chapter six

"Evidence First" Arbitration: A Conceptual Framework for Arbitration Efficiency

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A. COURT LITIGATION AND ACCESS TO JUSTICE

About ten years ago, I decided to become a full-time arbitrator. One of the factors that moved me in this direction, after thirty years of practising commercial litigation for national and international business clients, was a deep and growing dissatisfaction with the ability of court-based litigation to deliver results that were cost-effective, timely, or even, in many instances, reflective of the legal merits of the case.

As to cost-effectiveness and timeliness, it occurred to me that there are few if any issues that arise in the business world for which cost and time are secondary or irrelevant. The litigation of business disputes seems to be a notable exception. Court cases are regularly conducted on the basis that only a result achieved through an arcane, lengthy, and laborious process can be viewed as a legitimate outcome. Considerations of cost and time are subordinated to this belief, which is inculcated by counsel and readily accepted by clients. It is, therefore, unsurprising that costs routinely approach or exceed the economic value of the dispute and that the resolution of the dispute is routinely delayed well beyond the point at which the utility of a resolution has significant

benefit to the parties. In commercial disputes, access to justice is defined not as much by the ability of the parties to afford the dispute resolution process as by the ability of the process to deliver a result at a reasonable cost and in a reasonable time having regard to the business context. Furthermore, while cost may not be a factor in commercial disputes with very large financial implications, the timeliness of adjudication can be, and almost always is, critical. In these respects, court litigation fails businesses in both small and large disputes.

As to the results' reflecting the merits of the case, the fact that cost and time regularly exceed what is justifiable from a business perspective means that as the litigation grinds on, pressure will build to the point where one or both sides will seek a resolution primarily to bring an end to the pain of the litigation process. The parties may resort to negotiation or mediation. But in these processes, the cost and inefficiency of the litigation process itself will figure prominently as reasons for bringing the dispute to an end. Indeed, the problem of how to allocate litigation costs that have dwarfed the original dispute often proves to be the main challenge.

Mediation may produce finality, but in the absence of an effective adjudicative process, the result produced by mediation is more likely to reflect the power balance, or imbalance, between the parties and their respective abilities to absorb the costs and delays imposed by the litigation process. Thus, the cost and inefficiency of the litigation process will be primary factors in shaping the terms of a settlement.

Because commercial disputes are almost never concluded by court litigation within the business cycle in which they occur, settlement of a dispute will often be brought about not by the Herculean efforts and brilliance of advocates over a number of years but by changes in the circumstances of the parties that have no relationship to what has been occurring in the litigation, such as insolvency, sale of the business, or developments in market conditions or technology — not to mention normal human events such as death and reconciliation.

Despite the emphasis on perfection in procedure and on correctness in the application of the law, less than 5 percent of all cases filed with a court will actually be determined by applying the law to the facts. If the main goal of the *Rules of Civil Procedure* were to *prevent* cases litigated in the courts from being adjudicated, that goal would be achieved in over 95 percent of all cases.[1] Surely, I reasoned, a better process must exist. Arbitration holds out that promise. But often, the same lawyers using more or less the same procedures in arbitration as in court actions tend to achieve similar results, leading to the same complaints.

Since arbitration is based on consent, the question then arises whether there are choices that can be made by the parties and their counsel, as well as by arbitrators, that will deliver more cost-effective and timely results to those — possibly not everybody — for whom these considerations are important.

B. WHAT MAKES COURT LITIGATION COST SO MUCH AND TAKE SO LONG

It is worth spending a bit of time to consider certain key features of the normal court litigation process that contribute the most to the buildup of cost and delay. Once we have identified those features, we can and should try to avoid them in an efficient arbitration process.

1 It has been consistently reported in Canada over many years that less than 5 percent of all cases filed with a court reach trial: see, for example, The Honourable Neil C Wittmann, Chief Justice, Court of Queen's Bench of Alberta, "Judicial Dispute Resolution in the Court of Queen's Bench: Making Resolution Accessible" (2016) 25:1 *Canadian Arbitration and Meditation Journal* 14 at 19, online: http://adric.ca/wp-content/uploads/2016/06/ADRIC_JOURNAL_2016_Vol25_No1.pdf. My own experience as an arbitrator is that well over 50 percent of the cases in which I am appointed will result in an award, almost always within about twelve months and usually within about six months.

1) Loopiness

While we think of normal court litigation as taking place in stages, it is more revealing to think of it as taking place in loops. Broadly speaking, there are seven loops:

1) pleadings loop
2) document disclosure loop
3) discovery loop
4) expert evidence loop
5) interlocutory motion loop
6) trial loop
7) development of the law loop

Each loop anticipates later loops and may be reactivated by one of them. No loop is ever fully complete until a trial judgment is pronounced — and perhaps not even then.

Pleadings may be amended, and arguably should be amended, at any subsequent stage as new information and documents emerge. They may even be amended at the appeal stage to recharacterize the proven facts with a different legal theory.[2] While documents may be referenced or produced in any of the loops, new documents may emerge even during the trial and give rise to the need for amendments to the pleadings or even further discoveries. Expert reports, which are timed to come at a fixed interval before the trial of the action, presumably after all facts and documents have been disclosed and probed, may themselves give rise to new legal or factual theories or inquiries. Finally, the pleadings and every subsequent stage of the process may be informed by the possibility that the law will develop or be clarified as a result of the lawsuit itself to rectify what are perceived to be existing weaknesses in the legal basis of a claim or defence.

