropriate task. Mediation works well when the parties treat the dispute as a problem to be solved and when they cannot avoid a continuing relationship. Arbitration may be appropriate when the parties want an expeditious, confidential, and permanent determination of the issues. In matters of serious legal or technical complexity, however, the court system, with all of its checks, balances, and rights of appeal may remain the best venue.