

DRAFT 5.2

A Lawyer's Primer on Alternative Problem Solving
or
How to Start Dealing with the Change of Culture

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“It is not the strongest species that survive, nor the most intelligent, but the ones who are most responsive to change”

- Charles Darwin

INTRODUCTION AND SCOPE OF PAPER

The practice of law and the development and acceptance of mediation and arbitration has dramatically changed since I was first appointed an arbitrator in 1967 – in my third year law. The playing field has changed. The acceptance by clients and their counsel to problem solving has grown notwithstanding pockets of resistance.

The present challenge is how to impart to lawyers the need to redirect their cognitive reasoning, with their competitive spirit, in advising their clients towards resolving issues. Experience has taught me that lawyers, like other professionals, have some resistance to change - change not only in process (ie. the rules of court) but also a paradigm shift – a change from one way of thinking to another. England made the move over a decade ago.

The concern is not limited to litigators who spend their time preparing to use the, “one nail and one hammer” approach by only seeking resolution in the public courts, but also the need for solicitors to understand that tacking on an arbitration clause from some precedent, in a contract without understanding the divorce process has serious and unacceptable consequences to their clients.

After much consideration I thought it best to deal with the subject matter, not by way of preparing some academic paper, but by way of setting out in some eclectic fashion primary information for the reader, providing wherever possible, considerations for the practitioner in entering this problem solving area.

I have in this exercise relied upon papers I have written in past together with papers and information gleaned from colleagues, a number of whom have given me permission to repeat their sage words of wisdom.

Lastly, this paper is designed to invoke discussion and questions during our meeting. Hopefully when you return to your office and “take a view from the balcony” you will view this exercise in a positive way.

LEGAL CULTURE – THE SETTING

Legal culture has changed in the last 30 years. The skills set for lawyers of the 1970’s are inadequate for problem solving in this decade. Professor Julie Macfarlane in her book, “*The New Lawyer*”, suggests that:

The new lawyer takes on all the traditional professional responsibilities of counsel as well as some additional ones. These include the responsibility to educate the client on a range of alternate process options, to establish a constructive relationship with the other side that does not undermine her loyalty to her client, to commit to the good faith use of appropriate conflict resolution processes and to model good faith bargaining, attitudes, to anticipate pressures to settle, and to advocate strongly for a consensus solution that meets, above all, the needs of her client. It is in relation to these additional responsibilities that the new lawyer faces the greatest challenges in developing an appropriate professional response to new (or reconfigured) ethical dilemmas.

Allen Soltan recently reminded me of the culture we are introduced to the first day of law school. We read our first case of a failed negotiation.

Rodney MacDonald in his discussion paper of February 23, 2005 for the Civil Justice Reform Working Group cites the Australian Law Reform Commission:

significant and effective long term reform [of the system of civil litigation] may rely as much on changing the culture of legal practice as it does on procedural and structural change to the litigation system. In particular, lawyers, their clients and courts may need to change the ways in which they perceive their relationship and responsibilities.

Compare the words written by Peter Behie, Q.C. in his paper delivered at a CLE dispute resolution conference in 2006 to that of the following quote from Professor Macfarlane’s book:

It is hardly controversial to suggest that you and your client should know where a file is headed. As the inimitable Yogi

Berra said, "If you don't know where you're going, you'll end up somewhere else." The development of a road map will fulfill this role. More importantly, the early development of a game plan or roadmap is essential if you are to solve your clients' problems in the most efficient way and in a manner that puts the client in the driver's seat (two goals that I also take to be not controversial).

...

I spent the first many years of my practice transforming my clients' problems and concerns into legal issues and the advancing those legal issues through the litigation process. I undertook this kind of approach in a rather unexamined sort of way. I simply saw myself as and referred to myself as a commercial litigator. I formed litigation strategies sometimes only vaguely related to clients' problems and, I am embarrassed to admit, without a keen awareness of the costs (both soft and hard) of delivering these legal outcomes.

I began to realize that this approach was impoverished. It often did not deliver results that clients expected or wanted, or did so at a price that was unacceptably high. Clients routinely reported feeling disaffected and dissatisfied. Worse still, I sometimes felt that my training and understanding of the process became an impediment to solutions and outcomes. Often disputes were not being resolved, not because the parties were not willing to resolve them, but rather because counsel, caught in the system, resisted resolution. More information was required; a higher level of understanding of the intricacies of the facts was needed; discoveries had to be completed. These I began to see were my needs not necessarily my clients' needs.

...

Now, I say that what I do is solve clients' business problems often with, but not exclusively through, the litigation process. I also resist the temptation to merely transform clients' problems into legal problems and only address the latter and ignore the former. Clearly, one must apply legal analysis to the problems and use case law as a predictor of outcomes. The analysis should not, however, presuppose that litigation is inevitable or if the process is issued, that a trial is certain. The litigation trial should not wag the dog. When I use the litigation process I do so with an eye on the clients' commercial problem all times.

It is against that backdrop that I turn to the initial assessment. It goes without saying that if one's job is to solve commercial problems then the initial assessment has to focus on identifying what those problems are and developing a strategy that addresses the resolution of these commercial problems.

The goal, then, of the initial assessment is to form a strategy based on a clear understanding of the client's goals. It is my

view that this strategy should be reduced to writing sent to and reviewed with the client. It should include the following:

- (a) a description of the client's goals as you understand them together with the facts as you apprehend them;
- (b) clear options for the client which should include options short of or separate from litigation;
- (c) an honest estimate of the costs of each option;
- (d) some rough time lines for each option;
- (e) an analysis of the legal issues (both on liability and damages) and outcomes; and
- (f) the probability of success to at least the litigation options (based on your judgment of the risks).

There a number benefits to doing this. This road map will force discipline into your thinking from the outset, make you accountable to the client as the matter moves forward and gives the client the clearest possible picture of what lies ahead. It is a road map that will help you and your client avoid, as Yogi said, ending up somewhere else. In providing this road map, you will be allowing the client to exercise control over the decision making. In my view, it is no longer adequate to say that the litigation road has too many unexpected turns to undertake such any analysis or provide a road map. You can – and indeed must – explain the uncertainty of litigation and the difficulty of precision.

...

The first meeting is critical. You will want to expand on the information that has been provided to you. But more importantly, you will want to ask what the client wants to achieve. You must divine the client's goals; what they want, need and what can be done. You should obviously pay attention to the context in which the problem arises. Consider the relationships at play. Often I deal with shareholders' disputes in which the falling out is between old and dear friends or even family members. You must be attuned to these sorts of dynamics and they should weigh heavily on the judgment you bring to bear on course of action.

Professor Macfarlane quotes one lawyer as saying:

I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained pit bulls and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and strong and better than you are.

And what of the client? How have they viewed the culture of civil litigation?

It was the British humourist, Jerome K. Jerome who wrote:

If a man stopped me in the street, and demanded of me my watch, I should refuse to give it to him. If he threatened to take it by force, I feel I should, although not a fighting man, do my best to protect it. If, on the other hand, he should assert his intention of trying to obtain it by means of an action in any court of law, I should take it out of my pocket and hand it to him, and think I had got off cheaply.

In 2003, the Honourable George W. Adams, Q.C. in his book *Mediating Justice: Legal Dispute Negotiations*, comments on the present judicial culture:

Lawyers increasingly distrust one another. The profession is no longer a seamless cadre of legal professionals. Recessions and the economics of lawyering have also increased the number of inexperienced lawyers willing to handle lawsuits. The courts have been slow to adopt modern management techniques to administer the growing caseloads primarily because our traditional conception of justice encourages judges to be passive, disinterested and impartial. Dealing primarily with “private” disputes, judges have tended to leave the pace of pursuit to the parties.

We live in a cost conscientious global society where people want to solve their problems now - not in two years and as inexpensively as possible.

Disputes, unlike wine, do not improve by aging.”

