MEDIATION AND ARBITRATION REIMAGINED

Introduction

Alternative dispute resolution as multi-faceted as it is, makes some simple, central promises. At the core of mediation is the design of a process that encourages parties in dispute to reject the 'win-lose' constraints of civil litigation and all of the delays, complexity, psychological fatigue, and its high costs.

At the core of arbitration is design of an adjudicative process which draws upon the best of our Rules of Civil Procedure without becoming a mere carbon copy.

It is the purpose of this paper to re-imagine textbook mediation and arbitration processes to see whether the product we offer can better meet the needs of clients ranging across the spectrum from speed, to simplicity, to reduced fatigue, to cost savings and early resolution.

My experience as a lawyer and ADR practitioner leads me to believe that as ADR practitioners, we can and need to do better. Ramos v Centaur tells of my experience during a half-day mediation. Walters v ADFK Building Corporation tells of my experience in an arbitration.

A mediation: Ramos v Centaur Manufacturing Co.

I completed a half day mediation last year that was a complete waste of time. I have referred to the parties using pseudonyms to protect their rights to privacy and confidentiality. This mediation was referred by an unfamiliar litigation counsel.
Each of the parties was legally represented

Well in advance of the agreed date for mediation, I wrote to each counsel and requested that I be provided with client statements setting out the relevant facts

together with a copy of their Statements of Claim and Defence. This mediation concerned a Toronto employment dismissal action, mandatory under Rule 24. Counsel obliged and each provided me with a concise document brief containing the pleadings and relevant business records.

Ramos was an assembler employed in Centaur's assembly plant for 5 years. In 2019 Ramos had an argument with his supervisor that got out of hand. Ramos lost his temper and swore at the supervisor. This was not the first time that this had happened. He was reported to the owner and summarily dismissed. Centaur did not have any system of progressive discipline and Ramos did not receive any prior warning before being dismissed. The employer later sought legal advice and was told that the manner of Ramos' termination was problematic. He felt badly and knowing that he had not followed proper termination procedure decided to offer Ramos his job back on the same terms. The offer was made orally by telephone. Ramos was off work for 17 days. After agreeing to return to work Ramos let his temper get the better of him and failed to attend for work as agreed during that telephone conversation. He retained counsel and issued a Statement of Claim. Mediation was scheduled by which time he had been out of work for 9 months.

Ramos' document brief calculated his wage loss at $25,000.00. He had claimed EI which paid him 55% of has regular salary. This was a clearly avoidable dispute. Both parties over reacted making a difficult situation worse. In preparing for the mediation I tossed around the idea of splitting the difference in his claim. The idea was for Ramos to concede one half of his loss and encourage his employer to pay the other half to his existing RRSP. The after tax costs to the employer would have been marginal as a Small Canadian Business taxable at 9%. Ramos could have deferred paying income tax while these funds remained in his RRSP. The employer stated during mediation that he asked Ramos to return to work. I waited until brainstorming to mention my idea.

Counsel for Ramos was edgy and sarcastic from the outset. He did not seem to care about the table setting rules especially the rule requiring that parties behave

respectfully and avoid personal attacks and blame. Counsel for the employer was less aggressive but controlled the dialogue as though in court.

Ramos did not seem engaged in the process assuming that he understood it. His biggest concern was about his lawyer's mounting account. When counsel stopped bickering, I made my suggestion. We broke for 20 minutes and after we resumed our discussion Ramos lawyer immediately rejected it. Neither he nor his counsel made any alternate proposal and walked out in a huff.

My debrief

After it ended I debriefed and asked myself the following questions:

1) Was Ramos prepared for mediation.by his counsel?
2) Was it at all likely that he did some research on his own concerning the mediation process?
3) Was Ramos' counsel familiar with mediation as an 'interest based' and not a 'rights based' process?
4) Did the parties approach mediation with an open mind or did they attend only because Rule 24 required them to do so?
5) Was Ramos' counsel conflicted because his legal account would have made any reasonable settlement improvident for his client?