2 See, for example, *Clement v McGuinty* (2001), 18 CPC (5th) 267 (Ont CA). See also *Haikola v Arasenau* (1996), 27 OR (3d) 576 (CA). In a system where prejudice is defined as something that cannot be compensated in costs or cured by an adjournment, is it surprising that cases end up costing too much and taking too long?

Interlocutory motions and appeals create more loops in which a variety of judges who will not be involved in the final adjudication are tasked to participate. As these judges will not wish to foreclose a line of evidence or analysis that the trial judge may find useful, there is a tendency for their rulings to be permissive rather than preclusive. This contributes, along with the other factors mentioned, to the elaboration of the dispute rather than its refinement over the course of the litigation.

The adjournment of the trial on multiple occasions to accommodate other loops, and which is sometimes due to the lack of court resources, creates yet another loop. Counsel with only modest levels of tactical acumen can use all of these loops to considerable advantage. In the hands of seasoned practitioners, these loops can become nooses.

2) Stop and Go

As a result of what I have described as the "loopiness" of court procedure, there are frequent pauses in the process when the parties and their counsel recalibrate each element of the process in light of the most recent events. Often this will result in long delays during which work on the file by one or both sides will be postponed while further inquiries are made or actions taken. Every time the file is put down and taken up again, it is necessary for counsel to refamiliarize themselves with the matter at an additional cost to their clients. And each time that happens, it occurs in the context of some new information or development that may cause one or more of the loops in the process to be reactivated as counsel seek to maximize their chances of success (or minimize their chances of failure) with reference to the new information or development. If the original claims or defences falter, new claims or defences are added. The overall effect is reminiscent of the circus act where a performer seeks to keep multiple plates spinning at the top of multiple poles by running among them to attend to the plate most in need of a bit more spin.

The simplest cases can thus take two or more years to process. A complicated case may take as much as ten years to reach trial.

3) Anticipation

Until the presentation of evidence at trial, everything that occurs in a court litigation process merely anticipates what may or may not happen at trial. In chess, there is a saying that the threat is greater than the fulfillment. In litigation, it is all threat, and in the vast majority of cases, there is never any fulfillment in the sense of an adjudicated outcome.

Every fact that is in a pleading may not be proved or provable. Every document that is produced may not be relied upon by any party. Documents that have been produced may be referenced at trial by a witness in a way that was not anticipated by the discovery process. Lengthy examinations for discovery are conducted largely for the purpose of determining what the evidence of the other side will be at trial or trying to pin the opponent down to a particular version of events. Those examinations for discovery may not be referred to at all at trial. Alternatively, selective portions may be read in as evidence often giving rise to contextual objections. Sometimes witnesses who answered questions on their examinations for discovery using certain language may use different language at trial or give different answers, giving rise to issues as to whether or not they have contradicted what they said before or whether what they said before was not fully understood, perhaps as a result of a flawed question.

All of the foregoing is attributable to the fact that from an evidentiary standpoint, nothing actually happens until the trial. Everything that precedes the trial is therefore some combination of provable fact, optimistic or wishful thinking, idle threat, tactical overstatement, and outright prevarication.

4) Ambiguity and Anxiety

All of the aforementioned features of court litigation produce elevated levels of ambiguity and anxiety over a protracted time frame. Each party seeks to maximize its flexibility in terms of how it will present its claims or defences at trial while it seeks to minimize the other side's flexibility.

In the context of an adversarial process, these elements often and predictably lead to mistrust and significant escalations in the dispute that in turn appear to justify irrational levels of emotional and financial investment in the litigation process itself, which often disregard the objective value or time sensitivity of the dispute.

C. HOW ARBITRATION CAN BE DIFFERENT

One of the reasons why evidence in a court proceeding is not presented in a definitive manner until the trial is because that is when the trial judge makes her first appearance. In arbitration, the adjudicator is present from the outset. A neutral and objective presence, in the form of a person or persons chosen by the parties themselves or by an institution in which they have reposed confidence, is available to oversee the entire process from beginning to end. While the final decision on the merits can be pronounced only after the process is complete and after all the parties have had an opportunity to present their case, steps in the adjudicative process can begin immediately and continue in real time until the award is rendered.

Whereas in normal court proceedings a trial date is not set until most if not all preliminary phases of the litigation process have been completed (and given the vicissitudes of litigation, it would generally be foolhardy to do so before), in arbitration a final hearing date is usually one of the first matters that is settled. It is a testament to the efficiency of true arbitration processes (when they are employed) that the final hearing date rarely changes. The expectation is that the parties and the arbitrator will work toward completing the hearing on the set schedule, if for no other reason than that is what makes sense in terms of the nature and scope of the dispute.[3]

3 As with many other individual features of arbitration, the fixed trial date can be duplicated in court proceedings, but often the realities of the court system neutralize the benefit. I know of one case in which a party seeking to stay court proceedings in favour of arbitration was told by the motions judge that

In setting the final hearing date, the arbitrator commits to work with the parties to ensure that all parties will be treated fairly and given an opportunity to present their case within the agreed time frame. In my view, there should be no implication that the values of procedural fairness or the disclosure of relevant information within the power and control of any party will be compromised. Rather, the commitment is to work diligently, pragmatically, and cooperatively toward ensuring that these goals are met. I will say more about this shortly.