(the late, the Honourable Willard Z. Estey, Q.C.)

When I refer to costs, it is not only financial costs, but also emotional and productive costs. Many business people want to solve their conflicts and get on with business. Many times they would like to repair their long-term relationship with the other litigant.

Both the business executive and their lawyers share a common behavioural pattern.

Chief Justice Warren E. Burger said:

A common thread pervades all courtroom contest: Lawyers are natural competitors, and once litigation begins they strive mightily to win using every tactic available. Business executives are also competitors, and when they are in litigation, they often transfer their normal productive and constructive drives into the adversary contest. Commercial litigation takes business executives and their staffs away from the creative paths of development and production and

often inflicts more wear and tear on them than the most difficult business problems..The plaintive cry of many frustrated litigants echoes what Learned Hand implied: “There must be a better way”.

These words appear to be consistent with the view of the Australian Law Reform Commission, suggesting the need for involvement of lawyers, their clients, and the courts in this paradigm change.

The relationship between private decision makers, namely arbitrators and public decision makers, namely judges, was the subject matter of a paper by John Bolton (*Arbitration*, February, 1996) when he quoted Lord Woolf. His Lordship was delivering a paper on, “Why can’t an arbitrator be just like a judge?”. Lord Woolf turned the tables and said, in essence, “Why can’t a judge be just like an arbitrator?”. He was of course referring to the flexibility that arbitrators have in dealing with issues in dispute.

In July of 1996, Lord Woolf’s report was published citing well over 100 changes to the process of civil litigation (Civil Procedure Rules – “CPR”) many of which I suspect are contained in our own civil justice reform paper. One of the suggestions made in Lord Woolf’s report was the expansion of Calderbank offers, the concept of which in part now forms the amendment to our Rule 37. One notes that since 1980, Section 11 of the *Commercial Arbitration Act* statutorily grants an arbitrator discretion in awarding costs.

PAST AND PRESENT METHODS OF RESOLVING DISPUTES

Some years ago a Canadian publication (*The Lawyers Weekly*) set out the pros and cons of various dispute resolutions methods. I now reproduce this reference, with certain modifications.

METHOD		CONS	PROS
1.	Dueling	<ul style="list-style-type: none"> • out of fashion • might get killed 	<ul style="list-style-type: none"> • usually done at dawn so it won’t interfere with the work day.
2.	Coin Toss	<ul style="list-style-type: none"> • arbitrary 	<ul style="list-style-type: none"> • cheap • simple

			<ul style="list-style-type: none"> • a penny will do
3.	War	<ul style="list-style-type: none"> • might get killed • world might end • determines not who is right but who is left 	<ul style="list-style-type: none"> • good for business • great stories for grandchildren
4.	Bare Fists	<ul style="list-style-type: none"> • might need cosmetic surgery afterwards • dry-cleaning bill for blood on shirt 	<ul style="list-style-type: none"> • good exercise • cheap
5.	Litigation	<ul style="list-style-type: none"> • expensive • drags on forever 	<ul style="list-style-type: none"> • respectable • great fees (if you can collect them)
6.	ADR	<ul style="list-style-type: none"> • used to be seen as flaky • misunderstood by those who are not in the "inside" 	<ul style="list-style-type: none"> • cheaper than litigation • quicker than litigation • pick your own decision maker or mediator • private • now very popular • most clients prefer the system once they understand it • client driven

ARBITRATION'S RELATIONSHIP TO LITIGATION

The relationship between arbitration and litigation form part of the subject matter addressed by Newbury, JA in *MacKinnon v. National Money Mart Company, 2009 BCCA 103* when she cited Deschamps J. at paragraph 26 in *Dell Computer Corp. v. Union des consommateurs 2007 SCC 34*:

The neutrality of arbitration as an institution is one of the fundamental characteristics of this alternative dispute resolution mechanism. Unlike the foreign element, which suggests a possible connection with a foreign state, arbitration is an institution without a forum and without a geographic basis ... Arbitration is part of a no state's judicial system ... the arbitrator has no allegiance or connection to any single country ... In short, arbitration is a creature that owes its existence to the will of the parties alone ...

To say that the choice of arbitration as a dispute resolution mechanism gives rise to a foreign element would be tantamount to saying that arbitration itself establishes a connection to a given territory, and this would be in outright contradiction to the very essence of the institution of arbitration: its neutrality. This institution is territorially

neutral; it contains no foreign element. Furthermore, the parties to an arbitration agreement are free, subject to any mandatory provisions by which they are bound, to choose any place, form and procedures they consider appropriate. They can choose cyberspace and establish their own rules. It was open to the parties in the instant case to refer to the Code of Civil Procedure, to base their procedure on a Quebec or U.S. arbitration guide or to choose rules drawn up by a recognized organization, such as the International Chamber of Commerce, the Canadian Commercial Arbitration Centre or the NAF. The choice of procedure does not alter the institution of arbitration in any of these cases. The rules become those of the parties, regardless of where they were taken from.

MEDIATION VERSUS ARBITRATION

Mediation (a form of controlled negotiation):

1. Looks to the future
2. Focuses on relationships
3. Seeks to restructure relationships
4. Results in custom made solutions
5. Role for clients

Arbitration:

1. Looks to the past
2. Focuses on facts
3. Seeks to establish fault/liability
4. Winners and losers
5. Dominated by lawyers

Some of the advantages in arbitration as opposed to litigation are:

1. It is generally less expensive than litigation although it is not cheap unless carefully planned out in advance.

2. The matter can be heard promptly.
3. The evidence is heard in private.
4. The process and the award is generally confidential.
5. Parties can determine who the decision maker will be (a great advantage over the court system).
6. The process, namely the rules of arbitration, can be determined by the consent of the parties as opposed to being governed by or required to be adopted by a specific set of rules (ie The Supreme Court Rules).

The lawyer's role in the arbitration is similar to the lawyer's role in litigation; that is to say the lawyer is an identifier, selector, and marshaller of the evidence. In fact, one text describes the role of the litigators as that of historians and litigation largely a process of recreating historical facts. One needs only to look at the division of time spent on a case. The majority of time is spent gathering and presenting the evidence as opposed to gathering and arguing the law.

During the process of dispute resolution, the client and their counsel deal with the evaluation of risk taking. By risk taking I mean assessing a risk – namely, the cost if things go wrong and the probability of that occurring. If the cost is high, the probability must be minimized. If the cost is low, the probability may be allowed to increase according to the party's personal assessment of "acceptable risk."

Risk are controlled by:

1. The elimination of the risk.
2. Eliminating activities that produce undue risk.
3. Insuring for uncontrolled risk.
4. The informed consent of the client.
5. The establishment of standards, controls and regulations.

These factors come into play in any dispute either as a proactive or reactive procedure. I shall later deal with the involvement of the solicitor in commercial disputes and their duty to reduce or eliminate the costly downtime to both client and litigator when a dispute arises.

THE PROACTIVE ARBITRATOR - APPLYING MANAGEMENT PRINCIPLES TO ARBITRATION

By proactive, I mean active rather than passive conduct by the arbitrator.

The management skills required of an arbitrator are numerous. He or she is in fact not a “public” judge, while still having judge like powers, with the ability to bind the parties in a manner similar to that of a judge. They are in fact decision makers. At the end of the day when they act as decision maker in the arbitration process, one party will be happy and one party will be unhappy. It is important for the arbitrator to ensure that they write a decision that clearly explains to the unsuccessful party the reasons for the decision. If not, the arbitrator will be performing economic suicide.

There has been criticism by lawyers and their clients that the arbitrator fails to take a leading role in controlling the proceedings from the commencement to the completion of the arbitration. Such control, without arrogance, is I suggest required in most arbitrations. Generally counsel prefer an arbitrator who manages the whole hearing process so that decisions are made promptly, clearly and concisely. People like to win but when they don't win they need to know that the process was fair - procedural justice.