I quickly came to the conclusion that no one in the room had the least intention of settling unless settlement was on his own terms. The concept of compromise was furthest from their minds. I was the only one to suggest compromise as a basis to end what was a low dollar level claim in the Superior Court of Justice. Counsels' best estimate was a four day trial meaning likely fees of about $30,000.00 on both sides. If Ramos were to win, he would still owe his lawyer a great deal of money and if the employer were to win it might not recover all of its costs. Reason took a flying leap out the window that day. It is a challenge for a mediator to talk to himself.

Several months later I thought about the standard text book mediation process and what I have come to perceive as its weaknesses.

My concerns about process

The principal weaknesses of the standard mediation textbook approach are:

1) clients who are uninformed about the process; .
2) lawyer-combatants who are uninformed or dismissive of mediation;
3) clients who by reason of the work they do are unlikely to do any research about mediation;
4) clients whose education and/or culture predisposes them to see the world in strictly binary terms [ie win-lose]
5) clients who as a result of education, socialization and personality view compromise as weakness;
6) clients who neither understand nor place any value on the psychological damage done by protracted conflict.

The next ADR process was a two party arbitration completed late last year.

An arbitration: Walters v ADFK Building Corporation

Last year I was asked to arbitrate a failed residential real estate purchase**.** Walters purchased a residential construction condominium unit from ADFK Building Corporation. The interim occupancy date was stipulated to be three years after the date the Agreement of Purchase and Sale was signed. The focal closing date was to be determined in accordance with Tarion's statutory requirements.

Walters paid all of the required deposits. The total of his paid deposits were $645,000.00. The deposits remained in the builder's lawyer's trust account.

It appears that both Walters and the builder attended to their respective contractual obligations. Approximately six months before the final closing date two events transpired that doomed the closing. The first was that the builder became financially over extended. The second was that an unexpected rise in the real estate market significantly drove up the prices of all similar units in the area.

The builder ran out of cash and could not complete. It was also tempted to default knowing of sudden rise in the prices of these units.

The builder defaulted. The Agreement of Purchase & Sale contained an arbitration clause. I was appointed to arbitrate. At the preliminary first meeting counsel were invited to propose a time table for the arbitration. Both lawyers were litigation counsel. They seemed to be equally experienced and were co-operative with one another. The builder's counsel had a more forceful personality than his counterpart.

Both litigation counsel seemed almost reflexively to assume that they were obliged to follow the Rules of Civil Procedure. The central issue in this dispute was not complex. Whether or not the builder defaulted was a question of fact. Either the builder was ready, willing and able to complete on closing or it was not.

The Statements of Facts and Positions that each counsel sent to me agreed that the builder ran out of cash and was unable to pay off an outstanding mortgage and register a discharge as it was contractually obligated to do. That the builder may have seen an opportunity to remarket this unit and realize a higher price was a mere matter of intention. .

At the preliminary first meeting counsel advised me that they had not yet prepared or exchanged document briefs. They told me that there were limited oral

discussions between Walters and the builder before closing and that no written record was made or kept of these discussions.

Counsel decided to move ahead with examinations for discovery and indicated that they would each order transcripts. It appears that the principle of the builder spoke English weakly and would need the assistance of a licensed interpreter during discovery and during the hearing.

I asked counsel about the length of their documents briefs. The impression left was that they would be substantial. I cautioned them that Covid 19 would necessitate a video conference for examinations for discovery and for the hearing. I suggested that electronic document filing could be problematic. It is not unheard of for e filed documents to go missing. Searching for them during a hearing is more than just a waste of expensive time. It is annoying. They were unmoved. The point that I made was that document brevity was the best policy not merely because it would facilitate a speedier, less expensive hearing but would minimize the risk of any possible technical disruptions. Counsel were not inclined to reconsider.

I was notified before the hearing that there would only be two witnesses, the claimant, Walters and the president of the builder.

Counsels' best time estimate for the hearing was three days including argument. The hearing lasted almost four days. I retired to consider the evidence and made my award in favour of the claimant holding that the builder defaulted. I awarded damages consisting of the paid deposits and loss of bargain based on the increased price of similar units in the vicinity. One critical piece of evidence that was introduced at hearing was that the builder owned some land subject to a small first mortgage that could be refinanced. Costs together with pre and post judgment interest reflected the builder's refusal to honour his contractual obligations.

