

## Alternate Dispute Resolution

## FOCUS

## New Act helps establish Ontario as world centre for ADR

Canada was the first country to adopt the UNCITRAL Model Law on International Commercial Arbitration back in 1986. But it has been slower to adopt the UNCITRAL Model Law on International Commercial Conciliation, which represented a 2002 consensus among the 90 member nations that participated in its preparation and drafting.

In passing the *Commercial Mediation Act, 2010*, Ontario has now followed Nova Scotia in adopting legislation based on the Conciliation Model Law. The Ontario Act is an important development in efforts to demonstrate to international parties that the province is friendly to alternative dispute resolution.



RANDY PEPPER

#### Advantage of the new legislation

The central advantage of the new legislation is the ability to register with the court minutes of settlement arising out of a mediation, in order to have them treated like a judgment for enforcement purposes. There is no need for any court proceeding before the mediation occurs.

The legislation provides that settlement agreements or minutes of settlement “are binding

on the parties to the mediation who sign them”: s. 12. As a result, if parties resolve a commercial dispute before a mediator, a party wishing to enforce the settlement agreement can apply to a judge for judgment in the terms of the agreement or for an order authorizing the registration of the agreement. Once registered, the settlement agreement has the same force and effect as if it were a judgment, and the costs related to the registration of the settlement agreement are recoverable “as if they were sums payable under a judgment”: s. 13(7).

The Nova Scotia and Ontario Acts set out best practices for the conduct of commercial media-

tions. Prior to this legislation, there was no legislative framework in Canada to make the mediation process more certain and reliable for participants, something commercial parties often find attractive.

There are conflicting views on whether formalising mediation in legislation will do more harm than good. Some argue that the very reason why mediation works and is gaining popularity is precisely because it is not structured and regulated. The opponents of formalized mediation can take comfort in subs. 2(2) of the Ontario Act, which provides that the parties to a commercial mediation can

agree not to have the Act apply to the mediation.

#### Best practices

The new legislation deals with fundamental issues in mediation, such as the commencement and termination of mediations, the appointment of the mediator, confidentiality, disclosure and admissibility of evidence in other proceedings.

The new legislation will have an impact on how mediators are selected. In the past, it has been common to appoint mediators without reference to potential conflicts of interest, on the theory that mediators are not adjudica-

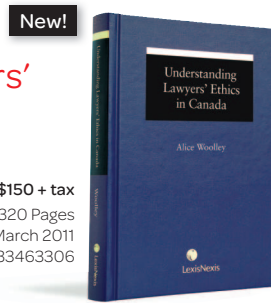
See **Commercial** Page 12

Butterworths®

### Understanding Lawyers' Ethics in Canada

Alice Woolley, B.A., LL.B., LL.M.

**\$150 + tax**  
Approx. 320 Pages  
Hardcover | March 2011  
ISBN: 9780433463306



#### Conducting Yourself Ethically In Your Day-to-Day Practice

Legal ethics expert Alice Woolley has written a thorough and scholarly review of the legal and ethical duties every lawyer should follow in order to manage risk and make prudent decisions in everyday practice. This useful text sets out numerous ethical issues lawyers face in their dealings with clients – complete with analysis, commentary and insight. This book is highly recommended for every lawyer who wishes to represent his or her client to the fullest, while at the same time, remain within the boundaries of legality and of ethical practice.

#### Key Features

- Provides an excellent summation of the duties and responsibilities lawyers must follow
- Examines case law and disciplinary decisions with respect to lawyer misconduct
- Looks at ethical issues arising in areas such as:
  - Lawyer-client relationship
  - Advocacy
  - Lawyer-client trust and confidence
  - Client perjury
  - Dealing with witnesses
  - Conflicts of interest
  - Criminal law
  - Access to justice
- Contains the totality of the codified duties of lawyers in Canada, referencing specifically the codes of conduct in New Brunswick, Quebec, Ontario (Upper Canada), Alberta and British Columbia, as well as the model codes of the Canadian Bar Association and the Federation of Law Societies

Order Today! Take advantage of the **30-Day Risk-Free\*** Examination.  
Visit [www.lexisnexis.ca/bookstore](http://www.lexisnexis.ca/bookstore) or call 1-800-668-6481

Please quote Reservation Code **3306** when ordering.

LexisNexis®

\* Pre-payment required for first-time purchasers.

Price and other details are subject to change without notice. We pay shipping and handling if payment accompanies order.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Butterworths is a registered trademark of Reed Elsevier (U.K.) Limited and its affiliated companies. Other products or services may be trademarks or registered trademarks of their respective companies. © 2011 LexisNexis Canada Inc. All rights reserved.

## Enforcing arbitration agreements against non-signatory parties

Serious problems can arise when a crucial party to a transaction has not signed the document which contains the agreement to arbitrate disputes.

