A PRACTICAL INTRODUCTION TO ARBITRATION

William G. Horton[*]

The idea of arbitration is that of binding resolution of disputes accepted with serenity by those who bear its consequences because of their special trust in chosen decision-makers.

Jan Paulsson[1]

Arbitration is a form of dispute resolution created by contract. As such, in its purest form arbitration is based exclusively upon the consent of the parties. It exists independently of the courts and of the legislation by which it is regulated. However, the courts and legislation are needed to ensure that arbitration agreements are respected and not abused, and that resulting arbitration awards are enforced.

The conception of arbitration as a purely consensual form of dispute resolution does not apply to all arbitration. For example, many statutes, such as the *Insurance Act* and the *Condominium Act*, impose a requirement on parties to have particular disputes determined by arbitration. In addition, many contracts of adhesion impose arbitration as a form of dispute resolution on parties who accept arbitration, unwittingly or unwillingly, simply by entering into the main contract. The same may be true when arbitration is used in noncommercial settings, such as family or employment disputes, where there is a possibility that vulnerable parties may be pressured to give up recourse to the courts.

This "practical introduction to arbitration" will focus primarily on arbitration which is voluntarily chosen by the parties as the means by which they will decide an existing or future business dispute.

WHY ARBITRATE?

Arbitration is not necessarily superior to litigation for the adjudication of business disputes. It all depends on what the parties are trying to achieve by agreeing to arbitration and whether or not they have taken specific measures in the arbitration to achieve those objectives.

---

* William G. Horton, C.Arb., FCI Arb. The author practices as an arbitrator of Canadian and international business disputes.

1. Jan Paulsson, *The Idea of Arbitration* (Oxford: Oxford University Press, 2013).

Often the only advantage the parties seek from arbitration is confidentiality. The result is private litigation conducted according to court rules. No other advantage is sought or gained. Often, parties whose only motivation is confidentiality will conduct the arbitration using the *Rules of Civil Procedure* and will also preserve rights of appeal from the arbitration award, thus creating the possibility that, at the end of the process, no meaningful advantage will be gained from having arbitrated the dispute. This is "arbitration" in name only. The potential value of arbitration should not be judged by such examples.

Unless arbitration is conducted in a manner that delivers tangible benefits, it is often a much less attractive form of dispute resolution than court litigation, not only because costs are greater due to having to pay for the tribunal and the hearing facilities, but also because there are many additional complexities in arbitration, such as jurisdictional issues and issues relating to the appointment of arbitrators. Unless arbitration delivers some benefit that outweighs all of these built-in costs and risks, arbitration will not be as attractive an option as court litigation.

In addition, if the parties or their counsel are not prepared to accept the decision of the tribunal on questions of fact and law but insist on having the right to have a court review process that may last exponentially longer than the arbitration process itself and may cost as much or more, there may be little point in choosing arbitration.

In other words, arbitration has no automatic benefits. Arbitration should be undertaken for specific reasons that are then reflected in the procedure that the parties adopt.

Business people are often heard to say: "I need a final decision in a reasonable time so that I can make the right strategic decisions about my business in a timely manner. Being in a dispute diverts substantial time and resources away from profitable activities. I prefer to be doing new projects rather than having all my key people involved in multi-year disputes about old projects."

If one is to take these concerns seriously, arbitration can almost always provide the answer. Using arbitration, most routine business disputes involving up to a few million dollars (and many non-routine decisions involving tens of millions of dollars or more) can be fully, fairly and finally disposed of in six to 12 months, providing that appropriate and available arbitration techniques are used. While the costs incurred in the course of arbitration may not be appreciably lower than the costs for a similar amount of "legal process" in a lawsuit, arbitration costs are substantially curtailed by the following considerations:

a) the lawyers do not have to relearn the file multiple times over the course of many years as they must do in a protracted litigation process,
b) motions practice is replaced by informal consultations in real time with the tribunal;
c) the entire proceeding is supervised by the same tribunal that will make the final decision;
d) wasteful discovery processes are replaced by other more efficient forms of disclosure which are focused and managed by the tribunal; and
e) there is no lengthy and costly appeal process.

Undoubtedly, as pointed out in the quotation from Professor Jan Paulsson at the top of this article, the one indispensable factor in achieving all of the above is the trust the parties repose in the tribunal which was selected by them, or pursuant to a mechanism upon which they agreed.

PRE-DISPUTE vs POST-DISPUTE ARBITRATION AGREEMENTS

It is important to note the distinctions between pre-dispute arbitration agreements dealing with *future* business disputes, and post-dispute arbitration agreements dealing with *existing* business disputes.

