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Litigation & Dispute Resolution

Mediation More Attractive in Ontario

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Ontario recently enacted the *Commercial Mediation Act, 2010* (the Act). The purpose of the Act is to facilitate the use of mediation to resolve commercial disputes. Ontario is the second Canadian province after Nova Scotia to adopt such legislation.

SCOPE

The Act applies to mediation of a commercial dispute. A "mediation" is defined as a collaborative process in which the parties to a commercial dispute agree to request a neutral mediator to assist them in their attempt to settle their dispute and the mediator does not have authority to impose a solution.

A "commercial dispute" is defined broadly as a dispute between parties relating to matters of a commercial nature, whether contractual or not, such as trade transactions for the supply or exchange of goods or services, distribution agreements, commercial representation or agency, factoring, leasing, construction of works, consulting, engineering, licensing, investment, financing, banking, insurance, exploitation agreements and concessions, joint ventures, other forms of industrial or business co-operation or the carriage of goods or passengers.

The Act does not apply to a mediation relating to a collective agreement or a computerized mediation. Actions taken by a judge or arbitrator in the course of judicial or arbitral proceedings to promote settlement and mediations for which procedures are prescribed in the Ontario *Rules of Civil Procedure* are also excluded. The Act also does not apply to a mediation to the extent that the Act conflicts with other legislation.

The parties to a mediation may agree not to have the Act apply to the mediation or to apply the Act with such modifications as agreed.

INTERNATIONAL BASIS

The Act is based on the *UNCITRAL Model Law on International Commercial Conciliation* (2002). In interpreting the Act, consideration must be given to its international origin, the need to promote uniformity in its application, and the observance of good faith. Recourse may also be made to the Model Law. Any issue that is not expressly covered by the Act is to be determined in accordance with the general principles underlying the Model Law. The parties may not exclude or modify the application of these statutory interpretive requirements.

MEDIATOR

A mediation is to be conducted by a mediator appointed by agreement of the parties. The parties may ask another person to recommend or appoint a mediator and, if the person agrees to do so, that person must make every effort to recommend or appoint an impartial and independent individual.

Unless all parties to a mediation otherwise agree, a mediator must not act as both a mediator and an arbitrator, or as an arbitrator after acting as the mediator, with respect to the dispute that is the subject of the mediation or another dispute that arises from the same or a related contract or legal relationship between the parties.

A person who is approached to be a mediator must make sufficient inquiries to determine if he or she may have a current or potential conflict of interest or if any circumstances exist that may give rise to a reasonable apprehension of bias.

A person is deemed to have a conflict of interest with respect to a mediation if the person has a financial or personal interest in the outcome of the mediation or the person has an existing or previous relationship with a party or a person related to a party to the mediation.

Any such conflict of interest or circumstances must be disclosed to the parties without delay. The mediator's duty to disclose continues until termination of the

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mediation. A person who discloses any conflict of interest or circumstances before or while acting as a mediator may subsequently act as the mediator only with the consent of all parties given after full disclosure.

MEDIATION

The Act provides that a mediation commences when the parties agree to submit a commercial dispute to mediation.

The parties and the mediator may agree on the manner in which the mediation is to be conducted and may agree to follow a set of existing rules or procedures unless prohibited from doing so by other legislation.

To the extent that the parties have not agreed on how the mediation is to be conducted, the mediator may act as he or she considers appropriate, taking into account any requests by the parties and the circumstances of the dispute, including any need for speedy settlement.

The mediator may meet or communicate with the parties together, separately or in any combination and make proposals for settlement of the dispute at any stage of the mediation. The mediator must maintain fair treatment of the parties throughout the mediation, taking into account the circumstances of the dispute. The parties must not modify the obligation of the mediator to maintain fair treatment nor relieve the mediator from the duty to comply with that obligation.

The parties may agree not to proceed with arbitral or judicial proceedings before the mediation is terminated. However, an arbitrator or a court may permit such proceedings and may make any order necessary if it considers that proceedings are necessary to preserve the rights of any party or in the interests of justice. The commencement of any arbitral or judicial proceedings is not of itself termination of the mediation.