Often, counsel or arbitrators who come to arbitration from a litigation background conceive of arbitration as simply a speeded up version of litigation. Using this conception, they adopt the *Rules of Civil Procedure*, or some variation of them, and follow the same process as in court litigation but agree on shorter time frames for each stage. This almost never works. The reasons are obvious if one considers the aforementioned points about normal litigation procedure. The loops and resulting dynamics described above will almost certainly ensure that no agreed-upon time frame will ever be met. Disputes will arise regarding such matters as the particularity of the pleadings, the ability of the parties to review all their documents before deciding what to produce, the scheduling of examinations for discovery, and additional information or documents required to complete expert reports. In my experience, arbitrations that are conducted on this basis simply replicate most if not all of the problems of litigation and are extremely difficult to keep on track.

D. EXAMPLE FROM INTERNATIONAL ARBITRATION

An example of another approach may be drawn from international arbitration. While there is considerable variability among different rules and approaches, one feature stands out: the extent to which

he would give the parties a fixed date for the trial in a year and would personally supervise the litigation if they stayed in the court system. Unfortunately, when the trial date arrived, the judge had been moved to another court, and no other judge was available to make good on the commitment.

parties are required to present the actual evidence in support of their claims or defences at an early stage and as the process unfolds.

Both a claimant and a respondent are expected to deliver with their initial pleading all of the documents on which they rely. After pleadings are delivered, the parties are expected to exchange one or two rounds of "memorials" that will typically be accompanied by the witness statements and expert reports on which they rely (or that they put forward by way of reply in the second round). In their statements or reports, witnesses will reference or attach all the documents on which they rely.

The memorials are what we might call briefs or facta and detail both the facts and the legal theory and authorities on which each party relies. Thus, subject to documentary production, all of the evidence is put forward immediately following the close of pleadings together with each party's explanation of exactly how the testamentary and documentary evidence supports the claim that it is making. In the second round of memorials, each party is expected to put forward the evidence and legal arguments that contradict the position taken by the other party in the first round. Little is left to the imagination — and nothing to anticipation — by the time the two rounds of memorials have been completed.

Leave of the tribunal is required before further evidence is allowed. All that remains is for witnesses to be cross-examined at the final hearing. Because there is no need to repeat impeaching facts that are already to be found in the factual record, cross-examinations tend to be extremely brief and may even be waived in cases where a witness's evidence can be adequately challenged on the record as it exists.[4]

4 In one Stockholm Chamber of Commerce arbitration in which I was involved, one week was set aside for the hearing of a $10–20 million case involving geothermal energy contracts. There were nine fact witnesses and four experts. The hearing was actually completed in one and a half days rather than the scheduled week. Cross-examinations were brief and to the point. I was not left with the impression that any point had not adequately been brought to the attention of the tribunal.

With respect to documentary discovery during the arbitration, an extremely disciplined process is usually employed using the *IBA Rules on the Taking of Evidence in International Arbitration* whereby requests can be made for documents that are

1) within narrow and specific categories of documents;
2) reasonably believed to exist;
3) relevant to the case and material to the outcome; and
4) not in the possession, custody, or control of the requesting party and believed to be in the possession, custody, or control of the other party.[5]

These requests are made in a preformatted document (commonly referred to as a "Redfern Schedule") that anticipates, by blank cells, the response of the other side, the reply if any, and the ruling of the tribunal. The process is conducted in a very linear, disciplined manner.

Examinations for discovery or depositions are, for the most part, not requested or allowed, although exceptions are known to occur.

One of the keys to the efficiency of international arbitration is the emphasis on adducing evidence early in the process, and not at the end. However, there are certain aspects peculiar to international arbitration procedure that should, in my view, be further refined for noninternational commercial disputes arbitrated in Canada. For example, the need to exchange two memorials setting out the legal basis of the claims is understandable where the parties may be from jurisdictions with different legal systems employing different legal categories, statutes, concepts, and terminology. In a purely Canadian setting, it is rare for there to be much doubt as to the legal basis on which a claim is put forward in a business dispute. In some cases, where it is unclear, a direction of the tribunal may be sought ordering that some clarification should be provided or that some other procedural relief be granted. But this is rare and does not justify routinely building into

5 International Bar Association, *IBA Rules on the Taking of Evidence in International Arbitration* (London: IBA, 2010) art 3, online: www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx.

the arbitration process two rounds of legal briefs and a double rehashing of the facts. It is normal in noninternational arbitration, especially in larger cases, for counsel to provide an overview of the case shortly before the final hearing, and this may even form part of the formal procedure. In my view, this is more than enough in most commercial cases.

E. COMPARISONS WITH CERTAIN COURT PROCEEDINGS

Initially, when I began to try to implement, with the concurrence of counsel, some of the efficiencies inherent in international arbitration procedure in noninternational cases, I met with resistance based on unfamiliarity and skepticism. Ten years ago, almost all arbitration in Ontario was conducted as private litigation. The only difference was the substitution of an arbitrator for a trial judge when the hearing was reached and, perhaps, the elimination of rights of appeal.[6]

However, I found that I could achieve some traction with counsel by analogizing the international arbitration procedure to the "application procedure" available under the Ontario *Rules of Civil Procedure*.[7] The application procedure offers a more summary method for adjudicating certain types of cases. The applicable rules are interesting because they too contemplate an "evidence first" approach for a limited class of cases.

