

**SECOND MEETING OF THE INTERNATIONAL JUDICIAL DISPUTE
RESOLUTION NETWORK (JDRN)**

MONDAY, 22 MAY 2023 & TUESDAY, 23 MAY 2023

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK**

Introductory Remarks by JDRN Members on Day 1

Speaker: Justice Thomas J. McEwen from the Ontario Superior Court of Justice, Canada

Good morning, my name is Tom McEwen. I sit in Toronto and I am here with my colleague, Justice Conway. First of all, thanks to the JDRN and our Host in the Southern District of New York, and the Judiciary of Singapore for all your hard work in bringing us together in these beautiful premises. Justice Conway and I and Miss Elliott-Magwood, who is from our Department of Justice and who is participating remotely, are all delighted to be here at this wonderful event. I will share our experiences on how we apply the JDR process to our judicial system. So, like many jurisdictions, I am sure our Superior Court in Ontario which is the main trial division has a heavy workload that is only exacerbated by the effects of COVID and most recently by the current economy. Even prior to COVID, however, we realised that if we are going to continue providing timely and effective access to justice, we had to enhance our judicial mediation processes. In Toronto where we sit in teams - criminal, family and civil being the largest - Justice Conway and I sit on the Commercial List which is a small team of seven judges dedicated to hearing insolvency and complex commercial matters. It was created in 1991 and it is the only dedicated list in Canada.

Although all civil courts in the province adhere to the same rules of civil procedure, the Commercial List has its own practice direction which is a document that governs the hearing of matters on our list. An important part of that practice direction deals with case management, dispute resolution and all complex matters are managed by one judge up until trial and it is turned over to a trial judge. As part of that case management or facilitative mediation, the judge in-charge interacts, meets regularly with counsel through a variety of ways - one is called Chambers Appointment where we do scheduling to decide whether or not it should even be scheduled at all or whether it's in our view not worthy of a hearing and proceed from there.

The second common way we do it is through case conferences which I am sure we all do, where we meet with lawyers and try to streamline issues and resolve a dispute without the need for an expensive motion and schedule next steps and keep it moving along. As Justice Conway would agree, we actively discourage unnecessary interlocutory motions and try to get consensus on resolutions at case conferences and the rules also allow us to make rulings on certain matters at case conferences without the need for a motion and if necessary, a motion would follow. The goal of course is to keep the parties focussed on issue resolution and settlement and if not possible, the earliest possible trial dates, with a sensible amount of time being set aside. Much of the Commercial List work involves real time litigation where

businesses need prompt resolutions to their problem, so time is often very important because literally, jobs are on the line.

Throughout the case management system, we keep an eye as to when the value of judicial or private mediation would be appropriate. In our experience, we don't want to conduct it too early – I call that poisoning the well - or show judicial opinions too early as parties don't necessarily understand their case or similarly, they are not nervous enough to settle their case because it is just too early and they still don't know the strength of their own convictions. Timing is everything.

The practice direction also provides that we can send parties to private mediation which we seldom do but we sometimes do that where we feel that parties are bringing several petty quarrels to the court and not properly using the court's limited resources and gives them the message that we do not have the public resources to deal with each and every one of their problems or what I call "become their pet judge". Sometimes, they also want a private mediation outside our place and they have a mediator in mind then that is fine with us.

If trial is pending and we still haven't resolved this through a judicial mediation, we conduct a comprehensive pre-trial conference where the focus is still on settlement. They are conducted in person, if at all possible. We insist on clients being present at those pre-trial conferences. We usually conduct them 6 to 9 weeks before the trial and we find that that's a good spot because they are getting suitably nervous because now, they realize things are about to happen, but they have not yet committed expensive funds towards trial preparations. So, we think that is a bit of a sweet spot. Overall, we have settlement rate of about 85 to 90% of the cases that come to the Commercial List. We tried different variations but what I generally describe in a very general way, we found that that's the most useful process and it is favoured actually by the lawyer who tried other models that have been successful.

We are in the process of updating and improving our practice direction. We will have that out in the next few months and we will be pleased to share it with the JDRN. We currently have one on our website as well. So, we certainly don't believe that's the best or it's the only system. We hope that it may be a system for people to think of other ways to approach judicial dispute resolution, but we also have our ears wide open. For the next two days, we want to look, we want to learn from everybody around this table. We look forward to learning from other jurisdictions as we did last May and I just want to thank everyone again and we are so pleased to be in your company.