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Ontario: A Compelling Jurisdiction for Resolving Commercial and Trade Disputes

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Ontario continues to develop as a well regarded forum for the resolution of commercial and trade disputes. Its *Commercial Mediation Act, 2010* (the "Ontario Act"), for example, contains some interesting features regarding mediation which are well worth considering when evaluating the advantages and disadvantages of a particular choice of forum in international commercial and trade (in particular, customs) disputes.

Key Features of Ontario Act

The Ontario Act deals with "commercial disputes" whether contractual or not. It aims to facilitate the effective use of mediation by enshrining certain requirements specifically designed to make it more likely that the process will accomplish what the parties are seeking. This is not to say that these features were not in use before, but only that they are now legally mandatory, which means, among other things, that if there is a breach of the mediation rules, the aggrieved party now has a clear remedy.

Here are some key features of the Ontario Act:

- **conflicts of interest** - the proposed mediators must first make sufficient inquiries to determine if they have any conflicts of interest or if there are any circumstances that could give rise to a concern about any bias. If there is, there must be full disclosure to the parties, which still have the option of allowing the person to mediate the case.
- **scope for mediation** - the parties may have the entire dispute or only certain aspects of it mediated;
- **fairness in the process** - the Ontario Act explicitly requires the mediator to treat the parties fairly through the process. If a party concludes that it has been treated unfairly, it is open to the party to seek a remedy in the courts.
- **relation to litigation or arbitration proceedings** - mediation can proceed before, during or after litigation or arbitration and will be always available, if needed, to preserve the rights of a party or to assure that the interests of justice are met.
- **confidentiality of information** - this issue can often be a significant barrier to a successful mediation. Now there is an explicit obligation on everyone involved to keep information relating to the mediation confidential unless all parties agree to disclosure or if the success or fairness of the process requires it. This is designed (a) to minimize the risk that business-sensitive information disclosed to facilitate a mediated settlement will become widely known and (b) after a mediation is concluded, to prevent a party that has learned something during the mediation from launching a subsequent suit on an unrelated subject.
- **admissibility in other proceedings** - the Ontario Act sets out a lengthy list of information that

cannot be used in other legal proceedings (arbitration, litigation or administrative/regulatory), whether relating to the same subject matter as the mediation or not (unless, as before, there is consent or the effectiveness of the process, or the general law, requires it). The obvious intent here is to encourage the parties to make the best of the mediation. Briefly, the fact that there was a mediation, views were expressed, things were said or done or proposals made, together with information or documents generated for the purposes of the mediation, are now all protected from being admitted in other proceedings.

- **enforcement** - this is a particularly welcome feature which simplifies greatly what one needs to do in order to enforce an agreement reached via mediation. The Ontario Act does away with the prior step of commencing a lawsuit for breach of the mediated agreement. (In many cases, having to do this would have the effect of rendering the original mediation rather pointless). Now, a party simply applies to the court to have the agreement registered, after which it is as good as a court judgment and can be enforced through the established means available for the enforcement of judgments here and elsewhere.

Some Comparisons

Mediation regimes of different types exist elsewhere in the NAFTA region. Alternative dispute resolution ("ADR") in all its forms is well developed in the U.S. of course. ADR in the U.S. bears a great deal of resemblance to ADR in Canada.

The more interesting contrast is with Mexico. Mexico has a law at the federal level on dispute resolution mechanisms which deals principally with mediation. The purpose of the law is to facilitate mediation at the federal law level but also to encourage the development of dispute resolution at the state level. Most of the country's 32 states have put in place various forms of officially sanctioned mediation.

Mediation in Mexico is contrasted most often with conciliation, which is mediation in which the mediator is empowered to make recommendations to the parties. In most cases, this distinction carries little practical consequence as in both cases the hallmark of the process is that the mediator cannot make any binding decisions. As in most other places, the Mexican law requires mediators to have some specialized training in the field.

There are other differences in the Mexican regime worth noting. The law provides that a judge may order the parties to litigation to refer their matter to mediation. The law also imposes a requirement before a mediated agreement can be taken to the courts for enforcement that the mediator certify the agreement reached. This risks placing the neutral mediator in the middle of the two warring parties. The Mexican federal mediation law also restricts the mediator's role to those trained in law, a rule that other jurisdictions have long ago shown to be too restrictive. Other features of the law call into question the true "voluntariness" of the process, one of the most appealing features of this type of ADR. For example, monetary penalties are imposed on parties who refuse to participate at certain stages of the mediation.

On the more positive side, the law sets out explicitly the principles that are to guide any mediation proceeding in Mexico (in no particular order): efficiency, good faith, neutrality, flexibility, impartiality, equity, honesty, certainty and confidentiality. However, little guidance has to date been available on how these principles are to find expression in actual mediation proceedings.

Purely private forms of mediation also exist in Mexico although it remains largely undeveloped and lacking in commonly accepted principles and procedures. Often the parties will simply adopt the approach they may be familiar with from other jurisdictions.

Overall, it is clear that ADR, including in particular mediation, remains in its early stages in Mexico. Increasing trade, commerce and investment relations between the north and the south elements of the

NAFTA region, however, can be expected to lead to a strengthening of all modes of dispute resolution in that country.

Suggestions

Mediation, both formal (court mandated) and informal, has been a component of the dispute resolution landscape in many jurisdictions for many years. For those already sold on the concept, the Ontario Act makes the case more compelling and Ontario more attractive as a dispute resolution forum in comparison with other NAFTA jurisdictions.

A suggestion worth following is that parties active in the international arena (and in particular Mexico and other similar Latin American countries) and their lawyers should consider what changes should be made to their approach to dispute resolution and, most importantly, to their governing documents (contracts and agreements) in order to take full advantage of the features of Ontario's commercial mediation regime *regardless* of where the parties are located or where the dispute arises.

Canada is building an enviable reputation as a dispute resolution forum which, when needed, also offers a court system that is regarded in many places as a model of what an enforcement system should be. ■