When the exact dispute to be resolved exists and is known, it is much easier for a party to decide whether it wishes to submit the dispute to arbitration as opposed to some other form of resolution. In addition, if both sides can agree that an existing dispute should be arbitrated, all of the elements of the arbitration, including such matters as the makeup of the tribunal, the identity of the tribunal members and the procedural rules, can be discussed and agreed upon with the specific dispute in mind. When agreeing to arbitrate unknown future disputes, however, any attempt to determine such elements in advance in a detailed and rigid manner may result in unnecessarily costly or ineffective rules which defeat the purpose for which arbitration was selected by the parties.

It has often been suggested that post-dispute arbitration agreements are more difficult to achieve than pre-dispute agreements because of the likelihood that one of the parties will insist on its right to go to court. This is generally true and is the main reason why pre-dispute arbitration agreements are considered to be more effective. Parties do tend to be more objective and rational regarding the

method by which their disputes should be resolved before an actual dispute arises and before one party or the other seeks leverage by refusing to agree to a more efficient and cost-effective process. However, this usual state of affairs is changing as the popularity of arbitration increases and as lawyers become more comfortable recommending arbitration to their clients.

I have noted in my practice as an arbitrator over the last 12 years that post-dispute arbitration agreements are becoming more and more common. Often, an obvious need to keep the dispute confidential and out of the courts is recognized by both sides as soon as the dispute arises. However, I have had a number of cases in which the parties have agreed to arbitration after they have spent considerable time publicly litigating the dispute in the courts. Sometimes, parties have submitted a dispute to arbitration after all pretrial steps have been taken in a court action. In one case, the motivating factor appeared to be that the specific judge who was appointed to try the case did not have the confidence of either side. In other cases, the length of time to get to trial after the case was set down for trial was considered to be too long by both sides. Unfortunately, if parties wait until late in the litigation process to agree to arbitration, most of the potential benefits of arbitration will have been lost.

Consider posing the following questions when trying to persuade a skeptical opposing counsel to agree to arbitration:

a) Does your client have any interest in resolving this dispute within a year or less, or is your client happy with the idea that we could be litigating this in the courts five or six years from now? and

b) Why don't we see if we can agree on an arbitrator we both trust to decide this dispute rather than spending years in court only to have a judge neither of us wants decide the issue?

In terms of choosing and planning to arbitrate the dispute, most considerations that apply to pre-dispute agreements to arbitrate also apply to post-dispute agreements. I will therefore focus on pre-dispute arbitration agreements in the following discussion.

INTERNATIONAL OR NON-INTERNATIONAL ARBITRATION

Anyone who is drafting an arbitration agreement or setting up an arbitration process should be aware of whether or not the arbitration is international or non-international. (The latter is sometimes

referred to as a "domestic" arbitration.) There are several reasons for this. Although an international and a non-international arbitration agreement may look identical, there are important differences in terms of practice and usage between the two types of arbitration. Also, there are significant differences as to the role of the courts and the reviewability of arbitration awards that can become problematic if the practitioner is not conscious of the distinction.

In Ontario, international arbitration is governed by the *International Commercial Arbitration Act* ("ICAA").[2] Non-international (domestic) arbitration is governed by the *Arbitration Act*.[3] Pursuant to s. 2(1) of the *Arbitration Act*, that Act does not apply to an arbitration to which ICAA applies. ICAA therefore applies exclusively to international commercial arbitrations, and the *Arbitration Act* applies exclusively to domestic arbitrations.

ICAA enacts in Ontario two important instruments of international law relating to international arbitrations: *The New York Convention* (the "Convention") and the *UNCITRAL Model Law on International Arbitration* (the "Model Law"). Both of these instruments are attached as schedules to ICAA. Article 1 of the Model Law provides a definition of international arbitration which is relatively complex and should be referred to every time there is an arbitration involving a business or a set of parties with a foreign (*i.e.* non-Canadian) connection.

Although there are many differences between ICAA and the *Arbitration Act*, the most significant difference is that awards that are subject to ICAA will not be subject to judicial review on the merits. Only specific grounds that are enumerated in Articles 34 and 36 of the Model Law can be the basis for setting aside an ICAA award or defending against the enforcement of an ICAA award. The same grounds are generally available for setting aside or defending against the enforcement of an award under the *Arbitration Act*. However, under the latter, there is also the possibility of appeals on the merits. This will be explained in more detail below.

Other distinctions between international and non-international arbitration that are important to be aware of relate to the legal culture and habitual practices that exist in international arbitration around the world. For example, especially where the parties are represented by lawyers from different countries, international arbitration is not seen as an alternative to litigation. Rather it is *the* dispute resolution method of choice. This is typically because neither

2. S.O. 2016. This revision of the previous Act came into effect on March 22, 2017.
3. S.O. 1991, c. 17.

party wishes to litigate in the courts of the other party's home jurisdiction.

