Colm Brannigan

Chartered Mediator and Arbitrator

Colm Brannigan's ADR Notes

Welcome to my Fall Newsletter

In a couple of recent cases, counsel have told me that they heard that I was either planning to retire or had retired. Well, I do not know where that rumour came from, but I have not retired, nor do I plan to do so for quite a long time!

I have also run into questions over the substantive areas in which I mediate and arbitrate disputes and want to use this newsletter to clarify that my ADR practice includes condominium, construction, real estate, insurance and commercial disputes as well as others.

This newsletter contains the usual self-promotion stuff, a short article on an arbitration case, a mediation practice tip and a book recommendation.

As always, I welcome your feedback and please feel free to forward my newsletter to any of your colleagues.

mediate.ca
BRANNIGAN ADR

OHLS Class

On September 19, 2019 I had the opportunity to speak about med-arb to students in the OHLS LLM in Dispute Resolution, Introduction to Dispute Resolution class. The benefits of a well-designed stand-alone process combining the flexibility of mediation with the certainty of an outcome through arbitration was well received. It is an innovative process and we should be using it in appropriate cases instead of defaulting to stand alone mediation and arbitration.

ADRIC Conference

The ADR Institute of Canada's Annual Conference, "Realizing ADR's Full Value" will take place in Victoria, British Columbia on November 21 and 22, 2019.

Before the full Conference, on Wednesday, November 20, 2019, I will be presenting a half-day Pre-Conference Workshop on "Med-Arb: Innovative, Effective and Fair" with Richard Moore from Ottawa.

On Friday, November 22, 2019, I will be moderating a panel discussion on "Med-Arb Best Practices" with Arlene H. Henry, Allan P. Seckel and Elton Simoes.

For further information go to http://adric.ca/conference/adric-2019-victoria-bc/

In an Arbitration Agreement, does "final and binding" really mean that?

One of the main advantages of arbitration is to provide an efficient way for the parties to resolve their dispute. In support of this goal, the Arbitration Act, 1991 permits parties to contract out of the right to appeal an arbitral award to the Superior Court.

As can be seen from the high volume of case law, much of the litigation around arbitration involves the construction of arbitration clauses or agreements.

Where the arbitration provision in a contract, or a separate agreement to arbitrate, states that the arbitral award is "final and binding", does this mean there is no right to appeal, even on questions of law?

A recent decision of the Superior Court says, "yes", well, at least most of the time.

In the Superior Court case of 108 Media Corp. v. BGOI Films Inc. 2019 ONSC 2211 (http://canlii.ca/t/hxcdp), and affirmed by the Court of Appeal, 2019 ONCA 539,(http://canlii.ca/t/j15ll) a Sales Agency Agreement (SAA) between the parties included this arbitration clause:

Should there be a disagreement or a dispute between the parties...the same shall be referred to a single arbitrator....and the determination of such arbitrator shall be final and binding upon the parties...

There was also a Procedural Order, made on consent in the arbitration that took place after the relationship between the parties broke down, that stated,

> 6.1 The Award of the Arbitrator shall be final and binding on the Parties.
>
> 6.2 The Award may only be set aside in accordance with the provisions of the Arbitrations Act.

This would certainly seem to support the idea of "final", but if that is what 6.1 means, what did 6.2 add to it? Given that parties cannot contract out of the right to apply to set aside an award under section 46 of the Act, the meaning or value of this part of the Procedural Order is ambiguous and should probably not have been included in the consent order.

The Arbitrator found in favour of BGOI. As a result, 108 began an application for leave to appeal the Arbitral Award to the Ontario Superior Court.

Under section 45(1) of the Arbitration Act, 1991 (ACT), if the arbitration agreement does not deal with appeal rights, a party can appeal the arbitral award on a question of law, with leave of the Court. Section 3 of the Act allows parties to vary or exclude certain provisions of the Act.

The combined effect of section 3 and 45(1) is that a statutory right to appeal on a question of law exists, unless the parties, by their agreement, eliminate the right to appeal.

108 argued that the phrase "final and binding" in the arbitration clause of the SAA did not preclude an appeal on questions of law and this meant, the parties had agreed that an appeal of the arbitral award was still available, even though the SAA stated that the arbitral award was "final and binding".

The Superior Court disagreed and said that where a legislative provision provides that an order is "final", there is no appeal from that

order.

