Commercial Mediation Update: Ontario's New *Commercial Mediation Act*

An Introduction to the Act

In 2010 Ontario enacted the *Commercial Mediation Act* (the "Act"). The Act is meant to facilitate the use of mediation to resolve commercial disputes, and to make Ontario more amenable as an international jurisdiction for commercial mediation by basing the Act on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation (2002) ("UN Model Law").

However, a poorly implemented commercial mediation can lead to unintended, negative consequences rather than a reasonable resolution of the commercial issue between the parties.[1] This concern continues to apply even when participants make use of the *Commercial Mediation Act*. No-one should opt-into the Act's regime without a full understanding of what they are getting into, not only in terms of commercial mediation in general but also in terms of features in the Act itself that participants might need to risk manage.

Important Safeguards for All Participants

The Act contains some important safeguards that protect all participants. These include:

- The Act cannot be forced upon a participant. Every participant has to opt-in by agreement or by acceptance of an invitation, and can opt out any time they want before a final settlement is reached.

- The definition of "mediation" emphasizes the collaborative (versus adversarial) aspect of mediation, and the fact it is based on negotiated (versus adjudicated) resolution.

- Mediators have to be appointed by mutual agreement of the parties, there is no mechanism for a third party to force a mediator on the parties

- Mediators must be independent and impartial.

- Mediators have an ongoing obligation to disclose any potential conflicts of interest.

- The parties and the mediator may agree on the manner in which the mediation is to be conducted, and the mediator has the power to determine process and procedure where the parties have not agreed.

[1] See other articles on our website www.thompsonlaw.ca on particular issues related to alternative dispute resolution and commercial mediation for owner managers.

- The mediator is under a duty to maintain fair treatment of all parties.

- There is an obligation of confidentiality imposed on the participants and the mediator.

- Generally speaking the mediation invitation and how the participants respond to it and everything that goes on at the mediation is inadmissible and non-discoverable in arbitration, judicial or administrative proceedings. In other words the mediation is "without prejudice".

- A mediator cannot subsequently act as an arbitrator unless all parties agree.

- Mediation is not automatically terminated by the commencement or continuation of arbitration or judicial proceedings.

- Settlement agreements are binding and can be enforced in court without undue process and procedure.

- Fee arrangements for paying for mediation services are also enforceable in court under the same process and procedure.

- Settlement agreements must be in writing and signed by the parties.

Significant Traps for the Unwary

There are, however, some features in the Act that might need to be risk managed which owner managers and their professional advisors need to consider:

- *Standard Clauses in Boilerplate Agreements.* Many contracts contain "boilerplate" dispute resolution mechanisms. These might include provisions automatically implementing the Act or automatically commencing mediation under the Act. These clauses might even attempt to limit a party's ability to opt out of the mediation or the Act. These kinds of clauses should be considered at the time the contract is negotiated and not automatically accepted without a pause to make sure the approach suggested is appropriate for the contract or relationship in question.

- *Can opt-in without meaning to.* There is no requirement that a mediation agreement or acceptance of a mediation invitation be in writing. Under the Act it is possible for person to opt-in to a mediation process without signing any written agreement.

- *UN Model Law.* Under the Act, if a question arises during the mediation that is not covered by the Act or its regulations then the question will be settled in conformity with the general principles in the UN Model Law. This brings the UN Model Law into play, and requires anyone considering mediation under the Act to also consider and be familiar with the UN Model Law to anticipate potential unintended consequences. Three of those principles are inserted into the Act: consideration must be given to the UN Model Law's "international" origin; the need to promote "uniformity" in its application; and the observance of "good faith". Of particular concern is the reference to "good faith", which is not a defined concept

and which Ontario courts have consistently tried to exclude from commercial dealings in Ontario with limited exceptions.

