COMMERCIAL ARBITRATION FROM COMMENCEMENT TO HEARING: PRACTICAL AND LEGAL CONSIDERATIONS

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Introduction[1]

The Central Aim of Commercial Arbitration is Efficiency and Finality

Parties in commercial relationships agree to have their disputes determined by arbitration for several reasons, some related to the arbitration process itself, and others that relate to a comparison between positive attributes of arbitration and negative aspects of litigation in the public courts. One factor that resonates with dispute resolution lawyers, in-house counsel and their clients is the fact that arbitration allows parties in dispute to "tailor fit" their arbitrations to the exigencies of the cases that present themselves for determination. This is a reflection of parties' desires for efficiency in dispute resolution and their desire to obtain final determinations as quickly and as inexpensively as possible.

Unfortunately, and all too often, in cases typically arbitrated in Ontario, counsel and their clients fail to take advantage of many of the benefits that arbitration offers, such that matters often proceed as nothing other than "private litigation"; or, trials that take place in private, conducted by adjudicators who are paid for their time. Indeed, what is often referred to as the "judicialization" of arbitration is often cited by parties as an important reason for discontent with their arbitration experiences. Often, this judicialization results from the relative inexperience of counsel, risk aversion on the part of in-house counsel, and/or from arbitrators who are retired judges or senior litigators and who, by default, fall back upon on their long-standing court-based experiences in dispute resolution.

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1. Paraphrasing Gascon J., *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, 411 D.L.R. (4th) 385, 4 L.C.R. (2d) 1 (S.C.C.) at paras. 1, 74 and 83.

A private trial in the traditional sense may be what the parties in any given case want. But parties who pursue "private litigation" deprive themselves of the substantial benefits that arbitration offers; the availability of practices and procedures that can provide certainty, finality and enforceable awards, and the concomitant efficiency that is reflected by substantial saving of time and costs during the dispute resolution process.

This paper will survey the arbitration process from commencement of arbitration to the start of the evidentiary hearing. It presumes that the parties have agreed to arbitrate, either by a dispute resolution section of an existing commercial agreement, or by an agreement to arbitrate made after a dispute arises. An understanding of applicable statutes, available soft law instruments, issues that can subvert or delay arbitrations and accepted arbitration practices is essential to the creation of fair, economical and efficacious arbitrations. While reference will be made to international commercial arbitration, which is almost invariably institutional, and to domestic institutional arbitration, most of this discussion will be focused upon the most typical commercial arbitration that takes place in common law Canada: domestic arbitrations that are conducted *ad hoc* under provincial domestic arbitration statutes.[2] In this context, primary reference will be to Ontario's *Arbitration Act, 1991*[3] (the "Ontario Domestic Act"), a statute that is, by and large, representative of the arbitration statutes in most of common law Canada.[4]

2. The term *ad hoc* arbitration is used to distinguish those arbitrations that are administered by arbitral institutions
3. R.S.O. 1991, c. 17.
4. As a general comment, the domestic arbitration acts in Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia are substantially the same, and are modelled on the 1990 Uniform Arbitration Act of the Uniform Law Conference of Canada. Unless otherwise stated, where references are made in this paper to sections of the Ontario Domestic Act, equivalent sections will be found in the statutes of those other provinces. The domestic act of British Columbia is also based upon the principles underlying that uniform act, with substantial drafting differences. It should be noted that for domestic arbitrations in British Columbia, s. 22 of the Act provides that the rules of the Briitsh Columbia Commercial Arbitration Centre ("BCICAC") automatically apply unless the parties have agreed otherwise; thus, that act and those rules have to be read in conjunction with each other. The domestic acts of the remaining provinces and territories are based upon the English *Arbitration Act* of 1889 (52 & 53 Vict. c. 49), a statute which, in the United Kingdom, was replaced by the substantially reformed *Arbitration Act, 1996*. In Quebec, arbitrations are governed by Book VII, Title II of the recently-amended Code of Civil Procedure. While some of the observations made in this article apply to arbitrations seated in Quebec, references to statutory law do not include provisions of that Code.

Conditions Precedent to Arbitration

A question that must be addressed in the face of an imminent arbitration, typically on receipt of a notice of commencement of arbitration, is whether the parties have established any conditions precedent to the formal start of arbitral proceedings and if so, whether any such conditions precedent have been satisfied.

Typically, such conditions precedent take the form of so-called "stepped" clauses that require some form of pre-arbitration interaction (negotiation or mediation) between the parties designed to promote settlement of their disputes. Where negotiation is required, clauses may specify who is to participate (by name or job description), and they may define the length of time that must pass before the negotiation obligation can be said to have been discharged. Very often, parties provide that negotiations must be conducted in good faith (using those words or words having similar import). Where mediation is required, these provisions will often incorporate reference to defined mediation procedures and/or provide time limits within which mediation must be completed.

The contractual issue in this context is whether prescribed steps must take place prior to the commencement of arbitration. If so, a premature arbitration may be delayed or stayed on the basis that the tribunal lacks jurisdiction to proceed. In international arbitration, an award made through a procedure contrary to an arbitration agreement may be set aside, or recognition and enforcement may be denied.[5]

To be effective, clauses that purport to require negotiation and/or mediation must be specific and enforceable. There must be certainty as to the steps that are required and as to the times within which those steps must be completed. Where there are effective and enforceable mandatory pre-arbitration processes, any failure to follow those required steps will, in the absence of waiver or subsequent agreement of the parties, deprive a tribunal of jurisdiction to proceed with the arbitration. It should be noted that where a responding party intends

5. UNCITRAL Model Law on International Commercial Arbitration (the "Model Law"), articles 34 and 35. The Model Law has been incorporated into the international commercial arbitration statutes of all of the territories and the common law provinces, save for British Columbia. In Ontario, the 2006 version of the Model Law was adopted with enactment of the *International Commercial Arbitration Act, 2017*, S.O. 2017, c. 2, Sched. 5 (the "Ontario International Act"). British Columbia's international statute is based upon the 1985 version of the Model Law and substantially incorporates its provisions; see *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

to argue that an arbitration is premature, its participation in the tribunal's appointment will not, *in se*, constitute a waiver of its right to object to that tribunal's jurisdiction.[6]

Historically, there was some doubt in Canada that stepped negotiation/mediation clauses could constitute conditions precedent to arbitration. This was on the basis of the well-accepted principle that mere agreements to agree are unenforceable. In *Alberici Western Constructors Ltd. v. Saskatchewan Power Corporation*,[7] for example, the parties agreed that they would "make all reasonable efforts to resolve all disputes and claims by negotiation" prior to commencing arbitration, but they did not specify any time period within which the negotiations had to take place. The court wrote that "stronger language would be required" to conclude that that provision constituted a condition precedent to arbitration.[8] This was consistent with *Walford v. Miles*,[9] in which the House of Lords ruled that a promise to continue negotiations to buy a business was unenforceable as a mere agreement to agree, and that a requirement to negotiate in good faith is inconsistent with the right of a bargaining party to bargain on the basis of its best interests.[10]

Given recent decisions elsewhere however, Canadian courts should be inclined to enforce parties' bargains to negotiate before being able to start arbitrations. For example, in *Cable & Wireless Plc v. IBM UK Ltd.*,[11] a clause that required good faith negotiation through an ADR procedure recommended by the Centre for Dispute Resolution was ruled binding because there was certainty in the arbitration agreement as to the required mediation procedure. Further, in *Wah v. Grant Thornton*[12] the court accepted as sufficiently clear and certain a contractual precondition to arbitration, articulating the following test:[13]

> In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or

6. Section 17(2) of the Ontario Domestic Act; see also article 16 of the Model Law.
7. 2015 SKQB 74, 39 B.L.R. (5th) 101, 41 C.L.R. (4th) 17 (Sask. Q.B.), affirmed 2016 SKCA 46, 400 D.L.R. (4th) 617, 55 B.L.R. (5th) 1 (Sask. C.A.).
8. *Supra*, at para. 67.
9. [1992] 2 A.C. 128, [1992] 1 All E.R. 453, [1992] 2 W.L.R. 174 (U.K. H.L.).
10. See also *Sul America v. Enesa Engenharis*, [2012] 1 Lloyd's Rep. 671 (C.A.), where a failure to name a mediator or define a mediation procedure rendered a mediation condition precedent to arbitration unenforceable.
11. [2002] EWHC 2059, [2003] B.L.R. 89, [2002] All E.R. (Comm) 1041 (Eng. Comm. Ct.).
12. [2013] 1 Lloyd's Rep. 11 (Ch.).
13. See paras. 59 and 60.

> bringing proceedings the test is whether the provision prescribes, without the need for further agreement: (a) a sufficiently certain and unequivocal commitment to commence a process; (b) from which may be discerned what steps each party is required to take to put the process in place; and which is (c) sufficiently clearly defined to enable the court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach.

The foregoing should be read in light of *Emirates Trading Agency LLC v. Prime Mineral Exports Private Limited*,[14] in which the English Commercial Court, to give effect to the parties' contractual intentions and expectations, liberalized the approach to be taken to the construction and enforceability of preconditions to arbitration. There, the contract provided that, before being entitled to proceed to arbitration, the parties had to "first seek to resolve" the dispute "by friendly discussion". It further provided that arbitration could only be invoked "if no solution can be arrived at . . . for a continuous period of four weeks". The respondent took the positions that the clause presented a condition precedent to arbitration, that that condition precedent had not been met, and that the arbitrators thus lacked jurisdiction to proceed. The claimant's answer, which was accepted by the tribunal in first instance, was that the putative condition precedent was unenforceable as a mere agreement to negotiate and that if it were enforceable, its terms had been met.

On judicial review, the court rejected the argument that friendly discussions had to proceed continuously for four weeks; rather, the clause established a four-week time limit for negotiations, after which arbitration could be invoked. This met the parties' objective that there had to be some finite time period within which they were to try to avoid the costs associated with arbitration proceedings. The reference to a four-week continuous time period ensured that the defaulting party could not indefinitely postpone commencement of arbitration and that the claimant would have the opportunity to consider proposals that might emerge from settlement discussions for a defined time period before it could invoke arbitration.[15]

The court then dealt with enforceability of the "friendly discussion" obligation. It cited extensively from *United Group Rail Services v. Rail Corporation New South Wales*,[16] in which an Australian court ruled that an agreement to undertake negotiations in good faith to

14. [2014] EWHC 2104 (Comm).
15. *Supra*, at paras. 28 through 31.
16. (2009), 127 Con. L.R. 202.

settle a dispute arising under a contract was enforceable, in large part on the basis that "there is a public interest in giving effect to dispute resolution clauses which require the parties to seek to resolve disputes before engaging in arbitration or litigation".[17] In dealing with the particular contract language in issue:

> The agreement is not incomplete; no term is missing. Nor is it uncertain; an obligation to seek to resolve a dispute by friendly discussions in good faith has an identifiable standard, namely, fair, honest and genuine discussions aimed at resolving a dispute. Difficulty of proving a breach in some cases should not be confused with a suggestion that the clause lacks certainty. In the context of a dispute resolution clause pursuant to which the parties have voluntarily accepted a restriction upon their freedom not to negotiate it is not appropriate to suggest that the obligation is inconsistent with the position of a negotiating party. Enforcement of such an agreement when found as part of a dispute resolution clause is in the public interest, first, because commercial men expect the court to enforce obligations which they have freely undertaken and, second, because the object of the agreement is too avoid what might otherwise be an expensive and time consuming arbitration.

The lesson here for a claimant is to ensure that all enforceable preconditions to arbitration are satisfied before commencing arbitration. Conversely, respondents should be alive to this issue so that they can, on a timely basis, either challenge the jurisdiction of an appointed tribunal to proceed or at least have the arbitration suspended pending any contractual obligation to negotiate or mediate.