Using the application procedure under the rules, the applicant delivers a document entitled an "application" that sets out in summary form the nature of the dispute and the relief sought as well as the grounds for seeking the relief.[8] The application is a form of pleading but very much to the point with no requirement for any elaboration as to the facts or evidence. The application is typically accompanied (or followed very shortly) by affidavit evidence and

6 Sadly, this remains true for many noninternational arbitrations today, although the tide is changing.

7 RRO 1990, Reg 194, r 14.05.

8 *Ibid*, r 38.04.

exhibits that constitute the documents relied on by the applicant in making the claim. A respondent is expected to respond with similar material. The parties may request further information and documents from each other and may bring a motion before the court for any disputes in that regard. No examinations for discovery, as such, take place. However, either side may cross-examine on the other side's affidavits or seek to examine a nonparty as a witness on the application. The cross-examinations take place out of court (i.e., not in the presence of a judge), but the transcripts automatically become evidence in the case in their entirety, and not on a selective basis as with examinations for discovery.

The application procedure is limited to certain types of disputes and requests, but some of these are commercial in nature, for example, disputes relating to the interpretation of a contract, disputes relating to land and interests in land, and requests for injunctive or mandatory relief. In theory, the application procedure is also limited to situations in which the facts are not materially in dispute. However, where the facts do prove to be in dispute, the judge hearing the application may direct the trial of an issue, in which case the witnesses may have to testify or be cross-examined in court so that the judge can be in a better position to determine a contentious issue.

As it happens, in Ontario something very akin to the application procedure is also used to determine many important commercial cases relating to matters such as insolvencies and commercial disputes arising in the context of corporate reorganizations. With this type of procedure, these disputes are resolved on a very expeditious timeline, as is required by the obvious exigencies of such cases, despite the fact that the amounts involved may be billions of dollars.

The application procedure provides an ideal model for non-international commercial arbitration. The limitation to situations in which the facts are not in dispute is not applicable in the arbitration context since the arbitrator, unlike the application judge, will be present for the cross-examination of all witnesses and can make determinations of credibility and disputed facts when called upon to do so. Once the "undisputed facts" lim-

itation is removed, the subject matter limitations on the application procedure are also not apposite, although most commercial arbitrations involve as a core issue the interpretation of a contract — which is a typical subject matter for the use of the application procedure in court. Certainly, few commercial arbitrations would exceed in value or complexity the types of proceedings that are dealt with in the commercial courts using a procedure similar to the application procedure for matters relating to insolvency and corporate reorganization. Indeed, if the application procedure were to be made available to parties to commercial disputes in court actions on the same basis as it is made available in arbitration, the two processes would be very similar in terms of procedural efficiency, and other reasons for considering commercial arbitration (which are not the focus of this chapter) would have to be weighed in deciding which process to use. However, in the near term, it seems unlikely that the courts will be able to make sufficient resources available to replicate an arbitration process within the court system for *all* commercial disputes.

The courts have made an attempt to provide a more efficient service by making the summary judgment procedure more readily available and taking a robust view as to the kinds of determinations that can be made, in terms of disputed facts, on a summary judgment motion. Such motions now often incorporate a hearing or minitrial at which witnesses who have provided evidence by affidavit are cross-examined in the presence of the judge hearing the motion.[9] However, while this approach does import into the court system some of the methodology of arbitration, the two remain quite different.

An arbitration hearing is a trial. It is not a hearing to determine whether there is a genuine need for a trial, as is the case on a summary judgment motion. Theoretically, the summary judgment procedure is available to decide clear cases. There is a risk that with the provision of summary judgment as an antidote to

9 See Garry D Watson, QC, & Michael McGowan, *Ontario Civil Practice 2017* (Toronto: Carswell, 2016) at 560–61.

the generally inefficient court process, there will be a tendency to overlook factual or legal nuances in an analysis to justify a final disposition using the more efficient summary judgment process.

Although under some arbitration rules, dispositive motions may be granted, it is rare for such motions to be brought or granted given that they duplicate the effort that is already being expended to bring forward the same evidence on more or less the same timeline.

Generally speaking, an arbitration award is subject to very limited rights of appeal, and usually all rights of appeal have been eliminated by agreement. In the summary judgment process, when judgment is granted, an appeal may be brought as of right with respect to both the judgment on the merits and whether or not the summary judgment rule permitted the matter to be adjudicated at that stage. There is a real risk that the loops will be reactivated.[10]

F. EVIDENCE FIRST ARBITRATION

Included in this chapter, as Appendix 1, is the sample procedural order that I typically use in my arbitrations. As with all procedural rules or orders, there is always an issue as to whether one is looking at the forest or at the trees. On the one hand, it is useful to see whether and how the entire set of rules works together to achieve the desired results of efficiency, fairness, and quality. For example, it is not enough to know when written witness statements will be exchanged; one must also know how they may be used at the final hearing. On the other hand, to focus too much on implementing any overall set of rules risks losing sight of the need for flexibility and creativity in fashioning specific rules for a particular dispute. Both perspectives are vital. For that reason, I emphasize that the sample procedural order included here is a product of the arbitrations I have conducted to date using these rules as a model and that they will be changed by the arbitrations I have yet to conduct. It is

10 For a discussion of loops in court litigation, see Section B(1), above in this chapter.

rare for this or any other set of arbitration rules to not be modified in some way according to the circumstances of a given case.

I should also state unequivocally, in case there is any doubt, that in arbitrations I conduct, the parties are always free to agree upon any other procedure that they wish, even after the arbitration has started. It is a choice that I respect once it is made by agreement of the parties.