Sometimes, when counsel are from the same jurisdiction, court litigation in that jurisdiction becomes a more acceptable alternative than it would if one of the parties and its counsel are from a different country. However, even in these cases, the fact that an arbitration award is infinitely easier to enforce internationally than a court judgment[4] should lead counsel to consider the benefits of arbitration. Also, lawyers should be careful when advising foreign clients to submit to the jurisdiction of Ontario courts instead of arbitration as those clients may have very different expectations as to procedure, especially procedure relating to discovery, and to the role of the court in promoting efficiency. Internationally, arbitration procedure, with limited use of discovery methods used in North American litigation, has become widely accepted, and expected, as a method of resolving business disputes.

When arbitration is chosen for the resolution of international business disputes, as it almost always is, other characteristics of the process immediately become apparent. For example, international arbitration is heavily dependent on arbitration institutions such as the International Court of Arbitration of the International Chamber of Commerce ("ICC") and the International Center of Dispute Resolution of the American Arbitration Association ("ICDR"). Non-international arbitration conducted in Ontario is almost entirely non-institutional, or as it is sometimes called, *ad hoc*. *Ad hoc* arbitrations are run by the arbitral tribunal without the involvement of any arbitration institution. However, there are a number of arbitration institutions operating in Canada such as ADR Institute of Canada and the British Columbia International Commercial Arbitration Centre. The comments below relating to institutional arbitration are also applicable in relation to those Canadian institutions.

INSTITUTIONAL OR AD HOC ARBITRATION

A critical decision when drafting an arbitration clause is whether or not the arbitration will be institutional or *ad hoc*.

Institutional arbitration provides practitioners with a pre-packaged set of arbitration rules and procedures which can be extremely valuable, particularly to those who are new to arbitration practice. The arbitration institution will:

4. *Redfern and Hunter on Arbitration*, 5th ed. (Oxford, 2009) p. 33 and fn. 113.

a) provide a form of arbitration clause, often with specific guidance as to choices that can be made by the parties to modify that clause according to their needs:
b) serve as a "court of record" for documents that initiate the arbitration and that are exchanged in the course of it;
c) assist with the formation of the arbitration tribunal and make any necessary appointments if the parties cannot agree or if one party is not cooperative;
d) handle the financial arrangements so as to secure the deposits of the parties and payment of tribunal's fees and expenses;
e) provide an editorial (and in some cases, a substantive) review of the draft arbitration award before it is finally issued; and
f) formalize the issuance and authentication of the award.

It is sometimes suggested that an award issued in an institutional arbitration may have greater credibility with the courts if enforcement proceedings are required. However, I am not aware of any attempt that has been made to validate this suggestion. In fact, awards issued by institutional and *ad hoc* tribunals have exactly the same legal status under the Convention and the Model Law and exactly the same legal principles apply with respect to both.

Institutional arbitration comes at a cost. Although fees charged by the institution usually constitute only a small percentage of the overall costs, those charged by many institutions are substantial in absolute dollars. In addition, institutions influence the cost of arbitration proceedings in other ways. For example, additional lawyering costs are incurred in complying with the institution's procedures and dealing with its staff. In some cases, there can be a bureaucratic element to those procedures that can be costly and frustrating. Similarly, the institution's handling of financial issues can add an extra layer which reduces the kind of transparency and immediacy that exists for the benefit of both the parties and the tribunal in *ad hoc* arbitration. Some counsel are also troubled by the institutional review of arbitration awards before they are released, in that the review (or "scrutiny" as it is called in ICC arbitration) may introduce new elements to the award. Others feel that such a review protects against obvious errors and oversights.

While it is sometimes suggested that institutional arbitration gives the parties greater assurance that proceedings will be run expeditiously, the fact is that the tribunal bears almost exclusive responsibility for the achievement of that objective regardless of

whether the arbitration is institutional or *ad hoc*. The authority of the tribunal to do so comes from the consent of the parties to the arbitration, not from the institution.

Perhaps the strongest argument in favor of institutional arbitration is that, when the arbitration is taking place pursuant to a pre-dispute arbitration agreement, the institution provides a vital role in ensuring that the tribunal is established even if one of the parties is non-cooperative at that stage. It is true that in the absence of an institution, or some other mechanism, to ensure that a tribunal will be appointed even if one party does not cooperate, such issues will have to be determined by the court at the place where the arbitration is to be conducted. Clearly, since the objective of most international arbitration is to avoid recourse to the courts, this is not desirable.