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My concerns about process

Several months after making my award I thought about this particular arbitration process and some of the weaknesses that prolong the process, making arbitration longer, and much more expensive.

The main weaknesses of the typical process are:

1) litigation counsel who approach arbitration as though they were litigating;
2) litigation counsel who demonstrate a lack of awareness of the basic workings of the Arbitration Act;
3) unwillingness of counsel to narrow issues and reduce the volume of documentary evidence and hearing time;
4) unwillingness of counsel to consider creative arbitration alternatives such as ‘no hearing arbitration’ on documents and limited in-person evidence on undocumented evidence requiring findings of credibility;
5) counsel’s lack of awareness of ‘no-hearing‘ arbitration in documentary contract disputes where they agree that credibility is not an issue

Conclusions about the typical mediation process

The Ramos v Centaur mediation is but one of my more frustrating, unsuccessful mediations over the years In the process of debriefing, mediators can and should question what they might have done to change the result. We all need to learn from our mistakes.

However, at a certain point we need to ask ourselves whether the standard Textbook model for mediation simply doesn’t work for everyone for the reasons enumerated. One size fits all mediation make no more logical sense than one size fits all clothing. ADR provides us with excellent tools with which to fit the process to the individuals we deal with. Fitting clients and counsel indiscriminately to a one-size process is a bit like playing dice. The odds of consistently winning are low.

This paper has been written to reduce pure chance and increase the likelihood of success.

Conclusions about the typical arbitration process

One of the features of litigation is over writing and over speaking. It was not that Long ago that the Rules of Civil Procedure imposed limits on the time spent on examinations, and required brevity and proportionality. It may be that old habits die hard. Retired Ontario Court of Appeal Justice John Laskin repeatedly warned loquacious lawyers not to wind up but rather to pitch. Arbitration given its adaptability and flexibility should profit from these Rule changes even though they do not apply. This paper will examine some approaches that could encourage change.

Mediation: Dealing with litigation counsel

For those of us who practice mediation more often than not any dispute that is complex and has high dollar value will arrive at our door step with legal counsel seeking our involvement before hearing or meeting the disputants. It doesn't take long to separate litigation counsel who through no fault of their own are geared to a binary process. And that logic shapes their communication style. Almost from the outset litigators pounce on any statement that might be appear critical of their client.

While contemporary law school curricula require at least one ADR course, the educational pattern for graduating lawyers remains rooted in case law and oral and written legal speak. The University of Ottawa law faculty stands alone in Canada requires three years of writing courses given by 'trained writers'. Law students do not naturally speak and write like lawyers. That communication style is learned unless an alternative is provided. The problem with legal speak is not merely that clients who pay their lawyers' bills glaze over, not understanding what is meant. The added problem is

that adversarial content that may not interest them. Most clients look to their lawyers as problem solvers, not as lecturers.

As I just said, litigators who represent clients at mediations as though they were ready for battle increase the likelihood that the mediation will end in stalemate. The first question then is how we as ADR practitioners can help both the lawyers and their clients before meeting them in plenary session.

The text book model of mediation

As we all know, the text book model of mediation consists of five, and with any luck six steps.

1) introductions and table setting
2) disputants fact statements
3) probing for the parties' interests
4) listing their shared interests.
5) brainstorming
6) recording agreement

While this process is sequential and logical all too often the participants are simply unready to engage productively. And the two principal reasons for this are the propensity of many litigation counsel to be disruptive when they feel the need to protect what they view as their client's legal interests. In doing so, they subordinate or do not fully appreciate that the fundamental purpose of mediation is practical compromise.

Many clients attend mediation unprepared to engage productively because they lack skill in the art of positive communication. The standard textbook approach all too often places participants in the position of scoring goals without a clear shot on the goal line

Dealing with clients

All too often clients are encouraged to be direct and honest. The problem is that at times honesty produces bluntness motivated by anger, frustration and blame. It takes practice to bite our tongue and to resist the understandable temptation to fire back. It's no surprise that many mediations go off the rails when parties egged on by their lawyers turn mediation into a circular debate about legal rights, thereby widening the chasm.