*Dallah Real Estate and Tourism Holding Company v. Government of Pakistan*, [2010] UKSC 46, a recent decision of the new Supreme Court of the United Kingdom (replacing the function formerly served by the House of Lords), involved a contract between Dallah and a trust created by the government of Pakistan for the construction of housing for pilgrims to the Holy Places in Saudi Arabia. The trust was dependent for its continued legal existence on the passage of regulatory ordinances by the government at frequent intervals.

The obligations of the trust were guaranteed by the government, but the government did not sign the agreement that contained the arbitration clause, which only referenced disputes between the trust and Dallah. The trust did not have its own letterhead. It is clear that the government, through the Ministry of Religious Affairs, controlled the trust and conducted the trust's dealings with Dallah with reference to the project.

The trust ceased to exist when the government of Benazir Bhutto fell from power and the necessary ordinances to continue the existence of the trust were not passed by the new government. The government decided not to pursue the project, and started an action in the courts of Pakistan in its own name, seeking a declaration that Dallah, by its actions, had repudiated the agreement. Dallah pursued its



WILLIAM G. HORTON

“

The government took the position that it was not a party to the agreement that contained the arbitration clause.

rights by initiating an International Chamber of Commerce (ICC) arbitration. However, the government took the position that it was not a party to the agreement that contained the arbitration clause.

The ICC arbitral tribunal, which conducted hearings in France as required by the arbitration clause, decided unambiguously that it did have jurisdiction over the government on the basis that the involvement of the government in the negotiation and performance of the contract established a common intention of the parties that the government was the “true party” to the agreement. In reaching this conclusion, two members of the tribunal noted that the case fell “very close to the line” which requires that the separate juridical personalities of distinct legal entities be respected. They observed that,

while the facts of the government's involvement taken individually may not have established a common intention to be bound, taken as a whole they were satisfied that such an intention had been established.

All of the judges in the three levels of English courts which considered the enforceability of the award disagreed with the conclusion reached by the tribunal. They held that the government was not bound by the agreement to arbitrate, and that a common intention of the parties to bind the government to the arbitration clause had not been established by the facts of the case.

Within the decision of the U.K. Supreme Court, the reasons of Lord Collins, who is also the modern editor of *Dicey, Morris and Collins on the Law of Conflicts*, provides a broad and illuminating review of many key aspects of English law and international practice pertaining to arbitration. These include the right of a tribunal to determine its own jurisdiction, the respective roles of the courts at the seat of the arbitration and in other jurisdictions in which the award is sought to be enforced, the law applicable to the issue of who is a party to an international arbitration agreement and the circumstances in which a non-signatory may be held to be bound by an agreement to arbitrate.

As with all of Lord Collins' legal expositions, time spent reading his decision is informative and rewarding. However, the stark conclusion that the government was not bound to arbitrate the dispute will leave many Can-

See **Non-signatories** Page 12

## Alternate Dispute Resolution

## FOCUS

## Corporate lawyers should update their dispute resolution precedents

## Commercial

Continued From Page 10

tors, but facilitators. However, the Ontario Act provides that a person who is asked to be a mediator is required to make enquiries to determine if a current or potential conflict of interest exists, as well as any circumstances that may give rise to a reasonable apprehension of bias.

This duty of disclosure continues until the termination of

the mediation. A potential mediator is deemed to have a conflict if the mediator has a "financial or personal interest in the outcome of the mediation" or "an existing or previous relationship with a party or a person related to a party to the mediation": s. 7(6). Further, there is a prohibition on a mediator acting as both a mediator and arbitrator, unless the parties otherwise agree.

The Ontario Act applies only to "commercial disputes," which

are broadly defined. The legislation does not apply to collective agreements, family law matters, accident benefit issues with insurers or the existing mandatory mediation provisions under the *Rules of Civil Procedure*.

## Drafting ADR clauses

Corporate lawyers who draft dispute resolution clauses may want to refine their precedents to provide that, when a dispute arises and before litigation or

arbitration is commenced, the parties will proceed with a mediation pursuant to the new legislation. If a settlement is reached, the party who then needs to enforce the settlement will have a reasonably straightforward enforcement mechanism that could avoid the need for more protracted litigation or arbitration.

## International ADR in Ontario

There were a number of steps taken in 2010 to try to establish

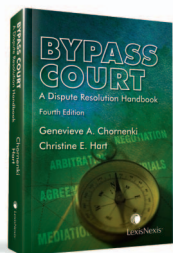
Ontario, and Toronto in particular, as a preferred place for international commercial dispute resolution. For example, the past year saw the formation of the Toronto Commercial Arbitration Society (<http://torontocommercialarbitrationsociety.com>) with the ambitious objective of promoting and developing Toronto as a world centre for commercial arbitration.

The Ontario Act represents another step in this direction. The new legislation shows international parties that Ontario is a jurisdiction that promotes the timely and cost-effective resolution of commercial disputes. ■

*Randy Pepper is a mediator and arbitrator with ADR Chambers, chair of the Marketing and Communications Committee of the Toronto Commercial Arbitration Society and a barrister in Toronto who acts on a variety of international and domestic mediations and arbitrations.*

## Butterworths® ADR, Mediation, and Arbitration Titles

Everything you need to cost-effectively and efficiently prepare for and engage in the appropriate dispute resolution process.

