ARBITRATORS BEWARE OF LITIGATION-STYLE ARBITRATION!

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Arbitration is a dispute resolution process which allows disputes between parties to be resolved fairly outside the traditional court system, by an impartial third party without unnecessary expense or delay. Choice is what sets arbitration apart from litigation – choice of decision maker, choice of the process, including the time and place of the hearing and all aspects of the procedure and choice of whether the arbitration is to be administered by an arbitral institution, or whether it will be *ad hoc*. Arbitration provides the flexibility to the structure which litigation lacks. It can be uniquely tailored to provide speedy and cost-effective procedures that are difficult or impossible for courts. But is arbitration becoming too much like litigation?

Arbitration is perceived to be different than litigation and should be different than litigation. Arbitration is viewed as a manageable and efficient process for resolving disputes, while avoiding time consuming and costly litigation. Arbitration is usually viewed as less expensive and faster than litigation. Efficiency is one of the reasons often cited as to why parties choose to arbitrate. However, arbitration is not always simple or inexpensive, but it is expeditious, or it should be expeditious compared to litigation. It is often said that arbitration is cheaper and quicker than litigation, but admittedly this is not always the case. In recent years, the business community has complained that arbitration is not as efficient as it should be and that it has become just as time-consuming and expensive as litigation. Some lament that arbitration has become too much like litigation, that it has taken on more and more features of a court trial. Some argue that arbitration has lost its way and that it has become nothing more than litigation in disguise; that it has become nothing more than a private trial. Is this what the parties bargained for when they agreed to arbitrate their disputes? When the parties agreed to resolve their disputes by arbitration, did they sign up for a private trial, conducted by a "private judge", with all the trimmings and trappings of a civil trial?

Commercial arbitrations in Canada are either administered by an arbitral institution, such as the ADR Institute of Canada or are conducted *ad hoc.* Freedom of contract allows arbitrating parties to choose an arbitral institution to administer their arbitration in accordance with the institution's rules or to write their own rules of arbitration. If the arbitration agreement provides for arbitration under a particular arbitral institution's rules, these rules must be followed in conducting the arbitration. When the parties in their arbitration agreement adopt a set of arbitral rules, they elect to an established process. Under most arbitral institutions' rules, arbitrators have a broad mandate to conduct proceedings in accordance with

the pre-established rules and procedures as they see appropriate in an impartial, efficient and expeditious manner, giving each party an equal and reasonable opportunity to present its case.

If the parties have not agreed on an institutional arbitration, the arbitration will be conducted *ad hoc,* subject to applicable provincial arbitral legislation. While litigation processes provide more or less a one-size-fits-all service, almost every aspect of the arbitration process can be tailored to the specific needs of the parties and the specific dispute. Some parties are of the view that as the arbitration is contractual, where the arbitration agreement does not adopt arbitral rules, they should be able to shape the process any way they want during the arbitration. While arbitration is premised on the fundamental principle of party autonomy and therefore the parties can elect to establish any process they choose for resolution of their disputes, subject to mandatory principles of public policy, often therein lies the problem. Party autonomy can often hinder procedural efficiency. The parties can customize the arbitral process to meet their needs. They can eliminate legal rules and normal trial procedures that might prove inconvenient or unsuitable and retain procedural elements they believe necessary to achieve fairness. Unfortunately, however many lawyers revert almost automatically to the habits of litigation. Often, such habits are disproportionate to the nature, complexity, significance and value of the dispute, resulting in the arbitration being conducted in an inefficient and unnecessarily costly manner.

Many lawyers are reluctant to give up the litigation processes and procedures they are comfortable with. When lawyers employ litigation tools and devices, arbitration often mutates into a private litigation proceeding that looks and costs like the litigation it's supposed to avoid. When the arbitration procedure becomes a litigation look-alike, the cost and the pace of the arbitration begins to approach the cost and pace of the litigation it's supposed to replace. When lawyers stick to the litigation-style procedures that give them comfort and security to navigate the arbitral arena, such as expansive documentary and oral discovery and pre-hearing motions for example, the arbitration goals of effective, fair and efficient dispute resolution can be compromised. When lawyers employ litigation tools and methods, the arbitration is susceptible to being hijacked and turned into a private trial and arbitrators can get swept along. When arbitration procedures are allowed to become a litigation look-alike, the arbitration too often mutates into a private trial that looks and costs a lot like the litigation it's supposed to prevent.

Arbitration is not a panacea, nor is it always the right choice for resolving disputes. Not all disputes are best suited for arbitration. In some instances, parties are better off in court. There are many reasons for choosing a trial over arbitration, but having agreed to resolve their disputes by arbitration, the parties and the arbitrators should not run the arbitration like a private trial. There is a fine balance between the parties designing their own process and permitting the arbitration process to replicate a civil trial with litigation-style processes and procedures that compromise arbitration's goals of fair, effective and efficient dispute resolution.