- *No requirement for mediators to have expertise.* While the Act reinforces the requirement for mediators to be independent and impartial it does not require or enforce the idea that mediators have any expertise in the subject matter of the dispute or in commercial mediation process. There is a tendency to simply use retired judges or mediation trained lawyers as mediators. Depending on the nature of the dispute a mediator's lack of expertise or practical commercial experience can do a great disservice to the parties.

- *Mediators make settlement proposals at any stage in the mediation without the prior consent of or notice to the participants.* The Act permits mediators to make settlement proposals to the participants at any time in the mediation process but does not impose any prior notice to or consent from the participants. This can be problematic, as well-meaning and thoughtful mediators can make matters worse through their proposals of settlement. Mediation is supposed to be a process leading to a negotiated settlement without adjudication. Unilateral mediator settlement proposals conflict with that principle and can be misinterpreted. Participants may wish to restrict their mediator's ability to switch from a facilitative to an evaluative mediation model without prior notice to or consent from all parties, and some participants may want to opt out of mediation before a mediator issuing his or her views on settlement depending on how the mediation is going.

- *There is no definition of "fair treatment".* While the Act requires all mediators to provide "fair treatment" to all participants, fair treatment is not a defined term and could empower mediators to take actions or say things that a particular participant might not perceive as "fair" at all.

- *Some significant exceptions to duty of confidentiality.* The Act contains two important exceptions to the duty of confidentiality, and one procedural defect. (i) The first exception is disclosure "required by law". This is not a defined concept. For example, it does not limit the exception it to statute law and does not limit it by jurisdiction. This could result in disclosure of mediation materials to regulators, third parties or other jurisdictions where disclosure was not originally intended. (ii) The second exception provides that an obligation of confidentiality does not apply to information that the parties, "by their conduct, do not treat as confidential". In other words, by your actions (as opposed to your written agreement) you might be authorizing other parties or the mediator to disclose information you thought was confidential. (iii) The procedural defect is that the Act does not require notice to an affected participant before release of their confidential information, which means a participant's information can be disclosed without their knowledge and without an opportunity for them to challenge the disclosure before it happens.

- *Uncertain exceptions to the admissibility and discoverability prohibition.* There are also issues in the Act related to the limits on admissibility and discoverability of mediation materials on court or arbitration proceedings. The Act limits this protection to documents "prepared solely for the purposes of the mediation". If a document was not prepared for the mediation, or if a document has been prepared for multiple purposes, it might be better to not

present it at all or at least to redraft it and present it as one prepared "solely" for the purposes of the mediation. Another good practise would be to mark all documents with a "prepared solely for the purposes of mediation" qualifier to bringing it more securely within the Act's protection.

- *The door is open for unsigned settlement agreements to be enforceable in court.* While the Act refers in several places to settlement agreements signed by the participants, it appears in sub-section 13(6) that the Act permits the court to grant judgment or an order if it can be shown that the participant resisting enforcement consented to the terms of the agreement "otherwise" than by signing it. The language is slightly ambiguous and has not yet been interpreted by the court, but it is nevertheless a disturbing opening for a participant to be bound by a settlement agreement it did not in fact sign.

- *There is very broad regulation making power available to Cabinet.* Finally, the Act concludes with an extremely broad regulation making power. It expands the need for due diligence beyond the Act and the UN Model Law, as the regulations under the Act could in fact be quite substantive.

Conclusion

In conclusion, the Act could be helpful to owner managers involved in commercial mediation but risk managing the Act should include:

- Retaining experienced advisors who will maintain a critical approach to all alternative dispute resolution mechanisms.

- Not automatically adopting the Act into all contracts or circumstances.

- Taking time to understand the ideal mediation process for your situation and how the Act could help or hurt your strategic goals in that regard.

- Ensuring that the right mediator with the right experience, expertise and qualifications is retained.

- Not agreeing to mediation until the participants and the mediator have prepared and settled on a situation specific mediation agreement that best suits the circumstances and takes into account the risk factors that are inherent in mediation itself and in this Act in particular.