Commencement of Arbitration

It is important that there be certainty as to when an arbitration has actually started. This is primarily because there may be limitation provisions that apply. Also, there is some authority (even if questionable) for the proposition that arbitration costs that can be awarded by an arbitration tribunal cannot include expenses or fees incurred before the formal commencement of arbitration.[18]

Notwithstanding the need for such certainty, consistent with the fundamental precepts that arbitration is flexible and party driven, Canadian domestic acts and the Model Law provide no precise

17. At para. 50.
18. For example, *Italiano v. Toronto Standard Condominium Corp. No. 1507* (2008), 168 A.C.W.S. (3d) 239, 2008 CarswellOnt 3951, [2008] O.J. No. 2642 (Ont. S.C.J.) at para. 7.

means by which an arbitration must be commenced. For example, broadly-worded s. 23(1) of the Ontario Domestic Act first provides that an arbitration "may be commenced in any way recognized by law" and then gives three non-exhaustive examples, each premised upon the existence of an arbitration agreement:

(i) a party to an arbitration agreement serves all other parties a notice to appoint or to participate in the appointment of an arbitrator under the agreement;
(ii) one party serves a notice upon a non-party authorized to appoint an arbitrator asking that party to exercise that power and serves a copy of that notice upon the other parties; and,
(iii) a party serves on the other parties a notice demanding arbitration under the agreement.

Section 24 further provides that if a notice of arbitration does not identify the specific dispute that is to be arbitrated, that notice shall be deemed to refer to all disputes that the arbitration agreement entitles the party giving the notice to refer. On the international side, the Model Law simply provides that arbitral proceedings commence on a date on which a request for arbitration of a dispute is received by a respondent.

The foregoing being noted, the statutory provisions only apply where the parties have not agreed otherwise in their arbitration agreements. Often, the formal means of commencement, and hence by implication the commencement dates, are expressed within the arbitration agreements themselves. Invariably, arbitration will be triggered by notification of a claimant's demand for arbitration received or brought to the knowledge of a respondent. Also, arbitration agreements may provide for the adoption of the procedural rules of any one of a number of arbitration institutions. Almost all such rules make express provision for the formal commencement of arbitration. For example, under article 2 of the ADR Institute of Canada ("ADRIC") Rules, a party to an existing arbitration agreement commences an arbitration by delivering a written Notice of Request to Arbitrate to each respondent, and if ADRIC is to administer the arbitration, delivering a copy of that notice to ADRIC and paying ADRIC's commencement fee. Under those rules, the formal commencement date is the date on which the requisite notice is delivered to the respondent.[19]

19. The rules of other Canadian domestic arbitration rules are similar. For the International Centre for Dispute Resolution Canada ("ICDR Canada"), the commencement date is the date on which the ICDR receives notice. For ADR Chambers and the BCICAC, arbitrations commence when the institutions receive notice and the filing fees are paid. For international

Apart from specifying a commencement date, domestic and international institutional rules typically provide for mandatory information that is to be provided in an initiating arbitration document. For example, article 2.1.2 of the ADRIC Rules requires the Request to Arbitrate to contain the following:

(a) the name, place of business (if any) and mailing address, telephone number, fax number, and email address of each party to the dispute if known;
(b) an address, fax number (if any), and email address (if any) for delivery of Documents to the claimant;
(c) a brief description of the matters in dispute or a Statement of Claim;
(d) a request to arbitrate the dispute;
(e) an estimate of the amount claimed or, if that is not available, of the value of what is in issue in the dispute. If the claimant cannot estimate this value, it must explain the reason;
(f) a statement of what remedy the claimant is seeking;
(g) a statement of whether the Tribunal is to be made up of one or more Arbitrators, if the parties have agreed;
(h) the name of any agreed Arbitrator;
(i) any agreed qualifications of the Arbitrator(s);
(j) the proposed language of the arbitration; and
(k) a statement of any variations or exclusions of the Rules to which the parties have agreed in writing.

In addition, article 2.1.3 requires that the applicant append a copy of the arbitration agreement or clause and any contract that relates to the dispute that is to be arbitrated. To a very similar effect, article 2 of the ICDR Rules requires that a Notice of Arbitration contain:

(i) a demand that the dispute be referred to arbitration;
(ii) the names, addresses, telephone numbers, fax numbers, and email addresses of the parties and, if known, of their representatives;
(ii) a copy of the entire arbitration clause or agreement being invoked, and, where claims are made under more than one arbitration agree-ment, a copy of the arbitration agreement under which each claim is made;
(iv) a reference to any contract out of or in relation to which the dispute arises;
(v) a description of the claim and of the facts supporting it;

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arbitrations, the rules of the International Chamber of Commerce ("the ICC Rules") provide that arbitrations commence by the submission of a Request for Arbitration on the date that that request is received by the ICC Secretariat. The rules of the International Centre for Dispute Resolution (the "ICDR Rules") and the London Court of International Arbitration ("LCIA Rules") are substantially the same.

(vi) the relief or remedy sought and any amount claimed; and
(vii) optionally, proposals, consistent with any prior agreement between or among the parties, as to the means of designating the arbitrators, the number of arbitrators, the place of arbitration, and the language(s) of the arbitration, and any interest in mediating the dispute.[20]

The importance of complying with the foregoing types of requirements cannot be overstated. In *Plan Group v. Bell Canada*,[21] the arbitration agreement required that any arbitration would be conducted under the rules of a designated institution and further provided that a failure to commence arbitration within 12 months would constitute a waiver of all claims. The claimant did serve a notice of arbitration on the respondent, but failed to comply with a rule requiring filing of that notice with the institution. The court ruled that, on a proper construction of the arbitration clause, the arbitration had not been timely commenced and the claims were thus waived. The lesson here is that substantive notice requirements and/or time limits either expressed in an arbitration clause or incorporated by reference to arbitration rules must be complied with lest a right to arbitrate may be lost or, more seriously, a claim may be extinguished by waiver or the expiration of a limitation period.

Quite apart from what may be necessary by rule or statute, it is in the interest of claimants to set out, in as much detail as possible, their positions on the issues to be arbitrated and the essential evidence (including key documents or document extracts) and legal principles that support those positions. Unlike court rules of civil procedure, no constraints are imposed upon the content of arbitration initiating documents, and a notice that commences an arbitration will be the first document read by the arbitrators, once appointed. As such, the initiating notice presents an excellent opportunity for advocacy that should not be ignored. As well, where the arbitrators are to be appointed by an arbitral institution, the notice of arbitration will be used as a source of valuable information that can inform the arbitrator selection process.

A respondent should not, of course, be disadvantaged by a claimant's early presentation of its case. Typically, institutional rules provide for a right of response to an initiating notice of arbitration. While there is no express right of response in the ADRIC Rules, article 3 of the ICDR Canada Rules requires such a response within

20. Institutional rules for international arbitrations are much to the same effect. See, for example, article 4 of the ICC Rules and article 2 of the ICDR Rules.
21. 2009 ONCA 548, 62 B.L.R. (4th) 157, 96 O.R. (3d) 81 (Ont. C.A.).

30 days and provides that a respondent can in that response assert counterclaims and setoffs. Notably, a failure to respond will not, under the ICDR Canada Rules, prevent an arbitration from proceeding.[22]

It has been suggested that respondents should always avail themselves of an opportunity to respond even where such right is not provided by agreements or rules:

> Regardless of whether there is any rule or legislation requiring it, it is a good idea, even in an *ad hoc* arbitration, to file a detailed response to the document commencing the arbitration; otherwise, the issues that the respondent may wish to raise along with any counterclaim will be unknown at the time the tribunal is being constituted and may well still be unknown at the time the tribunal holds its first procedural meeting. If the Notice of Arbitration and the Answer are fully detailed, they can also obviate the necessity of further pleadings.[23]

The foregoing represents but one instance of a common theme in arbitration. In a process that incorporates pro-active case management by an appointed tribunal from commencement through final award, parties should take full opportunity for advocacy at every stage of their proceedings.

Appointment of Arbitrators and Pre-Appointment Interim Proceedings

Importance of Arbitrator Selection

The rights of parties in dispute to choose their adjudicators is often the main reason arbitration is chosen over litigation. Hence, the choice of arbitrators, and the process by which they are appointed, will likely be the most important pre-hearing component of any arbitral proceeding. As the writers of a leading text in international arbitration note:

> . . . choosing the right arbitral tribunal is critical to the success of the arbitral process. It is an important choice not only for the parties to the particular dispute, but also for the reputation and standing of the process itself. It is, above all, the quality of the arbitral tribunal that makes or breaks the arbitration, and it is one of the unique distinguishing factors of arbitration as opposed to national judicial proceedings.[24]

22. For international arbitrations, see article 3 of the ICDR Rules and article 5 of the ICC Rules.
23. J. Brian Casey, *"Arbitration Law of Canada: Practice and Procedure"*, 3rd ed. (Juris, 2017), p. 147.

Further as to the importance of choosing an effective tribunal:

> The choice of arbitrator may be the single most important part of the arbitral process. Because arbitration is consensual and operates outside of the rules of procedure and practice used by the courts, the role of the arbitrator is crucial in maintaining the integrity and efficiency of the process. One of arbitration's biggest advantages is that the matter is case managed by the arbitrator from beginning to end. In an arbitration, as with any dispute, one party is usually keener to proceed than the other. The inevitable jockeying for tactical position, strategic delaying and the adversarial stance taken by most lawyers as a result of their training in the court system necessitates a strong and knowledgeable arbitral tribunal. A weak judge is a disappointment and an impediment to justice in the court system. A weak arbitral tribunal is even more dangerous as there is little right of appeal or recourse. Arbitrators must be chosen with care.[25]

Pre-appointment Interim Measures of Protection

Tribunals must be appointed as soon as possible after formal commencement of arbitration, as no substantial steps can be taken in the proceedings until that happens. As expressed in the domestic arbitration statutes of Ontario, Alberta, Saskatchewan, Manitoba, New Brunswick and Nova Scotia, and as implicit in the domestic acts in the remaining provinces and territories and in the Model Law, an arbitral tribunal can only exercise its powers after all members have accepted their appointments.[26]

There is, however, an important caveat to this. It may happen that a party to a newly-commenced arbitration requires some form of emergency remedy; for example, preservation of documents or property, or some form of injunctive relief. Under the domestic arbitration acts of most of the provinces, fully constituted tribunals have jurisdiction to grant such relief. Section 18(1) of the Ontario Domestic Act provides, in this regard, that arbitrators may make orders "for the detention, preservation, or inspection of property and documents that are the subject of the arbitration or as to which a question may arise in the arbitration, and may order a party to provide security in that connection". For international arbitrations, article 17 of the 1985 version of the Model Law provides for similar relief. By amendments to that instrument in 2006, Chapter IV A sets

24. Nigel Blackaby and Constantine Partasides, *Redfern and Hunter on International Arbitration*, 6th ed. (Oxford University Press, 2015), para. 4.13.
25. Casey, *supra*, footnote 23, at p. 154.
26. See, for example, s. 23(2) of the Ontario Domestic Act.

out a far more detailed version of article 17 that provides a detailed set of rules for the making, recognition and enforcement of interim protective orders.[27]

The foregoing powers exist, however, only in fully constituted tribunals. Thus, prior to a tribunal's appointment, a party will have to seek emergency relief from the courts. For domestic arbitrations, recourse will be to the courts of the jurisdiction in which the arbitrations are seated. In this regard, s. 8 of the Ontario Domestic Act provides that the Superior Court's "powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions". In international arbitration, the issue of court recourse, and the applicable legal tests and principles is, as one might expect, more complicated, but the court of primary jurisdiction will be the court of the state in which the arbitration is seated.