Arbitration is often praised for its procedural flexibility, but in practice that flexibility can often mean more process, not less. Arbitrators should resist the tendency to allow more process. The flexibility of arbitral procedure should not mean that the parties and arbitrators should be free to follow litigation-style procedures, particularly overly broad litigation-style discovery, one of the most expensive and time-consuming processes in litigation. Although the parties can agree otherwise, the scope of discovery in international commercial arbitration is very limited. There is no practice of automatic discovery in international commercial arbitration. The usual practice is to limit documentary discovery as much as possible to documents that are strictly relevant to the issues in dispute and necessary for the proper resolution of those issues.[1] In contrast, the general practice in litigation in Canada is for broad documentary and oral discovery.

Under domestic arbitration legislation[2] arbitrators have jurisdiction to direct pre-hearing document disclosure and discovery. Arbitrators should be deferential to the parties' legitimate discovery needs but should not abdicate their authority to manage the discovery process, both documentary and oral discovery. The key is for the parties to have a reasonable discovery plan commensurate with the case's complexity. Arbitrators should carefully balance the legitimate need for pre-hearing discovery with the overriding consideration of relevance to prove or defend their claim and the expectations of the parties when they agreed to arbitrate their dispute.

Arbitrators must allow parties to present their case and to respond to the other parties' cases.[3] However, this does not mean that arbitrators must allow endless motions, expansive documentary and oral discovery or needless presentation of irrelevant or cumulative evidence. Arbitrators must allow the parties to craft their own process and rules, but "an arbitrator should not become the conductor on a runaway train".[4] Arbitrators must be mindful of their duty to conduct the proceeding efficiently to avoid unnecessary costs and delays. Arbitrators should be prepared to exercise active case management to ensure a timely and cost efficient resolution of the dispute.[5] The parties choose arbitration instead of litigation and "they should not have that choice frustrated by arbitrators or lawyers who intentionally or inadvertently hijack the process".[6] Arbitrators must maintain a balance between proactive and judicious efforts to move the proceeding forward in an efficient and proportionate manner while at the same time respecting the principle of party autonomy. Subject to due process and fairness concerns, the arbitrators' task is to assist the parties to tailor an expeditious and efficient process that is most suited to the circumstances of the case. Arbitrators should play a pivotal

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[1] A. Redfern, *Law and Practice of International Commercial Arbitration,* 4th ed. London: Sweet & Maxwell, 2004, p.299

[2] *Arbitration Act,* 1991, S.O. 1991, c.17, s. 25(6)

[3] *Arbitration Act,* 1991, S.O. 1991, c.17, s. 19

[4] L.Tyrone Holt, *Whither Arbitration? What Can Be Done to Improve Arbitration and Keep Out Litigation's Ill-Affects.*

[5] *Arbitration Act,* 1991, supra, s. 20

[6] Michael Erdle, *Are Lawyers "Hijacking" Mediation and Arbitration?*

role in shaping the proceedings in an efficient and cost-effective manner without all of the unnecessary time-consuming and costly trimmings and processes of litigation.

The efficiency and fairness of arbitral proceedings can be enhanced when arbitrators effectively manage the proceedings through the use of case management conferences to address procedural and scheduling issues. Timetables for pre-hearing procedural steps and hearing dates set in consultation with the parties should be contained in procedural orders. Whether the arbitration is *ad hoc* or administered by an arbitral institution in accordance with the rules of the institution, once a timetable for pre-hearing steps and a hearing date have been set in consultation with the parties, arbitrators must commit to enforcing that schedule. Arbitrators should make clear to the parties that they are expected to comply with the procedural timetable. Arbitrators should explain that modifications to the timetable will require arbitrator approval and that requests for such modifications may be granted only where there are good and sufficient reasons to do so. Arbitrators should remind the parties of any potential consequences of non-compliance with procedural orders.

Arbitrators should regularly review the progress of the proceedings to ensure they are on track in accordance with the timetable and convene case management conferences with the parties to address outstanding organizational and procedural issues as and when necessary and appropriate. Effective case management of the proceedings by arbitrators enhances the efficiency of arbitrations and is a key element of distinguishing arbitration from litigation.

If the parties have agreed on the procedures to be followed in the arbitration, arbitrators should respect the parties' agreement unless it is contrary to any overriding mandatory laws or principles of public policy or would cause the proceedings to be conducted in an unfair or inefficient and unnecessarily costly manner. Arbitration should really be arbitration and not camouflaged litigation. In these circumstances, arbitrators should pro-actively encourage parties to adopt processes and procedures that are more suitable to arbitration and less like litigation.