Arbitrators need confidence in their expertise and experience coupled with the working knowledge of business and management. One must remember that the arbitrator relies on the parties to perform his or her directions and orders so that the process works smoothly.

This process requires preplanning on the part of the arbitrator with substantial input from the parties or their counsel, or both; including deciding whether or not they are going to conform

to a specific set of rules or adapt their own rules, or both. Other forms of appropriate dispute resolution may be used. For example, it is not uncommon in certain situations to use Med/Arb.

The structure and process should evolve and everyone should know what has to be done and who will be doing it and within what time frame. Throughout this process the arbitrator must have a clear idea of the necessary personal duties and responsibilities while retaining command of the proceedings. This form of discipline and control must be evident together with hopefully, a trace of humility and gentle humour.

The process may commence with correspondence sent out by the arbitrator setting out a prehearing agenda, inviting counsel for input to the agenda. This letter is generally followed by a prehearing meeting (preferably at the arbitrator's office) to decide a number of issues. The alternative is to have a conference call. By taking this approach no one is caught off guard or is subjected to "trial by ambush".

It is important for an arbitrator to anticipate, to think ahead of possible developments, and make the parties aware of events to come in a timely fashion. The proceedings should be controlled with flexibility and humanity. The arbitrator must be prepared to make clear decisions and offer directions at critical stages.

What is more, the parties must be aware of the arbitrator's objective at all times, which is to ensure that natural justice (procedural justice) and common sense prevails, based on good commercial practice.

I suspect that no arbitrator comes close to being a Solomon, however, certain leadership qualities are essential.

Derek Sharp in his article, [Applying Management Principles to Arbitration](#), published in *Arbitration*, February 1996, listed those leadership qualities:

1. **Knowing and understanding what is wanted by the parties and communicating it to all involved.**
2. **Creating a personal atmosphere, having the right appearance, body language, voice quality and formulating the appropriate package with flair.**
3. **Demonstrating integrity, fairness, truthfulness and the confidence to act alone.**
4. **Having the confidence to dominate encounters, meetings and hearings, being able to set the scene, begin to set the pace, keep control, manage change and stop proceedings when appropriate.**
5. **Remaining calm in crises, absorbing stress, standing off to see the whole problem, creating order from chaos, giving simple, clear directions and knowing how to get relief from the tension after each crisis is resolved.**
6. **Making the parties aware of where their authority, responsibility and accountability lie and ensuring that each party performs their role and focuses on the desired results.**
7. **Maintaining discipline by establishing ground rules of behavior, being punctual and reliable and by offering a good example.**
8. **Gauging the place and timing of action, knowing the right moment to intervene, being consistent in directions and stimulating action by the parties at the right time.**
9. **Ensuring balanced, harmonious progress, tying up loose ends, giving clear directions on time and maintaining continuity and enthusiasm.**

10. **Maintaining good morale - we are all human and the best results are based on trust, recognition, rewards, satisfaction and fulfilment, allowing people maximum freedom of action.**

Bonita Thompson, Q.C. in her article *Commercial Dispute Resolution: A Practical Overview* found in Paul Emond's book *Commercial Dispute Resolution*, refers to the avoidance of problems which can plague arbitration. She says:

Most of the problems that can plague the arbitration process can be avoided by:

- (a) choosing counsel who are knowledgeable in the process;**
- (b) choosing highly experienced arbitrators;**
- (c) using rules of procedure that provide for an efficient and timely disposition of the arbitration;**
- (d) citing the arbitration in a jurisdiction with laws that are supportive of the arbitral process.**

PARTICULAR CHALLENGES TO COMMERCIAL ARBITRATORS

One of the greatest challenges faced by an arbitrator is where a party attempts to delay the process thereby lengthening the process, adding to its costs, its expenses and antagonizing the other parties and their counsel.

They can come in the form of:

1. Jurisdictional Challenges
 - (a) the substantive law applied to the dispute
 - (b) the governing law re the arbitration procedure
 - (c) the validity of the arbitration clause
 - (d) the rules of the administering organization
2. Discovery Challenges
3. Perceived Procedural Irregularities

- (a) arbitrator's impartiality
- (b) unfair treatment of the arbitrator
(See *The Dorchester Hotel Limited v. Vivid Interiors Ltd.* [2009] EWHC 70 (TCC)
Also, see *Bovis Land Lease Limited v. The Trustees of the London Clinic* [2009] EWHC 64 (TCC)

While arbitrators have no ability to control delays prior to their appointment, good and active management skills after being appointed from the preliminary hearing stage to the rendering of the final award allows the process to move to a prompt conclusion and thus giving effect to the positive aspects of private arbitration.

BRITISH COLUMBIA'S COURTS ATTITUDE TO ARBITRATION

The British Columbia Court of Appeal in *Hayes Forest Services Limited v. Weyerhaeuser Company Limited*, January 24, 2008, 2008 BCCA 31 in its decision written by Chiasson J.A., a judge well versed in the law of arbitration, stated:

1. Commercial arbitration is a private dispute resolution process designed to enable parties to deal with disputes efficiently, effectively and economically. In this case, applicable legislation is the Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (the "Act"). Although the Act provides in s. 14 that arbitral awards are "final and binding on all parties", s. 31 gives parties a right to appeal to the court "any question of law arising out of the award", either by agreement or with leave of the court. Section 32 contains a limited privative clause.

2. The parties expressed clearly their intention to resolve disputes efficiently and effectively by agreeing to arbitrate before a single arbitrator to be selected from an agreed list of named persons.

4. In my view, a core value of the arbitration process – the efficient and effective resolution of private disputes – has been lost in this case, in part, because rather than simply ensuring the rights of the parties were determined on sound legal principles, the court usurped the function of the arbitrator and exceeded the authority granted to it by s. 31 of the Act.

31. The Commission (referring to the Law Reform Commission of British Columbia 1982 report on arbitration) noted that case-stated procedure was much criticized as

increasing the cost and inefficiency of arbitration and had this to say at 72:

Although arbitrations are intended to provide a less expensive and less cumbersome method of resolving disputes than litigation in the courts, the setting aside of an award can sometimes make arbitration a more costly and a less satisfactory procedure than litigation. It can also make a mockery of the two principal objectives of arbitration, namely early finality and a determination outside the courts.

In *Hayes Forest Services Limited v. Teal Cedar Products Ltd. et al* Docket CA034926

The Honourable Chief Justice of British Columbia speaking for the court said as follows:

[76] Hayes also bases this proposition on the decisions of this Court in *Randhawa v. Pepsi Bottling Group (Canada) Co.*, 2006 BCCA 273, in which it was held that section 23 of the *Commercial Arbitration Act* excludes equitable remedies, and *DeMitri v. Plumtree* (1989), 63 D.L.R. (4th) 229 (B.C.C.A.).

[77] I do not accept Hayes' argument that an arbitrator appointed under the Regulation or the contract has no power to grant the declaratory or injunctive relieve sought by Hayes.

[78] An arbitrator has the power to award equitable remedies pursuant to s. 22(1) of the *Commercial Arbitration Act* and Rule 29(1)(k) of the *Rules of Procedure for Domestic Commercial Arbitration* of the British Columbia International Commercial Arbitration Centre.

[82] To hold that section 23 of the *Commercial Arbitration Act* excludes equitable remedies would render Rule 29(1)(k) of the *Rules of Procedure for Domestic Commercial Arbitration* meaningless.

[83] The purpose of section 23 of the *Commercial Arbitration Act* is not to exclude equitable remedies. Rather, it was included in the legislation to address the substantive rules that an arbitrator may apply to a dispute.

[87] In my opinion, under the statutory and regulatory scheme applicable, an arbitrator would have jurisdiction to decide the subject matter of Hayes' complaint, to make orders affecting all parties necessary to resolution of the dispute, and to grant remedies effective to address the wrongs that Hayes asserts.