Where arbitral tribunals are not yet fully-appointed, and where the parties have agreed to adopt institutional rules, the need to resort to the courts for interim measures of protection will be obviated by alternative procedures made available by most of the institutions, both domestic and international. While the individual set of rules vary in their details, their general thrust is that a party to a commenced arbitration can, on payment of a fee, make a formal request to the institution for emergency relief, by written notice setting out the precise relief requested and explaining why it is necessary that that relief be ordered on an emergency basis. The institution will then, after undertaking some form of screening process, appoint an emergency arbitrator with power to receive submissions and then grant emergency interim relief, including relief on an *ex parte* basis where appropriate. The rules also typically provide for challenge procedures relating to the appointed emergency arbitrator, applications to vary and set aside interim orders, and requirements that the substantive arbitrations then proceed before a properly constituted tribunal. Typically, the emergency arbitrator will not be appointed to the permanent tribunal.[28]

Number of Arbitrators

In undertaking the appointment of the permanent tribunal, the initial consideration should be whether the parties should name one

27. To date in Canada, only Ontario has adopted the 2006 version of the Model Law (by enactment of the Ontario International Act).
28. See, for example, ADRIC article 3.7; ICDR Canada article 6; LCIA article 9; and, ICC article 29 and Appendix V: Emergency Arbitrator Rules.

or three arbitrators.[29] Most often, where there are pre-existing arbitration agreements, the contracting parties will already have made their choice as between one or three. Note, however, that those types of clauses are negotiated before the parties know, other than in very general terms, what the actual issues in dispute will be. Once a dispute does emerge, any aspect of a pre-existing arbitration agreement can be changed by further express agreement, the composition of the arbitral tribunal included. Indeed, it often happens that, when faced with the additional time and expense associated with a three-member tribunal, parties amend their agreements to reduce their tribunals to a single arbitrator.

Where parties cannot agree on the number of arbitrators, statutes and rules provide defaults. Under Canada's domestic acts, the default is a single arbitrator.[30] The same is true under ADRIC, ICDR Canada and BCICAC rules. On the international side, article 10(2) of the Model Law provides for a default tribunal of three arbitrators. Institutional rules (which if adopted will supersede the Model Law) vary. For example, under article 12 of its rules, the ICC Court will, in the absence of party agreement, appoint a sole arbitrator "save where it appears to the Court that the dispute is such as to warrant the appointment of three arbitrators", presumably referring to factors such as the number and geographic location of parties, the complexity of the dispute, and the amounts in issue. Similarly, article 5 of the ICDR rules provides for a default of one arbitrator "unless the administrator determines in its discretion that three arbitrators are appropriate because of the large size, complexity or other circumstances of the case".

Rules and statutes aside, in structuring their arbitrations, parties should take a fresh look at the number of arbitrators at the outset of the process, with their particular needs and objectives in mind and with reference to the issues that require adjudication. In this regard, the following factors should be considered.

29. There are no institutional rules or statutes that preclude an even number of arbitrators, or tribunals comprised of more than three arbitrators. The norm in domestic and international commercial arbitration is that there be either one or three arbitrators. The use of tribunals comprised of two arbitrators and an umpire is very rare; however, see s. 4 of the British Columbia Domestic Act. Under that section, a tribunal composed of an even number of arbitrators can appoint an umpire, who will then decide matters upon which the arbitrators cannot by majority agree.

30. For example, s. 9 of the Ontario Domestic Act. The domestic acts of Prince Edward Island and Newfoundland and Labrador are silent on this subject.

- *Cost and efficiency*: there is no question but that single-member tribunals are more efficient and thus less costly than proceedings before three arbitrators. The difference is far more than treble the rates charged by a single arbitrator. The entire process before a larger tribunal will be more complicated and time-consuming. It will be harder to find open dates for case conferences and evidentiary hearings. Where interlocutory issues are to be decided by all tribunal members, they will all participate in deliberations and, conceivably, writing interim and procedural orders. Hearings before three arbitrators are invariably longer than those before a single arbitrator. Following the hearing, three arbitrators will have to participate in individual and then collaborative deliberations, and they will then have to take the time required to ensure that they each concur in the result and in the reasons for decision. In exceptional cases, one of the three arbitrators may disagree with the result and then take time to write a dissenting award (particularly where any right of appeal is preserved).
- *Appointment Process*: while parties will often agree on the appointment of a single arbitrator, disputes can arise during this part of the process, particularly if a responding party chooses to be recalcitrant. Any dispute over the appointment of a sole arbitrator can consume valuable time and resources at the outset of an arbitration, especially if the court or an appointing authority becomes involved. Where such a third party becomes involved in the appointment process, parties may find themselves with an arbitrator that neither would have appointed on their own. Parties may find it easier to come to terms on tribunal appointment by being able to each appoint their own arbitrator and by then empowering their appointees to name a third arbitrator to act as tribunal chair. Ironically, where this occurs, to save time and expense, parties sometimes then ask their appointees to withdraw, leaving the chair to act as sole arbitrator.
- *Diversity of nationality*: often, considerations of diversity on the tribunal render it necessary that there be more than one arbitrator. This is typically the case in international arbitration, because the parties will be from different states. This will invariably entail a need for an understanding of different legal provisions and divergent legal customs and mores. This will be particularly important where the parties are from both common and civil law jurisdictions, in which

case they will have very different expectations as to the fundamental nature of quasi-judicial proceedings, especially at the evidentiary hearing stage. It is not uncommon in international arbitrations that the tribunals will be composed of party appointees who are of the same nationality as the respective appointing parties, and a chair who is from a neutral state.

- *Diversity of expertise and experience*: it is not uncommon that parties wish to have arbitrators that have certain experience and expertise that will make it easier for issues in dispute (and expert evidence relating to such issues) to be more easily and efficiently understood and adjudicated. While this objective can be achieved by appointing a single arbitrator, there are many situations where a mix or combination of expertise may be desirable. These requirements may be set out in a pre-existing arbitration agreement (in which case the parties will be bound unless they otherwise specifically agree) or parties may come to terms on this during the appointment process once the precise issues in dispute are known. Where provision is already made for a three-member tribunal, each of the parties will have the opportunity to appoint an arbitrator with its own preferred experience and expertise. For example, in a typical commercial rent reset case, the parties will often appoint two experienced real property appraisers as wing arbitrators, with a legally-trained arbitrator as chair. As another example in a case involving issues of copyright infringement in computer software, the parties appointed an intellectual property lawyer and a person with detailed knowledge of the computer language in issue as their appointees, and a retired Federal Court judge as chair.[31] Often, commercial disputes engage complex accounting issues, such that having an accountant on the tribunal will be desirable. Finally, in a dispute between a national air carrier and a regional airline relating to their commercial arrangements, the arbitration agreement required that the party appointees were to be retired airline executives with knowledge of the type of commercial arrangement in issue and that the chair was to be a legally trained individual.[32]

31. *Xerox Canada Ltd. v. MPI Technologies Inc.*, 2006 CarswellOnt 7850 (Ont. S.C.J.). (The writer acted as counsel to MPI in this case.)
32. This case cannot be identified as it is not of public record. The writer acted as counsel to one of the parties.

- *Complexity*: it is certainly true that, for cases that are not complex and/or where the amount in issue is relatively small, a single person tribunal will be adequate and appropriate. On the other hand, while there are certainly many complex and expensive cases that are arbitrated before single-member tribunals, parties often believe that where there is more in issue, their cases can support and benefit from a greater number of decision-makers. This is particularly the case where there are no rights of appeal. There is no doubt that complex and nuanced issues can benefit from the ability of decision-makers to confer with each other in the deliberative and award-writing processes. Many arbitrators themselves will often express their preferences to sit on three-member tribunals.
- *Party acceptance*: parties will often be loath to repose adjudication of a very important dispute to a single individual. This will be particularly the case in so-called "bet the farm" cases. With three-member tribunals, losing parties may have greater confidence that their positions have been understood by their tribunal, even if not ultimately accepted.
- *Availability of appeal*: in international arbitration, while the Model Law does provide for procedures to have awards set aside (or to have recognition and enforcement of awards denied), the grounds upon which awards may be set aside are very limited, including for the most part matters of jurisdiction, fair process and procedure, bias and corruption.[33] As well, the threshold for having international awards set aside is very high.[34] There are no rights of appeal on questions of fact or law in international arbitration, unless the parties provide for appeal rights to appeal arbitral tribunals (a practice that is exceedingly rare). In domestic arbitration, a losing party's ability to have an award set aside (or not enforced) mirror the same rights and are similarly constrained as under the Model Law.[35] As to

33. Model Law, articles 34 and 36.
34. *Xerox Canada Ltd. v. MPI Technologies Inc.*, *supra*, footnote 31; *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International S.p.A.* (1999), 45 O.R. (3d) 183, 91 A.C.W.S. (3d) 520, 104 O.T.C. 1 (Ont. S.C.J. [Commercial List]), affirmed (2000), 49 O.R. (3d) 414, 136 O.A.C. 113, 99 A.C.W.S. (3d) 537 (Ont. C.A.), leave to appeal refused [2001] 1 S.C.R. xi, 149 O.A.C. 398n, 271 N.R. 394n (S.C.C.); *United Mexican States v. Karpa* (2005), 248 D.L.R. (4th) 443, 30 Admin. L.R. (4th) 272, 74 O.R. (3d) 180 (Ont. C.A.).
35. See, for example, s. 46 of the Ontario Domestic Act.

> appeals, the domestic arbitration acts vary. All provinces and territories permit parties to agree to rights of appeal to the courts on questions of law, fact and mixed fact and law. Some provinces guarantee a right of appeal on questions of law (with leave of the court),[36] and others permit parties to opt out of such a right.[37] However, regardless of the particular regime, appeal rights in Canadian domestic arbitrations have now been significantly curtailed by virtue of two recent Supreme Court of Canada decisions, in which that court very narrowly defined the expression "question of law" and ruled that the standard of review on arbitration appeals will be "reasonableness" as opposed to "correctness".[38] Given this, parties may take greater comfort in having the risk of legal error spread over three arbitrators as opposed to one.

The practical take-away from this discussion is that, on the commencement of arbitration, regardless of the terms of their arbitration agreements, parties should take a fresh look at the number of arbitrators that will have to be appointed, with a view to maximizing the efficiency and fairness of the process they are initiating.

Independence and Impartiality

There are, of course, other legal and practical issues that come into play in the arbitrator appointment process.