> [20] Unless the context indicates otherwise, it is generally accepted that where a legislative provision provides that an order is "final" there is no appeal from that order. The phrase "final and binding" would have no meaning whatsoever if it did not exclude a right of appeal that had been given by statute...

At the same time the Court noted that while the use of the term "final and binding" does not necessarily preclude an appeal, meaning judicial review, it "does reflect an intention to exclude a right to appeal".

> [21] It is now well-established that an arbitration agreement which states that the parties agree to "final and binding" arbitration does not necessarily preclude judicial review, but it does reflect an intention to exclude a right of appeal....

There seems to be some confusion over the difference between an "appeal" under section 45 of the Act from an Award and an application to "set aside" an Award under section 46. It is an important distinction.

The losing party then tried to appeal the Superior Court's decision to the Court of Appeal. The Court of Appeal dismissed the case finding that no appeal lies from a refusal to grant leave where that refusal is based on the merits.

Apart from applying the ordinary meaning of "final and binding" this case confirms the strong trend in our case law of the courts supporting the use of arbitration.

If you decide to arbitrate and agree that an arbitral award is to be 'final', the Courts are not likely to be sympathetic of any attempt to use them to avoid the outcome of the arbitration process.

Although perhaps a little confusing in places, this case reinforces the importance of clear drafting in arbitration provisions in both contracts and separate agreements to arbitrate.

Mediation Practice Tip - The Conference Call

Over the years, I have often suggested that we have a pre-mediation conference call with counsel. It is an opportunity to start working together to make the most effective use of the time set aside for the actual meditation session.

In a concerning number of cases, the suggestion is declined as unnecessary. But each mediation is different, and while a "large value" dispute may require a significant pre-mediation conference call or

meeting with the mediator, "smaller" disputes are still very important to the parties and require preparation to maximize the opportunity for settlement, if that is the goal.

In many mediations, counsel propose a mediator to each other and once that is decided, they let the mediator know, then mediation briefs are exchanged, and everyone shows up at the mediation.

All of this is often done by e-mail which is very efficient but my experience over the last twenty years shows that it makes sense to set up a call with the mediator and opposing counsel just to talk through the process and the issues that might derail the mediation. A short conference call can save time and often avoid quite foreseeable problems at the mediation session.

If nothing else, the call will give the mediator a sense of what can be done to make the mediation as productive as possible. Some important questions, and there are many others, include:

- Do you need information/documents from the other side? Ask for it during the call, not when you are an hour into the mediation.
- Who is going to be attending the mediation from each side? Do you need to balance off numbers, especially in a multi-party mediation?
- Will there be someone at the mediation with full authority to settle? If not, will someone with authority be available by telephone?
- Who will speak for the parties?
- Will counsel make a formal opening?
- Will there be a joint session, or will the mediation be a caucus style process after a short opening by the mediator?
- What can the mediator do to help you?
- What type of mediation process are you looking for? Facilitative? Evaluative? Transformative or a mixture of whatever works?

We take it for granted that a preliminary conference is part of every arbitration. It should also be a part of every mediation.

Book Recommendation

The problem of a mediator's "neutrality" or "impartiality" comes back every now and then, if only because many practitioners cannot agree on what these concepts mean in practice.

It has been a while since I first read it, but going back to check on a point in Gary Friedman's book, Inside Out: How Conflict Professionals Can Use Self-Reflection to Help Their Clients[1], reminded me of how well written and interesting it is.

If for no other reason than thinking about what the author's quite early comment, "a mediator isn't an objectively neutral container" means to you in practice, the book is worth reading.

---

[1] https://www.amazon.ca/Inside-Out-Conflict-Professionals-Self-Reflection/dp/1627227768

If I can be of help in providing information about mediation, arbitration, med-arbitration or ADR training, please contact me.

Colm Brannigan is a Chartered Mediator and Chartered Arbitrator. He can be contacted at colm@mediate.ca.

mediate.ca
BRANNIGAN ADR

Follow me on twitter

View our profile on LinkedIn

Join Our Mailing List

Colm Brannigan
Chartered Mediator and Arbitrator
2 County Court Blvd. 4th Floor
Brampton, Ontario L6W 3W8
Tel: 905.840.9882 | Cell: 416.460.6841
Email: colm@mediate.ca
Website: www.mediate.ca

Negotiate - Mediate - Arbitrate
Better Solutions