The mediator's task is to appeal to all participants during a customarily brief 'table setting' to establish and seek agreement to positive rules of engagement. Prevailing upon parties and counsel to behave productively is often easier said than done.

The need for pre-mediation coaching

We need to face up to the reality that our culture socializes us to respect and emulate winners, not losers. While we are taught to respect decency, fair dealing and good sportsmanship both at work and in our social lives, coming second never feels good.

It is not surprising that some clients in conflict who have decided to participate in mediation [assuming that mediation is not legally required] are reflexively ready for combat. The very idea of strategic communication geared to reaching compromise is challenging for many. This 'win-lose culture' is at the root of our civil and criminal justice system. US President John F. Kennedy may have said it best when he wrote the words

" Victory has a thousand fathers. Defeat is an orphan."

The challenge of personality

The worst challenge for mediators lies in dealing with diametrically opposite personalities involving one party who is extremely aggressive, the other extremely passive. Where both are passive they are more likely to take direction from the mediator. Should both be equally aggressive the mediator can remind them of the 'table setting' requirement for respectful behaviour and use multiple time outs to allow them an opportunity to cool down. Should neither of these approaches work, at some point they are likely to run out of steam and lower the decibel level.

The key to successful mediation lies in the mediator insisting upon early, direct discussion with the parties to determine their personality types. Where appropriate, pre-mediation coaching should be considered and discussed in order to mitigate against unexpected, explosive behavior during mediation.

The following hypothetical fact situation is not atypical and will illustrate use of pre-mediation coaching.

Coaching Williams v Russell : a scenario

Let us assume that Mr. Williams is the principal of a small company that manufactures automobile parts. He has two adult children who are each professionals and have no interest or previous involvement in his business.

He is 58 years old and has built a profitable business over twenty five years that has annual gross revenues of $25,000,000.00 and a net income before income tax of $18,000,000.00. He is known and well respected in his community.

He decides to sell 40 percent of his common shares to Mr. Russell, a younger, successful competitor who lives out of town, in the hope of not only growing his company but also of having someone to succeed him when he decides to retire. He knows that his competitor is successful but knows little about him as a person. Russell is 35 years old.

While both parties extensively share financial data, and have their accountants and lawyers advising them, Mr. Williams is somewhat trusting and doesn't sense that Mr. Russell may have ulterior motives. They complete their share sale/purchase transaction and all is well for the first six months after closing.

Mr. Russell begins to take extended holidays and doesn't believe that he need to consult with Mr. Williams in advance. Williams is a very kind and generous man who hates to offend. He hates to argue. Russell on the other hand has an aggressive nature and can be blunt and hurtful.

Eleven months after closing, Mr. Williams learns from a friend that Russell is planning to offer his shares to a third party. Williams is shocked and knows nothing about this third party. Williams and Russell have a signed Shareholders' Agreement that permits either to offer his shares for sale no earlier than 12 months following closing. When Russell asked Williams to insert this provision, the latter agreed. Unfortunately for Williams, no flashing red lights went off. Russell accordingly has every right to sell his shares. Williams asks Russell about his intentions and Russell confirms that he is indeed looking to sell his shares.

Apart from Mr. Williams shock at this turn of events, he has invested sixty percent of the share sale proceeds which are locked in for 18 months. They cannot be withdrawn. Let's assume that Williams is aware that he has a weak legal position. Also assume that he is passive, easily intimidated, and uncomfortable proceeding to a textbook mediation session. He doesn't feel ready and prefers to participate in pre-mediation coaching. On the other hand, Russell is extremely self-confidant and is disinterested in pre-mediation preparation. Russell feels that he has the upper hand.

Pre-mediation coaching scenario

Since Russell will only agree to participate in a textbook mediation session, the named mediator cannot remain neutral, independent and unbiased if he advocates a particular process which Russell rejects.

The mediator, Allan Jones, wants to assist both parties to mediate their dispute but is caught in a procedural conflict between them.