Having said the above, I will comment on certain features of my sample procedural order under the section headings below.

1) Preliminary Observations

When an arbitrator is called upon to settle procedural rules, the arbitration is already underway. If the parties have agreed to a set of procedural rules, the arbitrator or tribunal may have little to do after being appointed but await the first procedural dispute or — if all goes well — the final hearing. If the parties have not agreed to a set of procedural rules, the arbitrator may be called upon to settle all of the rules or some aspect of them upon which the parties cannot agree.

My arbitrations invariably begin with a preliminary conference call with counsel in which I determine whether a set of rules has already been agreed upon. If not, I get a sense of what the differences in suggested approach might be. Usually, at the time that the first conference call occurs, the terms of my appointment as arbitrator have not yet been settled, and, indeed, one of the items discussed on the call will be the finalization of those terms so that the terms of appointment can be completed and signed shortly after the call. I make it clear to the parties that I will not make any decisions on contentious issues, including as to procedure, until the terms of appointment have been signed. I encourage them to continue their discussions with regard to procedural rules while the terms of appointment are being finalized. During the conference call, I provide counsel with my sample procedural order by directing them to my website, where it can be found, and I encourage them to consider whether the approach represented

in the sample order could work for them. If there are questions regarding the procedure, these are discussed openly and candidly so that the parties will get a good idea of the spirit in which I will implement the sample procedural order if it is adopted.

I have not yet had the experience of parties deciding not to proceed with my appointment as an arbitrator after I have discussed my sample procedural order with them! Perhaps the future holds such an experience. In some instances, counsel discuss the matter among themselves and agree that they will adopt their own procedure, usually one that incorporates the *Rules of Civil Procedure* directly or by analogy. Commonly, when this occurs, the arbitration disappears from my radar screen for months or years — occasionally with brief interludes in which a procedural issue arises. Invariably, on these occasions, one party seeks to enforce the *Rules of Civil Procedure* while the other protests, "But this is arbitration!" My experience is that a hybrid process that uses the *Rules of Civil Procedure* "subject to the discretion of the arbitrator" produces a maximum of confusion, dissatisfaction, and dysfunction in the arbitration.

Introducing my sample procedural order into the discussion, before any agreement on the process has been reached, usually results in one or both parties' seeing the advantages of adopting a procedure that will get to the merits of the case more quickly and efficiently. Counsel then present me with a revised version of the sample procedural order that reflects particular concerns in and circumstances of the case and that sets out an overall timetable with which the parties can live. Usually, this results in an overall schedule that will be completed in six to nine months. I have known many arbitrations using this procedure to be completed in less than two months (some in less than a week!), and some have taken over a year (typically where significant documents are outside the control of either party).

2) Pleadings

Since the procedural order is made after the arbitration has commenced, at a minimum a notice of arbitration (or some similarly

titled document) will have already been delivered by the claimant. Usually an answer or response will also have been delivered by the respondent. These documents may contain more or less detail depending on the advocacy style of counsel. However, all that is really necessary for the purposes of the sample procedural order is that the notice of arbitration does the following:

1) identifies the dispute to be resolved in the arbitration
2) identifies the parties to the arbitration
3) states the relief claimed in the arbitration
4) initiates the tribunal formation process, for example, by appointing or nominating an arbitrator

Typically, some factual allegations will be included to support these essential elements. The sufficiency or particularity of these factual allegations is not a critical feature unless the respondent is left in doubt as to one of the four points listed above.

The answer or response to the notice of arbitration is a somewhat more variable document. In addition to stating the respondent's overall position with respect to the dispute and the claims advanced, the respondent should state any objections to the arbitrability of the dispute or the jurisdiction of the arbitrator or tribunal and take the steps required with respect to the formation of the tribunal, for example, by accepting the arbitrator nominated by the claimant or appointing its own arbitrator.[11]

Certainly, if there is any lack of clarity regarding the matters set out in these documents, that can be discussed, and the arbitrator can provide directions as to whether further details should be provided, for example, with respect to the particular agreement under which the claim is made or the time range to which the claim relates. However, much more detail should not be required as the next stage in the arbitration will be the delivery of witness statements and documents and the making of information and document requests. Once this is understood, counsel are usually

11 The *Arbitration Act, 1991*, SO 1991, c 17, s 17(4) provides that participation in the formation of the tribunal does not prevent a party from making an objection to jurisdiction.

comfortable with closing the pleadings based on the formal documents that have been exchanged to initiate the arbitration, and that is what the sample procedural order provides.

3) Witness Statements

The sample procedural order presumes that there is a factual basis for the claim that can be put forward immediately in the form of witness statements and documents. Given that in commercial arbitration we deal with claims arising out of contractual relationships and are concerned with giving effect to the reasonable, contractually based, expectations of the parties, it may be expected that the claimant has a substantial body of information at its disposal upon which to base the claim. Speculative claims are possible in court litigation, but they are discouraged in arbitration, in part, by the use of "evidence first" types of rules.

Since the claimant chooses the moment to begin an arbitration, it can also be expected that in most cases the claimant has already spent some time reviewing the possible claim as well as the evidence that can be brought forward to support it. Particularly because the rules of evidence do not apply in arbitration (other than rules relating to relevance and privilege), there should normally be no difficulty in providing evidence to the tribunal at an early stage. Such evidence lays a foundation for subsequent requests for information and documents not in the possession of the claimant.

