SOME OBSERVATIONS ABOUT ALTERNATIVE DISPUTE RESOLUTION (ADR) BY A CORPORATE USER

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The Canadian Foundation for Dispute Resolution and the ADR Institute emphasize resolving commercial disputes. Arising from experience both with Imperial and the Foundation, there are some general observations I wish to make about ADR in the commercial context.

1. Arbitration is clearly seen as falling under the umbrella of ADR, both in theory and in practice. Many agreements provide for arbitration as a means of resolving disputes, and many corporations choose to use arbitration in preference to other ADR processes. Indeed, when entering into new agreements, many organizations choose to avail themselves of arbitration to the exclusion of mediation or other processes.

2. Increasingly, parties are incorporating dispute resolution provisions in agreements. Often such provisions include negotiation, mediation, and frequently arbitration. It is desirable to include in such clauses, reference to rules and procedures such as those of the Foundation, the ADR Institute of Canada, Inc., BCICAC, etc. The C2C ADR Council Handbook, *Let's Talk* makes reference to dispute resolution clauses being recommended for the oil and gas industry.

3. When corporations agree to use mediation in commercial disputes, it is my experience that in almost every instance, their legal advisors express a preference for a mediator who has experience in the area of the dispute. In spite of support in the ADR literature for choosing a mediator with skill in process over one with knowledge of the subject matter of the dispute, corporations and their advisers will seek both, and will accept skill in process alone with considerable reluctance.

4. Training in mediation is seen by corporations to be of less importance than experience. Indeed, mediators will often be accepted who have experience but no training in mediation.

5. Despite the increasingly available texts and materials on ADR, particularly as it relates to corporations, there remains a significant lack of understanding in the corporate and legal world as to the distinction between arbitration and mediation, and particularly the non-adjudicative nature of mediation.

6. Much debate occurs among mediators about evaluative and facilitative mediation, with facilitative mediators frequently refusing to engage in evaluation as a matter of principle. Speaking on behalf of users of the process, I feel it is important for mediators not to be too slavish in their following of doctrine. It may be that a stage arises in the mediation when corporate parties wish the mediator to express views which are evaluative in nature.

   I believe the mediator must be flexible enough to accommodate a move in the direction of the wishes of the parties. I have sufficient confidence in the mediation process and in an effective and experienced mediator, to believe that the appearance and reality of fairness are capable of being met, while at the same time assisting the parties in the application of reality checks.

   Further, if the mediation appears to be breaking down, a non-binding opinion expressed by the mediator may be a means of keeping the parties engaged in the mediation process. What I am urging is that the mediator have sufficient flexibility, at appropriate stages, to take risks rather than adopt a 'purist approach', which puts the process above the interests of, on occasion, sophisticated and knowledgeable parties.

Endnotes

The C2C ADR (Appropriate Dispute Resolution) Council Handbook includes explanations of negotiation and ADR techniques. It also contains instruments to assist in using those techniques. For example, it includes a risk analysis instrument, suitability for ADR assessment instrument and ways of accessing ADR resource people.