Fall
2014

Mediation And Other Stuff

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Mediate Better Solutions

I hope everyone enjoyed the Canadian Thanksgiving long weekend. As fall begins, I have decided to resume writing my newsletter on a more regular basis.

There have been a few changes since the last issue and I now have office space at 400 - 2 County Court Boulevard in Brampton, which is close to the Brampton courts and major highways.

This office gives me easier access to boardrooms and other meeting space for mediations and arbitrations. If you book a full-day mediation with me, I can now offer a neutral venue to you at no extra cost.

Over the last year, the nature of my ADR practice has increased to include more commercial leasing and workplace mediation in addition to the condominium, commercial, construction and other work I generally do. I am also delighted to be teaching an ADR course this semester at Faculty of Law, Queen's University in Kingston.

This newsletter contains a Case Comment, Practice Tip and Quote, I hope you find it useful.

Annual ACMO/CCI-T Condominium Conference

The Annual AMCO/CCI-T Condominium Conference takes place in Toronto on November 7 and 8, 2014. I have been invited to take part in a panel discussion about technology and I plan to talk

about the use of on-line communication in conflict management.

Case Comment

This newsletter marks the first time I have commented on an arbitration case. Arbitration has great potential for less expensive and quicker adjudication but in my experience, contractual arbitration clauses and other arbitration agreements are often not as clear as they might be.

While it is easy to understand why the parties to an agreement do not want to think about future disputes at a time when everyone is happy to be putting the deal together, it is important that some thought be given to the details of the dispute resolution provisions.

One of the most important considerations should be that an arbitral award is quite difficult, if not almost impossible, to set aside. It is crucial to set out the grounds for appeal and this has been reinforced by the recent Supreme Court of Canada Decision in Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 where the court seems to have continued the general trend of being "supportive" of arbitration.

While arbitral awards can be set-aside by a court, this can only be done on very limited grounds (emphasis added) as set out in the Arbitration Act, 1991, S.O. 1991. C. 17:

> Appeal on question of law
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> 45. (1) I**f 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).

Until now, it has been unclear whether an error in the interpretation of a contract is a question of law or a question of mixed fact and law? As can be seen from the Arbitration Act., 1991 this is a very important question.

The losing party in arbitrations have often argued that any error in the interpretation of a contract is a pure question of law and therefore subject to review.

In *Sattva* the Supreme Court Of Canada disagreed and held that the interpretation of a contract is almost always a question of mixed fact and law and that an application for review of an arbitral award based solely on a contractual interpretation error should rarely be reviewable.

The message from the Supreme Court of Canada to parties in arbitrations is that if you agree to arbitrate, you should expect to be bound by arbitrators' decisions.

This decision reinforces the importance of counsel considering whether or not a review of the arbitration award should be allowed and if so on what grounds. Otherwise this decision and the very limited grounds in the Arbitration Act, 1991, restrict your options.

Arbitration provisions in contracts and post-dispute arbitration agreements need careful drafting in each and every case to meet the needs of the parties and their counsel.

Practice Tip

Refining the Confidentiality Provisions of our Mediation Agreements

Mediation Agreements generally set out the time and place of the mediation but not what happens if the mediator continues on in helping the parties after that. Is the mediation continuing or has it ended? If an agreement is reached through the mediator's "post-session" involvement must it be in writing? Can a series of e-mails between the mediator and the parties constitute a settlement? Can that "settlement" be enforced?

In AB & AB -v- CD Limited in the English Technology and Construction Court [2013] EWHC 1376 (TCC) Mr. Justice Edwards-Stuart found that the mediation had ended on the date fixed for the mediation even though the mediator continued to be involved thereafter until a settlement reached.

On that basis, the Judge found that the requirement in the mediation agreement that the settlement had to be in writing and signed before it was binding did not apply and he went on to decide that there was a settlement here in telephone calls through the mediator.

Was this the desired or indeed expected result?

David Cornes a leading mediator in the UK (and from whom I get most of my information on the UK mediation), suggests that we prevent this type of result by more careful drafting and review of mediation agreements. David's way of dealing with the scenario above is to add a provision similar to this to the mediation agreement:

If there is no settlement at this meeting, and the mediator continues to be involved by telephone, email or correspondence or further meetings, the mediation is continuing and the terms of this mediation agreement apply unless the mediation is terminated.

This makes good sense to me.

Quote

Why you should try mediation in neighbour disputes:

"Not all neighbours are from hell. They may simply occupy land of bigotry. There may be no escape from hell but the boundaries of bigotry can with tact be changed by the cuttung edge of reasonableness skillfully applied by a trained mediator. Give and take is often better than all or nothing." Lord Justice Ward - England and Wales Court of Appeal in Hameed Faidi and Inam Faidi Vs. Elliott Corporation.

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