However, another alternative does exist. Parties can choose *ad hoc* arbitration and specify, in their arbitration clause or agreement, an appointing authority whose specific function will be to deal with issues relating to the appointment, replacement and remuneration of the arbitral tribunal. In fact, most arbitration institutions are prepared to act solely as appointing authorities for a much reduced fee. If the parties are unable to agree on, or forget to specify, an appointing authority, they would still have access to such an authority if they chose to conduct their arbitration under the *UNCITRAL Rules of Arbitration*. Those rules were specifically put together by UNCITRAL to provide for *ad hoc* arbitration in an international context. However, parties may specify the UNCITRAL Arbitration Rules even in non-international cases.

When using the UNCITRAL Rules, the parties may specify an appointing authority; however, if they fail to do so and can not agree, one of the parties may subsequently apply to the International Court of Arbitration at the Hague to select an appointing authority for them should the need arise. Therefore, the *UNCITRAL Rules of Arbitration* provide an excellent alternative to institutional arbitration, especially in the international context.

THE ARBITRATION CLAUSE OR AGREEMENT

The arbitration clause lays the foundation for a successful arbitration. Too often an arbitration clause is drafted in haste or based on a general precedent without due consideration. However, a well considered arbitration clause need not be long or overly complex.

Many of the same considerations apply whether one is drafting an *ad hoc* arbitration clause or considering how to vary an institutional clause. Here are some of the key points to ponder.

1) Scope of the Clause

Since the jurisdiction of the arbitration tribunal is based upon the consent of the parties, it is open to the parties to define the scope of that jurisdiction in any manner they choose. In principle, any matter in the dispute the parties could have settled *between themselves* by agreement, can be resolved by arbitration.

Counsel should be aware that any restrictions on arbitral jurisdiction (*eg*. some issues under an agreement are to be arbitrated but not others) will create potential issues as to where the jurisdictional boundaries lie. This can be one of the most problematic and dysfunctional issues that can arise in an arbitration. Nobody wants to choose arbitration only to spend time in court trying to figure out whether a particular dispute falls within the clause. Therefore, unless there is a specific reason to restrict arbitration to some specific subset of disputes that may arise between the parties, it is generally wise to provide very broad language as to the scope of disputes that may be submitted to arbitration. Language to the effect that "any dispute or difference respecting or arising from this agreement or the business relationship relating thereto shall be determined by final and binding arbitration" is recommended where the intention is that arbitration, not litigation, is intended to be the method of dispute resolution which the parties will use.

2) Applicable Law

All modern arbitration statutes and jurisprudence make it clear that an arbitration agreement or clause is to be considered as a separate agreement from any other agreement between the parties, including an agreement in which the arbitration clause is to be found. Thus, the choice of law clause for the overall agreement will not necessarily be treated as applicable to an arbitration conducted under a clause in the same agreement. It is therefore important that any arbitration clause or agreement specify the specific law under which the arbitration is to be conducted. In most cases, the parties will choose the law of the place where the arbitration is to be conducted even if the contract itself is subject to a different law. If that place is Ontario, the clause should clearly specify whether ICAA or the *Arbitration Act* will apply, and counsel should make sure that the right Act is selected.

3) Place

It is critical to specify the place (city and country) where the arbitration is to be conducted. In the absence of such a specification, the tribunal will be free to select the place of arbitration if the parties cannot agree. This could readily lead to surprising results from the perspective of one or both of the parties. Even if the case is not international, it is best to avoid disputes as to whether the arbitration will be held in, say, Ottawa or Windsor.

The place of arbitration is also important in an international case because, regardless of the choice of law made by the parties, the place of arbitration (sometimes referred to as the "seat", or the "site") will determine which courts have supervisory jurisdiction with respect to such matters as tribunal appointments (if the parties cannot agree) and arbitrator challenges (where that has not been displaced by the selec-tion of an institution to administer the arbitration) and with respect to the important question of whether or not any award resulting from the arbitration should be set aside. Therefore, the question of the place or seat of the arbitration should not be left to chance.

It will always be open to the parties, or to the tribunal if the parties cannot agree, to select a different place in which to hold one or more of the hearings for the arbitration, depending on questions of convenience. However, the legal site of the arbitration as set out in the agreement to arbitrate will not be affected by such decisions.

4) Language

If there is any doubt as to the language in which the arbitration should be conducted, that should be resolved by an express choice made in the arbitration clause or agreement. The choice of language may have important implications as to who bears the costs of translating documents or interpreting evidence. The probative value to be attached to documents in a different language which are not translated may be called into question. Again, this is not a matter that should be left to the agreement of the parties after a dispute has arisen, or to the discretion of the tribunal if agreement cannot be achieved.

