Kluwer Mediation Blog

Good Intentions Gone Bad – Ontario Commercial Mediation Act, 2010

Rick Weiler (Weiler ADR Inc.) · Sunday, January 22nd, 2012

Picking up where I left off last post, I want to discuss what I consider to be a major problem with the Ontario Commercial Mediation Act, 2010 (OCMA) relating to the admissibility of evidence of what occurred during a mediation.

Generally (with some exceptions) at Common Law anything said or done in mediation is inadmissible in subsequent proceedings. This "mediation settlement privilege", as it is sometimes referred to, is understood to be critical to the success of the process because it permits frank and open discussion at the mediation.

However this concept has been seriously eroded the Province of Ontario, Canada, by the enactment of section 9(3) of the OCMA which says, "***Information about the conduct of a party to the mediation or the conduct of the mediator may be disclosed after the final resolution of the dispute to which the mediation relates for the purpose of determining costs of the mediation or of proceedings taken because the mediation did not succeed.***"

What does this mean? It means, for example, that a litigant could introduce evidence about a mediation in order to influence a cost award after the final resolution of the dispute. That evidence might include a refusal to participate in mediation, evidence of alleged bad faith bargaining during the mediation session, evidence of a mediator's proposal made during the session. The list is endless.

A bit of history is in order.

Working Group II (the WG) of the United Nations Commission on International Trade Law (UNCITRAL) began working in 2000 on developing standard rules for the use of conciliation (which, for practical purposes, is exactly the same process as mediation) for the resolution of international commercial disputes. The WG documents can be seen online and make for interesting reading. The work was prompted by an awareness at UNCITRAL of the increasingly important role then being played by commercial mediation, particularly in North America. That work resulted in the adoption by UNCITRAL on June 24, 2002 of the Model Law on International Commercial Conciliation.

Articles 9 and 10 of the Model Law dealt with Confidentiality and Admissibility of evidence in other proceedings and were, in my view, pretty tight, recognizing the importance of confidentiality

and settlement privilege to the success of the mediation process.

In particular, Article 10 prohibited the admissibility in subsequent proceedings of the following: "***(a) An invitation by a party to engage in conciliation proceedings or the fact that a party was willing to participate in conciliation proceedings; (b) Views expressed or suggestions made by a party in the conciliation in respect of a possible settlement of the dispute; (c) Statements or admissions made by a party in the course of the conciliation proceedings; (d) Proposals made by the conciliator; (e) The fact that a party had indicated its willingness to accept a proposal for settlement made by the conciliator; or (f) A document prepared solely for purposes of the conciliation proceedings.***"

The only exceptions were that such evidence could be admitted, ***"to the extent required under the law or for the purposes of implementation or enforcement of a settlement agreement."*** Again, pretty limited exceptions.

Once the Model Law had been adopted various jurisdictions around the world considered enacting their own version of the Model Law and, indeed, it has been adopted in a number of places, including the Canadian provinces of Nova Scotia and Ontario. The troublesome section 9(3) was introduced as the Model Law was being considered in my home province.

In Ontario it was hoped that the enactment of such a law would serve to further promote the use of mediation across the Province. Mediation was already a mandatory step in Superior Court cases in Ottawa, Toronto and Windsor and had been flourishing in other parts of the Province as well. Strictly speaking, the law wasn't necessary as commercial mediations had been conducted without benefit of legislation for more than 20 years. Still, it was thought there was utility in moving forward with such a law to provide the governments "good housekeeping seal of approval" to the process.

The purported justification for OCMA section 9(3) is to serve as a damper on bad behavior in commercial mediation, by the parties or the mediator. The obvious problem is exactly what does that mean. In my experience parties often begin the negotiation process with their positions quite far apart for a variety of strategic and tactical reasons (not to mention an honestly held divergence in the valuation of the case). This doesn't necessarily mean those parties are negotiating in bad faith.

Do parties and their lawyers sometimes negotiate in bad faith in mediation? Of course they do but, in my view, the consequences are rarely rewarding to them. In my view the potential harm to the mediation process caused by section 9(3) far outweighs any benefit it might bring.

In the meantime how do I deal with this in my own mediations? Fortunately parties to a mediation can agree not to have OCMA apply to their dispute. My standard mediation agreement has a box, right at the top, where the parties can opt out of the Act. In my mediations they always do.

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