ALTERNATIVE DISPUTE RESOLUTION

LOOK AT...

ARBITRATION

Don't view it as an alternative to litigation

When we think of arbitration as an "alternative" form of dispute resolution, a key question is what, exactly, arbitration is an alternative to. The usual answer — that arbitration is an alternative to litigation before the courts — is not the only answer and may, indeed, not be the best way to view arbitration. This conventional view leads to many of the most contentious aspects of arbitration practice and arbitration law.

Viewing arbitration as an alternative to litigation before the courts leads to invidious comparisons between arbitration and litigation. Deviations from court procedures may be viewed as less than perfect compromises — sacrificing quality of result at the altar of efficiency and cost control. The inability to correct "errors of law" is seen as a troubling flaw in the rough diamond of arbitral justice. The exercise of jurisdiction by an arbitral tribunal may be viewed as an incursion on jurisdiction vouchsafed to the courts in general or to a particular level of court.

This, in turn, can lead to tortured discussions as to the arbitrability of certain statutory causes of action such as those arising from copyright, patent, oppression or competition legislation.

A contrasting perspective is not to see arbitration as an alternative to litigation before the courts, but as an alternative to the parties settling their difference for themselves. Viewed in this light, many seemingly vexatious issues become less so.

Rather than agreeing to a resolution of their own making, the parties agree to be bound by a resolution reached by a third party chosen by themselves or by a method on which they have agreed. Seen this way, it seems clear that, as between themselves, the parties should be able to arbitrate anything upon which they themselves could reach a binding agreement, as the Supreme Court has found in several cases (See for example: *Desputeaux v. Éditions Chouette (1987) Inc.*, [2003] S.C.R. 178).

What is relevant from this point of view is not whether legislation confers jurisdiction on the courts or a particular court, but whether legislation limits the binding effect of private agreements, usually for reasons related to the public interest, for example with respect to family law or consumer matters.

Similarly, from the standpoint of legal process, we see that however abbreviated arbitration processes might be in comparison to litigation procedures, they are usually very extensive and elaborate compared to the procedures adopted by ordinary business people in making decisions and coming to agreements about disputes of exactly the same level of importance and complexity as those that are submitted to arbitration or, for that matter, to litigation. What is important in a business decision making context is not the "rules of evidence and civil procedure" but an intelligent and practical search for and evaluation of available information. That is also the essence of arbitration, unless the parties agree that more is required.

When considering issues of law, one need only note that mistake of law is not a ground for setting aside a commercial agreement that is otherwise valid.

Finally, when we understand that, in essence, arbitration is an alternative to agreement, not litigation, we understand why arbitrators do not have to be lawyers and why sitting as an arbitrator is not the practice of law, although lawyers who practice as arbitrators are subject to the rules of the legal profession.

What, then, is the responsibility of arbitrators and the courts as conceived within the paradigm of arbitration as an alternative to agreement? The basic answer must, consistently with the paradigm, be found in whatever agreement the parties have in fact reached, as far as they were able — since arbitration and arbitrators are the creatures of whatever agreement created them.

It is the parties who make the law relevant by subjecting their agreement to the law of their choice. If no express choice of law is made and one or more of the parties contend that the dispute turns on a point of law, the arbitrator must determine the applicable law as he or she would any other contentious point on which the parties' agreement is silent.

In either case, the arbitrator or tribunal owes a duty to the parties to fulfill their mandate to the best of its ability based on the contractual intentions and expectations of the parties.

The parties are free to elevate the importance of the law in determining their dispute by choosing or specifying arbitrators that are legally qualified and by preserving rights to appeal points of law to the courts or to an appeal panel within the arbitral process. Equally, the parties are free to agree that their disagreement will be resolved by a non-lawyer, or that the decision will not be subject to any appeal, including on a point of law, or indeed that their dispute will not be decided in accordance with legal principles at all — just as they are free to make an agreement for themselves which takes no account of legal principles, or the "wrong" legal principles.

Viewed in this context, the role of the courts, if one of the parties complains, is to enforce the agreement of the parties, to ensure that the arbitrators did not purport to decide something that the parties did not entrust to them for determination or did not apply the law incorrectly, contrary to the agreement or reasonable contractual expectations of the parties. ■

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fresh look

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