5) How Many Arbitrators?

In almost all cases, it will be more efficient and cost-effective to appoint a single arbitrator to decide the dispute. Any difficulty in having the parties agree to a single arbitrator can be addressed through various selection mechanisms or by naming an appointing authority or institution to make the appointment. Some selection mechanisms are discussed below.

Often, parties opt for three arbitrators only because they believe this will make it easier to constitute the tribunal, i.e. with one party appointing one of the three arbitrators, the other party appointing another, and the two appointees selecting a chair. This is a poor reason for constituting a tribunal with three members.

First, using this mechanism is not necessarily a guarantee of success as the non-cooperating party may choose not to make an appointment. Second, although the use of a three-member tribunal may make it marginally easier to constitute the tribunal, the parties will pay a heavy price for a three-member tribunal throughout the balance of the arbitration. The cost of the arbitration will be *more* than three times that of a single arbitrator because of the need for the three arbitrators to consult and deliberate with each other. Also, all scheduling issues become much more complex when the calendars of three busy arbitrators are to be accommodated.

There are situations in which three member tribunals are warranted. High-value cases may justify such an expense as a way of ensuring that all factual and legal issues are fully considered. In addition, three-member tribunals can be a good alternative to providing a right of appeal. Three-member tribunals decrease the likelihood that the award will be based on an avoidable oversight, thus making a party more comfort-able with giving up a right of appeal. On the other hand, three-member tribunals introduce other dynamics in terms of producing a consensus decision that may result in a compromise decision, sometimes known as "splitting the baby", which one or more of the parties may find undesirable.

6) Arbitrator Qualifications

It is often tempting for parties to list detailed qualifications for potential appointees to the tribunal. If the dispute which has arisen or which is likely to arise is one which requires a particular technical expertise, a stipulation that such expertise should be possessed by the arbitrator is understandable. However, counsel should be aware of certain pitfalls with regard to requiring qualifications which are too specific or too complex. Often, candidates who have very specific expertise (especially so called "industry experts") also come with conflicts of interest that may create problems when they serve in a neutral role such as arbitrator. In addition, insisting on multiple qualifications can exponentially reduce the field of possible candidates. Once such qualifications are embodied in an arbitration clause it is difficult for the parties to override those requirements except by agreement, which often is hard to achieve after a dispute has arisen.

It is useful to think of the primary qualification that is required of an arbitrator to be that of experience in adjudication. And that is certainly an important component. However, an arbitrator's role potentially goes well beyond that of a judge in court litigation. In international arbitration, an arbitrator is required to have a sophisticated understanding of international arbitration culture, law and practice. In domestic *ad hoc* arbitration, an arbitrator is frequently called upon to set the rules by which the arbitration will be conducted so as to produce a fair and final result within a relatively short period of time. This requires specific expertise in arbitration procedure which is not necessarily required in other forms of adjudication or dispute resolution.

7) Institutional, or Ad Hoc with Appointing Authority?

If it is intended that the arbitration should be administered by an institution or should take advantage of the services of an appointing authority, that should be specified in the arbitration clause or agreement. Care should be taken to ensure that the institution or appointing authority is correctly named and, if it is not a mainstream organization providing such services, that it is prepared to act in that capacity.

8) Arbitration Procedure

There are great differences of opinion among arbitration practitioners as to how much detail should be provided in an arbitration clause or agreement regarding the procedure for the arbitration. In institutional arbitration, it is not necessary to provide detailed rules as these will be supplied by the institution itself. It should be borne in mind that some institutions will provide more flexibility than others regarding the ability of the parties to vary some or all of the institutional rules.

In *ad hoc* arbitration, rules for the arbitration can usefully be discussed and agreed upon after a dispute has arisen. Counsel who wish to arbitrate should become familiar with and implement efficient arbitration procedures which are not based on court rules.[4] In addition, the parties would be well served if they provide some residual discretion to the tribunal to modify the rules as circumstances arise. In the absence of such discretion, the tribunal will find it extremely difficult if not impossible to vary pre-agreed rules. This

4. See my chapter entitled "Evidence First Arbitration" in the forthcoming book, *A Practitioner's Guide to Commercial Arbitration*, Marvin J. Huberman, ed. (Irwin Law, 2017). A copy of this chapter will also be available at wgharb.com when the book is released.

can result in one or both parties "gaming" the rules in a way that proves to be unfair or abusive.