The Act provides that a mediation terminates on the earliest of:

- the parties reaching a settlement agreement;
- the parties jointly declaring to the mediator that the mediation is terminated;
- the mediator, after consultation with the parties, declaring that further efforts at mediation are no longer justified and that the mediation is terminated; and
- a party whose participation is necessary for the mediation declaring to the mediator and to the other party(ies) that the mediation is terminated.

A mediation may continue after the termination of a party's participation in the mediation if such party's participation is not necessary for the other parties to continue with respect to issues that are still in dispute.

CONFIDENTIALITY

The Act imposes obligations relating to confidentiality. A mediator may disclose to a party any information relating to the mediation that the mediator receives from another party unless that other party expressly requests otherwise.

Information relating to the mediation must be kept confidential by the parties, the mediator and any other persons involved in the conduct of the mediation unless all parties agree to disclosure and, if the information relates to the mediator, the mediator agrees to disclosure, or unless disclosure is required:

- by law;
- to carry out or enforce a settlement agreement;
- for a mediator to respond to a claim of misconduct; or
- to protect the health or safety of any person.

The requirement to keep information relating to the mediation confidential does not apply to information that:

- is publicly available;
- the parties, by their conduct, do not treat as confidential; or
- is relevant in determining if the mediator has failed to make a required disclosure relating to a prior or existing relationship with a party.

The Act prohibits discovery or admission in evidence of certain information relating to a mediation. None of the following information (collectively, the "Restricted Information"), in any form, is discoverable or admissible in evidence in arbitral, judicial or administrative proceedings:

- an invitation by a party to mediate a dispute, a party's willingness or refusal to mediate the dispute, information exchanged between the parties before the mediation commences and any agreement to mediate the dispute;

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- a document prepared solely for the purposes of the mediation;
- views expressed or suggestions made by a party during the mediation concerning possible settlement;
- statements or admissions made by a party during the mediation;
- statements or proposals for settlement made by the mediator;
- the fact that a party indicated a willingness to accept a proposal for settlement made by the mediator; and
- the fact that a party or the mediator terminated the mediation.

However, Restricted Information may be admitted in evidence if all parties to the mediation consent and, if the information relates to the mediator, the mediator consents or may be admitted to the extent required:

- by law;
- to carry out or enforce a settlement agreement; or
- by a mediator to respond to a claim of misconduct.

Except for the Restricted Information or the restrictions on the use of other information, information created for purposes other than a mediation does not become inadmissible only because it was used in the mediation.

Information about the conduct of a party to a mediation or the conduct of the mediator may be disclosed after final resolution of the dispute to which the mediation relates for the purpose of determining costs of the mediation or related proceedings.

The foregoing rules apply whether or not the arbitral, judicial or administrative proceedings relate to a dispute that is or was the subject of the mediation.

ENFORCEMENT OF SETTLEMENT

A settlement agreement is binding on the parties to the mediation who sign it. One of the major advantages of the Act is that it is easier to enforce a settlement agreement. There is no need to commence a lawsuit for breach of contract.

If a party fails to comply with a settlement agreement, another party wishing to enforce its terms may, on notice to all other parties to the agreement, apply to the Ontario Superior Court of Justice for judgment in accordance with the terms of the agreement or for an order authorizing registration of the agreement with the court.

A judgment or an order must not be granted if it is shown that:

- a party to the mediation against whom the applicant is seeking to enforce the agreement did not sign the agreement or otherwise consent to its terms;
- the agreement was obtained by fraud; or
- the agreement does not accurately reflect the terms agreed by the parties.

On registration of a settlement agreement, it has the same effect as a judgment of the court. The agreement can then be registered in other provinces in Canada and in some foreign jurisdictions under applicable reciprocal enforcement of judgment rules.

The Act is another indication of the growing trend to use mediation and other forms of alternative dispute resolution.

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