ICSC Canadian Shopping Centre Law Conference

Roundtable: Mediation & Arbitration – Does It Work Or Is It More Trouble Than It Is Worth?

Thursday 21 April 2016, 9:00 am, Fairmont Royal York Hotel

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John O'Sullivan practices civil litigation with an emphasis on court advocacy. He concentrates on real estate, business and contentious trusts and estates litigation. He practices mainly on the Commercial and Estates list in Toronto.

O'Sullivan was called to the Bar of Ontario in 1988. After 25 years with a downtown firm he set up a solo practice as a barrister in 2012.

O'Sullivan is a frequent speaker and writer in the area of civil advocacy, and the future of the practise of civil litigation. He is a founding member of the Legal Innovator's Roundtable.

He is co-author of the Canada chapter in the UK publication International Trust Laws (Jordan Publishing 2014). He is a regular contributor to the Canadian blog http://www.slaw.ca/.

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Sara Beheshti practices commercial and residential real estate law in Toronto, Ontario. Sara also works with senior litigation counsel on a variety of civil and commercial matters including real estate, contract, wills and estate administrations disputes.

Sara serves on the OBA Real Property Section Executive as well as the OBA Animal Law Section Exceutive. Sara frequently writes and presents on a variety of topics relating to real estate law and litigation.

Sara Beheshti was called to the Bar in 2008 and articled at RBC Insurance. She has a B.A. and J.D. from the University of Toronto.

The Golden Rules:

A) The longer it takes to resolve a dispute, the more it costs;

B) If one party wants to obstruct, the longer it takes;

C) Pre-dispute agreements containing iron-clad compulsory arbitration clauses, are the most likely to result in fastest (and therefore least expensive) resolution.

Mediation

1. How it works
    a. Mediation is a process by which a neutral third party facilitates settlement negotiations between parties to a dispute;
    b. Under the *Rules of Civil Procedure* most civil actions in Toronto, Windsor and Ottawa are subject to mandatory mediation. Exceptions include Toronto Commercial List actions, Mortgage Actions;
2. Advantages
    a. Less expensive that litigation or arbitration IF settlement is reached early;
    b. The parties control the outcome;
    c. Avoids win-lose "zero sum" judgments by a third party. Solutions can accommodate the needs and interests of all parties;
3. Disadvantages
    a. Adds a step, increases cost and causes delay if no settlement results - are all parties motivated to settle? (The longer it takes, the more it costs);
    b. Mediator has no authority over a party who is being unreasonable;
    c. Mediator is motivated to get a settlement, not a result that corresponds to a party's rights under the law;
    d. Gives opposing parties a "free look".

Arbitration

1. How it works
    a. Parties can agree to arbitrate a dispute, before or after it has arisen;
    b. Ontario law, *Arbitration Act* sets out entire procedure which prevails by default if one procedure is not agreed between the parties (including composition of arbitral tribunal, time and place of arbitration, conduct of proceedings, witnesses, evidence, etc.);
    c. The courts will not hear disputes which parties have agreed to arbitrate;
2. Advantages
    a. Where parties are motivated to have the dispute determined, arbitration will usually be quicker and less expensive than litigation;
    b. Faster, simpler proceedings are more amenable to fixed legal fees;
    c. "Reserve" times for the arbitrator's decisions can be stipulated;
    d. Parties can choose the arbitrator with the necessary expertise;
    e. Parties can define the process, which can be as formal/informal as the parties agree;
    f. Arbitral awards are enforceable as judgments of the court;
    g. Proceedings are private;
    h. Decisions are final with limited right of appeal and limited court intervention (see sections 6, 45 and 46 of the *Arbitration Act*);
3. Disadvantages
    a. Arbitration can be as expensive as litigation where there is an unmotivated party; (The longer it takes, the more it costs)
    b. Parties must pay fees for arbitrator(s) and hearing facilities;
    c. Arbitrator does not have a judge's power to control conduct, e.g to hold misbehaving parties in contempt or impose punitive costs;
    d. Limited right of appeal if unsatisfied with the outcome;

Litigation

1. How it works
    a. Proceedings governed by the *Rules of Civil Procedure*. Many steps required before determination, including pleadings, discovery plans, discoveries, motions for interim court rulings (e.g. to compel production, summary judgement), mandatory mediation, pre-trial conference, trial;
2. Advantages
    a. Judicial authority can be brought to bear on difficult parties;
    b. Impartial, disinterested adjudicator has no interest in currying favour with a party for future business;
    c. Judge's are oriented towards "Fairness" and the rights of parties under the law;
    d. No cost for judges or for use of the civil justice system, except court filing fees (minimal);
3. Disadvantages
    a. Obtaining hearing dates can be very slow and therefore expensive; (The longer it takes, the more it costs)
    b. Adjournment requests that are not on consent, are common and usually allowed; (The longer it takes, the more it costs)
    c. Proceedings are public, with few exceptions;
    d. Often difficult to get judges to decide a dispute – strong inclination of many judges to force the parties decide it themselves, e.g. via referral to further mediations and pre-trials.

Take away

- The longer it takes to resolve a dispute, the more it costs;
- If one party wants to obstruct, the longer it takes;
- Pre-dispute agreements containing iron-clad compulsory arbitration clauses, are the most likely to result in fastest (and therefore least expensive) resolution.