From a legal perspective, the governing principle is that all arbitrators, whether party-appointees or tribunal chairs, must be independent of the parties and must act impartially.[39] This is an explicit requirement in most domestic arbitration acts.[40] This is implicit in international arbitration, by virtue of article 12(1) of the Model Law, which requires potential arbitrators to "disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence". Unfortunately, conflict issues have become the basis for some gamesmanship in the arbitrator selection process, as well as during ensuing arbitrations and ultimately

36. British Columbia (although parties can opt out of appeal rights after an arbitration commences), Alberta, Manitoba and New Brunswick.
37. Ontario and Saskatchewan.
38. *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, 373 D.L.R. (4th) 393 (S.C.C.); and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, 411 D.L.R. (4th) 385, 4 L.C.R. (2d) 1 (S.C.C.).
39. See *Szilard v. Szasz* (1954), [1955] S.C.R. 3, [1955] 1 D.L.R. 370, 1954 CarswellOnt 143 (S.C.C.), at p. 373.
40. See s. 11(1) of the Ontario Domestic Act.

through attempts by losing parties to have awards set aside. A detailed review of this aspect of the arbitration is beyond the scope of this paper; nevertheless, the following points should be considered as part of this practical overview:

- In domestic arbitration, parties can waive statutory requirements of independence and impartiality. They cannot, however, contract out of the statutory requirement that arbitrators treat the parties "equally and fairly".[41]
- Similarly, in international arbitration, while parties can waive any independence-related issues disclosed by a potential arbitrator, they cannot waive article 17 of the Model Law, which provides that the "parties shall be treated with equality and each party shall be given a full opportunity of presenting his case".
- Often, in Canadian domestic arbitration, parties appoint individuals with little arbitration experience, and most arbitrations are *ad hoc* (*i.e.*, not administered by an institution). In these situations, it is extremely important that, at the outset (if not prior to actual appointment) the arbitrators are made aware of their statutory obligations of independence and impartiality. This knowledge should not be presumed. Indeed, it is all too often the case that inexperienced party-appointees believe that they have some obligation to favour, in some way, the positions of their appointing parties. Unless this is addressed at the outset, arbitrator misconduct of this type can threaten the integrity of the arbitration and, ultimately, the finality and efficacy of the award.
- When considering the appointment of arbitrators from the United States, be aware that historically, because arbitration was viewed as "alternative dispute resolution", party-appointed arbitrators were not expected to be independent or impartial. In one leading case, for example, the court wrote that party-appointed arbitrators "should be expected" "to be pre-disposed towards the nominating party's case.[42] For this reason, it is important that any U.S. national (experienced or not) being considered for appointment in an arbitration seated in Canada be fully informed as to the

41. See ss. 19(1) and 3(1)(ii) of the Ontario Domestic Act.

42. *Del Monte Corporation v. Sunkist Growers*, 10 F.3d 753, 760 (11th Cir., 1993). Now, with changes made in 2004 to the American Bar Association Code of Ethics for Arbitrators in Commercial Disputes, party-appointee neutrality is expected as the norm.

expectations of neutrality that the parties and the co-arbitrators will undoubtedly have, and as to the statutory obligation to treat all parties fairly.

- Typically, arbitration statutes and institutional rules require that proposed arbitrators make disclosure of any circumstances of which they are aware that could give rise to a reasonable apprehension of bias.[43] This is a critically important requirement, as it underlies the rights that parties have to challenge the appointment of arbitrators and defines the facts and circumstances in respect of which waiver arguments may be made. Parties who engage in the collaborative appointment of arbitrators should ensure that this disclosure is made even where they have easily come to terms on the appointment of particular arbitrators.
- Unsurprisingly, the disclosure obligations of arbitrators do not end on their appointment; they continue throughout the arbitral process.[44] Particularly where inexperienced arbitrators are appointed, the parties should at the outset of any arbitration ensure that all tribunal members are made aware of these ongoing disclosure requirements.

The most important obligation arbitrators owe to the parties is to produce awards that are final, binding, recognizable and enforceable. Any failure to disclose circumstances that could give rise to reasonable apprehensions of bias could prove to be problematic after an award is rendered and, having lost, one party is not satisfied with the result. For example, in *SA Auto Guadeloupe Investissements v. Colombus Acquisitions Inc.*[45] the French court refused to enforce an international arbitration award on the basis that the arbitrator's law firm, unknown to the arbitrator, represented the parent of one of the parties during the currency of the arbitration. This fact undermined that arbitrator's independence and impartiality and, in the result, the arbitration was a waste of all the time, effort and money that had been expended.

Jacob Securities Inc. v. Typhoon Capital B.V. is also illustrative of this same issue, albeit with a different result.[46] In that international arbitration seated in Toronto, the sole arbitrator had had, before his

43. For example, section 11(2) of the Ontario Domestic; article 12 of the Model Law; ADRIC rule 3.3.3; ICDR Canada article 13; and ICDR article 7.
44. For example, s. 11(3) of the Ontario Domestic Act.
45. RG 13/13459 (Cour d'appel de Paris, 14 October 2014).
46. 2016 ONSC 604, 262 A.C.W.S. (3d) 840, 2016 CarswellOnt 1014 (Ont. S.C.J.), additional reasons 2016 ONSC 1478, 264 A.C.W.S. (3d) 318, 2016 CarswellOnt 3047.

retirement less than a year before the commencement of the arbitration, a 40-year career as a senior litigator at McCarthy Tetrault LLP. He did disclose that he had no previous dealings with any of the parties or their principals, and he did provide statements to that effect in express provisions in the written agreement that confirmed his appointment. After the final award was issued, the losing claimant retained new counsel and then became aware that McCarthy Tetrault had, while the arbitrator was still a partner, acted for the underwriters for the project that was in issue in the arbitration as well as for an individual who testified at the hearing. In considering actual or potential conflicts of interest, the arbitrator had not conducted any conflict search in McCarthy Tetrault's records.[47] Alleging that the arbitrator had deprived the applicant of the ability to consider whether there was any reasonable apprehension of bias when the appointment was made, the applicant moved to set the award aside. In dismissing the application, Justice Mew ruled that, as the arbitrator had not worked on any of the underwriter's files while at his firm, and as the underwriter was not itself a party, and as the arbitrator did not have personal knowledge of the material relationships, the applicant failed to rebut a strong presumption of neutrality enjoyed by arbitrators.[48]

Jacob Securities is also important in a domestic context, because many of Canada's leading arbitrators either practice as litigation counsel or are recent retirees from their firms. The applicant argued that the arbitrator had an obligation to conduct a conflict search at his former firm, notwithstanding his retirement months before his appointment. This suggestion was rejected by the application judge in the following terms:[49]

> 56 I would agree that an arbitrator who is a partner of, or otherwise works for a law firm, has a positive duty to investigate any potential conflicts of interest with his or her law firm in order to satisfy his or her disclosure obligations. However, the question posed by the present case is whether that obligation extends to the Arbitrator's *former* law firm and, if it does, whether the search should include not only the names of the parties to the arbitration, but also to witnesses, the employers of witnesses, or non-parties to the dispute, who nevertheless feature in it.
>
> 57 In contrast to the arbitrator in *HSMV Corp.*, Mr. Heintzman had left McCarthys eleven months prior to accepting his appointment.

47. Indeed, the evidence was that as a retired partner, the arbitrator did not have access to the firm's conflict search system.
48. See paras. 43 through 50.
49. At paras. 56 through 59.

> The applicant argues that this was not a very long interval. In *Rando Drugs*, the Court of Appeal made reference to the common practice of judges in the Superior Court of not hearing cases involving their former firms for at least three years following their appointment.
>
> 58 I am aware of no authority which imposes on judges, recently appointed or otherwise, a duty to ask their former firms to conduct conflict searches for the names of all parties to the cases which the judge deals with. Judges will typically know the clients they acted for when they were lawyers as well as other major clients of their former firms. But they cannot possibly know or be expected to know every client that their former firms acted for. I do not see why the position of an arbitrator who is in independent practice and who is no longer associated with a law firm should be any different. As with the judge in *Rando Drugs*, the Arbitrator was unaware of the facts relied upon by the applicant as giving rise to a conflict of interest. The notion that a judge or arbitrator must make a concerted effort to search for hitherto unknown conflicts from a firm that he or she no longer works with would be a burdensome exercise and wholly disproportionate response to the duty to disclose.
>
> 59 As a practical matter, firms such as McCarthys owe an obligation to their clients not to disclose confidential information to third parties, which would include former partners and lawyers. It is presumably for that reason that McCarthys are rarely asked to conduct conflict searches by individuals who formerly worked at the firm. Furthermore, the parties to a private arbitration might have confidentiality concerns of their own about their names being run through the conflict search system of a firm that an arbitrator is no longer a member of.

Trying to ascertain the proper test for arbitrator disclosure can, unfortunately, be a quagmire, and views will differ as to disclosure requirements, particularly in international arbitration, where widely different norms and principles may apply. As a practical matter, potential arbitrators may be loath to make disclosure of facts that would not, in their minds, be problematic for fear of being disqualified. There is also, at least in Canadian markets, a mindset that, because the legal community is relatively small, the existence of relationships between counsel and arbitrators will be inevitable. As a result, there may be a tendency to close one's eyes to matters that should be disclosed.

Guidance for arbitrators and counsel can be taken from material published by arbitration institutions and, in particular, from the International Bar Association's *Guidelines on Conflicts of Interest in International Arbitration*, first published in 2004 and then amended in 2014 (the "IBA Guidelines").[50] There, the IBA lists non-

exhaustive lists of circumstances that could give rise to doubts as to impartiality in the following four categories:

- Non-Waivable Red List: situations in which an arbitrator should not act, even with the consent of the parties.
- Waivable Red List: situations that, while potentially leading to disqualification, may be waived by express agreement of the parties in any particular case.
- Orange List: situations which may give rise to justifiable doubts as to independence or impartiality that, once disclosed, gives the parties the option to challenge; if they do not do so on a timely basis, they will be deemed to have waived their right to challenge on the basis of that disclosure.
- Green List: circumstances that do not give rise to any duty of disclosure.

To date, no state or arbitral institution has formally adopted the IBA Guidelines and they have been subject to some criticism. For example, it has been observed that the Guidelines are too strict, particularly as they apply to lawyers in large law firms, and that they are of limited utility as they do not purport to supersede national law and apply only to disclosure as opposed to disqualification.[51] It has also been observed that, as a practical matter, once disclosure is made, parties will then object or challenge as a matter of course.[52] The following is offered as guidance:[53]

> The proposed nominee who believes that there are no circumstances which would give rise to a reasonable apprehension of bias should nonetheless disclose what investigations he or she made, and the results thereof, with a view to listing those matters which the other side might regard with suspicion or which ought to be brought to their attention. This should include a comment that the arbitrator does not believe these give rise to any reasonable apprehension of bias. This then puts on the other side the obligation to object within 30 days or be deemed to have waived any objection.

Consistent with the underlying arbitration themes of party autonomy and arbitration efficiency, where there are grounds upon which an appointed arbitrator may be challenged for lack of independence and impartiality, such challenge must be pursued

50. Available at www.ibanet.org.
51. *W Ltd. v. M SDN BHD*, [2016] EWHC 422 (Comm); *H v. L, M, N, P*, [2017] EWHC 137 (Comm).
52. See, Casey, *supra*, footnote 23 at section 4.9.3.
53. Casey, *supra*, footnote 23, at page 172.

promptly. Under most Canadian domestic acts, an applicant must provide the basis for its challenge to the arbitration tribunal within 15 days of becoming aware of those grounds, and it is the tribunal itself (including the challenged arbitrator) that makes an initial determination. No challenge may be made on grounds of which a moving party was aware at the time of the appointment. There is a right of court appeal from a tribunal's decision, but that right must be exercised within ten days of the initial decision.[54] Articles 12 and 13 of the Model Law are to the same effect, except that only an unsuccessful challenging party has a right of appeal, which right must be exercised within 30 days of the decision rejecting the challenge.

For arbitrations administered by arbitral institutions, it is the rules of those institutions that apply. All such rules require that challenges be brought on a timely basis after an applicant first becomes aware of the grounds for challenge, with precise short time limits imposed. However, the institutions differ to some degree as to how challenges are resolved. For example, under ADRIC rule 3.6, where there is a single arbitrator, he or she makes the decision; where there are three arbitrators and the chair is not challenged, the chair alone makes the decision; where the chair is challenged, the entire tribunal makes the decision; where there is not yet a chair, or where the tribunal is not yet fully appointed, an interim arbitrator appointed by ADRIC makes the decision. Under the ICDR's Canadian and international rules, it is the ICDR Administrator that decides challenges. Under the ICC rules, challenges are determined by the ICC Court.