In 1810, Jeremy Bentham, in his book, *The Rationale of Evidence*, described arbitration as a process by which the parties consent to judgment. That is, the parties come to an agreement that a third party will impose a binding decision between the parties without the aid

or recourse to the public dispute resolution system - namely the courts. I suspect this thought process forms the genesis of the reason why the courts are loathe to overturn an arbitrator's decision and are more susceptible to a reversal of a judge made decision within the public court system.

MEDIATION

A concise definition of mediation is the process of adjusting each party's level of expectation without suffering a loss of face. In many cases, the process deals strictly with money. On other occasions, the process deals with the interests of the parties (their needs, wants, and fears) - not their position.

Mediation is different from the adversarial litigation process. It does not involve the search for truth about the legal and factual issues in the case but rather is involved in a search for a final solution to a dispute. In order for mediation to be successful it requires not only trust in the mediator but also a commitment by the parties to resolve the dispute. Failure in either one of those factors will result in the dispute continuing.

The lawyer's role in mediation is quite different from that at trial. The lawyer is not there to be confrontational. This is not the time to object to evidence or call the other side a liar or a cheat. He or she is there to assist in resolving the dispute and to prepare the Memorandum of Agreement once that dispute has been resolved.

It is important to prepare a Mediation Brief for delivery to the mediator in sufficient time for the mediator to be able to absorb an understanding of the nature of the dispute, coupled with any collateral factors prior to entering the mediation session.

One of the important functions of the party and their lawyer is to listen. When one is talking and one is listening, only the one who is listening is learning.

SUBJECT MATTER, PROCESS, AND CULTURE

A mediator should understand the subject matter, the process and the culture. By subject matter I mean the mediator's understanding of the context of the dispute whether it be corporate, estate, regulatory, trust, land or some other area.

Does the mediator understand the process to be implemented in assisting the parties to resolve their dispute? Generally, but not always, a process protocol might include the following:

1. Telling of the story by each party including reviewing the chronology of the dispute.
2. The identification of the issues, problems, concerns, needs and wants of each party.
3. The development of options and alternatives.
4. Building on the alternatives to assist the parties in fashioning their solution either through open conferencing or caucus conferencing.
5. Setting down in writing the agreement reached by the parties.

When I use the word "culture" I use it in the same context as Michelle LeBaron uses it in her book, *Bridging Cultural Conflicts*. She defines it as "what fish swim in". It is all around us.

Each of us come from and live in a number of cultures. When I use the term I use it in a non-limiting sense as meaning more than ethnic, racial, or religious. The culture surrounding mediating a motor vehicle accident case is different from that of a fire insurance case, an employment case, a real estate case, a wills variation case or a professional association or self-regulating body case. The cultures of those employed in the real estate industry in the Lower Mainland may vary from the culture of their colleagues practicing in Prince George or Quesnel or Hazelton.

Each of us live in many cultures which affects our thinking in different ways. (*give the example of the two sons who graduated from University involving an estate dispute*) Each case is different and requires counsel to provide input either orally or in writing, or both in sufficient time for the mediator to digest the information in order to assist the parties to resolve the outstanding issues which may or may not be apparent at first blush.

Mediation:

1. can be compulsory (See the Ontario experience)
2. can be mandatory (See the BC experience, especially the *Law and Equity Act*)
3. can be contractual
4. can be consensual. (ad hoc)

Arbitration:

1. can be compulsory (see various statutes which require arbitration)
2. can be contractual.
3. can be consensual.

An essential flaw in contractual mediation or arbitration, or both, is the failure of solicitors in drafting agreements, to obtain from their clients sufficient information in order to assist in drafting the appropriate dispute mechanism clauses. This failure includes a lack of understanding of the nature of the relationship between the parties; the parties' intent and purpose in having an alternative dispute mechanism in place; and the appropriate clauses to deal with restricting the interference by the courts, altering the parties' true intentions.

THE COURT'S VIEW OF MEDIATION

In July of 1996 the Right Honourable The Lord Woolf, Master of the Rolls published his final report on changes to the civil justice system in England and Wales. That report considered and recommended "a new landscape" in providing services to litigants, including not only the concept of proportionality but also a change in the existing paradigm in resolving disputes in a public forum. At page four for his Lordship's report, Lord Woolf states:

**1. The new landscape will have the following features.
Litigation will be avoided wherever possible.**

(a) people will be encourage to start court proceedings to resolve disputes only as a last resort, and after using other more appropriate means when these are available.

(b) information on sources of alternative dispute resolution (ADR) will be provided at all civil courts.

(e) before commencing litigation both parties will be able to make offers to settle the whole or part of the dispute supported by a special regime as to costs and higher rates of interest if not accepted.

(See CPR 1.1 – 1.4)

The rapid rise of mediation and its benefits have been commented on by the English Courts in *Dunnett vs. Railtrack PLC* [2002] EWCA (C.A.) Per Brooke L.J.:

Skilled mediators are now able to achieve results satisfactory to both parties in many cases which are required beyond the power of lawyers and courts to achieve. This court has knowledge of cases where intense feelings have arisen, for instance in relation to clinical negligence claims. But when the parties are brought together on neutral soil with a skilled mediator to help them resolve their differences, it may very well be that the mediator is able to achieve a result by which the parties shake hands at the end and feel that they have gone away having settled the dispute on terms with which they are happy to live. A mediator may be able to provide solutions which are beyond the power of the court to provide. Occasions are known to the court in claims against the police, which can give rise to as much passion as a claim of this kind where a claimant's precious horses are killed on a railway line, by which an apology from a very senior police officer is all that the claimant is really seeking and the money side of the matter falls away.

It is to be hoped that any publicity given to this part of the judgment of the court will draw attention of lawyers to their duties to further the overriding objective, in the way that is set out in Part 1 of the Rules and to the possibility that, if they turn down out of hand the chance of ADR, when suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences.

Lord Woolf, in his *Final Report on Access to Justice*, stated:

“(d) Two other significant aims of my recommendations need to be borne in mind: that of encouraging the resolution of disputes before they come to litigation, for example by greater use of pre-litigation disclosure and of ADR, and that of encouraging settlement, for example by introducing plaintiffs’ offers to settle, and by disposing of issues so as to narrow the dispute. All these are intended to divert cases from the court system or to ensure that those cases which do go through the court system are disposed of as rapidly as possible. I share the view, expressed in the Commercial

Court Practice Statement of Dec. 10, 1993, that although the primary role of the court is as a forum for deciding cases it is right that the court should encourage the parties to consider the use of ADR as a means to resolve their disputes. I believe that the same is true of helping the parties to settle a case.”

Compare the above quote to a comment written in *The Solicitor's Journal and Weekly Reporter*. (September 6, 1919 at pg. 84) some 90 years ago:

A barrister is a fighter. Lawsuits are gladiatorial shows, like prize fights in the ring or the cock fights and bear-baiting sports of old. The barrister is felt to be a sort of pugilist and the sporting instinct makes him a favourite of the crowd. Again, the wig and gown lend glamour to the profession which the populace feel, just as they feel the charm of the Royal pageants and the Lord Mayors' Shows.

The English courts have recognized the change in the landscape and have where applicable adopted the concept encouraged by Lord Woolf. One of the leading English decisions is *Halsey v. Milton Keynes General NHS Trust et al* [2004] EWCA Civ 576. The English Court of Appeal dealt with the issue of the imposition of costs as a sanction (not the ability of the courts to require parties to engage in the mediation process) against a successful litigant on the grounds that he refused to take part in Alternative Dispute Resolution. The Court sets out some of the factors which they take into consideration whether a party has acted unreasonably in refusing Alternative Dispute Resolution. Those factors include:

- 1. the nature of the dispute;**
- 2. the merits of the case;**
- 3. whether other settlement methods have been attempted;**
- 4. whether the costs of mediation would be disproportionately high;**
- 5. delay;**
- 6. whether the mediation had a reasonable prospect of success.**

Permit me to belabour the point further. A recent training course for the Hong Kong judiciary involved, among other matters, educating of the judiciary in applying ADR as a method

of resolving disputes that would otherwise find their way through the normal trial process. The lengthy paper cited numerous decisions of the English courts encouraging mediation including dealing with the issue of costs as set out in the *Halsey*.

