ALTERNATIVE DISPUTE RESOLUTION

Litigation or arbitration: alternative routes to justice

By William Horton

Chief Justice of Canada Beverley McLachlin recently observed that alternative forms of dispute resolution form a "vital, indispensable part of the justice system." This is an extra-judicial acknowledgement of a clear policy, expressed in many recent decisions of the Supreme Court of Canada and several appeal courts, that strongly supports forms of dispute resolution chosen by the parties themselves.

The autonomy of parties who choose to arbitrate rather than litigate their differences is a hallmark of free and democratic societies.

While a judicial role in preventing abuses in arbitration is essential, litigation and arbitration represent distinct and independent methods for providing parties to a dispute with access to justice. The differences can be significant and can go beyond the frequently cited (but somewhat qualified) factors of confidentiality and cost.

The basis for arbitration is contractual, with a focus on giving effect to the agreement of the parties and the expectations they have arising out of it. Litigation occurs within a broader context of legal policy and public interest, which is enforced through the appeals process. Arbitration is a process which parties select and shape for themselves, whereas litigation is a process that is determined by the state.

By their choice of one system or the other and the choices they make within the arbitration context, the parties can define for themselves the most important features of a just result.

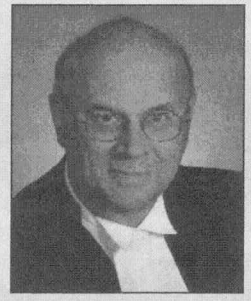
A commercial agreement between the parties will likely contain a provision that it is to be governed by the law of a particular jurisdiction. In an international arbitration, or if the parties have excluded any right of appeal in a domestic arbitration, the parties have also agreed to accept the arbitrator's view of the law, which takes effect not because it is "correct" but because the parties agreed to be bound by the arbitrator's determination. It is a matter of contract, not a matter of law.

A court of appeal applies a "standard of correctness" when reviewing issues of law. This also does not mean "correctness" in an absolute sense, as court decisions themselves are subject to dissenting opinions and reversals by higher courts or by future court decisions.

More objectively stated the "standard of correctness" is a standard of "substitution", whereby a higher level of court may freely substitute its view for that of a lower court or tribunal.

In international arbitration, and in domestic arbitration where the right of appeal has been excluded, the parties choose the actual individuals who will make the decision in the first place (or choose the process by which qualified individuals will be chosen) and then agree to seek no substitutes for their opinion.

Where much is at stake in the dispute, parties to an arbitration generally seek to assure the quality of the ultimate decision not by sequential reviews of the outcome but by choosing more highly qualified arbitrators to make the decision in the first instance and, possibly, by having the matter decided by a panel of three rather than by a single arbitrator.



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Of course, the parties to a domestic arbitration may choose not to exclude a right of appeal to the courts or to specifically provide for an extended right of appeal (in jurisdictions where that is allowed). In that case they will have the best, or worst, of both systems. (The recent recommendation of the Civil Justice Reform Project in Ontario to allow appeals directly from an arbitration tribunal to the Court of Appeal could well make a combination of the two systems preferable in some cases.)

Court decisions may set a precedent that will guide other parties, judges and arbitrators in the future, whereas commercial arbitration awards do not. If the parties need a decision that will affect future cases, they must go to court. An arbitrator in a commercial case concentrates on the agreement between the parties and giving effect to their expectations.

An arbitrator must apply the law chosen by the parties as he or she finds it in the authorities. A court, particularly at the appeal stage, can change the law based on the facts of the case before it.

In arbitration, parties may choose not to make law the decisive framework for the resolution of their dispute.

They can do this by modifying the choice of law clause, by specifying that disputes may be resolved in accordance with standards of "business fairness" or, as a practical matter, by including non-lawyers on the arbitral tribunal, for example people with technical or business expertise.

The recent decision by the Law Society of Upper Canada that acting as an arbitrator does not constitute the practice of law (although lawyers who do so are still subject to all the rules of the profession) underlines this point.

Parties to contract-based disputes may want to consider these differences in making their choices for a dispute resolution process.

William Horton practises as an independent counsel in Toronto. His work as an arbitrator and mediator is done as a resident of ADR Chambers.