In pre-dispute arbitration agreements and clauses, it is almost always better to leave the matter of procedure to agreement between the parties or determination by the tribunal after a dispute has arisen. Otherwise, there is a considerable risk that the parties will be locked into a procedure that proves to be inappropriate for the actual dispute that arises, in other words a procedure that is subject to strategic abuse by one side or the other. If the parties are unable to agree on the rules after a dispute has arisen, experienced arbitrators will be able to suggest and apply many options that may not have occurred to counsel or the parties. This is an area in which the best arbitrators often make their most valuable contribution to the dispute resolution process.

9) Confidentiality

There is a generalized expectation of privacy in arbitration. However, it is not always clear what that means in practice. If confidentiality is an important reason for choosing arbitration, it is essential that an explicit provision that the arbitration will be private and confidential be included in the arbitration clause or agreement. If that is the case, some thought should also be given to the circumstances in which parties will be excused from the obligation of confidentiality. For example, exceptions may be needed in order to develop and present evidence for the case. In addition, exceptions may be needed in order to inform third parties, such as creditors or shareholders, who may have a right to know and an obligation to comply with legal requirements imposed by law. It should also be borne in mind that if a confidentiality clause is too broad and requires the entire dispute and the arbitration proceedings to be held in confidence, this could work to the disproportionate detriment or benefit of one of the parties in certain circumstances, for example, where sensitive reputational issues are at play.

Thus, the issue of confidentiality in arbitration should never be taken for granted or overlooked in drafting the arbitration clause or agreement.

10) Appeal Rights

Appeal rights, being rights to challenge an award based on an alleged error going to the merits of the case, are to be distinguished from rights of judicial review which arise when a party seeks to enforce or set aside an arbitration award. In general terms, regardless of whether the arbitration is international or domestic, parties cannot contract out of the grounds on which an award may be set aside

or not enforced, for example, on the grounds of fraud or the absence of fair and equal treatment of the parties. However, the situation is considerably more complex when one considers the right to appeal an award on the merits, i.e. on the basis of an error of law, an error of fact or an error of mixed fact and law.

When dealing with international or foreign awards, no appeal to a court on the merits is ever possible, although some grounds on which an award may be set aside or not enforced can tempt a court into the margins of a merits-based appeal.

In domestic arbitrations conducted in Ontario, s. 45 of the *Arbitration Act* provides that if the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave of the court. Recent case law in the Supreme Court of Canada[5] has imposed a further limit on such rights of appeal by holding that awards will only be overturned if the tribunal has committed an error on an "extricable" question of law (*i.e.* one that does not depend upon the facts of the case) and then only if the outcome is unreasonable. There are exceptions relating to cases which raise questions of a constitutional nature or questions which are fundamental to the administration of justice. However, such cases rarely arise.

In Ontario, unlike some other provinces, parties have the freedom to choose to have no rights of appeal from an arbitration award or, on the other hand, to provide for rights of appeal with respect to questions of fact or questions of mixed fact and law. It is not unheard of for parties to choose to go in either of these directions. In statutory arbitrations, for example, it is common for parties to expand the rights of appeal to include questions of mixed fact and law.[6] This is not surprising since, in arbitrations imposed on the parties by statute, the parties did not voluntarily choose arbitration as their method of dispute resolution.

In normal commercial arbitrations, it is very common for parties to exclude all rights of appeal. Again, this is consistent with the basic notion of arbitration whereby the parties choose a method of dispute resolution which is intended to keep them out of court. Indeed, if one were to consider all of the discrete reasons why parties may choose to arbitrate their dispute, every one of those reasons is undermined to some degree, or defeated altogether, by preserving rights of appeal. Confidentiality, expedition, economy, proactive case management,

5. *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, 59 B.C.L.R. (5th) 1 (S.C.C.).
6. *Intact Insurance Co. v. Allstate Insurance Co. of Canada*, 2016 ONCA 609, 403 D.L.R. (4th) 438, 131 O.R. (3d) 625 (S.C.C.).

trust in specific arbitrators to make a decision both sides can live with – all of these reasons to arbitrate are negated if there is an appeal.[7]

There are many cases in which arbitrations which are concluded in a few months or under a year are then subject to many years of litigation in the courts relating to appeals on ostensible questions of law. At the end of the process, the result of the arbitration may be affirmed, or replaced with a result that is as much open to question as the original decision of the tribunal. If parties are not prepared to accept any result as legitimate other than one which is blessed in law by the courts, a much more rational choice is to litigate the whole dispute in the courts where a comprehensive set of rules and procedures is available and the adjudicators are made available at no charge.