In May of 2008 Sir Anthony Clarke, Master of the Rolls delivered a paper on the future of civil mediation in England in Wales. His Lordship said at page 3 of his paper:

1. **Over and above education what can the judiciary do? What we certainly cannot do is sit back and do nothing. Those days are now long gone. Active case management and the overriding objective very properly put paid to the days of the passive judge. One thing we can do is to render mediation part of the normal pre-trial case management process. There is of course a potential problem here, of which you are all well aware. I refer to the Court of Appeal's decision in *Halsey*, although it is to my mind much maligned. Lord Justice Dyson, giving the judgment of the court, in that case held that compulsory ADR would breach the right to fair trial as it would amount to an unacceptable constraint on the right of access to the court. He concluded that while the court could and should encourage ADR robustly it could not compel the parties to engage in it.**

MEDIATION TIPS

Eileen Barker in her article on *Tips for Lawyers in preparing for Mediation* (see her website) sets out in concise form a useful check list. I have reproduced most of her checklist.

1. Timing is Everything

- In general, mediate at the earliest possible time to avoid wasting time and money, provided that the parties are ready to settle the case.
- Ensure that you are sufficiently informed to evaluate the case for settlement.
- Ensure that the key players have been identified on each side.

2. Select the Right Process

- Do you want the mediator to provide an evaluation of each side's case?
- Is your client interested in restoring/repairing their relationship with the other side?
- Would face-to-face discussions be helpful?

3. Select the Right Mediator

- Is the mediator's style evaluative or facilitative, or both?
- Is the mediator comfortable with face-to-face discussions, if needed?
- Does the mediator have sufficient experience?

4. Prepare for Mediation

- Identify the factual, legal, and non-legal issues that must be resolved.
- Identify the individuals who must be present
- Set aside sufficient time for the mediation.
- Bring any key documents or data with you to the mediation and/or distribute in advance.
- Be prepared to resolve the dispute on the day of the mediation.

5. Prepare Your Client

- Explain the process, including the stages of mediation.
- Emphasize that the parties are the decision-makers.
- Prepare client to participate effectively during mediation
- Realistically review the strengths, risks and costs of going forward.
- Determine a range of acceptable outcomes.

6. Prepare the Mediation Statement

- Summarize the procedural history and status of case.
- Identify key factual and legal issues.
- Describe any important non-legal issues.
- Provide pertinent pleadings and exhibits.
- Review history of any settlement negotiations.
- Include confidential letter to mediator, if appropriate.

7. Strategies for the Joint Session

- Remember that your opening remarks set the tone for the entire process.
- Address yourself to the decision-maker(s) on the other side.
- Avoid arguing with, attacking or alienating your adversary.
- Encourage your client to participate fully.
- Be willing to listen to and address the issues raised by the opposition.
- Look for areas of agreement or common ground.
- Don't be impatient to begin bargaining; allow the parties to "have their day in court."

8. Working with the Mediator

- Treat the mediator as a collaborator, not an adversary.
- Share risks and weaknesses, as well as strengths.
- Do not mislead the mediator about your position,
- Use the mediator as a sounding board to explore strategies and options.
- Be creative.

DOs AND DON'Ts

DON'T

1. Add fuel to the dispute. This includes encouraging the client to litigate by focusing only on the strengths of the case, denigrating the other side, over-identifying with the client and/or the conflict, failing to provide a balanced view, and failing to caution client as to the risks and costs of litigation.
2. Prevent your client from talking with the mediator and/or the other side.
3. Block or rush face-to-face discussion and/or emotional expression between the parties.
4. Use hardball negotiation tactics including taking extreme and rigid positions, imposing arbitrary preconditions to settlement negotiations, etc.
5. Focus excessively on future litigation such as discovery, motions, etc.
6. Attempt to manipulate or mislead the mediator as to your clients' true position and convictions.

DO

1. Encourage the parties to talk about what's most important to them, including how they feel about the situation and what they need. Let them say what's on their minds. Be patient.
2. Ask your client to see the other side and accept some responsibility for the problem.
3. Address your client's desire for revenge or retribution. Seek the mediator's help with this if necessary.
4. Make sure your client knows the weaknesses of their case and the risks of proceeding to trial.
5. Make sure your clients know how much it will cost them to proceed to trial.
6. Use the mediator as a collaborator. Enlist the mediator's help in achieving a settlement that will meet your client's real needs.

I concur with Allan Stitt's understanding of mediation when he says in his book,

Mediating Commercial Disputes:

A decision to attend a mediation is not a decision to settle. It is a decision to explore the possibility of settlement and to see if there is a settlement that makes more sense for both disputants than continuing with the dispute. If there is not, the case should not settle.

ARBITRATION CLAUSES – DOs AND DON'Ts FOR LAWYERS

While arbitration offers significant advantages over litigation, poorly drafted clauses lead to not only costly and time consuming delays but also fail to meet the intentions and expectations of the parties - in particular the businessmen who have entered into contracts to achieve some rational commercial purpose. Counsel should adopt the same importance to a dispute resolution clause as they do in any other fundamental term of the agreement.

Agreements to arbitrate are formed:

1. during negotiating a contract, or
2. after a dispute has arisen.

The preferred system is to negotiate a process prior to entering the main contract and not after acrimony has developed. The arbitration clauses stand separate and apart from the main agreement. I refer you to *Premium Nafta Products Limited v. Fili Shipping Company Limited*, [2007] UKHL 40. I quote from paragraphs 18 and 35 of that case:

18. On the other hand, if (as in this case) the allegation is that the agent exceeded his authority by entering into a main agreement in terms which were not authorized or for improper reasons, that is not necessarily an attack on the arbitration agreement. It would have to be shown that whatever the terms of the main agreement or the reasons for which the agent concluded it, he would have had no authority to enter into an arbitration agreement. Even if the allegation is that there was no concluded agreement (for example, that terms of the main agreement remained to be agreed) that is not necessarily an attack on the arbitration agreement. If the arbitration clause has been agreed, the parties will be presumed to have intended the question of whether there was a concluded main agreement to be decided by arbitration.

35. That is not this case, however. The appellants' argument was not that there was no contract at all, but that they were entitled to rescind the contract including the arbitration agreement because the contract was induced by bribery. Allegations of that kind, if sound, may affect the validity of the main agreement. But they do not undermine the validity of the arbitration agreement as a distinct agreement. The doctrine of separability requires direct impeachment of the arbitration agreement before it can be set aside. This is an

exacting test. The argument must be based on facts which are specific to the arbitration agreement. Allegations that are parasitical to a challenge to the validity to the main agreement will not do. That being the situation in this case, the agreement to go to arbitration must be given effect.

Considerations in domestic arbitration may be different from considerations in international arbitration. The starting point would be to carefully review the statutes which will be applicable in your client's case. Clauses dealing with costs, confidentiality, restrictions to the court and a plethora of other matters must be considered in each case. There are very few cases in which one can apply a standard arbitration clause that meets the needs and commercial expectations of the client. In addition, consideration must be given to a set of rules (such as institutional rules) dealing with the process which will govern or whether rules will be decided on ad hoc basis, or blending of the two.

I have provided a checklist which includes some of the dos and don'ts in considering arbitration provisions. A number of these points are set out in an article written by Karen Birch of Allen & Overy LLP in the United Kingdom.

