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Arbitration Appointments Made Easy

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There are many ways to overcome a sometimes troublesome hurdle to arbitration: the appointment of the tribunal itself. While having the whole arbitration run by an arbitral institution is one option, there are others that work very well in most situations. This article suggests a few.

A key concern in committing to arbitrate future disputes under a contract is that, when a dispute arises, the parties may not be able to agree on who will arbitrate the dispute. Often that is because one party uses the appointment process to obstruct the arbitration.

One solution is to opt for an arbitration administered by an arbitral institution. This will give the party that wants to proceed with the arbitration the ability to ask the institution to make the appointment if the parties cannot agree after a certain time.. In Canada, this is not a popular solution for commercial arbitrations. Businesses and their lawyers generally prefer to avoid the additional costs and largely unnecessary bureaucracy of an institution involved in the arbitration from beginning to end. They prefer to use the default mechanism in most provincial arbitration Acts, which is to apply to the Court to make the appointment. In fact, this rarely happens – perhaps because in most cases both sides wish to avoid the having the Court select their arbitrator.

A cheaper, and more effective alternative to a Court application is for the arbitration agreement to name an institution as the "appointing authority". This can be done without agreeing to have the institution administer the entire arbitration. Most institutions provide an appointing service, which will also cover most disputes about the constitution of the tribunal, for a small fraction of what they would charge to administer the entire arbitration. Once the tribunal is in place, the arbitration will be administered by the tribunal in accordance with whatever rules the parties have agreed upon or in accordance with procedures set by the tribunal.

The appointing authority solution works in both international and non-international arbitrations. In international arbitrations, if the parties have adopted the UNCITRAL Rules of Arbitration but have not named an appointing authority, either party may apply to the Permanent Court of International Arbitration at the Hague to name an appointing authority.

Many institutions now provide an emergency arbitrator service. This service will allow a party to apply for urgent relief, either before the tribunal has been formed to hear the dispute on the merits, or without notice to the other side after the tribunal has been formed. There are strong differences of views as to whether these options are desirable in arbitration. In most cases where urgent relief is needed before a tribunal has been formed, an application to the Court is likely to be more effective. However, if the parties wish to provide for urgent relief or for a highly expedited arbitration on the merits, one very effective option is to specify in their arbitration agreement a list of individuals who they would both find acceptable as a sole arbitrator or chair. The party who initiates the arbitration may then select any arbitrator from the list (subject to availability and any subsequently arising conflicts), without any further appointment process. This has worked well in many very substantial but time sensitive disputes.

Often, in an effort to avoid institutional arbitration, parties will agree that each will appoint an arbitrator and the two party appointed arbitrators will appoint a chair. This is a wasteful solution if the only reason to adopt it is to achieve certainty in the appointment process. The cost of a three person tribunal is more

than three times the cost of a sole arbitrator, given the need for the tribunal members to communicate and co-ordinate with each other, in addition to doing the work they would otherwise do as sole arbitrators.

A more cost effective alternative is for the role of the party appointees to be limited to the selection of a sole arbitrator. They are given a limited time to make the appointment and may consult with the parties that appoint them. But they have a positive mandate and the authority to make the appointment jointly. If they fail to do so within a specified time they will be replaced by other appointees.. The purpose of this approach is to eliminate direct communication on the topic of arbitrator selection between the counsel running the case, communication that is often marked by "reactive devaluation" of all suggestions made by the other lawyer.

A further variation addresses the possibility of an uncooperative party in both the three person tribunal and delegated authority scenarios. If the responding party fails to appoint its arbitrator or nominee in the appointment process, the person designated by the claimant will serve as the sole arbitrator as if appointed by both sides.

Finally, it must be recalled that whatever method of appointment the parties have agreed upon – even institutional – it is always possible for them to agree to abandon that method once an actual dispute arises, and simply agree upon an arbitrator or tribunal.

I have experienced all of the foregoing methods of appointment (with some variations) and can attest to the fact that they can work very well. However, the optimal method of appointment in my experience is where the parties agree jointly on a sole arbitrator, or even upon the entire panel of a three person tribunal. The tribunal that is most likely to meet the expectations of the parties and achieve the inherent benefits of arbitration is one which the parties have actively agreed upon and appointed.

Of course, as in any adjudicative process, there is no guarantee of satisfaction with the actual outcome!

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