Assuming that Russell is unfamiliar with the mediation process, the solution to this disagreement would involve the mediator Jones telling Williams and Russell at their very first discussion that their personality differences in his view have the potential to trigger an explosion during mediation which could be counter-productive and defeat the possibility of their reaching any agreement. Mediators have a duty to ensure that the mediation provides safety to all participants. Because Williams and Russell are in conflict about the mediation process, Jones has two options. The first is to decline to act as the mediator knowing that this assignment will be extremely challenging.

Or, he could move forward knowing that toughness and fairness are not mutually exclusive. Indeed when the facts in play so require, the mediator should be direct and blunt in cautioning both parties about the risks of proceeding to mediation without pre-mediation coaching.

As counter intuitive as it may seem, toughness and fairness are mutually inclusive. Conducting a mediation when the risks of failure are obvious does none of the participants any good including the mediator who would prefer to be paid for a successful mediation rather than a disaster.

During this discussion the mediator could sweeten the conversation by suggesting that during pre-mediation coaching time could be devoted to modeling *effective problem solving*. The parties might just buy in paving the way for their final meeting.

One last point to consider. People in conflict often fail to choose their words wisely. They speak too much and in doing so sometimes trigger new problems. Modelling effective communication can be very helpful.

How coaching might be approached

Assuming that Russell understands the very real risk that mediation without coaching is likely to fail, the following comments provide a helpful road map.

'Table setting': a simulation

Jones, the mediator should discuss the critical importance of listening more and speaking less. This discussion should not be rushed. Jones needs to take the necessary time to satisfy himself that parties and counsel really understand the rules. Jones needs to hammer away the idea that 'intensive listening' without interruption allows the opposite party to be fully understood. It encourages mutual respect and helps to de-escalates conflict. Because Williams and Russell are obviously mismatched personalities ensuring that they both understand this reduces the risk of verbal explosions that could cause a failed mediation.

Because one of the pillars of mediation is psychology, it is critical for Jones to engage in a behavioural discussion that helps the parties modify their speaking and listening styles. The purpose of this behavioural change is strictly transactional.

Preparing fact statements: a simulation

Very often lawyers prepare a fact statement for their client. Although these are intended to be 'brief' that isn't always the case. Effective advocacy includes effective writing. Brevity is the key. It is a good idea for any reasonably literate client to prepare his own fact statement and have his lawyer edit it only if necessary. The more the client voices, the more respect the other party will have for him. Hiding behind a lawyer is less likely to be as effective. Again, people have varying literacy levels. So the mediator can only do his best to level the playing field.

Assuming that the parties are legally represented, the duty of each party's lawyer is to prepare him for mediation. Merely talking about the process is not the same as actively engaging the client in the process.

Listing 'shared interests': a simulation

Jones will compile a list of each party's interests and of their shared interests. It is a good idea to re-inforce what they have in common. Making check-lists is purely administrative. It is merely a bridge to brainstorming and deserves to be clearly explained and reinforced.

Brainstorming: a simulation

ADR like law is jargonistic. We should not assume that the public is versed in our jargon. I can assure you that in annual surveys of popular North American reading material, Fisher and Ury's *Getting to Yes* doesn't make the list. So it's vital for us to translate technical jargon by using popular language. I suspect that most people who are not familiar with the word 'brainstorming' will understand the words 'problem solving or 'puzzle'. Use of straight forward language makes clients more comfortable and builds trust in us and in the mediation process.

Approaches to problem solving: a simulation

There are two different approaches to this. The first is to encourage the clients to propose solutions based upon their shared interests. In my experience this works well with sophisticated clients who are highly literate and whose work experience demands problem solving skills. Of course, it is preferable for clients to generate their own solutions and thereby take ownership.

Not every client has experience in critical thinking without which they will lack problem solving skills. Jones will know quickly based on his interactions whether or not either or both parties have problem solving skills. If not, he will need to direct the discussion in order to move it forward.

That Russell has the legal right to sell his shares after 12 months is not insurmountable. There are two ways of approaching this.