Selection Criteria

In appointing arbitrators, parties should ensure that their tribunal members are not just "good people" or even "good lawyers" or "good retired judges"; they should ensure that they are well suited to their proposed specific mandate, based upon the following criteria:

- Arbitration experience: perhaps to overstate the obvious, experience in the law and practice of arbitration is of paramount importance in the appointment of arbitrators:

> There is no sense in appointing an experienced lawyer as sole or presiding arbitrator responsible for advancing the process if that experience does not include practical experience of arbitration. The reputation and acceptability of international arbitration depends

54. See Ontario Domestic Act, s. 13.

upon the quality of the arbitrators themselves. The task of presiding over the conduct of an international commercial arbitration is no less skilled than that of a surgeon conducting an operation, or a pilot flying an aircraft. It should not be entrusted to someone with no practical experience in it.[55]

- *Contractual requirements*: Often, arbitration agreements specify specific attributes that arbitrators must have. These may be expressed in terms of professional training, professional experience, subject-matter experience or other similar criteria. While parties may, after a dispute arises, agree to deviate from their agreement, any such change must be clear and in writing. A failure to comply with this type of contractual requirement can serve as the basis for setting aside an award on judicial review.[56]
- *Legal training and experience*: In by far most arbitrations, domestic and international, arbitrators have legal training and experience; they are either retired judges or senior litigation counsel. In a significant number of cases, other professionals sit. For example, it is not uncommon in commercial rent re-set disputes, that real estate appraisers will sit as arbitrators. Similarly, in commercial disputes that involve financial and accounting issues, chartered accountants and business valuators will often be appointed. In this regard, it is to be noted that there is no statutory or other legal requirement that arbitrators be lawyers, and no set of institutional rules limits arbitration appointments to lawyers. Moreover, there is in Canada (as in most other jurisdictions) no mandatory arbitrator certification process or professional governance regime. This being stated, where there is to be a single member tribunal, prudence dictates that that arbitrator be a lawyer or retired judge; they will be best equipped to ensure that the arbitration process can move forward in compliance with the law of the arbitration and they will be best equipped to fashion awards that will withstand judicial scrutiny. For the same reason, where there are to be three arbitrators, it is by far best practice to have a lawyer or retired judge act as tribunal chair. Moreover, it has been observed that where the chair and one party appointee are lawyers or judges, the third arbitrator should be one as well; a combination of two lawyers and one technical arbitrator "may

55. *Redfern & Hunter*, *supra*, footnote 24, para. 4.68. The same applies with equal force in domestic arbitration.

56. See s. 46(1)(4) of the Ontario Domestic Act and article 34(2)(iv) of the Model Law.

result in the arbitral tribunal having two lawyers 'against' a technical expert arbitra-tor",[57] a situation that should for obvious reasons be avoided.

- *Efficient and effective case management from the time of appointment through issuance of a final award*: as distinct from court litigation (which is characterized by a lengthy and complex set of rules and procedures), arbitration is meant to provide procedures that are tailor-made to each case. Arbitrators should have sufficient knowledge of substantive and procedural arbitration law and should be well versed in the many soft law instruments that are available to them to guide the arbitration process consistent with the nature and complexity of the cases before them. Arbitrators should not presume that counsel will, themselves, be aware of the many possibilities that exist for efficient and effective case management, and, while party autonomy is a governing arbitration principle, they should not simply acquiesce to procedural agreements that counsel may too quickly make at the outset of an arbitration.
- *Fair and equal treatment*: as stated above, it is a central and non-waivable statutory tenet of arbitration that parties are to be treated fairly and equally and that each party must be permitted to present its case and respond to the cases made against it.[58] Institutional rules are to the same effect.[59] Importantly, any failure to adhere to this principle is one of the few grounds upon which an arbitral award may be set aside by the courts.[60] Parties should be confident that their nominees have the ability to manage their proceedings consistent with these cardinal principles.
- *Personality*: arbitration shares one important aspect of dispute resolution with litigation: it is an adversarial process. While the parties will have agreed to arbitrate (typically, in their pre-existing commercial agreements), and while they will often agree on many aspects of the arbitral procedure, it will almost invariably happen at some stage of the proceeding that one party (perhaps sensing that it will lose) will become recalcitrant. As well, there will often be honestly held differences of opinion

57. *Redfern & Hunter*, *supra*, footnote 24, para. 4.57.
58. See s. 19 of the Ontario Domestic Act and article 18 of the Model Law.
59. See, for example, article 20 of the ICDR Canada rules and rule 4.7.2 of the ADRIC Rules.
60. See s. 46(1)(6) of the Ontario Domestic Act and article 34(2)(ii) of the Model Law.

as to how any given arbitration should proceed. While arbitrators are, in effect, "hired" by the parties, soon into the process they will have to take charge of the matter to move the arbitration to hearing and final adjudication. As it has been observed, "the proceedings must maintain their momentum" and "must not be allowed to sink in a quagmire of procedural problems".[61] Also, arbitrators will often have to make findings of credibility, and they must have the ability to come to grips with and then resolve conflicting factual evidence. All of this necessitates the appointment of individuals with the strength, stamina and perseverance to make strong decisions. At the same time, given that arbitration is a consensual process and that arbitrators are appointed to perform a service for all of the parties in any given case, potential arbitrators should be appointed, at least in part, based upon their ability to act in a polite and civil manner throughout the proceedings.

- *Collegiality*: where there three arbitrators, it is important that the parties choose individuals, the chair in particular, who can act well together throughout the process and, most importantly, during their deliberations and award-writing. This is particularly important in international cases, where arbitrators will typically come from different states and legal cultures.
- *Knowledge of applicable law*: in domestic arbitration, unless otherwise agreed, tribunals must decide disputes "in accordance with the law".[62] To the same effect, in international arbitration, article 28(1) of the Model Law provides that disputes are to be decided in accordance with the rules of law chosen by the parties. While applicable legal principles will in every case be the subject of legal submissions of counsel, persons appointed as arbitrators (whether lawyers or not) must be capable of understanding and applying those principles.
- *Subject-matter knowledge*: Whether provided for in the arbitration agreement or not, consistent with the underlying principle that parties in arbitration have the right to select their own adjudicators, they should in considering potential arbitrators consider individuals with some experience in the issues that are to be adjudicated. Doing so will enhance the efficiency of the entire proceeding including, in particular, the consideration of expert and factual evidence that may be adduced and the legal principles that will have to be applied. While this is a rather straightforward proposition, arbitrators

61. *Redfern & Hunter*, para. 4.14.
62. See s. 31 of the Ontario Domestic Act.

chosen for their subject-matter knowledge must nevertheless act in a quasi-judicial capacity and must decide their cases based upon the evidence and submissions put before them in the actual proceeding, lest their awards be subject to being set aside. There may be a delicate balance between an arbitrator deciding a case based upon the record, and an arbitrator using aspects of his or her own knowledge in assessing the evidence that has been adduced. In *Xerox Canada Ltd. v. MPI Technologies Inc.*,[63] for example, one member of a three-member tribunal was a subject-matter expert in computer technology. During the hearing, that arbitrator engaged in a review of source code that had been entered into evidence and provided a summary of his review to counsel for consideration and comment. On hearing an application to have the tribunal's award set aside, Justice Colin Campbell wrote, at paras. 85 and 102:

> 85. In my view, there seems little point in having an individual with technical expertise unless that individual can use his or her background in assessing the evidence before the tribunal. That is indeed one of the hallmarks of commercial arbitration as opposed to courtroom adjudication. There is a difference between an individual who because of his or her expertise is in a position to assess technical evidence that is before the Panel and an expert who relies on evidence from other sources outside the evidence and only available to that expert and not disclosed to the parties. I conclude, as I believe the Panel did, that the analysis by Mr. Platte was in the former category, not the latter.
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> . . . . .
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> 102. I also accept the statement of law at paragraph 120 of Xerox's factum:
>
> > The law is clear that the use of specialized training by an arbitrator cannot be a substitute for evidence adduced by the parties. Accordingly, while specialized training may be of assistance in understanding and evaluating record evidence, it may not be used to bridge a gap in evidence adduced by a party or as a substitute for existing evidence. An arbitrator may not use expertise that he or she may have to create new "evidence" by extrapolating from record evidence, nor can an arbitrator use such expertise as a basis for conducting independent factual investigations. See *Murray v. Rockyview (Municipal District No. 44)* at 655; *Huerto v. College of Physicians and Surgeons* (1994), 117 D.L.R. (4th) 129 at 137-139 (Sask. Q.B.) aff'd (1996), 133 D.L.R. (4th) 100 at 106-

63. 2006 CarswellOnt 7850 (Ont. S.C.J.); the writer acted for MPI.

107 (Sask. C.A.); *Dennis v. British Columbia (Superintendent of Motor Vehicles)* (2000), 82 B.C.L.R. (3d) 313 at paras. 10-12, 16-17 (C.A.)

- *Availability*: in choosing arbitration, parties look for efficiency, particularly in comparison with court litigation. During the appointment process, they should have in mind their expected time frame for completion of the arbitration, including the hearing dates and the time afterwards during which the tribunal will deliberate and write its award. Parties will be frustrated when, following tribunal appointment, they are told that the arbitrators are too busy to schedule essential steps in their proceeding on a timely basis. The irony here is, of course, that while parties will want to have experienced and highly regarded arbitrators, those very same arbitrators will, by virtue of their reputations and experience, be very busy. When considering availability, parties should ask potential arbitrators to confirm that they will have open time to schedule the hearing and then to deliberate and write their awards. For their part, arbitrators should not allow themselves to become over-stretched. "They should not say 'yes, yes, yes' like children in a sweet shop".[64] Most arbitration institutes recognize the importance of availability. For example, article 13(1) of the ICC Rules provides that "In confirming or appointing arbitrators, the Court shall consider the prospective arbitrator's . . . availability and ability to conduct the arbitration in accordance with the Rules", and the Secretariat requires potential appointees to submit 24-month calendars showing dates on which they will not be available to act and to certify their availability and willingness to act. In an *ad hoc* arbitration, the parties should ask for that very same information.[65]

64. Neil Andrews, "Improving Arbitration: Responsibilities and Rights" 83:3 *Arbitration* 330 at p. 337.

65. Somewhat related to this criterion is the delicate issue of age and health. While arbitration is intended to be a relatively quick process, the unavoidable truth is that many arbitrators are of an age when health issues may materialize after their appointment. While unknown health issues are risks impossible to avoid, arbitrators who know of health issues should disclose the same to the parties. The writer is aware of one instance where an arbitration had to terminate well into the process where an arbitrator's behaviour displayed a health issue that ought to have been disclosed.

How Potential Arbitrators Are Identified

The ability to choose arbitrators is, in effect, permitted "judge shopping", something that is impermissible in litigation. Given that arbitration is, for the most part and by design, a private and confidential process, the ability of parties to easily identify capable and qualified arbitrators by looking at past mandates and awards is very limited. Reliable data as to the actual experience and work product of arbitrators is simply not available.