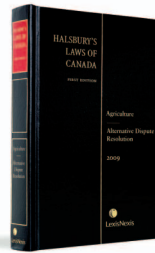


\$115 + tax | Approx. 384 Pages  
Softcover | March 2011  
ISBN: 9780433462996

Bypass Court – A Dispute Resolution Handbook, 4<sup>th</sup> Edition **New Edition!**

Genevieve A. Chornenki &amp; Christine E. Hart

Recourse to dispute resolution processes such as mediation and arbitration is increasing as litigants look for more practical means of resolving their disputes. This authoritative and accessible work provides practical advice on how to select, prepare for and engage in a range of dispute resolution processes and includes such invaluable tools as analytical work sheets, mediation and negotiation agreements, and checklists.

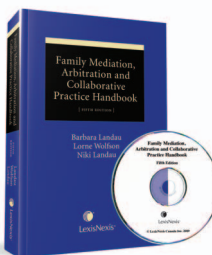


\$135\* + tax | 70 Volumes  
Hardcover | Billed as Issued  
ISBN: 9780433454946  
\$270 + tax | 2 Volumes  
804 Pages | Hardcover | 2009  
ISBN: 9780433463634

## Halsbury's® Laws of Canada – Agriculture / Alternative Dispute Resolution

Dr. Donald Buckingham / Duncan W. Glaholt &amp; Markus Rotterdam

The *Alternative Dispute Resolution* volume is an invaluable resource for understanding the increasingly popular options available to resolve disagreement between parties without resorting to traditional litigation. Topics include: legislation requiring alternative dispute resolution; negotiation, mediation and arbitration; ombudspersons, community and faith based dispute resolution processes; conciliation; court annexed alternative dispute resolution; practice issues; and international commercial arbitration.

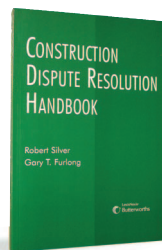


\$90 + tax | 556 Pages  
Softcover + CD-ROM | 2009  
ISBN: 9780433460794

Family Mediation and Collaborative Practice Handbook, 5<sup>th</sup> Edition

Barbara Landau, Lorne H. Wolfson &amp; Niki Landau

This text, now in its fifth edition, is a must have for family law lawyers and other professionals dealing with families facing separation and divorce, including mental health professionals, financial specialists, clergy, educators and judges. Less than 2% of families resolve their family law issues in court, so they need alternative processes that encourage cooperative, timely and cost effective resolutions. This book discusses each of these processes in depth, and helps family law professionals and their clients choose the processes best suited for them.



\$90 + tax | 152 Pages | Softcover  
2004 | ISBN: 9780433444787

## Construction Dispute Resolution Handbook

Robert Silver and Gary Furlong

This best-practices manual shows you how to use alternative dispute resolution to handle construction disputes. Construction mediation experts Silver and Furlong explain strategies for minimizing conflict before, during, and after a project. You'll achieve solutions faster, save significant amounts of money and maintain business relationships for future projects.

## Non-signatory was a state entity

## Non-signatories

Continued From Page 10

adian readers wondering whether a similar result would be reached by a Canadian court.

One may contrast the conclusion reached in *Dallah* with the decision of Ontario courts in *COTISA v. STET International* [1999] O.J. No. 3573, in which the principal of a group of companies was held to be bound by an agreement to arbitrate, although he did not sign the agreement himself. Possibly part of the distinction lies in the fact that the non-signatory in *Dallah* was a state entity.

*Dallah* serves as a colourful reminder of an obvious but frequently overlooked point. The failure to include all necessary parties to a dispute in an agreement to arbitrate can be a fatal error in an arbitration agreement. Even if one is ultimately successful in establishing a right to arbitrate against a non-signatory, the expenditure of time, money and effort to establish that result eliminates virtually all of the benefits of arbitration.

A failure to establish such a right may result in an aggrieved party having no effective remedy. In *Dallah*, the only other alternative would have been to sue the government of Pakistan in its own courts. ■

*William G. Horton practises in Toronto as an arbitrator of Canadian and international business disputes.*

**Order Today!** Take advantage of the **30-Day Risk-Free\*** Examination.

Visit [www.lexisnexis.ca/bookstore](http://www.lexisnexis.ca/bookstore) or call 1-800-668-6481

Please quote Reservation Code 3306 when ordering.



\* Per volume with commitment to purchase the entire 70-volume set.

† Pre-payment required for first-time purchasers. Price and other details are subject to change without notice. We pay shipping and handling if payment accompanies order.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under licence. Butterworths and Halsbury's are registered trademarks of Reed Elsevier (U.K.) Limited and its affiliated companies. Other products or services may be trademarks or registered trademarks of their respective companies. © 2011 LexisNexis Canada Inc. All rights reserved.