Subject to the Shareholders Agreement, Williams could offer to repurchase them and block an outside, unknown buyer from acquiring them. On the other hand, if the Shareholders Agreement allows a sale to a third party, subject to Williams 'right of refusal', usually that takes time. The buyer will want his lawyer and accountant to do all of their 'due diligence'. Accounting due diligence can take the form of a full or limited audit and delay a quick closing.

If a quick closing and cash is important to Russell, Williams may be able to persuade him that the resale price will have to be reduced. Williams will advise that he's stretched for cash because of his locked in investment. While Williams may feel betrayed by Russell, a share sale such as this must follow established processes and if the business falls within a regulated field, more delay is likely.

Some final thoughts

If the parties participate well in mediation coaching it's not impossible for them to reach agreement and not need to return. The promise of mediation is that the clients construct the process. Abridging it lies within their power.

If, on the other hand, both need more time to research closing details before making a final agreement, they could make an interim agreement at the coaching session. In other words, an 'agreement to agree' and move forward as soon as they are ready. Whatever they achieve at this session is positive and a move away from conflict.

Arbitration: dealing with litigation counsel

More often than not arbitration is referred by counsel for one of the disputants. It should come as no surprise that the involvement of litigation counsel attracts similar problems as does litigator involvement in mediation.

The easiest place to begin is with a restatement of the basic organizing principle in arbitration law. Although there are a number of statutes which govern arbitration at the federal and provincial level, the domestic statute used most often in Ontario is the *Arbitration Act 1991, ch 17.*

Lawyers usually take it for granted that private arbitration requires a formal hearing. Formal hearings in court take the form of motions, applications under Rule 14.05 and trials. However, the last clause of section 26.1 of the Ontario Arbitration Act provides as follows:

" …. the tribunal shall hold a hearing *if a party requests it*."

This will probably come as a surprise to any litigation counsel who has not read the Act. My sympathies to counsel who have not read it. The organization of this act is a challenge and badly needs editing.

‘No hearing’ arbitration

It is worth noting that there are a number of disputes that can, should and often are adjudicated without a hearing. The following is a partial list of these disputes.

1) real estate valuation disputes;
2) share valuation disputes;
3) business asset sale valuation disputes;
4) insurance policy holder disputes
5) any business/contract dispute that does not require credibility findings

A particular problem that arises with insurance policy claims is that policy holder may be unaware of their process rights and may assume that they must issue a court claim if dissatisfied with their insurance adjuster’s decision. Most policy holders are unlikely to parse the technical language of their policies. If their adjuster does not alert them they may not know that mediation or arbitration is an option.

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Because many lawyers are unfamiliar with arbitration statutes, some disputes that can be quickly and less expensively adjudicated based on paper trail alone proceed to unnecessary formal hearings.

Typical process for ‘no hearing’ arbitrations

Usually these kinds of arbitrations are handled by arbitrators by a joint letter or counterpart letters that act as an agreed set of instructions to the named arbitrator. Included in these letters will be a provision that the adjudication be paper based without any hearing. The arbitrator will respond agreeing to proceed in this manner. Shortly afterward, each party will deliver a bound, indexed binder with all relevant documents.

Where the central issue is one of valuation based on fair market value, arbitrators will receive an expert report from each party and both sides will agree at the outset that these reports shall be relied upon by the arbitrators in making an 'award'.
Because each party has agrees to proceed in this manner and credibility is not in issue, the arbitrator may immediately begin to review these materials. While valuation reports are lengthy, usually an executive summary will appear at the beginning of the report to assist the arbitrator. Given this format, no discussion takes place with the parties and once the materials are reviewed, the arbitrator is ready to make an award. Because arbitration is a quasi- judicial process, Ontario arbitrators must comply with sections 45 and 46 of the Arbitration Act, 1991.

Section 45 provides for a right of appeal provided that the parties have not waived that right. It is customary in these valuation 'no hearing' arbitrations for the parties to waive any appeal and accept the arbitrator's award as final and binding.

