EFFECTIVE ARBITRATION REQUIRES CREATIVITY

INTRODUCTION

Until Covid 19 impacted Canadian courts in March, 2020 lawyers heard the annual lament of appellate judges about lack of provincial funding for court infrastructure, staff and judicial appointments. Well before Covid impacted court services, Superior Courts in our largest cities often took five years or more for civil litigation to reach trial.

For parties in dispute who cannot afford to allow their conflicts to fester for years, private arbitration is often a viable option provided that it is structured to satisfy four basic objectives; namely procedural simplicity, timely resolution, cost effectiveness and early disposition.

All too often, lawyers who act for clients in commercial arbitration complain that the process is a pale imitation of the Rules of Civil Procedure. What that often means is that the arbitration process has been reflexively designed to follow those Rules. Doing so is self-defeating and inevitably lengthens the time frame for resolution, increases costs, and delays arbitral awards.

Unless we ask ourselves why this happens, private arbitration is doomed not to satisfy its essential purpose. And that is an alternative dispute resolution process that is designed to serve the objectives referred to. One of the principal reasons that litigators rely on the Rules of Civil Procedure has less to do with choice and more to do with lack of familiarity. A cursory look at the curriculum of Canada's law faculties tells us that arbitration is not taught. It shouldn't come as a surprise that litigators who represent clients in arbitration rely on the familiar. And what is familiar are the Rules of Civil Procedure. Unless counsel register for arbitration certificate courses offered by accredited ADR mediation-arbitration providers, simply proceeding to arbitration because the parties have agreed to do so, is very much like a journey without an itinerary.

ARBITRATION SHOULD NOT IMITATE LITIGATION

The reality is that our Rules of Civil Procedure, with limited exceptions, were never designed with simplicity, speed, efficiency, or cost effectiveness in mind. While 'proportionality' in advocacy and cost assessment are elements of our Rules, we still read horror stories about Superior Court trials whose costs exceed damage awards.

In Ontario Rule 53.02 allows for a party's evidence to be given by affidavit rather than in person. As often as not however, trials proceed in the traditional manner. This Rule contains a built-in conflict. On the one hand, it allows for an order permitting a party to give evidence by affidavit made just before, or at trial. On the other hand, such an order can be set aside in the 'interests of justice'.

To make private arbitration work properly, litigators need to familiarize themselves with the arbitration statute that applies in the circumstances. Leaving aside the federal arbitration statute which deals with arbitration of disputes involving the federal government or its agencies, and international disputes, most domestic commercial arbitrations will be decided under provincial arbitration law. In Ontario that statute is the Arbitration Act, 1991.

Unfortunately, this Act leaves a great deal to be desired. It reads like a disordered hodge-podge. For example, of the Act's 60 sections, one of the most useful sections is section 26. It is this section that mandates document based, 'no-hearing arbitration' unless a party requests a hearing. It isn't entirely surprising that some litigators present unaware. As cryptic as this section is, the reason for it is obvious. Not all arbitrations need to be conducted using extensive formal hearings at which witnesses appear to be examined, cross-examined and perhaps re-examined. It isn't every arbitration that requires counsel to make an opening statement, call evidence and argue orally and/or in writing. A short list of subjects that can be efficiently dealt with strictly on a documentary basis are:

i) real estate valuations

ii) share sale/purchase valuations
iii) business asset sale valuations
iv) insurance policy holder damage assessments
v) any contractual dispute that the parties agree does not depend on credibility findings

Typically, section 26 arbitrations begin after the parties select and notify an arbitrator of the proposed arbitration. The arbitrator will receive a jointly authored letter signed by the parties setting out the critical terms of the arbitration followed by indexed, tabbed binders of materials that each party delivers to the other. Liability may be in question. More often, valuation or quantum of damages is the central issue.

This joint letter will also confirm any limitations regarding the arbitrator's discretion. Usually, the arbitrator is told that he has complete discretion to make an award that is fair and equitable on the evidence provided. Alternatively, the arbitrator's may be afforded absolutely no discretion and will be provided with each party's 'offer' and be instructed to choose one or the other. This process is known as 'baseball arbitration'. The arbitrator will inevitably choose the 'offer' that seems most appropriate in the circumstances.

It is disappointing that section 26 'no-hearing arbitrations' are not used more frequently. Depending upon the volume of documentary materials, these arbitrations can be disposed of in a matter of days including delivery of the arbitrator's written award. Usually, these arbitrations are conducted based on a written waiver of the right of appeal under section 45 on questions of law or mixed law and fact. The parties can anticipate an early, final decision that is extremely cost effective. If it happens that the parties have a continuing business relationship that risks being damaged or delayed, the finality and speed of this process is an added benefit that may exceed the value of the issues in dispute.

PRELIMINARY FIRST MEETING

One of arbitration's invaluable processes is the 'preliminary first meeting.' Sections 18 through 26 of the Ontario Arbitration Act, 1991 confer broad procedural power to arbitrators. These powers include making orders regarding delivery of statements of facts and positions, exchange of documents, interim orders to preserve property which may be at risk, setting a timetable for the entire arbitral process and convening further meetings as required.

One of the functions of an arbitrator is discussion with counsel of the volume of document production. Over production of relevant but arguably immaterial documents is an unfortunate feature of civil litigation that doesn't assist the trier and serves to drive up client costs. While the language of the Act is often general, it is also encompassing and empowers arbitrators to do what they need to do. While arbitrators must zealously remain, independent, neutral, fair and unbiased, the arbitration process may be responsive and informal. Arbitrators, like judges must not communicate ex parte.

The so called 'preliminary first meeting' especially in light of Covid, can be done by way of telephone conference call or by video conference. At that meeting counsel will be encouraged to agree to an all inclusive procedural time table. Generally, the parties do not participate. The arbitrator has statutory authority to issue binding directions under sections 18 and 25 of the Act whether or not the parties consent. Arbitrators are not mere order takers and have statutory power to assert their authority. Trying to obtain consent is always preferable bearing in mind that arbitrator appointments are based on consent and consent can be revoked under section 14. Effective arbitration carefully balances exercise of authority against facilitation so as to encourage procedural buy-in.

Although many counsel will have prepared and exchanged their own procedural time tables in advance, an arbitrator's duty is to engage in a discussion of the costs and benefits of agreeing to an over extended and unnecessary process that impedes early resolution and drives up the parties' costs. For example, there is no reason not to conduct a section 26 'no hearings arbitration' if the vast majority of the issues are governed by the parties' documents and do not depend on findings of credibility. There is no logical reason that credibility issues cannot be dealt

with using in person evidence or by way of cross-examination on a party's affidavit using a hybrid process. The promise of ADR, and arbitration in particular is its adaptability to process design. Arbitrators need to initiate and encourage this kind of discussion with counsel.

The key to effective arbitration is creative process design so as to maximize simplicity and efficiency, and minimize time spent, and the parties' costs. Much of this depends on whether counsel are prepared to engage in open discussion putting aside the Rules of Civil Procedure.

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April 30, 2021