Do

1. have a clear, unequivocal agreement to arbitrate.
2. consider the dispute resolution clauses early in negotiations.
3. consider whether to include a formal pre-arbitration procedure, eg mediation.
4. make an informed choice between institutional and ad hoc arbitration and read any relevant rules. In British Columbia direct your attention to section 22 of the *Commercial Arbitration Act*.
5. specify the "seat" or formal place of arbitration.
6. specify an odd number of arbitrators, the manner of appointment, and if it's an ad hoc arbitration the appointing authority.
7. specify the language of arbitration.
8. consider the scope of the agreement to arbitrate.

9. specify the governing law.
10. consider whether a waiver of judicial review or appeals of decisions of the tribunal is desirable and enforceable. Subject to the applicable arbitration legislation (See sections 23, 31, and 35 of our Domestic Act) the parties should clearly state their intentions with respect to appeals. The joint intention should include that the decision of the arbitrator shall be final and binding and shall not be subject to appeal on a question of fact, law or mixed fact and law.
11. consider providing for joinder or consolidation of disputes if it is a multi-party or multi-contract situation.
12. obtain an understanding of your client's business including whether or not products or services sold are within the province, the country, or another state.
13. consider the nature of relief an arbitrator may impose having regard to the law in a particular jurisdiction.
14. what is the effect of an arbitration clause in one agreement where the parties have other agreements in place (See *Dancap Productions Inc. et al v. Key Brand Entertainment Inc. et al and Ed Mirvish Enterprises Limited* 2009 ONCA 135.)

DO NOT

1. assume that dispute resolution provisions do not really matter.
2. assume that arbitration is the best option for all disputes.
3. assume that all jurisdictions are supportive of arbitration.
4. blindly adopt an arbitration clause from another agreement.
5. draft an arbitration clause without examining the rest of the agreement and related agreements.
6. choose more than one governing law or seat. It is important to remember that the substantial rights may be different from the procedural law ("lex arbitri"). Generally the

seat of the arbitration will be the *lex arbitri*. This is one of the reasons why Canada is most suited for international arbitration.

7. choose arbitration rules that are inconsistent with the arbitration clause without specifying that such rules are being amended by agreement.
8. assumed that “split clauses” (which provide for one party to have the option to arbitrate or litigate while the other party can only litigate) are valid in all jurisdictions.
9. include restrictive criteria for the qualifications of arbitrators that may make it difficult or impossible to appoint suitable arbitrators.
10. specify as an appointing authority a person, position or institution unless you are sure that it exists and will be willing to make the appointment.
11. assume that arbitration will be confidential. If the parties want confidentiality, provide for it expressly.

Another excellent arbitration clause checklist may be found at, *The Advocates’ E-Brief*, Vol. 19, No. 3, Spring 2008, written by Barry Leon and Jana Slettnie, of Torys LLP. A copy of this article may also be found on Torys’ website.

A good example of a contingent problem is where a client is selling goods to a purchaser who resides in the United States. Without understanding the United Nations Convention on the International Sale of Goods you may wish to have your client opted out of this convention by setting out a specific clause in the agreement:

This agreement shall be governed by and construed under the laws of the Province of British Columbia Canada pursuant to the *International Commercial Arbitration Act of British Columbia*. The parties exclude the application of the 1980 United Nations Convention on Contracts for the International sale of goods if otherwise applicable.

Failure to provide this clause may require your client to follow a process inconsistent with their intentions.

DISPUTE STRATEGIES

The paradigm shift requires counsel to be proactive with their clients – that includes advising clients ab initio on cost effective dispute resolution. Dr. Robert Gaitskell, Q.C., of Keating Chambers, London, has produced a concise 5 point checklist on their website.

I have for brevity sake limited the quote. I encourage the reader to visit the site for a fuller version of the article.

1. Avoid a dispute

Right at the beginning when you negotiate the contract, think about the things that are likely to go wrong.

...

2. Tiered dispute clause

Does the contract contain a dispute resolution clause that offers a range of techniques for resolving disputes?

...

3. Strategic decision-maker

As soon as there is an inkling of a dispute, appoint someone who will manage the dispute in just the way you would manage a construction project.

...

4. Legal adviser

One of the first challenges for your strategic decision-maker will be identifying and appointing the right legal adviser.

...

5. Tribunal

When choosing a tribunal, it is 'horses for courses'. It is invariably better for parties to agree a specific tribunal in whom they have confidence than to leave the choice to an appointing body.

...

In conclusion, a dispute is not to be lightly entered into. It can, where big sums are involved, make or break a company. Give it the attention it deserves.

CONFIDENTIALITY OF ARBITRATION AWARDS

One of the benefits of private arbitration is the assumption that not only the process attendant upon the arbitration is confidential but also the award. In cases where the award is being reviewed by the court a request may be made to the presiding judge that the award be sealed. Clearly the presiding the judge in his or her reasons would be careful on how they express their views on the contents of that award.

In drafting a confidentiality clause consideration should be given:

1. On whether the issue of confidentiality is recognized by the law of the venue of the arbitration.
2. If the governing arbitral body has a confidentiality provision included in their rules.
3. To include a provision that the award is not subject to an appeal on a question of fact, law or mixed fact and law.

The importance of confidentiality was raised recently in *John Forster Emmett v. Michael Wilson & Partners Limited* [2008] EWCA Civ 184. There are other circumstances in which an award may not be kept confidential. Some of those are:

1. The subject matter in dispute must be reported as material to the financial condition of a public company.
2. Disclosure may be required by shareholders, partners, creditors and others having a legitimate business interest.
3. One or more parties may be subject to a fiduciary duty to disclose.
4. Parties may have a duty of disclosure to their insurers.
5. Parties may be obliged to disclose evidence from the arbitration in a subsequent proceeding.

Consideration of these factors will help you design the most appropriate confidentiality clause as it not only relates to process but also to the award.

COMPETENCE COMPETENCE - JURISDICTION

Jurisdictional challenges are sometimes made by a party seeking to have the courts declare that an arbitrator lacks jurisdiction to hear a particular matter. This form of application is generally brought together with an application for a stay of proceedings. Both the *Commercial Arbitration Act* (“the Domestic Act”) and the *International Commercial Arbitration Act* (“the International Act”) deal with the issue of the arbitrators jurisdiction.

Section 22 of the Domestic Act states in part:

22(1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic Commercial Arbitrations apply to that arbitration

Section 20 of the Domestic Act Rules of Procedure states:

20(1) The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.

Article 16 of the *International Act* says:

16(1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,

(a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract; and

(b) a decision of the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

Competence – competence refers to the tribunal’s power or competence to rule on its jurisdiction. The arbitral process would be undermined by delays and challenges to court if it were not so.

ENFORCEMENT OF AWARD

Under section 29 of our Domestic Act, with leave of the court, an award may be enforced in the same manner as a judgement or order of the court. Judgement is entered in the terms of the award.

Under section 35, and subject to section 36, of our International Act an arbitral award, "...irrespective of the state in which it was made must be recognized as binding and, on application to the Supreme Court, must be enforced." This is consistent with Canada being a signatory to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ("the New York Convention"). Over 140 countries have ratified the convention.

The purpose and intention of the New York Convention was to give certainty in having the issue of award enforceability, rather than depending on each country's national laws.

Please note the *Foreign Arbitral Awards Act* RSBC 1996.

COSTS

In 1980 our legislative assembly amended section 11 of the Domestic Act thereby allowing an arbitrator discretion in awarding full indemnity for legal costs incurred by a party to the arbitration. The arbitrator was no longer bound by the decision in *Ridley Terminals Inc. v. Minette Bay Shipdocking Ltd.* (1989), 40 B.C.L.R. (2d) 115 affirmed (1990), 45 B.C.L.R. (2d) 367 (C.A.). There is a similar section in the International Act, (See section 31(8)).