Section 46 of this Act allows awards to be set aside on a variety of grounds which are:

1) a party's lack of legal capacity in agreeing to arbitrate;
2) an invalid or expired arbitration agreement;
3) a decision beyond the scope of the agreement;
4) invalid composition of the tribunal contrary to the agreement or a failure to deal with a remitted matter;
5) a decision on a matter that by law is not arbitrable;
6) failure to treat parties equally and fairly;
7) procedural non compliance with the Act;
8) arbitrator corruption, fraud or bias;
9) an award obtained by fraud;
10) an invalid unenforceable family law arbitration

This would be highly unlikely in such circumstances.

Finalizing an award

While awards are not required to be in writing, the customary practice is for awards to be written setting out critical facts, evidentiary findings, findings of law where necessary, quantification of fair market value or losses as the case may be and can include an award of costs and pre and post judgment interest under sections 54 and 57 of the Act. Once an award is delivered to the parties, the arbitrator's function comes to an end.

Unfortunately, some arbitrations proceed to unnecessary formal hearings. However, if counsel are willing the parties can re-engage the arbitrator and convert the process on consent to a 'no hearing' arbitration. As with mediation process is what they make of it.

Introductory matters: hearing arbitrations

Once an arbitrator is appointed, he will forward a formal arbitration agreement to counsel or to the parties, if self-represented confirming his appointment and the undertaking of the parties to proportionally pay his fees, and expenses plus HST. He will be presumed to have complete authority unless the scope of that authority is expressly limited. If the arbitrator's award is intended to be final and binding a provision will be added waiving any appeals. Usually the arbitrator will ask for an initial retainer intended to cover his time spent in the early stages of the arbitration.

It's important to realize that though arbitration is a private non-court alternative, the arbitrator performs a quasi-judicial function and must conduct himself like a judge. He cannot communicate with one party in the absence of another. Although counsel and the arbitrator may speak to one another informally it is vital that the arbitrator behave even handedly so as to avoid any appearance of bias. The arbitrator has the same

powers as a justice of the Superior Court to hold hearings, make findings of fact and liability, and award appropriate remedies and costs and pre and post judgment interest.

Should parties wish to limit the scope of an arbitrator's powers, they must agree to do so at the outset. An arbitrator's award is enforceable in the Superior Court of Justice. Section 50(1) of the Ontario Arbitrations Act permits a party to apply to enforce an arbitrator's award made in Ontario or elsewhere in Canada.

Preliminary first meeting: scheduling

Perhaps the single most useful feature of arbitration law is the 'preliminary first meeting'. Usually, and especially now owing to Covid 19, there is no need for a face to face meeting. Once the parties agree upon the selection of an arbitrator they will communicate with one another.

The current practice is a virtual video meeting. This meeting can be expected to last an hour or more and is intended to map out the process from delivery of each party's Statement of Facts and Positions; to a time frame for delivery of productions and examinations for discovery; though to the hearing. Parties do not generally attend.

Because counsel may agree not to follow the Rules of Civil Procedure, parties are free to craft their own process thereby condensing the time frame and eliminating unnecessary processes that drive up clients' costs. And if the Rules of Civil Procedure do not apply, parties are free to add or delete processes as long as they do so on consent. As long as parties consent, formal orders are unnecessary. E-mail communication is completely satisfactory if they so agree.

Preliminary first meeting: the arbitrator should weigh in

Since litigation counsel are usually retained to represent their clients the central issue before counsel is whether or not to follow and time table the processes laid out in the Rules of Civil Procedure regarding court proceedings.

Counsel are not obliged to follow these Rules unless they choose to do so is crucial. Arbitration is a flexible, creative dispute resolution process and is easily adaptable to the particular facts of the dispute. The preliminary first meeting can be an extremely useful opportunity to limit and expedite the process making it more efficient, and less costly for clients. And increased efficiency, and speed allow earlier decision making and an earlier arbitrator's award. Clients who use private arbitration as an alternative to litigation in the Superior Courts of Justice usually do so because they are already aware of the 5 year plus timeline for civil cases to reach trial. And that timeline does not take Covid 19 delays into account.

Section 20 of the Act confers unrestricted authority to the arbitrator to determine the procedure to be followed throughout the arbitration. This power can be used to shape the process and eliminate any processes which may not be required or be helpful to the arbitrator's decision and award.