Having said all of the above, it is important to state that parties to arbitration agreements and clauses should specifically turn their minds to whether or not a right of appeal will be available and to provide for any such right explicitly. In all too many cases, the parties do no more than say something like "the award will be final and binding", without explicitly saying that no appeal will lie. It is by no means clear that such language will preclude a right of appeal.[8] Similarly, parties will often say something like "the award will be subject to appeal as provided for by the *Arbitration Act*". Again, this language is ambiguous as to whether or not appeals will be limited to questions of law with leave, or whether the language opens up the possibility of an appeal on a question of law without leave, or an appeal on a question of fact or mixed fact and law. Clear language is best.

11) Costs

If the parties do not make any specific provision for costs, the arbitration tribunal will have the discretion to decide how to allocate the costs of the arbitration based on the outcome of the arbitration. As in litigation, the tribunal can take into account offers to settle and other factors used in awarding costs in court proceedings. However, the tribunal is not bound by the same rules as courts with respect to costs. For example, arbitration tribunals regularly award costs based on a full indemnity principle, but taking into account which parties won which issues and how much time was spent arguing each issue, in other words making distributive orders for costs. Such orders are rare in court litigation.

---

7. W.G. Horton, *Reforming Arbitration Appeals* (Jan. 2017), 75:1 *The Advocate*, p. 37, also available at www.wgharb.com/talks-papers/publications.
8. *Peters v. D'Antonio*, 2016 ONSC 7141, 2016 CarswellOnt 21243 (S.C.J.).

If the parties want to specify particular rules as to costs (for example, no costs no matter what the outcome, or partial indemnity costs only) they should provide for this in their agreement.

COMMENCING AN ARBITRATION

Once a dispute has arisen, it is of course imperative that counsel consider the dispute resolution provisions in any applicable agreement. It is always open to the parties to agree to something different in light of the particular dispute that has arisen. By agreement, parties may choose to ignore an institutional arbitration clause in favor of *ad hoc* arbitration, or to ignore an arbitration clause entirely in favor litigation in the courts, or to choose arbitration despite no arbitration clause having been included in the agreement. However, all of these decisions can only be made by agreement. A party acts at its peril if it unilaterally ignores an arbitration provision and proceeds to litigation or proceeds with arbitration in the wrong forum. Such mistakes can have disastrous consequences by failing to stop limitation periods from running[9] and/or by embroiling the parties in lengthy and costly litigation as to the forum in which the dispute is to be adjudicated.

Any institutional rules regarding the commencement of the arbitration should be strictly observed by the claimant. *Ad hoc* arbitrations should be commenced by delivery of a notice as specified by s. 23 of the *Arbitration Act* or Article 21 of ICAA.

In any arbitration, a key initial issue will be whether or not the parties can agree upon the tribunal to be appointed. Even before any self-executing mechanism for the appointment of a tribunal is triggered, counsel for all parties would do well (if time and circumstances permit) to discuss whether some other mechanism would serve the parties better in the context of the dispute which has actually arisen. For example, they may wish to consider whether a single arbitrator may deliver more value than a three-member tribunal, or whether an institutional arbitration is necessary after all, if the parties can agree upon a tribunal in which they have confidence to run the proceedings. Counsel should also discuss whether and how any pre-arbitration requirements specified in the arbitration agreement with respect to negotiations or mediation should be fulfilled.

Experience has shown that, unlike counsel in many other jurisdictions, counsel in Ontario are generally able to agree with little difficulty on the appointment of the arbitration tribunal. This is not

9. *Lafarge Canada Inc. v. Edmonton (City)*, 2013 ABCA 376, 87 Alta. L.R. (5th) 308, 25 C.L.R. (4th) 208 (Alta. C.A.).

to say that there will not be disagreements or delay. However, it is rare for parties to have to turn to the court to make such appointments. Therefore, discussions with opposing counsel should be entered into in a spirit of good faith and optimism. Frank discussions should be conducted as to acceptable candidates and open disclosure should be made as to any circumstances known to counsel that may call a candidate's impartiality into question. It is often a useful technique for counsel to exchange short lists of acceptable candidates simultaneously by email while speaking to each other on the phone. It is quite common for at least one name to appear on both lists, thereby greatly facilitating agreement. This approach is particularly useful when discussing the appointment of a sole arbitrator or the chair of the tribunal.

Where the appointment mechanism includes the appointment by each side of one arbitrator, it is proper for the lawyer for each side to contact potential candidates and have a brief discussion with them as to their qualifications, any conflicts of interest, availability issues and willingness to serve. It is also considered permissible to discuss with a potential appointee to a tribunal possible candidates to chair the tribunal. However, in my experience, it is better to defer a discussion of that topic until both parties have appointed tribunal members. Any discussion of the merits of the case or the potential approach of the arbitrator to any issue in the case, substantial or procedural, should be scrupulously avoided.

