THE DOMINANT ALTERNATIVE

Arbitration has evolved into the preferred method for efficient dispute resolution. There is risk, however, in bypassing the courtroom

BY PAUL MCLAUGHLIN

DURING THE EARLY 1990S, George MacDonald, QC, a partner with Pink Larkin in Halifax, got a call, via Montréal, regarding a contractor in France that had a dispute with the Calgary company building the Confederation Bridge, the 12.9-kilometre link between PEI and mainland New Brunswick.

Rather than begin what could have been a lengthy and expensive litigation process, MacDonald recommended the parties agree to an arbitration hearing, which they did. Because his clients wanted to give evidence in French, the arbitration took place in Québec.

"We had a decision one year to the day after the process began," says MacDonald. "If we had gone to court, I doubt we would even have had an exchange of pleadings in a year."

MacDonald offers the anecdote as just one possible example of how arbitration may be preferable to litigation. "Litigation today is prohibitively expensive and getting more so," he says. "It is also very time-consuming, so it should be avoided, if possible, at all costs."

Of course, litigation may still be the best mechanism to resolve particular disputes — or, in some cases, the only one acceptable to one or more parties involved — but there's little doubt that, with some exceptions, it's the least economical option, in terms of time and money.

Delays in resolving a litigated dispute, which obviously contribute significantly to the cost, are a serious problem, says Ian Binnie, QC, a retired Supreme Court of Canada judge and partner at Lenczner Slaght Royce Smith Griffin LLP in Toronto. "I think there's a general concern within the legal profession that the courts are not delivering a fast enough service. If you're looking for a trial in excess of five days [in duration], you're months, if not years, away from trial. Most businesses can't afford to wait around that long."

Binnie says many corporate counsel "are fairly obsessed with the topic of avoiding litigation." In addition to their concerns about time and cost, "I think it's [also] the desire to deal with things privately within arbitration or mediation. I think they feel that, when they get to court, they have pretty well lost control over a situation."

While mediation and arbitration are the principal alternatives to litigation, Cliff Lax, QC, a partner in the Toronto firm Lax O'Sullivan Lisus Gottlieb LLP, notes that the best way to reduce the possibility of a costly dispute is to properly conduct business transactions in the first place. "[That] would involve proper documentation, clarification of any ambiguous aspects of a commercial litigation and proper due diligence at the outset of a relationship among other responsibilities."

Another avoidable pathway to litigation, says Tina Cicchetti, a partner in the Vancouver office of Fasken Martineau DuMoulin LLP, is for the parties to understand the difference between a legal dispute and a business one. "The business people [sometimes] haven't applied themselves to the problem to make sure it's actually a legal dispute," she says. "I think that's when things typically get off the rails, right from the start."

MacDonald often advises lawyers working within corporations to have a trained litigator review a significant contract before it's finalized. "We tend to read things differently [from them]," he says. "I'm looking for potential problems. I often pick up things that showed confusion or weren't as clear as they could be. I often say, 'You can pay me a little now or a whole lot later.'"

When a dispute does arise, one of the first alternative dispute resolution (ADR) measures to consider is mediation, a non-binding, voluntary process in which the parties work with a neutral third-party facilitator to reach an agreement.

The facilitators do not make a ruling; rather, they attempt to guide the parties through the issues in dispute, and advise them on the legal aspects of the matter and the strengths and weaknesses of each side's position. If the parties reach an agreement, the ADR Institute of Canada notes, it only becomes binding after they sign a formal settlement agreement.

"I'm generally a fan of mediation, as it forces the parties to come to grips with the pros and cons of their respective positions earlier in the file than waiting for arbitration or the courthouse," says Clarke Hunter, QC, a partner in the Calgary office of Norton Rose Fulbright Canada LLP. "Even when it doesn't produce a complete resolution, it often results in a real focus on what the real issues are. It can result in more efficiencies going forward than if you just head to litigation with everything still on the table."

Although Cicchetti specializes in arbitration, she does not think "it's always the best tool in the box." She says that mediation "should always be considered" because it's more flexible than arbitration. "Although in arbitration you can pick and choose the procedural things you need to get a resolution, you're still talking about a legally binding process."

Similar to what happens in mediation, a neutral arbitrator — who is acceptable to and paid for by all the parties — is selected to rule on the merits of the matter at hand. Unlike mediation, however, the arbitrator's decision is, with few exceptions, binding and cannot be appealed. While that process is generally quicker and less expensive than litigation, it is not always the method preferred by corporate counsel. For example, corporate counsel usually don't turn to arbitration to resolve IP disputes, says Cicchetti:

"When the IP is a big corporate asset, they would never agree to arbitrate the ownership of the IP because, for them, that's the crown jewels, and they can't be in a situation where they have lost the crown jewels with no ability to appeal."

Hunter, for his part, believes that litigation processes have been "creeping their way into arbitration and making them take as long" as a court case. He also points out that, in some ways, arbitration can be more expensive "because you're paying for your judge."

Another cause for corporate counsel's hesitation, says Binnie, is the human concern about being blamed if something goes wrong: "If you take a case to court, nobody is going to fault you if it goes badly because you've taken a risk with a known state institution. But if things go badly [in arbitration], you're the one who set up the dispute resolution tribunal and some corporate counsel don't like that responsibility."

Despite some reservations about arbitration, it has become increasingly popular. "There's been a huge sea change [in its acceptance]," says Binnie. "In the last 20 years it's really achieved the kind of momentum it deserves. I get the impression since returning to practice that it is now very much the mechanism of choice to solve disputes."

ADR has become so prevalent, MacDonald says, that there is a "mandatory [ADR] provision in all construction projects that use the standard CCDC [Canadian Construction Documents Committee] contracts. You can't go to court. You appoint someone who is the project mediator, and that person becomes familiar with the projects and any disputes that arise … and that person resolves them."

Another option for parties looking for ADR solutions is something called med-arb. "They've now developed a mixed hybrid," says Lax, "where they start off by exploring the possibility of coming up with a resolution through mediation. If they can't work out an agreement, then the med-arb person changes hats and becomes an arbitrator and proceeds to a decision."

An unintended drawback from the increasing application of ADR is that, because they are private, many important rulings are not being reported and can't be used as precedents, a longstanding backbone of the Canadian legal system. "Arbitration has clearly taken out of the courts a great many commercial issues that would benefit the public generally if they got into court and received appellate attention and built up the jurisprudence in the traditional way," says Binnie. "But you can't expect businessmen to contribute to the public good by litigating matters that could be more efficiently dealt with in arbitration."

On the other hand, the increased use of ADR, he adds, has forced courts to respond by "attempting to fashion procedures to expedite matters, get a better control of the docket, make the proceedings more efficient, cut down on the endless discoveries that in some cases go on and on and cut down on the number of expert witnesses they're prepared to listen to in order to get back control of their courtrooms."

While litigation tends to be expensive and time consuming, ADR has its own costs. No matter which option a business is considering, before entering into any process — but especially litigation — clients should insist on a cost-benefit analysis fairly early on in the process, says Lax. "Once the parties have exchanged pleadings, a client should insist on a schedule, a cost forecast and an opinion as to success," he says.

Clients should also know the chances of recovering a settlement. "What is the point of suing for one hundred million dollars if the person's net worth is $40 million? What good will it do to force the person into bankruptcy?"

It's generally accepted these days that businesses should adopt a philosophy that embraces litigation if necessary but not necessarily litigation. If ADR is the faster and less expensive way, it seems well worth considering at a time when litigation is rarely either.