In certain types of cases, the claimant may not have all the information that will ultimately be necessary to make a final determination. For example, a claimant advancing a claim involving an alleged breach of a noncompetition agreement or breach of a cost-plus pricing contract may well require information from the respondent. However, such gaps in the claimant's knowledge are understandable and manageable in the arbitration process. There is no need for the claimant to delay putting forward the evidence that it does have to support both the claim and the making of orders for disclosure from the respondent.

The same considerations apply to the respondent. Understandably, the respondent may require more time to put its information forward because it may not have precisely anticipated the timing of the claim or the factual basis upon which it has been asserted. However, this assumption is not always true. For example, in rent renewal or valuation cases there may be no claimant or respondent as such. Each party may have an equal ability and responsibility to put forward evidence supporting the rent or valuation for which it contends. In such cases, the simultaneous exchange of witness statements and documents may be appropriate.

The sample procedural order assumes that expert reports can be delivered on the same schedule as witness statements. However, this can be altered if the case can be made that a party cannot supply its expert with all the information needed for the opinion or that the expert is unable to source the information needed independently until a later date.

In my view, the early exchange of witness statements and documents on which a party relies (with immediate requests for information that is relevant but not in the party's possession) substantially improves the quality of the evidence. Witness statements are put forward much closer to the events described therein, as opposed to evidence given many years after the fact, as occurs at a court trial. Early witness statements are less likely to have been influenced by the litigation or arbitration process itself and by the reconstruction of events that inevitably accompanies any protracted process that will conclude with the attribution of blame or fault.

All processes that use witness statements as a substitute for evidence-in-chief (including some commercial court processes) are subject to the concern that the statements are likely to be written by the lawyers. I suggest that this concern is less valid when the statements are required early in the process, as opposed to just before the hearing. The opportunity to "spin" the evidence and coach the witnesses is much greater later in the proceedings when the actual memories of the witnesses have begun to weaken and when the familiarity of the lawyers with the entire body

of evidence has grown. At the early stages, there is a much greater risk that spun evidence will be contradicted by subsequently disclosed information. Therefore, early evidence that conforms most closely to established facts is much more likely to survive, uncontradicted, to the hearing.

The checking of every possible version of events against every possible document that might be produced in the case and the construction of the most plausible version of the facts that supports one's case is less possible when using the evidence first procedure. That is an advantage — and a detriment — experienced by both sides equally.

4) Discovery Requests

Discovery is merely the process by which one learns something that one did not know before. The evidence first procedure makes it clear that a party is not excused from placing in evidence that which it has within its knowledge because there is other information that it still requires to complete its claim or defence. Furthermore, a party is not excused from providing relevant information that it alone has in its possession because it has not yet had an opportunity to review all of the information in its possession that may have some bearing on the dispute.

a) Information and Documents

Under the sample procedural order, either side may, at any time, request in writing information or documents from the other side relevant to the issues raised by the pleadings or the witness statements. In addition to specifying the information sought, requests are to be confined to information and documents not otherwise available to the party making the request. Any unreasonable delay in making a request for information may result in the denial of the request if granting the request would cause unjustified delay in the arbitration schedule.

Note that no distinction is made between requests for information and requests for documents, and there is no specific time-

table other than the date beyond which further requests cannot be made without permission from the arbitrator. In my view, the almost exclusive focus on documents and the discouragement of nondocumentary information requests that is evident in many international rules of arbitration[12] is artificial and leads to game playing with respect to the formulation of document requests and answers to document requests.

Whether or not a party is entitled to seek information that is within the possession or control of the other side to complete the proof of its claim or defence is a simple but critical decision that must be made in any dispute resolution process. Many non–common law legal cultures and arbitration rules (especially in the international sphere) manifest ambiguity or agnosticism on this critical point and seek to reduce the number of occasions on which requests for information can be made and to restrict the manner in which such requests must be put forward. Often, this reflects not merely a procedural preference but a fundamental view that parties should not be able to use the dispute resolution process to obtain information from the other party that they would not have been able to obtain in the absence of the dispute.

The sample procedural order is premised on the opposite view — namely, that access to information that is within the possession or control of the other side and that is necessary to the presentation of one's claim or defence is essential to the fairness of any adjudicative result, subject only to questions of relevance and privilege. Once that value judgment is made, an efficient process requires that the participants "cut to the chase" and make relevant information in their possession available without delay. Thus, in the sample procedural order there is no precondition to or rigid schedule for the making of a request for documents or

12 See, for example, International Centre for Dispute Resolution, *International Arbitration Rules* (amended and effective 1 June 2014) art 21(10), online: www.icdr.org/icdr/ShowProperty?nodeId=/UCM/ADRSTAGE2020868&revision=latestreleased: "Depositions, interrogatories, and requests to admit as developed for use in U.S. court procedures generally are not appropriate procedures for obtaining information in an arbitration under these Rules."

information. Such requests may be made at any time during the process until the deadline is reached.

The provision of information in response to specific requests avoids the excuse that a party must find all the information and documents that it might consider relevant before producing any to the other side. It also imposes a discipline that tends to ensure requests are reasonable and pointed because they will be subject to immediate scrutiny by the arbitrator if an objection is raised in that regard. Conversely, the fact that further information requests can be made before the deadline discourages the types of evasive answers that are common when the parties are limited to one or two rounds of requests.

