ALTERNATIVE DISPUTE RESOLUTION

The freedom to draft your own procedures in arbitration has limits

William G. Horton looks at some of the practical and legal limits that come along with the freedom to draft your arbitration rules.

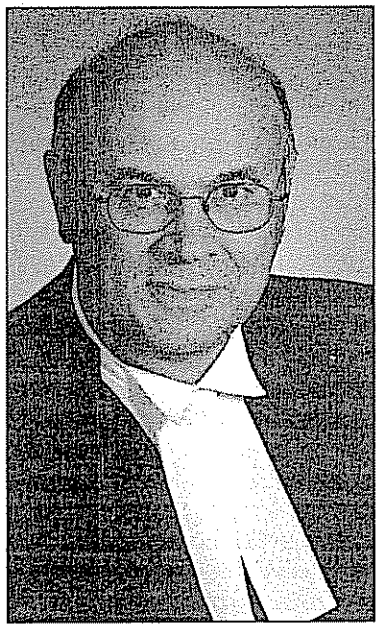
By William G. Horton

Given that parties often choose arbitration because they want a procedure which is faster and cheaper than litigation before the courts, it is understandable that they may wish to further that objective by specifying time limits or abbreviated procedures within the arbitration clause itself. Arbitration allows the parties to craft their own procedures, but there are some legal limits and practical considerations.

It is fundamental to all arbitration that the rules of procedure (whether specified in an arbitration clause or laid down by an arbitral tribunal) must treat all parties to the dispute equally and fairly. Each side must be given an opportunity to present its case. If this standard is not met, the results of the arbitration may be set aside or not enforced, regardless of any agreement between the parties. If this standard is met, the agreement of the parties as to procedures to be followed should be respected by the arbitrator and the courts.

Specifying particular procedures in the arbitration clause can be extremely useful if the parties have a good idea of the type of dispute which is likely to be arbitrated. In some circumstances, arbitration is not likely to be effective unless customized procedures are agreed upon in advance. For example, if the parties want to provide for the adjudication of disputes which may arise on the closing of a transaction and have the disputes decided before closing this can be better accomplished if arbitration rather than litigation is specified as the method of resolving the disputes. However, the benefits of arbitration will only be realized if stringent limits on timing and on the nature and extent of submissions are incorporated into the clause. It may also be wise to pre-appoint the arbitrator and have the arbitrator briefed on the transaction in advance of any dispute arising. This will avoid problems and delays relating to the appointment and availability of the arbitrator if a dispute does arise. Similarly, if the parties know that the disputes to be arbitrated will involve relatively small amounts of money, they may want to provide that submissions will be made only by way of an exchange of correspondence subject to the overriding discretion of the arbitrator if additional information is needed. The parties also may wish to appoint an arbitrator who has very specific expertise in the subject matter of the likely disputes so that the need to retain expert witnesses is avoided.

Where the nature of the potential disputes cannot be determined in advance, restrictive procedures designed for a simple or low value dispute may backfire when a complex or high value dispute erupts. Of course, the parties will be free to change the procedures to suit the dispute which actually arises, but this can only be done by unanimous agreement. Once a dispute has actually arisen, one of the parties may insist on strict adherence to the contractual limitations. In the absence of agreement between the parties, if the arbitrator chooses



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to vary the agreed procedures, the party who did not favour the variance may argue that the arbitrator lost jurisdiction and that the arbitration should be stayed or the award set aside because the procedure was not in accordance with

see HORTON p. 13

Manitoba Court of Appeal finds CRTC

highly competitive delivery of telecommunication and broadcast services in the province of Mani-

inside a subscriber's residence.)

The public notice listed four principles for implementing a new