Daoust Vukovich LLP
BARRISTERS & SOLICITORS

2018 ICSC

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Breakfast Roundtables

MEDIATION & ARBITRATION

DOES IT WORK OR IS IT MORE TROUBLE THAN IT IS WORTH?

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MEDIATION

Mediation is negotiation facilitated by a neutral third party - the mediator. Mediation affords the parties an opportunity to meet, hear and be heard, and attempt to resolve the dispute on their own terms. The mediator cannot impose a settlement on the parties.

In mediation, the parties should consider:

1. **Selection of a mediator:** mediators have wide range of backgrounds
2. **The timing of mediation**: can take place at any time
3. **Cost of mediation:** relatively inexpensive
4. **Control over the process:** parties negotiate their own resolution on own terms
5. **Mediation is without prejudice and confidential**
6. **No guarantee of success of mediation:** If it fails, the litigation process continues
7. **Mandatory mediation:** Rule 24.1 of the Ontario *Rules of Civil Procedure*

Does Mediation Work? In Ontario the experience of the Mandatory Mediation program is that over 50% of cases settle at mandatory mediation. Considering that this is mediation forced on parties who are in a lawsuit, and not a voluntary mediation, the settlement rate is impressive. Where the parties agree to mediation, then the chances of reaching a settlement are generally higher.

ARBITRATION: PROS AND CONS

Arbitration is an alternative method of dispute resolution. Arbitration differs from mediation in that the arbitrator, like a judge**, imposes a resolution on the parties**.

Commercial leases often include a clause which stipulates that some or all of the disputes which may arise under a lease must be resolved by arbitration.

In arbitration, the parties should consider:

1. **Time and Costs:** Arbitration is a longer process than mediation
2. **Private and Confidential:** Arbitration is a private and confidential process.

3. **Control over the Process:** All common law provinces have legislation which establishes rules and procedures for arbitration.
4. **Arbitration Legislation:** Where the parties have agreed to arbitrate, but have not specified many of the details by which the arbitration will proceed, provincial arbitration legislation establishes the procedure.
5. **Court Intervention:** Where there is an arbitration agreement in a commercial lease the parties must complete the arbitration before commencing a court action. Section 6 of the *Ontario Act* permits a court to intervene in order to "assist the conducting of arbitrations"[1] and "to ensure that arbitrations are conducted in accordance with arbitration agreements"[2].
6. **Procedure under the *Ontario Act*:** The *Ontario Act* provides a code of procedure for arbitration.
7. **Appeals:** Unless the arbitration agreement provides otherwise, the arbitrator's decision (referred to as an "award") is binding as between the parties.

Supreme Court of Canada makes appeals of arbitration awards more difficult: See *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53. The Supreme Court's holding in *Sattva* continued the trend of courts being deferential to arbitral decisions, since those decisions are made in a forum that the parties have expressly chosen to resolve disputes between them. This means that courts will generally be deferential in reviewing an arbitrator's decision. Two consequences arise: parties are encouraged to place confidence in the arbitrator's decision, but concurrently, there is a high bar to overturning the decision of an arbitrator.

Is Arbitration Worth the Trouble? Arbitrators and the hearing room where the arbitration is held (often a law firm's board room) are paid for by the parties. Judges and court rooms are paid for by our tax dollars. The arbitrator's fees can be substantial, and even more so where there are 3 arbitrators. For this added cost the parties receive the benefit of selecting a particular arbitrator, avoiding long court delays, greater control over the procedure for resolution, and the confidentiality of arbitration.

[1] *Supra* note 3, s 6.
[2] *Ibid*.

Finally, the benefits of arbitration are greatest where the parties acknowledge that they have a dispute and agree that it is in everyone's interest to resolve it in and efficient and cost effective manner. The best example is a dispute which arises under a commercial lease and needs to be resolved quickly and efficiently in order to promote a productive, long-term landlord and tenant relationship.