Of course, problems can arise, and in some cases they are insurmountable. For example, in one arbitration, critical documents were in the possession of a third party and could not be provided to the parties to the dispute except through a stringent government security clearance process. We had no choice but to wait for well over a year for the documents to be made available.

A recurring problem is requests involving the production of huge amounts of electronic information — the so-called big data issue. Usually the request is based on a very generalized submission as to relevance. A pragmatic approach is to deconstruct the request by seeking to establish a clearly stated proposition that the request is intended to prove or disprove. Means other than the production of big data may then be considered for verifying or falsifying the proposition. Smaller subsets of the data targeted to specific parameters or time frames may be sufficient for that purpose. Data sampling may be used to establish whether or not an allegation as to a generalized practice is likely to be true. Examination of the data by an objective third-party expert may provide an assurance without requiring the migration of large quantities of data to other secure systems where the data can be examined. This solution may also avoid protracted disputes regarding the access to be given to the data by the opposing side. In extreme cases, the dispute may be bifurcated so that less document-intensive issues (such as contract interpretation) can be determined

before more document-intensive issues (such as causation and damages).

But the most important factor in dealing with such disputes is the arbitrator's communication to the parties that tactical requests and objections will not subvert either the determination of the dispute on its merits or the process by which that determination is to take place.

b) Examinations for Discovery or Depositions

The sample procedural order provides that requests for further discovery may include requests to conduct examinations for discovery. However, unless consented to by the other party, requests for examinations for discovery will be granted only if it is demonstrated (1) that there is a specific need for further information before the hearing and (2) that the information requested can be reasonably obtained only in the manner requested. In other words, examinations for discovery will be available only after all other means of exchanging information have been attempted and found wanting. Furthermore, if allowed, examinations for discovery will be confined to the one or more specific issues for which the need was established. There is no conception of being given a time, however short, to do with as one wishes.

Despite the fact that most counsel in my arbitrations come from a litigation rather than an arbitration background and are accustomed to routinely conducting one or more examinations for discovery in the court cases they conduct, I can report that, to the best of my recollection, when the sample procedural order has been used, I have had no more than one or two requests for examinations for discovery.

5) Motions

The sample procedural order makes it clear that when procedural disputes arise, they must be promptly raised for determination. Formal motions to resolve procedural disputes are a last resort and may be brought only with permission of the tribunal. Furthermore,

it is made clear that parties should not "sit on" procedural disputes until they begin to affect the schedule. The stockpiling of procedural grievances is a principal cause of arbitration schedules gone awry.

It is important to make it clear that the arbitrator is available and willing to address procedural disputes on very short notice. Typically, a conference call in which the arbitrator hears about the problem and the positions of both sides and then offers one or more solutions is all that is required to resolve the dispute and allow the arbitration to stay on track.

Parties understand without any need for explanation that failure to cooperate with the tribunal that will make the final determination is not a sound strategy. There is almost never any need to mention the possibility of adverse inferences.

It is a rare procedural dispute that requires the expense and delay of a formal motion process. Once the process of using informal consultations to determine procedural disputes has been established, it is readily accepted by counsel. Indeed, my experience is that after one or two such informal consultations, counsel develop a good idea of the approach that the arbitrator is likely to take and require little further assistance.

Making all of this clear in the procedural order itself helps counsel to understand and explain to their clients that they are not taking a less aggressive and less effective approach by seeking early assistance from the arbitrator rather than engaging in an extensive motion practice.

6) The Hearing

The sample procedural order contains a number of provisions to ensure that all of the evidence that each party is relying on to establish its claims or defences is in the record before the hearing, including any information or documents that have been obtained from an opposing party through information requests and documents that will be put to a witness in cross-examination. The element of surprise is virtually eliminated. There may be some room

for discussion of whether this is conducive to effective cross-examination of untruthful witnesses. However, it must be remembered that contradictory evidence and documents will already have been put forward in the reply round of evidence exchange when using the sample procedural order. Furthermore, it is open to debate whether a more reliable conclusion as to the facts will be reached if an alleged contradiction in the evidence is raised at the very last moment in a hearing after all opportunities to further explore the factual context have been lost — barring, of course, an adjournment, which would entail additional delay and costs.

In some ways, the downfall of the normal court litigation process is its ambivalence toward the element of surprise. On the one hand, years of convoluted proceedings are justified as avoiding the element of surprise at trial. On the other hand, because only evidence adduced at trial is probative, the element of surprise is unavoidable. The evidence first approach unambiguously eliminates the element of surprise.

G. CONCLUSION

I estimate that I have used the sample procedural order, or some variation of it, in over fifty commercial arbitrations. The amounts in dispute have ranged from under $200,000 to over $100 million. Most disputes have been in the range of $1 to $10 million.

The sample procedural order has worked extremely well. I encourage all counsel and arbitrators to consider using the evidence first approach, and, to the extent that it is helpful, the sample procedural order is included below, as Appendix 1.

APPENDIX 1

Sample Procedural Order

Dates have been preserved to indicate sequence. Note this sample procedural order deals only with the issues addressed in the foregoing chapter.

Pleadings

1) The pleadings shall be limited to the Notice of Arbitration and Answer to Notice of Arbitration, which have already been exchanged.