If property or important client documents are in jeopardy, the arbitrator may make an interim preservation and inspection order under section 18. Usually counsel advise of their own timetable to deliver their client's Statement of Facts and Positions. Should the claimant fail to abide by their agreed schedule to deliver these documents, the arbitrator can dismiss the claim in the absence of a satisfactory explanation. It is more likely, and preferable that the issue of late delivery be resolved on consent by an exchange of e- mails between counsel and the arbitrator.

At a first meeting counsel will also timetable a date to produce and deliver their documents. The process of delivering them to the arbitrator and of marking them so that they are readily available for the hearing should also be discussed as would the question of whether examinations for discovery are needed.

Because discoveries are an integral part of the civil litigation process counsel will more likely agree to schedule them. As already mentioned discoveries are optional. The preliminary first meeting is a perfect opportunity to look at the claimant and respondents' positions to see whether the claim is strictly documentary. If so, the arbitrator should suggest that there be a waiver of discoveries.

Apart from counsels' and the court reporter's costs, discoveries require preparation time and lengthen the timeline. It is a fair question for an arbitrator to ask why counsel propose unnecessary examinations for discovery if they already agree that the arbitration will rest strictly upon documents.

Of course, discoveries may still be necessary if the parties communicated orally, did not memorialize their discussions in writing and disagree as to the contents of those discussions. Counsel could be encouraged to agree to limit discoveries to any such undocumented, oral communications. One again, arbitration is an ADR process and should be adaptable. By encouraging counsel to agree, the risk of a subsequent motion targeting the arbitrator for unfair, unequal or biased treatment is eliminated. The careful arbitrator therefore needs to negotiate these issues with counsel.

Another crucial issue is whether the arbitrator's decision making powers as conferred by the Act are to be limited. As already mentioned section 31 of the Act gives arbitrators the same powers as a Superior Court justice including the power to apply legal and equitable remedies.

An additional issue that should be raised involves the possible need for expert witnesses. Often in such a dispute counsel will have already secured and exchanged expert reports or will signal each other of their intention to do so. The Act permits the arbitrator to engage expert witnesses if the tribunal sees fit with the costs to be proportionally shared by the parties. It is more likely for an arbitrator to make such an

order under section 28 of the Act later in the process should he have reservations about the quality of the parties' expert reports.

One last procedural issue involves the need for counsel to arrange for licensed interpreters and for certified translations of any documents written in another language. If interpreters are required to be present at the hearing, counsel will need to make and confirm those arrangements as well.

Follow up meetings

The preliminary first meeting in many ways is a 'get to know session'. That doesn't mean that counsel and the arbitrator are restricted to a single meeting. Because section 20 of the Act confers procedural power upon the arbitrator, he can schedule additional meetings if so requested. These can and will given the meeting restrictions resulting from Covid 19, be by way of video conference, and/or telephone conference call. How counsel and the arbitrator communicate makes no difference provided that the selected methods are consented to.

Process reconfiguration

Sometimes counsel realize as they work their way through the process that they may have over layered the elements and that a particular part or parts of the agreed process are unnecessary. The key to such a determination by counsel is whether or not the agreed proceed is unlikely to affect the arbitrators determinations about liability and/or remedies.

If so, counsel on consent may approach the arbitrator for the purpose of revisiting the agreed process. As noted, arbitration is an adaptable form of alternative dispute resolution. It is not a straight jacket and provided that counsel agree on a substantial process change they should be encouraged to come forward and raise their concerns.

In ending this paper, I return to the theme raised at the beginning. The principal distinction between the Rules of Civil Procedure and ADR is the adaptability of ADR to a change of process. Whether parties go to mediation or wish an independent third party to decide their dispute reflects their predisposition to resolve conflict employing the principles of ‘interest based negotiation’ or neutral, third party decision making based on principle.

Either way, the process they use is the process with which they are most comfortable. And the speed of that process, the savings in lawyers’ fees and expenses, and the prospect of earlier resolution free them to look forward to the future, not backward.

That is the essential promise of ADR.

March 15, 2021