Scalability in arbitration: make the rules fit the ruckus

"However, it is important to remember that confidentiality is never fully assured in arbitration and requires several additional measures to be in place."

By William G. Horton

Arbitration can be almost exactly like litigation. The point is that it doesn't have to be.

If they so choose, the parties to an arbitration agreement can agree to have their arbitration conducted, as far as possible, in accordance with the Rules of Civil Procedure. They may thus avail themselves of full rights of production and discovery in any arbitration.

They may specify that the arbitrator is to be a retired judge who will apply the rules of evidence and decide the case in accordance with applicable legal principles. Finally, it is open to the parties to expressly provide for full rights of appeal (including on issues of fact or mixed fact and law) either to the court or to a specially constituted panel of retired appellate judges.

There are cases where all of this is necessary and where it still makes sense to arbitrate rather than to litigate. For example if privacy or confidentiality are important to both parties, they may choose to conduct full blown litigation in the form of arbitration.

However, it is important to remember that confidentiality is never fully assured in arbitration and requires several additional measures to be in place. The most important of these is to eliminate by agreement all rights of appeal to the court and to have the arbitration supervised by an arbitral body so that any issues relating to the appointment or disqualification of arbitrators can also be dealt with in private rather than having to be dealt with in court proceedings.

Another reason for choosing to arbitrate which may be consistent with full scale litigation procedures is that arbitration provides a particular form of case management where all pre-hearing issues are decided by the person (or, sometimes in three member panels, one of the persons) who will be deciding the case on the merits.

This often has the advantage of making parties to the dispute more reasonable in the use of pre-trial procedures.

It is also likely to provide a much accelerated interlocutory process.

Having said all of that, arbitration has even more to offer when full blown litigation is *not* appropriate. A binding dispute resolution procedure which fits the nature of the dispute can most easily be achieved through arbitration.

If timing is critical, for example in the resolution of pre-closing disputes, very specific timelines and pre-hearing procedures can be specified. The parties may also want to consider pre-appointing the arbitrator so

William G. Horton

see SCALABILITY p.14

Parties can agree arbitrator to decide on basis of what is fair

SCALABILITY
–continued from page 9–

that there is no delay or controversy surrounding the appointment if a dispute does arise. The arbitrator may be given basic material regarding the transaction and asked to review it in advance of any dispute.

Bear in mind, however, that time limits on the making of an award which are specified by the parties are subject to being extended by the court.

Therefore, deadlines which are artificial or unreasonably short in relation to the nature of the claim may actually be counterproductive and cause more delay rather than less.

Also, an arbitrator may feel that such deadlines interfere with the right of a party to present its case and to respond to the other party's case. This is a right which can not be altered, even by agreement.

In such a case the arbitrator may invite the parties to agree to a more reasonable timetable.

Where the parties wish to have a cost effective dispute resolution process, a number of options are available in arbitration. Agreeing to one arbitrator rather than three is a key point. Many experienced commentators question the utility of three arbitrators in any case, except possibly where a mixture of expertise on the arbitral panel is desired.

Limiting pre-trial production and discovery is another option. Much effort is spent in normal litigation trying to prove not only that the other party misbehaved but that they *knew* they were misbehaving. Each side spends countless hours looking for the "smoking gun" that will put the other side in an unsympathetic light.

The parties may decide that this is a luxury they can do without in a case with a limited dollar value.

In cases where the parties just need a decision so that they can get on with their business or lives, eliminating any right of appeal is also an important option to consider.

In cases where the parties are really just looking for a fair, common sense result they can agree that the arbitrator may decide the dispute on the basis of what is fair and not necessarily on strict legal principles.

There is a false assumption that all arbitrations tend to be decided this way.

In fact, my experience is that Canadian arbitrators are anxious to produce legally sound decisions unless directed by the parties to apply a different standard.

One last note: In the arbitration agreement, the parties themselves may specify the arbitration procedures which will fit their dispute.

Or, if providing for the arbitration of unknown future disputes, they may provide that the arbitrator should determine the appropriate procedures having regard to the nature, complexity, urgency and amount of the dispute. In either case, a key determinant of the efficiency of the arbitration will be the arbitrator. But there again, in arbitration the parties get to choose.

William G. Horton is a senior litigation partner at Blake, Cassels & Graydon LLP. He has acted as both counsel and arbitrator in commercial arbitrations.