Nevertheless, there are steps that can be taken to identify potential arbitrators suitable to any given case:

- *Prior experience*: counsel will very often nominate arbitrators based upon their prior experience using those same individuals as arbitrators. While this is convenient, it carries substantial risk. Arbitrators must be independent and impartial. A relationship between counsel and arbitrator based upon prior appointments can be problematic where there are, simply put, too many such appointments. In these situations, it will likely be difficult to persuade adverse counsel to accept a nominee as sufficiently impartial. Based upon anecdotal information, some arbitrators will not accept more than a given number of appointments from a single lawyer (or firm) over a defined time period. In any event, prior appointments should be disclosed by prospective arbitrators and by counsel.
- *General reputation and word of mouth*: counsel typically identify potential arbitrators based upon the recommendations of colleagues. While anecdotal, information based upon such recommendations will often be very useful in guiding counsels' recommendations to their clients.
- *Peer Recognition*: there are a number of legal directories and guides that provide lists of arbitrators that are based either upon peer recognition and/or client surveys. These publications can provide valuable information, at least insofar as they identify individuals who might otherwise not be known to appointing counsel. Useful guides include *L'Expert*, *Who's Who*, *Chambers* and *Benchmark*. Several such publications issue international guides as well as guides that are targeted to the Canadian market. When referring to such guides, users should distinguish between publications that are based upon third party information and guides that are, in effect, "pay to play".
- *Certification*: while there are no mandatory certification requirements for arbitrators in Canada, there are at least two

institutions that provide certifications that stand the scrutiny of peer review and rigorous training. The U.K.-based Chartered Institute of Arbitrators offers training that leads to a Fellowship designation ("FCIArb"). That institute has recently established a Canadian branch, and it is expected that domestic training and fellowship designations will as a result increase. The Chartered Institute requires a candidate to take a training course, write an exam and draft an award, and then to be interviewed. Second, ADRIC offers two designations, Qualified Arbitrator and Chartered Arbitrator. To attain the former, a candidate must take a recognized 40-hour training course, and write an exam. While certification will never be a guarantee that an arbitrator will be suitable, it will warrant that the he or she has a substantial base of arbitration knowledge and experience.

- *Rosters*: there are two types of rosters that can be used to identify potential arbitrators; open and closed. An open roster is one that is made available to the public. For example, the Toronto Commercial Arbitration Society permits any of its members to list themselves on that organization's website. A second example of this type of roster is the membership list of resident and non-resident arbitrators that is maintained by Arbitration Place in Toronto and Ottawa. As a third example, the Canadian College of Construction Lawyers (a "by invitation only" organization) permits its Fellows to list themselves as arbitrators who specialize in construction-related matters. A closed roster is a list that is maintained by an arbitral institution and that is not made available for review by the public. For example, the ICDR and ICDR Canada each maintain private rosters, one for domestic cases and the other for international matters. These are used by the ICDR to make appointments in cases that the institution administers or to make appointments where parties name the ICDR to act as an appointing authority. To be added to the roster, arbitrators must first apply to the ICDR and then, once approved, take an ICDR-administered training course.
- *Decided Cases*: while arbitration awards are confidential, court decisions on applications or appeals are not. By searching the names of potential arbitrators, one can often find useful case references that will militate in favour or against nomination of those individuals.
- *Advertisements*: Legal publications, including journals, newspapers and law reports, are replete with arbitrator advertisements. While one should not simply rely on such material,

they can be a source of names that would otherwise not be known to counsel.

- *Interviews*: Unlike litigation, interviewing potential arbitrators is permissible and is, in fact, a growing practice. While useful information can be obtained in this way, it is important that an arbitrator not be inadvertently tainted such that his or her appointment may later be challenged. The domestic arbitration statutes and the Model Law are silent on arbitrator interviews; however, before arranging an interview, it is important to review any institutional rules that may apply. The BCICAC, for example, imposes strict limitations on how interviews may be arranged and on what may be discussed.[66] There are some soft law publications that can be used to guide counsel and arbitrators on interview best practices. As one example, the Chartered Institute of Arbitrators has a guideline entitled *Interviews for Prospective Arbitrators*. Amongst other things, it suggests that: (i) the parties confirm that under applicable law and rules, interviews are permitted; (ii) the potential arbitrator be provided with the arbitration agreement before the interview takes place so that an initial conflict check can be conducted; (iii) the fact of the interview and any terms or limits relating thereto should be confirmed in writing; (iv) no remuneration should be paid for the interview; (v) the prospective appointee should take contemporaneous notes; (vi) the general nature of the case can be discussed, without any advocacy by either party; (vii) the interview should take place at either the arbitrator's place of business or at a neutral business location; (viii) further matters that can be discussed are the arbitrator's past experience and expertise, his or her availability, financial arrangements (if the arbitration is *ad hoc*) and relevant terms of appointment; (ix) matters that should not be discussed are the facts or circumstances giving rise to the dispute, the positions of the parties and the merits of the case. As further general guidance, it has been suggested that a person being interviewed should not be asked for his or her opinion on any legal issues, and that once appointed, the interviewee should disclose the fact that the interview occurred and the general nature of the discussions that took place. Finally, where an interviewee is to be a sole arbitrator or a tribunal chair, all parties should attend the interview.

66. See articles 10(3) to 10(5) of the BCICAC International Commercial Arbitration Rules.

How Tribunals Are Appointed

A detailed description of the actual process by which tribunals are appointed is, because of the numerous available techniques and procedures, beyond the scope of this paper. Nevertheless, the following general considerations should be understood:

- Where an arbitration agreement prescribes the way in which a tribunal is to be appointed, that procedure must be followed, unless the parties expressly agree in writing to adopt an alternative procedure. A failure to do so could render an award subject to being set aside.
- Similarly, if the parties have agreed that the arbitration will be administered by an arbitral institution, the rules of that institution must be followed.[67]
- Unless the rules of a contractually-designated institution provide otherwise, appointments by the parties themselves is strongly preferred over delegation of the appointment process to a third party. This maintains an important benefit of arbitration: the ability of parties to choose their own adjudicators.
- In some cases, the parties may prefer to delegate the appointment process to a third party (either a designated individual, a person holding a particular position, or an arbitral institution). They may do so, for example, where particular expertise is required and where they are unwilling or know that they will be unable to identify suitable candidates on their own.
- In by far most arbitrations in Canada, whether institutional or *ad hoc*, arbitral tribunals (whether single-member or three-member) are appointed through negotiation between counsel. It is not often the case that the parties will fail to come to terms on this.
- Where a sole arbitrator is to be appointed, a claimant will typically start the process by delivering a list of suitable arbitrators. Negotiations will then ensue. A variant of this is that counsel will simultaneously exchange lists of suitable arbitrators and will then look for commonality between their respective lists.

67. All institutional rules provide for arbitrator appointment, and most permit the parties to appoint their own tribunals should they choose and be able to do so. Such rules, however, should be read closely. The rules of the International Institute for Conflict Prevention and Resolution ("CPR") for example, permit the parties to choose their own arbitrators but (unless also otherwise expressly agreed) require that the arbitrators be chosen from the CPR's own roster.

- Where there are to be three arbitrators, the typical process is that each party will appoint an arbitrator and the two party-appointees will then appoint a third arbitrator who will act as tribunal chair.
- Given the important roles that a tribunal chair fulfills, it is important that the parties have significant input into his or her appointment.[68] Thus, even where the appointment is to be made by party appointed arbitrators, the parties should agree that they can each provide input into that process by communications with their individual party appointees.
- Almost all domestic arbitration statutes, and the Model Law, provide for the court appointment of arbitral tribunals where arbitration statutes are silent as to the appointment procedure, or where the parties are unable or unwilling to make their appointments.[69]
- Court applications to appoint arbitrators take time and are not inexpensive. As an alternative, most arbitration institutions will, for a relatively modest fee, act as appointing authorities for parties who cannot otherwise constitute their tribunals. Once a tribunal is appointed in this way, the arbitration can proceed *ad hoc*.
- Regardless of the manner of appointment, it is important that all arbitrators, once named, confirm their appointment in writing as soon as possible. Once done, the arbitration can proceed.

Jurisdiction

Unlike the courts, arbitrators do not have plenary jurisdiction. Anything and everything that they can do is pursuant to the express and implied powers given to them by the parties in their agreements to use arbitration to resolve their disputes to the exclusion of the courts. As succinctly explained:

> The arbitral tribunal takes its jurisdiction to decide a particular dispute from the agreement between the parties. An arbitral tribunal does not get its jurisdiction from any legislation. The scope of the

68. Casey, *supra*, footnote 23, at p. 161

69. See, for example, s. 10 of the Ontario Domestic Act, s. 17 of the British Columbia Domestic Act, and article 11 of the Model Law. Note that the power under the Ontario Domestic Act is discretionary. Nonetheless, it has been held that the Ontario courts will make an appointment upon being shown a *prima facie* case that the dispute in issue falls within an arbitration clause: *Syrianos v. Botelho*, 2014 ONSC 3852, 29 B.L.R. (5th) 291, 242 A.C.W.S. (3d) 13 (Ont. S.C.J.).

> tribunal's jurisdiction will be determined by the scope of the arbitration agreement, subject only to any mandatory legislative enactments governing the arbitration agreement. Under the theory of party autonomy, if two parties have the legal right to settle a dispute between themselves, then they can give jurisdiction to a third party to settle it for them.[70]

In dealing with jurisdictional issues, arbitration agreements are interpreted liberally.[71] As further explained:

> In the context of an arbitration agreement, the general overriding implication is that the tribunal has all necessary jurisdiction to see to it that the arbitration, as contemplated by the arbitration agreement, results in a final, binding and legally enforceable award that fully disposes of the parties' disputes.[72]

In his leading Canadian text, Mr. Casey reviews in detail the five categories of jurisdiction that present themselves in arbitration: (i) jurisdiction to determine jurisdiction (see below); (ii) jurisdiction over the parties; (iii) jurisdiction over the issues in dispute; (iv) jurisdiction to determine the law; and, (v) jurisdiction to determine the arbitral procedure.[73]

Jurisdictional issues can arise during the entire course of an arbitration, from inception through issuance of a final award, and parties can raise jurisdictional issues throughout the process, including on an application to set an award aside. At the outset of an arbitration, jurisdictional issues can be raised either in the courts (typically on motions to stay commenced court actions in the face of arbitration agreements or on motions for declaratory relief) or before arbitral tribunals soon after they are appointed.

Critical to an understanding of the role of an arbitral tribunal in relation to jurisdictional issues is the concept of "competenz-competenz", meaning that arbitral tribunals have competence and jurisdiction to rule on their own jurisdiction. The basis for this principle is that "there is no reason to assume that the arbitrators themselves will be unable to make decisions that are fair and protect the interests of both the parties and of society".[74]

The competenz-competenz principle is expressed in all modern arbitration legislation,[75] in article 16 of the Model Law and

70. Casey, *supra*, footnote 23, at p. 195.
71. *Desputeaux c. Éditions Chouette (1987) inc.*, 2003 SCC 17, [2003] 1 S.C.R. 178, 223 D.L.R. (4th) 407 (S.C.C.).
72. Casey, *supra*, footnote 23, at p. 197.
73. Casey, *supra*, footnote 23, Chapter 5.
74. J. Kenneth McEwan and Ludmila B. Herbst, *Commercial Arbitration in Canada* (Toronto: Thomson Reuters, 2016) at section 5:50.10.

invariably in the rules of arbitration institutions.[76] For example, s. 17(1) of the Ontario Domestic Act provides that a tribunal "may rule on its own jurisdiction and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement". Section 17 further gives recognition to the autonomy of arbitration clauses within other agreements (such that the arbitration clause will survive where the main agreement is found to be invalid), provides that participation in the appointment of the tribunal does not constitute any waiver of jurisdictional objections, and empowers tribunals either to rule on such objections as preliminary questions or in their final awards. Where dealt with as a preliminary matter, a party may appeal from that decision to the court, with no further right of appeal, and while any court application is pending, the tribunal can continue with the arbitration and issue an award.

The principle of competenz-competenz fulfills a very important precept of commercial arbitration; that is, that with expressed exceptions, the courts should not intervene in the arbitration process.[77] It also ensures that recalcitrant parties, having come to regret their contractual commitments to arbitrate, will not improperly use the court process to delay or defeat their arbitrations.