TERMS OF APPOINTMENT OF THE TRIBUNAL

When appointing the sole arbitrator or chair, the parties will wish to discuss the basis on which the arbitrator will be compensated, as well as other issues such as deposits to secure payment of arbitrator fees and expenses, and cancellation fees that may be applied if a hearing is canceled or adjourned. In Canada, it is usual for arbitrators to charge based on an hourly rate. They obtain deposits from the parties based on their estimate as to how much time they will spend. Such deposits may be payable in stages. Arbitrators will usually provide that there can be cancellation fees if a hearing is adjourned or cancelled too late for the time to be re-booked in the arbitrator's calendar. Usually a cancellation fee is payable if the cancellation takes place on less than 30 days' notice.

Counsel should also ask a sole arbitrator to provide draft terms of appointment which will detail these items and other matters such as immunity from suit, confidentiality, and document retention.

Similar discussions are not productive with arbitrators that are appointed to a three-member tribunal by each side ("party appointees"). Issues such as compensation, deposits and cancellation fees will need to be discussed with the tribunal as a whole once it is in place. Often, hourly rates will have to be adjusted so as to create parity among the members of the tribunal. In addition, it is possible that variations on the normal arrangements will be discussed. For example, one party may be willing to make deposits, whereas the other is not, or one party may be prepared to pay 50% of the entire tribunal's fees and expenses and the other wishes only to pay the fees and expenses of its party appointee (for example if his or her rate is much lower than the others) and 50% of the fees and expenses of the chair. In my experience, these asymmetrical variations are not desirable, as each of them places the parties and members of the tribunal on a different footing and creates an unbalanced dynamic within the tribunal. Nevertheless, if these differences are to be put in place they are best addressed once the entire tribunal is in place.

THE FIRST PROCEDURAL MEETING

Once the tribunal is in place, the first order of business will be the first procedural meeting. This may be conducted over the phone in a smaller arbitration. However, in an arbitration of any substance it is extremely valuable to have the first meeting take place in person. Some arbitrators also express a preference for clients to be present at the first meeting so that they will have a direct appreciation of the goals, issues and options involved in setting the procedure for the arbitration.

The first procedural meeting will set the overall rules for the entire arbitration and will fill in the blanks, especially relating to timing, if institutional or pre-agreed rules are in effect. This is an opportunity for counsel to raise any particular concerns they may have with respect to the conduct of the arbitration. Concerns may be raised with respect to the volume of documentary production or the availability of experts or other witnesses within certain time frames. Quite often, where the agreed rules contain no specific provision, counsel may wish to address questions as to discovery, for example, whether examinations for discovery or interrogatories will be available and, if so, how and when they may be conducted.

It is important that each counsel understands or that the tribunal explains the other methods by which arbitrations allow for the underlying purposes of discovery to be served while still achieving the desired goals of expedition, cost-effectiveness and fairness. One

method which is key to making an arbitration successful is the early delivery by both sides of the evidence on which they rely, delivering witness statements, documents and sometimes even expert reports almost contemporaneously with or very shortly after the delivery of their pleadings.[10]

In some cases, the procedure may be as simple as having both sides attend at a meeting on a given day with all relevant documents and witnesses. A second or third meeting may be held until everyone has said what they have to say and the arbitrator is in a position to make a decision.

Usually, the date of the final hearing will be set at the very first meeting, all of the pre-hearing procedures will be geared to that date, and all parties will be expected to keep the process on track to meet that deadline.

The first procedural meeting is critical. It will determine whether the arbitration will be conducted as a mirror image of court litigation or as an independent form of dispute resolution with its own values and methods. Once the course has been set at the first procedural meeting, it will be extremely difficult, if not impossible, to change it later in the arbitration.

Usually parties choose arbitration with the expectation that it will be more efficient and businesslike, producing final decisions within a reasonable time frame and at a proportionate cost. Unfortunately, counsel often defeat that expectation by insisting that the arbitration be conducted in accordance with the *Rules of Civil Procedure*, or "by analogy" to those rules, simply because that is what they are comfortable with. Often, such counsel will have difficulty agreeing to a hearing date because experience with court litigation procedure has taught them that the litigation process rarely delivers a hearing on time. If they do agree to a hearing date, the tribunal may be justifiably skeptical that such a date will be met because of the unpredictability of court litigation procedures. Inevitably, as the arbitration begins to run into the endless delays and loops which are a familiar part of court litigation, one lawyer will insist on the *Rules* being strictly applied and the other lawyer will complain "But this is arbitration!"

It is not enough to simply choose arbitration. It is also important to learn what arbitration has to offer and how to put it into practice.

10. See footnote 5, above.