UNCONSCIONABILITY

Arbitration clauses have become common place in national and international consumer contracts – contracts of adhesion. Coupled with this proliferation of "standard contracts" (take a look at your credit card contract) is an arbitration clause very favourable to issuer of the card. A number of these arbitration clauses have been considered by the American courts as unconscionable. Paul Marrow, in his article *Policing Contracts for Unconscionability: Guidelines*

for *International Arbitrators Subject to the Scrutiny of US Courts*, in (*Arbitration*, Vol. 73, No. 4, November 2007) sets out criteria dealing with procedural and substantive unconscionability.

Under the heading of procedural unconscionability factors to be considered are:

1. **Is the contract standard form?**
2. **Is the suspect clause boilerplate?**
3. **Was the clause hidden or made non-conspicuous?**
4. **Is the language used incomprehensible to a lay person?**
5. **Was there gross inequality in bargaining power?**
6. **Was there exploitation of a weakness such as lack of sophistication or education?**

Under the heading of substantive unconscionability, the factors are:

1. **significant price disparity;**
2. **private penalties;**
3. **a denial of a basic right or remedy;**
4. **liquidated damages;**
5. **disclaimers;**
6. **covenants not to compete;**
7. **limitations on remedies;**
8. **absence of mutuality concerning access to the judicial system;**
9. **pre-dispute mandatory arbitration.**

At page 387 Marrow goes on to say:

Substantive unconscionability is about terms that operate in an unfair or unreasonable fashion. Within the context of mandatory arbitration, a group of factual situations have emerged raising questions about fairness and reasonableness:

1. **Clauses that permit one party to select the arbitrator or specify qualifications.**

2. **Clauses that specify inconvenient locations for the arbitration proceedings.**
3. **Clauses that unnecessarily require one party or the other to incur burdensome expenses in the pursuit of a claim in arbitration.**
4. **Clauses that give the drafter the right to unilaterally alter the terms for arbitration.**
5. **Clauses that alter existing rights and remedies, examples being clauses that shorten a statute of limitations period or restrict the authority of arbitrators to impose punitive damages otherwise permissible by law.**
6. **Clauses that restrict class actions.**
7. **Clauses that lack mutuality, i.e. relegate one party to arbitration and give the other flexibility to pick and choose between arbitration and access to the judicial system.**

The issue, I suspect, yet to be tested is whether a court or arbitrator determines whether the arbitration clause is void for unconscionability. Two recent British Columbia Court of Appeal decisions dealt with the relationship between arbitral jurisdiction over commercial disputes and class action procedures. Neither case dealt directly with the unconscionability issue. (See *MacKinnon v. National Money Mart Company*, 2009 BCCA 103 and *Seidel v. Telus Communications Inc.*, 2009 BCCA 104)

GOVERNING LAWS AND JURISDICTIONAL CLAUSES

The drafter of the agreement must distinguish between the governing law and jurisdiction. Where the parties come from different jurisdictions an attempt to deal with both concepts in the same wording may lead to confusion. The parties may agree on the jurisdiction of one or the other parties, or they may agree on a third jurisdiction. Each choice brings into play different legal systems.

An example of what may be considered an acceptable clause is:

All disputes arising out of or relating to this contract, or the breach, termination or validity thereof, shall be settled by arbitration. The arbitration shall be conducted in accordance with the *International Commercial Arbitration Act of British Columbia*. The seat of the arbitration shall be Vancouver, British Columbia and the arbitration shall be conducted in the English language.

INTERNATIONAL ARBITRATION

My comments about international arbitration will be limited to:

1. PriceWaterhouseCoopers report on *International Arbitration: Corporate attitudes and practices 2008* ("the PWC Report")
2. A pitch for Canada as the ideal place for International Arbitration.

While international arbitration has been criticized for excessive delays and costs it has been considered by the stakeholders as a better alternative to international litigation. One of the reasons is that the fact that the award is deemed to be confidential.

A comprehensive study on international arbitration is found in the PWC Report of 2008 - a follow-up to the 2006 report. Permit me to quote from parts of the executive summary. Some of the key conclusions are:

- **International Arbitration remains companies' preferred dispute resolution mechanism for cross-border disputes**
- **International Arbitration is effective in practice**
- **When International Arbitration cases proceed to enforcement, the process usually works effectively.**

Barry Leon of Torys LLP, sets out a compelling argument in his paper titled, *Canada on the World Stage in International Arbitration*, (2006) 72 *Arbitration* 143-146:

The reason why Canada is a good place for international arbitration can be summarised in three words: supportive, accessible and acceptable. First, Canada's laws and its courts are supportive of arbitration. Canada has modern

arbitration statutes. In fact, it led the way in implementing Model Law international arbitration statutes and acceding to the New York Convention. Canadian courts are as independent and competent as any in the world. Recent decisions dealing with *Kompetenz-Kompetenz* subject-matter arbitrability, the scope of arbitration clauses, and recognition and enforcement of awards have consistently reaffirmed the support that Canadian courts will give to arbitration and indicated a strong judicial policy favouring arbitration.

Secondly, Canada is acceptable to most of the world as a place for arbitration because it has a multicultural society, a reputation for fairness and neutrality, and both common and civil law systems. From the perspective of many Americans, although Canada is foreign, it is a known commodity. Even though there are marked differences between Canada and the United States, Americans appreciate and are comfortable with Canada's common law system; legal culture; litigation system (for example, an adversarial system with limited documentary and oral discovery) and style; use of the English language; and approaches to doing business. These similarities are appreciated by people in other common law jurisdictions too, with the added attraction that Canadians are similar to, but are not, Americans. People in Continental Europe, Latin America, Asia and other parts of the civil law world may also appreciate that Canadians are similar to, but are not, Americans. Canada has less of what they see as undesirable aspects of the US legal system. Canada is more international in outlook, has a civil law tradition and is an English/French bilingual country.

Thirdly, Canada is accessible – its major cities are well connected by air to almost all business centres in the world. It has good hearing facilities, with easy access to all modern technologies. For people in many leading business centres, Canada's time zones are more convenient than those in many other potential places for arbitration. Also, it is not insignificant that for arbitration participants from some parts of the world, Canada is easier to enter than the United States. And Canada's major cities are attractive places in which to spend time and are reasonably priced.

Our International Act reflects in its construction the UNCITRAL Model arbitral law which is consistent with the many states who have signed onto this convention. Enforcement of an award is governed by the *Foreign Arbitral Awards Act RSBC 1996* which incorporates the New York Convention.

The combination of the UNCITRAL Model law together with the New York Convention sets out the prevailing culture for international arbitration in British Columbia. (relate the opinion

of senior counsel in Toronto on why Vancouver is the best city in Canada for international arbitration)

BRITISH COLUMBIA INTERNATIONAL COMMERCIAL ARBITRATION CENTRE (BCIAC)

BCIAC was established by the Provincial Government in 1986. As mentioned earlier the BCICAC rules govern domestic arbitration pursuant to section 22 of the Domestic Act. The entity is also referred to in the International Act and in numerous national and international articles which refer to regional arbitration institutions.

The advantages of using BCICAC include:

1. Pre-establish rules and procedure
2. Administrative assistance, including the handling of arbitrators fees and disbursements
3. Lists of experienced arbitrators
4. The appointment of arbitrators

While BCICAC does not have physical facilities, Vancouver is blessed with private facilities which are set up to deal with arbitrations and mediations. Its administrative charges, particularly in the field of International Arbitration are reasonable when compared to other institutions.

Part of the history of BCICAC can be found in the comments regarding the development of arbitration in British Columbia in *Commercial Arbitration in Canada: A Guide to Domestic in International Arbitration (2007)* by J.K. McEwen and Ludmila Herbst as cited in paragraph 47 of the *MacKinnon case* (Supra):

British Columbia was the first jurisdiction to adopt the Model Law anywhere in the world. British Columbia was particularly interested in attracting arbitration business as is reflected in the preamble to its International Commercial Arbitration Act, which was essentially a reworked version of the Model Law.