In the pre-hearing phase of arbitration, there are two important considerations. First, competenz-competenz does not eliminate recourse to the courts for jurisdictional determinations in all instances. The principle is that in the preponderance of cases tribunals should be the first instance where jurisdictional issues should be decided. There are, however, circumstances where the courts are as equipped as arbitrators to deal with these issues such that there should not be any need to engage a tribunal in that first stage of determination. Thus, there can be direct recourse to the courts where the issue of jurisdiction is based solely on a question of law and where, perforce, the court will not have to engage in any analysis of the facts in the case.[78] Also, where the issue is one of mixed fact and law, a party can go directly to the courts where, and only where, "the questions of fact require only superficial consideration of the documentary evidence

75. Meaning, in Canada, in all jurisdictions except Prince Edward Island, Newfoundland and Labrador, and the Territories.
76. See for example, article of the ICDR Canada rules.
77. See for example s. 6 of the Ontario Domestic Act, which permits court intervention to assist in the conduct of arbitrations, ensure that they are caried out in accordance with arbitration agreements, to prevent unequal or unfair treatment of parties and to enforce awards..
78. *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801, 284 D.L.R. (4th) 577 (S.C.C.) at para. 84.

in the record".[79] Finally, there is a check on unwarranted use of the courts to delay arbitration:

> Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court must decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.[80]

Second, to promote arbitration efficiency, objections to jurisdiction that are based upon grounds that are known at the start of the process must be brought on a timely basis. To this end, s. 17(2) of the Ontario Domestic Act requires that such objections must be made no later than the beginning of the hearing and, if there is to be no hearing, no later than the first delivery of a statement (*i.e.*, pleading) to the tribunal. Further, s. 17(5) provides that where an objection is that the tribunal is exceeding its authority, that objection must be made "as soon as the matter alleged to be beyond the tribunal's authority is raised during the arbitration".[81] For similar reasons, the same types of provisions are made in article 16 of the Model Law (objections must be made by the time that a statement of defence is delivered) and in institutional rules.

Obligations of the Parties, Counsel and the Arbitrators

An important feature that distinguishes arbitration and litigation is that arbitration is characterized by what is often described as "perfect case management" from commencement through the final award. By appointing a tribunal, the parties begin a process of interaction with the arbitrators during which the procedures for the case will be created (either from scratch or using institutional rules as a framework), pre-hearing procedures (such as the pre-hearing exchange of information) will take place, preliminary issues, if any, will be determined, and final pre-hearing arrangements will be made.

Also unlike litigation, arbitration is a contractual process. The parties will have agreed to resolve their disputes through a process that does not entail direct compulsion into the court system. Given that arbitration is nevertheless adversarial, a question that is raised is whether parties and their lawyers have any implicit contractual

79. *Dell*, *supra*, at para. 85.
80. *Dell*, *supra*, at para. 86.
81. Under s. 17(6), the court may allow untimely objections to be made if it considers the delay justified

obligation to "make the arbitration work". Lawyers are, of course, bound by their codes of professional conduct, but what of the parties? Section 40(1) of the English *Arbitration Act, 1996* provides that "parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings", but there is no such provision in any Canadian legislation nor in the Model Law. It has been observed, in this regard, that "arbitration presupposes that both parties will play ball in a positive spirit. That is impliedly what the parties agreed to and it is how their lawyers should approach the game". Further, "a culture of co-operative procedural compliance is needed. But this is a challenge".[82]

Arbitrators too are said to have substantial obligations to ensure that the process works and that the objectives of the parties are met. While there are no statutory provisions that impose any such obligations (apart from the fair and equal treatment obligation exemplified by legislation like s. 19 of the Ontario Domestic Act), arbitrator appointments are contracts made between them and the parties by which arbitrators agree to act as such and to adjudicate the issues that are presented to them. On this basis, and based upon a combined reading of provisions of a number of institutional rules and guidelines, it is suggested that arbitrators are obliged, at the very least, to ensure that their awards "will be legally binding and thus capable of being recognized and (where appropriate) enforced".[83] Further:

> From the outset the tribunal has two managerial responsibilities. These concern: (i) timing and planning and (ii) frugality, that is, controlling cost. Each arbitration is a project which should have a clear target date. It should be planned and co-ordinated from the outset. The governing responsibility should be sensible and effective time-management and the pursuit of judgment at proportionate cost.[84]

Ultimately, a successful arbitration will be dependent upon a recognition and discharge of these responsibilities by counsel, the parties and the arbitrators. This process typically begins at the first procedural meeting.

82. Neil Andrews, "Improving Arbitration: Responsibilities and Rights", 83:3 *Arbitration* 330 at p. 347.
83. *Ibid.*, at p. 336.
84. *Ibid.*, at p. 337.

The First Procedural Meeting

In any arbitration, the first meeting that takes place between the parties and the tribunal is an important event in the process. It is at that meeting that the foundations for the arbitration will be established, with many significant decisions either being made or scheduled for some form of adjudicative determination. Consideration should be given to the development of procedures that will maximize the efficiency and fairness of the arbitration, in the context of the particular case that is before the tribunal. While the first meeting is not a forum for the determination of substantive issues, within reasonable bounds it should be used as an opportunity for the first stages of advocacy in support of the parties' respective positions.

While the first procedural hearing is an important event in an arbitration, and while a certain degree of formality should characterize that meeting, it is not a "hearing"; there is, indeed, an important distinction to be made throughout an arbitration between meetings between the tribunal and the parties on the one hand, and procedural hearings on the other.

> In the former, the parties reach agreement over the procedure to be followed in the arbitration and debate or argue issues of timing and procedure. If however there is a significant dispute about procedure, for example a request to bifurcate the case, then a procedural hearing is needed. If the latter, full legal argument is made and the tribunal adjudicates or formally gives direction regarding the disputed procedural issue. Procedural fairness requires both sides to be heard, or at least both sides be given an opportunity to make proper submissions.[85]

There is no formal recognition of "first meetings" in the domestic arbitration statutes,[86] but institutional rules recognize the importance of having that meeting as soon as possible after constitution of the tribunal. For example, article 20 of the ICDR Canada Rules provides that the tribunal is to conduct the arbitration "with a view to expediting the resolution of the dispute" and that it "may, promptly after being constituted, conduct a preparatory conference with the parties for the purpose of organizing, scheduling, and agreeing to procedures". Similarly, article 24 of the ICC Rules directs tribunals to convene a "case management conference to consult the parties on procedural measures that may be adopted", so long as such procedures are not contrary to any agreement between the parties.

85. Casey, *supra*, footnote 23 at p. 245.
86. Section 20(1) of the Ontario Domestic Act, as an example, simply empowers tribunals to "determine the procedure to be followed" in an arbitration.

Typically, the first procedural meeting will be instigated by the tribunal, with an invitation to the parties to attend. The word "parties" in this sentence is deliberate. Too often, counsel attend these meeting without clients. While it is not the role of arbitrators to separate parties from their lawyers, arbitration is inherently a party driven process, and the parties should themselves be present at as much of the proceedings as possible. Especially important at this meeting is that the parties will have an early opportunity to have direct exposure to the tribunal, and thus to hear and consider any suggestions the arbitrators may have for the proceedings. Also, they will be in a position to provide immediate instructions to their counsel. Finally, the presence of clients will often have the salutary effect of eliminating unnecessary advocacy on the part of counsel. The meeting should be an opportunity for the parties, working together with their arbitrators, to work out the arbitration process that will follow in a civil and businesslike manner.

By this time, it is likely (but not certain) that the claimant will have delivered its formal notice to arbitrate, and it is possible that the respondent will have delivered some form of formal response. Where this has occurred, copies should be provided to the tribunal in advance of the meeting. The tribunal should also have received, in advance, copies of any contracts that will be in issue and copies of the arbitration agreement that is to govern the proceedings.

As a matter of good arbitration practice, two things should happen leading up to the meeting. First, the tribunal should deliver an agenda for the discussions at the meeting. Second, counsel should meet and confer on the agenda items. Where possible, the parties should agree on as much of the pre-hearing procedures as possible, with one important caveat; any agreements made should be subject to comments, suggestions and directions that the tribunal may have. On this point, one highly regarded Toronto arbitrator has observed that he prefers that counsel not appear with all procedures agreed, as that deprives the parties of the opportunity to take up valuable suggestions that the arbitrator may make. As a far-too typical example, the bane of most arbitrators is that counsel will have agreed that court rules of civil procedure should apply. Typically, lawyers who so agree are simply unaware of the various options that arbitration offers, they are oblivious to the complications that use of court rules may entail, and they lose the benefit of the wisdom and experience of their carefully-chosen arbitrators.

As a final introductory comment, the first procedural meeting should be followed by the tribunal's delivery of three documents. First, there should be a detailed memorandum of discussions held at

the meeting. Unlike litigation, there is no formal record of arbitral proceedings. Memoranda of every formal arbitration event will fill this void. Second, to the extent that procedures are either agreed upon or determined by the tribunal, they should be set out in a formal order, typically referred to as Procedural Order No. 1. For at least two reasons the need for an order, as opposed to a memorandum or an agreement, is not an unnecessary formality. First, the tribunal must be able to enforce its directions where a party fails to comply. Second, an "agreement" between the parties as to any aspect of the proceedings can be taken to be an amendment to their arbitration agreement. In that light, if there are deviations from any such agreement, there is a risk that an award can be set aside.[87] Finally, the procedural meeting should be followed by execution of a contract between the parties and the tribunal members, typically referred to as Terms of Appointment. It is this document that forms the agreement between the parties and the tribunal members and that serves as the basis of the obligations that the arbitrators have to the parties to act judicially in advancing the arbitration fairly and efficiently, and to render a final award that will determine all issues, withstand judicial scrutiny and be fully enforceable.

The following is a typical list of matters discussed in first procedural meetings, recognizing that all cases are different and that individual items may not be relevant.

- *Introduction to the case*: at the outset of the meeting, each party should be asked to summarize the case by describing the essential facts, the issues raised, key evidence, positions taken, and the relief sought. While this is intended for the benefit of the tribunal, and while some advocacy should be permitted in order that the sense of the case can be understood, this part of the meeting should be relatively short and civil, recognizing that it is for informational purposes only.
- *Confirmation that the tribunal has been properly appointed*: this is a necessary formality; the appointment of all tribunal members should be confirmed and memorialized in the Terms of Appointment.
- *Communications*: at the outset, there should be some clarity as to the types of communications that should be sent to the tribunal and the manner of delivery of these communications. It is best practice that all *ex parte* communications with the tribunal be

87. See on this issue Casey, *supra*, footnote 23, at pp. 245 and 246 and especially his reference to the "Frankfurt Trap" case: *Flex-n-Gate v. GEA* (no cite available).

precluded, and that all formal documents (statements, witness statements, written submissions) be provided to the tribunal at the same time that they are provided by the parties to each other. This should be confirmed in the Terms of Appointment.

- *Conflict issues and arbitrator disclosure*: the arbitrators should reduce their disclosure statements to writing and append same to the Terms of Appointment. In the same document, the parties should acknowledge that as at the date of the Terms of Appointment, they are aware of no facts that could rise to any basis to challenge any of the arbitrators.
- *Applicable law*: there are two types of applicable law that should be confirmed: the law that is to be used to determine the issues in dispute and the law that is to govern the arbitration ("*lex arbitrii*"). While in domestic cases these are usually the same, this need not be the case.[88] Both sets of applicable law should be confirmed in the Terms of Appointment.
- *Seat and venue of the arbitration*: the legal seat of the arbitration will almost always have been part of the initial arbitration agreement. If not, that issue should be clarified and made part of the Terms of Appointment. The law of the seat will almost always be the the law that governs the arbitration (although in theory they need not be). In addition, the parties may agree, or the tribunal may order, that all or some of the hearing take place at a place other than the seat (usually for the convenience of witnesses). Where this is so, it should be expressed in the Procedural Order.
- *Language*: while normally not a consideration in domestic arbitration, language issues may arise in cases involving parties from Quebec and in international cases. Where this is so, the parties should ensure they consider the need for translation of documents and/or witness testimony (pre-hearing and at the hearing). Where there are any such requirements, this should be addressed in the Procedural Order.
- *Procedural rules*: in an institutional arbitration, the rules of the designated institution will apply. Indeed, adoption of institutional rules in an arbitration agreement may imply an agreement for institutional administration, unless otherwise expressly agreed. Nevertheless, the parties may agree to supplement, vary or deviate from some or all of those rules. A typical variation is that the parties will agree that the *IBA Rules on the Taking of Evidence in International Arbitration*

88. As an example, the writer was counsel in an arbitration that was heard in Vancouver but that was subject to the Newfoundland Domestic Act.

will apply, in whole or in part. (Use of the IBA rules for the exchange of documents is becoming popular). In *ad hoc* domestic arbitration, there will be no rules unless the parties otherwise agree after commencement of the proceedings. It is not uncommon for parties to adopt institutional rules for this purpose, without using the institutions to administer their arbitrations. For domestic cases, parties frequently use variants of the ADRIC or BCICAC rules, as they can conveniently be amended to suit the exigencies of the case.[89] For *ad hoc* international arbitration, parties often adopt a set of rules written for that express purpose, the United Nations Commission on International Trade Law Arbitration Rules (the UNCITRAL Rules).

