WHY ARBITRATION SOMETIMES RESEMBLES LITIGATION

Some litigation counsel criticise arbitration because the time frame and cost especially in complex arbitrations can be about the same as in litigation. It does happen. However, the criticism is somewhat unfair. The direct answer to this criticism is that the parties and their counsel before moving to arbitrate need to step back and look at the facts on the ground much as a general does before commanding his forces to attack.

A good starting point is for counsel to examine the arbitration agreement that the parties have signed. Counsel may find that their clients have signed detailed commercial contracts that contain the barest of arbitration clauses. A proper arbitration agreement not only provides for a process to name arbitrators, but also a chronological list of procedures that will efficiently move the arbitration forward toward a final hearing. And that assumes that a formal hearing is required. It may not be.

At times, the parties have no formal arbitration agreements but have exchanged correspondence that is evidence of agreement to arbitrate. Sometimes, the evidence of parties intent to arbitrate is found in a court issued Statement of Claim which the defendant either admits, or at least, does not deny. Our courts will require parties to arbitrate in such circumstances under the rule in Scott v Avery, an old English arbitration decision.

While counsel examine the facts on the ground, as they should, they may discover one or more missing pieces.

For example, an agreement to arbitrate that does not provide for the following matters will very likely spark controversy along the way unless the parties are prepared to amend their agreement and specifically provide for them. The following list is intended to be illustrative, not all inclusive.

1) The matters to be arbitrated should be specifically listed. The parties may have multiple disputes and for various reasons may not want to arbitrate all of them;
2) The sharing of the expenses of arbitration, such as arbitrator’s fees; costs of rental of a venue for the hearing provided a hearing is necessary; experts

reports; reporters fees/transcript fees. Sharing expenses equally may not work if there are an uneven number of parties on opposite sides of the dispute;

3) The means by which the arbitrator(s) will be selected. If the dollar value of the dispute is more or less than a certain figure, say $50,000.00, are multiple arbitrators really necessary? What are the arbitrators qualifications? If the subject matter is highly technical should multiple arbitrators [eg three] be named, two with technical knowledge and experience and one who is a lawyer. The technical arbitrators may have the better grip on the technical facts. A lawyer will have the edge on procedure, evidentiary rulings and the writing of a formal award at the end of the hearing setting out the arbitrators fact findings, decision as to the winner, damages, other remedies, costs and interest payable;
4) Rules for discovery and document production. Litigation counsel will be comfortable with the Superior Court's Rules of Civil Procedure. Since arbitration is a private consensual process, perhaps the discovery/production process can be simplified;
5) Scheduling of discovery, productions and examinations for discovery assuming the parties really need discovery. If facts are agreed on all sides and if credibility is not an issue, are discoveries really necessary? Can the parties
6) Time limits for discoveries and time limits for presentation of evidence in chief, cross examination and re-examination at the hearing;
7) In appropriate cases such as construction, the use of 'hot tubbing' in order to allow simultaneous expert evidence to be heard and cross examined;
8) Agreement on privacy and confidentiality. The parties may not want their conflicts aired in the media;
9) The role of arbitrators as mediators [med/arb]/
10) Applicability of the court's Rules of evidence or admissibility of hearsay in the arbitrators discretion;
11) Use of hearing briefs.

12) Form of final award, oral v written;

13) Right of appeal on fact, law, both or no right of appeal;

14) Choice of legal jurisdiction;

15) Choice of legal remedies to be applied by the arbitrator.

Where parties move to arbitrate and have not dealt with one or more of these issues, there is a greater probability that one party or another will move for directions to the Superior Court of Justice for assistance which is their statutory right in Ontario under section 6 of the Ontario Arbitration Act. These kinds of motions delay the progress of the arbitration and add to the cost of arbitration making it resemble litigation. As I said at the beginning, everyone needs to step back and take an honest look at the facts on the ground before charging ahead.

One last point. Usually, at the outset of an arbitration, the arbitrators will meet in person or by conference with the parties counsel and review the arbitration agreement. Any of these missing pieces can be raised and dealt with then and there, eliminating the delay and expense of an endless cycle of motions.

Jack Zwicker

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