British Columbia took a leadership role in enacting new domestic commercial arbitration legislation as well. In this regard, the Law Reform Commission of British Columbia issued a Report on Arbitration in 1982 recommending the adoption of modernized legislation. The report has been described as the first proposal for modernizing the legislative regime then in place throughout common law Canada. Legislation influenced in part by the Model Law was drafted and enacted

...

CONCLUSION

Allow me to return to my initial comments on the lawyers dilemma - to be or not to be a problem solver.

I can do no better than to quote Sir Anthony Clarke, Master of the Rolls in his address on December 2, 2008 to the British Academy in a paper titled, *"The Woolf Reforms: A Singular Event of an Ongoing Process?"*:

29. Changing the rules is one thing; changing how the rules are interpreted and applied is another thing entirely. The most perfect system implemented imperfectly is an imperfect system.

30. In my opinion, Woolf's greatest insight was the realisation that discrete structural and procedural reforms were not both necessary and sufficient conditions for successful reform. Woolf proposed explicitly that not only should there be structural and procedural reform but that our litigation culture had to change as well. If the discrete structural and procedural reforms were to achieve the end of enabling litigation to be conducted expeditiously and economically, litigation had to be carried out in a radically different way.

Someone once said:

As a businessman, if I don't listen to the market, I am not in business. If I were an attorney, I'd make sure I was involved in Alternative Dispute Resolution, because it may well be the service that the market will demand and I will have to offer in the future.

In closing, I've attached comments made by a colleague about 100 years ago. His words and deeds capture the essence of many of the benefits of a change in culture. Permit me to suggest that in comparing what I have attempted to impart in this lengthy paper has been canvassed in this two page attachment.

There are many books available to the practitioner and to their client on mediation and arbitration. My five favourites are:

1. Mediating Commercial Disputes, by Allan Stitt, Canada Law Book
2. Getting Past No, by William Ury;
3. Drafting ADR and Arbitration Clauses for Commercial Contracts, by Wendy Earle, Carswell
4. Mediating Justice: Legal Dispute Negotiations, by The Honourable George W. Adams, QC published by CCH
5. The New Lawyer by Julie Macfarlane, UBC Press

Cobbled together by:
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Epilogue

As the paper suggests at the beginning and as I've reminded the reader on each page by the watermarks contained, this is a paper in the making. Call me if you have input which should be added to this paper. In addition much of what I've written comes from 40 years of experience in the trenches as a solicitor, as a barrister, as a mediator, as a arbitrator, and perhaps most importantly, twice as a litigant.

The material contained in this paper are for the purposes of raising general awareness of issues and stimulating discussion. Govern yourself accordingly.

**The Story of My Experiments with Truth/Part
II/Preparation for the Case**

An Autobiography or The Story of my Experiments with Truth
by Mohandas K. Gandhi
Preparation for the Case

The year's stay in Pretoria was a most valuable experience in my life. Here it was that I had opportunities of learning public work and acquired some measure of my capacity for it. Here it was that the religious spirit within me become a living force, and here too I acquired a true knowledge of legal practice. Here I learnt the things that a junior barrister learns in a senior barrister's chamber, and here I also gained confidence that I should not after all fail as a lawyer. It was likewise there that I learnt the secret of success as a lawyer.

Dada Abdulla's was no small case. The suit was for £ 40,000. Arising out of business transactions, it was full of intricacies of accounts. Part of the claim was based on promissory notes, and part on the specific performance of promise to delivery promissory notes. The defence was that the promissory notes were fraudulently taken and lacked sufficient consideration. There were numerous points of facts and law in this intricate case.

Both parties had engaged the best attorneys and counsel. I thus had a fine opportunity of studying their work. The preparation of the plaintiff's case for the attorney and the sifting of facts in support of his case had been entrusted to me. It was an education to see how much the attorney accepted, and how much he rejected from my preparation, as also to see how much use the counsel made of the brief prepared by the attorney. I saw that this preparation for the case would give me a fair measure of my powers of comprehension and my capacity for marshalling evidence.

I took the keenest interest in the case. Indeed I threw myself into it. I read all the papers pertaining to the transactions. My client was a man of great ability and reposed absolute confidence in me, and this rendered my work easy. I made a fair study of book-keeping. My capacity for translation was improved by having to translate the correspondence, which was the most part in Gujarati.

Although, as I have said before, I took a keen interest in religious communion and in public work and always gave some of my time to them, they were not then my primary interest. The preparation of the case was my primary interest. Reading of law and looking up law cases, when necessary, had always a prior claim on my time. As a result, I acquired such a grasp of the facts of the case as perhaps was not possessed even by the parties themselves, inasmuch as I had with me the papers of both the parties.

I recalled the late Mr. Pincutt's advice – facts are three-fourths of the law. At a later date it was amply borne out by that famous barrister of South Africa, the late Mr. Leonard. In a certain in my charge I saw that, though justice was on the side of my client, the law seemed to be against him. In despair I approached Mr. Leonard for help. He also felt that the facts of the case were very strong. He exclaimed, 'Ghandi, I have learnt one thing, and it is this, that if we take care of the facts of a case, the law will take care of itself. Let us dive deeper into the facts of this case.' With these words he asked me to study the case further and then see he again. On a re-examination of the facts I saw them in an entirely new light,

and I also hit upon an old South African case bearing on the point. I was delighted and went to Mr. Leonard and told him everything. 'Right,' he said, 'we shall win the case. Only we must bear in mind which of the judges takes it.'

When I was making preparation for Dada Abdulla's case, I had not fully realized this paramount importance of facts. Facts mean truth, and once we adhere to truth, the law comes to our aid naturally. I saw that the facts of Dada Abdulla's case made it very strong indeed, and that the law was bound to be persisted in, would ruin the plaintiff and the defendant, who were relatives and both belonged to the same city. No one knew how long the case might go on. Should it be allowed to continue to be fought out in court, it might go on indefinitely and to no advantage of either party. Both, therefore, desired an immediate termination of the case, if possible.

I approached Tyeb Sheth and requested and advised him to go to arbitration. I recommended him to see his counsel. I suggested to him that if an arbitrator commanding the confidence of both parties could be appointed, the case would be quickly finished. The lawyers' fees were so rapidly mounting up that they were enough to devour all the resources of the clients, big merchants as they were. The case occupied so much of their attention that they had no time left for any other work. In the meantime mutual ill-will was steadily increasing. I became disgusted with the profession. As lawyers the counsel on both sides were bound to rake up points of law in support of their own clients. I also saw for the first time that the winning party never recovers all the costs incurred. Under the Court Fees Regulation there was a fixed scale of costs to be allowed as between party and party, the actual costs as between attorney and client being very much higher. This was more than I could bear. I felt that my duty was to befriend both parties and bring them together. I strained every nerve to bring about a compromise. At last Tyeb Sheth agreed. An arbitrator was appointed, the case was argued before him, and Dada Abdulla won.

But that did not satisfy me. If my client were to seek immediate execution of the award, it would be impossible for Tyeb Sheth to meet the whole of the awarded amount, and there was an unwritten law among the Probandar Memans living in South Africa that death should be preferred to bankruptcy. It was impossible for Tyeb Sheth to pay down the whole sum of about £ 37,000 and costs. He meant to pay not a pie less than the amount, and he did not want to be declared bankrupt. There was only one way. Dada Abdulla should allow him to pay in moderate instalments. He was equal to the occasion, and granted Tyeb Sheth instalments spread over a very long period. It was more difficult for me to secure this concession of payment by instalments than to get the parties to agree to arbitration. But both were happy over the result, and both rose in the public estimation. My joy was boundless. I had learnt the true practice of law. I had learnt to find out the better side of human nature and to enter men's hearts. I realized that the true function of a lawyer was to unite parties riven asunder. The lesson was so indelibly burnt into me that a large part of my time during the twenty years of my practice as a lawyer was occupied in bringing about private compromises of hundreds of cases. I lost nothing thereby – not even money, certainly not my soul.

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