Exchange of Evidence

2) The evidence of both sides shall be presented in the form of witness statements, which shall be in writing and sworn or affirmed by the witnesses.
3) A party that requires evidence from a witness from whom a witness statement cannot be obtained shall, at or before the time that a witness statement from that witness would have been due, seek directions from the tribunal as to how and when the evidence of the witness in question shall be obtained and submitted to the tribunal.
4) The witness statements submitted by each party shall include all the evidence that party seeks to put forward through its witnesses.
5) The witness statements delivered by each party shall attach or be accompanied by all of the documents on which that party intends to rely at the hearing.
6) Expert reports shall be delivered on the same schedule as witness statements, unless leave is obtained from the tribunal to deliver them on a different schedule. Such leave will not be granted, in the absence of extraordinary circumstances, if it would delay the final hearing.
7) On or before 23 April 20—, the Claimant shall deliver its witness statements, reports, and documents.
8) On or before — May 20—, the Respondent shall deliver its responding witness statements, reports, and documents.

9) On or before 21 May 20—, the Claimant shall deliver its reply witness statements, reports, and documents, if any. The reply witness statements, reports, and documents may include evidence in respect of any information or documents obtained pursuant to the process set out in paragraph 12, below, that the Claimant did not have an opportunity to address in its witness statements, reports, and documents delivered on 23 April 20—.
10) Any witness statement a party needs to file in response to disclosure of documents, or information, or a witness statement from the other side that the party did not have a reasonable opportunity to address, may be filed by agreement of the parties or, failing agreement, pursuant to further direction. No further witness statements shall be delivered prior to the hearing without agreement of the parties or leave of the tribunal.
11) All statements, reports, and documents shall be delivered by sending a copy by email to the other party and the arbitrator, by 5:00 pm Eastern Time of the day in question, with an additional hard copy being delivered to the tribunal within 24 hours.

Discovery Requests

12) Either side may, at any time, request in writing information or documents from the other side relevant to the issues raised by the pleadings or the witness statements. Such requests, in addition to specifying the information sought, should be confined to information and documents not otherwise available to the party making the request. Any unreasonable delay in making a request for information may result in the request being denied, if granting the request would cause unjustified delay in the arbitration schedule.
13) Requests for information or documents shall be responded to promptly as they are received.
14) Any disputes regarding information or document requests, which counsel are unable to resolve after reasonable attempts to do so, shall be raised with the tribunal by email and dealt

with on a conference call, without a formal motion unless so directed by the arbitrator.

15) No issue should be raised with the tribunal before it has been discussed between counsel. All communications with the tribunal shall be copied to the other side. However, it is not necessary to obtain the approval of the other side for the content of any communication to the tribunal.
16) Requests for further discovery may include requests to conduct examinations for discovery. However, unless consented to by the other party, requests for examinations for discovery will only be granted if it is demonstrated that there is a specific need for further information before the hearing and that the information requested can only be reasonably obtained in the manner requested.
17) In the absence of extraordinary circumstances no requests for information, documents, and discovery shall be made after 2 June 20—.
18) By no later than 13 June 20—, each party shall notify the other of the documents, information, or discovery it has obtained from the other side that it intends to use or place in evidence at the hearing.

Prehearing Delivery of Material

19) On or before 27 June 20—, the parties shall provide to the tribunal:
    a) Copies of all witness statements exchanged between the parties;
    b) Copies of expert reports exchanged between the parties;
    c) A joint brief containing all documents produced by both sides, in chronological order, indexed, and tabbed;
    d) Information or discovery from one side that the other side intends to refer to or rely upon at the hearing;
    e) Copies of any key cases or other authorities with important passages highlighted and tabbed; and
    f) A hearing schedule setting out the proposed order of proceeding at the hearing, including the order in which the

witnesses will be examined and the anticipated time required for the examination of each witness.

20) If the parties are unable to agree as to any of the above, one or both of them shall initiate a meeting or conference call with the tribunal to resolve the issue.
21) On or before 10 July 20—, the parties shall deliver any pre-hearing memorial, factum, or other written submissions that a party wishes to submit.

The Hearing

22) The hearing shall take place on weekdays from 14 July to 18 July 20—.
23) The hearing will conclude with oral submissions by both parties. Either party may also submit, or the tribunal may request, written closing submissions at or shortly after the hearing, at such time as can be agreed by the parties or as directed by the tribunal.
24) The hearing may be at any location upon which the parties agree. A transcript of the hearing shall be maintained if it is requested by any party. Costs relating to the hearing facility and transcripts shall be borne equally by the parties, subject to reallocation among the parties in any cost order made by the tribunal.
25) A witness who has provided a statement or report shall be made available for cross-examination at the hearing unless the other side agrees otherwise. If a witness is unavailable for cross-examination, e.g., due to death or disability, the admission into evidence and the weight to be attached to the statement shall be in the discretion of the tribunal.
26) At the evidentiary hearing, witnesses may be briefly examined by the party that submitted their statements or reports, only for the purpose of introducing the witness and highlighting key aspects of the witness's evidence, without adding any new evidence of substance. Such introductory examinations shall not take more than fifteen minutes and shall be followed by a cross-examination of the witness by the other side and re-examination, if required.

27) By agreement of the parties or direction of the tribunal, the cross-examination of any witness or witnesses may take place at a time and place other than the hearing referred to below. However, unless both parties consent, the tribunal shall be present at any such cross-examination.
28) No document may be put to a witness in cross-examination unless it was produced prior to the hearing in accordance with the directions above.

Further Directions

29) Further directions may be sought by either party at any time as the need arises.