- *Written statements (pleadings)*: The use of written statements is implicit in domestic arbitration legislation and mandatory under the Model Law.[90] As in litigation, statements are useful as they set out the basic framework of the case, the facts in issue, and the relief sought. But statements have a more important role in arbitration, and a requirement for statements should not be waived, except where their role has already been fulfilled by the notice of commencement of arbitration and responses thereto. First, statements will assist in the tribunal's understanding of its jurisdiction, both as to claims made and any limitations to such jurisdiction. Second, statements will assist the tribunal in the event that it is called upon to make procedural orders on such matters as the scope and process for the exchange of documents. Third, and perhaps most important, statements can be used by the parties as effective advocacy documents. Effective counsel will not limit themselves to the type of notice pleading style that is characteristic of litigation. They will recite evidence, attach probative documents, and make legal submissions. To the extent that this is done, the parties and the tribunal will be well prepared and alive to the real issues in the case by the time the hearing starts. At the first meeting, the parties should be expected to discuss the timing of statement exchanges and the type of

89. Note that domestic arbitrations in British Columbia will be subject to the BCICAC Rules unless otherwise agreed. In Nova Scotia, the domestic act has an appended set of rules that will apply unless the parties otherwise agree.

90. See, for example, s. 25 of the Ontario Domestic Act. See article 23 of the Model Law. Typically, institutional rules make provision for the exchange of statements.

information the statements are expected to provide. In the spirit of front-end loading the arbitration process, arbitrators should encourage the parties to accept the proposition that in their statements, "less is more" is a proposition that need not apply. These matters should all be set out in the Procedural Order.

- *Preliminary motions*: at the first meeting, the parties will be expected to disclose their intentions, if any, to bring preliminary motions. Typically, such motions will relate to jurisdiction (see above), possible bifurcation of the case, the scope and type of documentary exchanges, oral discovery, summary disposition of some or all issues, etc. Counsel should be expected to disclose the motions they intend to bring, the material they intend to file on the motions, and a timetable for the delivery of material and a hearing of the motions (if there are to be hearings). In this regard, not all motions will be the same, and some will require more formality than others. While some motions may require delivery of notices of motion and affidavit evidence, the arbitrators should encourage the disposition of most interlocutory matters by less demanding means; for example, the use of telephone conferences and written submissions in lieu of oral presentations, etc. At the same time, however, while tribunals may prefer to decline to permit oral motion hearings, in order to avoid any fair process issues that threaten a final award, arbitrators should permit oral hearings where requested by either party. Finally, where motions are scheduled, it is important to consider the impact that motion determinations could have on the overall arbitration schedule. All procedural components of preliminary motions should be set out in the Procedural Order.
- *Dispositive motions*: unlike court rules of civil procedure, arbitration statutes and institutional rules make no express provision for dispositive motions (whether summary judgment motions or motions to dismiss claims on points of law). This said, in the spirit of efficient case management, the arbitrators and counsel should consider whether, in any given case, such motions can or should be brought. In any such consideration, the parties and tribunal must weigh the balance of possible time and cost savings against the possibility that any such motions will fail, and thus take more time and incur more cost. This is an issue that can be discussed at a first meeting, but (absent agreement) no formal decisions can be made (even as to whether motions can be brought) without a formal procedural hearing

and a formal procedural or preliminary order. If any such hearings are scheduled, the hearing dates and pre-hearing procedures should be set out in the Procedural Order.

- *Hearing dates and duration*: when building an arbitration schedule, it is best to schedule the hearing and then work backwards. If the arbitration is to proceed with any efficiency, this should be done at the first procedural meeting. Counsel should be prepared to commit to hearing dates, and to provide realistic time estimates for the duration of the hearing. This should be done on the basis that adjournments of the hearing will be difficult to obtain. These dates should be set out in the Procedural Order.
- *Direct evidence*: in discussing the length of the hearing, the subject of direct evidence will inevitably arise; to wit, should all direct evidence be adduced orally, or should some or all of that evidence be pre-filed in writing. The merits of written evidence as opposed to oral testimony is beyond the scope of this paper; nevertheless, it should be noted that the use of written statements of evidence is very common in international arbitration (with the possible exception of international arbitrations seated in the United States)[91] and becoming more common in domestic cases. The use of written direct evidence will, of course, have a significant impact on hearing time but, perhaps more important, it serves to "front end" a lot of the deliberative work the arbitrators have to perform. Where written evidence is suggested, the parties should consider whether any exceptions will be made for certain witnesses or issues, and they have to consider the extent to which, if any, direct *viva voce* evidence will be permitted either to supplement or clarify the written statements. Further, a schedule for the exchange of witness statements has to be set, with provision made for reply statements (and perhaps sur-reply). In this regard, the parties should ensure that the statements are not delivered too close to the commencement of the hearing. All decisions on this issue should be set out in the Procedural Order.
- *Exchange of documents*: Documentary production is one of the two most vexing issues that pervades the arbitration process (the other being oral discovery). On the one hand, parties opt for

91. In a typical ICC arbitration for example, the parties will, well in advance of the hearing, file "memorials", being collections of sworn witness statements, documents relating to their testimony, and factual and legal submissions. The hearings will then consist of cross examination of some or all witnesses and closing submissions.

arbitration for time and cost efficiency, in reaction, at least in part, to the very onerous documentary production procedures (production of all relevant documents with a low threshold of materiality) that form an essential part of court litigation. On the other hand, there are cases in which documents emanating from the adverse party are essential (or at least thought to be essential) to a party being able to prove its case or defence.

In domestic arbitration, Canadian statutes contemplate but do not mandate any procedure for documentary production. The Ontario Domestic Act, for example, simply provides that tribunals may give directions with respect to the delivery of records and documents.[92] For international arbitration, it is noteworthy that the Model Law makes no reference at all to documentary production, leaving this subject to the discretion of the tribunal in its establishment of the arbitral procedure.

In fulfillment of their objective to make arbitration efficient, affordable, fair and flexible, the rules of arbitration institutions are either silent on this issue, or impose constraints. Article 25 of the ICC Rules for example, simply provides that "the tribunal shall proceed within as short a time as possible to establish the facts of the case by all appropriate means". The ICDR Canada Rules for use in domestic cases take another approach. Dealing with oral and documentary discovery together under the heading "Exchange of Information", article 21(10) provides that domestic court procedures are "not necessarily appropriate" for arbitration. Article 21(1) provides that the tribunal is to manage all discovery with a view to maintaining efficiency and economy and to avoid unnecessary delay and expense but also to avoid surprise to the adverse party. As to documentary production *per se*, the default ICDR Canada process is that parties deliver the documents upon which they intend to rely. Parties can then make requests for further documents, provided that they reasonably believe that the documents exist and that they are "relevant and material" to the outcome of the case. Notably, the discretion of the tribunal under these rules supersede any agreement to the contrary that the parties may make.[93] This process is very similar to the process provided for by article 3 of the *IBA Rules on the Taking of Evidence in International Arbitration*, a process often used by parties in *ad*

92. Section 25(6).
93. The ICDR Rules for international arbitration are silent on this issue, but published guidelines mirror the provisions of article 21 of the ICDR Canada Rules.

hoc and institutional arbitrations, and to Rule 4.13 of the ADRIC Arbitration Rules. Under both the IBA and ADRIC Rules, a party seeking delivery of additional documents must explain how they are relevant and material to the outcome of the case, and why production by the adverse party will not be unreasonably burdensome.[94]

Where parties come to a first meeting having agreed to a documentary production regime, it may be difficult for the tribunal to persuade them otherwise. Where, however, no such agreements have been made, arbitrators should explain the alternatives that are open to the parties and should try to persuade them to use procedures best suited for their case.

Finally on this subject, in establishing the arbitration schedule the parties should be sure that sufficient time is built in to deal with production-related motions and any further production that may be ordered as a result. Regardless of the docu-mentary exchange protocol that is adopted, all of its details should be formalized in the Procedural Order.

- *Examinations for discovery*: oral discovery is the second issue that vexes commercial arbitration. Oral discovery is, of course, time consuming and expensive, and it is one of the mandatory components of commercial litigation that sophisticated users of arbitration, parties and their counsel, usually seek to avoid by opting for arbitration.

  In international arbitration, save perhaps where one of the parties is American and where U.S. counsel are engaged, oral discovery is very rare. This is because in many cases, parties will be from states that do not provide for oral discovery in their court procedures. The Model Law makes no mention of it; thus, the process is not part of any Canadian arbitration legislation. The same is true of the dominant sets of institutional rules that are typically used in arbitrations that are seated in Toronto, those of the ICC, the ICDR and the LCIA, and of the UNCITRAL Rules that are designed for use in *ad hoc* international arbitrations. Accordingly, where any such rules are used, parties should have no expectation that, in the absence of agreement between themselves, their tribunals will easily accede to requests for oral discovery. The ICDR's predilection against oral discovery is expressed as follows in its *Guidelines for Arbitrators Concerning Exchanges of Information*:

94. ADRIC Rules 4.13.4(b) and (c), and IBA Article 3(3) (b) and (c).

> While arbitration must be a fair process, care must also be taken to prevent the importation of procedural measures and devices from different court systems, which may be considered conducive to fair process within those systems, but which are not appropriate to the conduct of arbitrations in an international context and which are inconsistent with an alternative form of dispute resolution that is simpler, less expensive and more expeditious. One of the factors contributing to complexity, expense and delay in recent years has been the migration from court systems into arbitration of procedural devices that allow one party to a court proceeding access to information in the possession of the other, without full consideration of the differences between arbitration and litigation.
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> Depositions, interrogatories, and requests to admit, as developed in American court procedures, are generally not appropriate procedures for obtaining information in international arbitration.

As to domestic arbitration, the statutes are similarly silent; there is no express reference to oral discovery. As for institutional rules, the ICDR Canada rules for oral discovery are contained within the Exchange of Information Rule 21 summarized above, with discretion given to arbitrators, subject to their overriding obligation to ensure that arbitrations proceed efficiently and fairly. Somewhat out of the ordinary, ADRIC's rules do address oral discovery, but in a way that is consistent with the view that such examinations should not proceed as a matter of right. Under ADRIC Rule 4.14, parties have to apply to their tribunals for a right to oral discovery, and they have to persuade the tribunals that such examinations are "necessary" for them to "have a fair opportunity to present" their case. In making an order, the tribunal must take Rule 1.1 into account, to wit: the arbitration must be just, speedy and cost-effective.

At the first meeting, where the parties have agreed to oral examinations, there should be some discussion of parameters; typically, the number of witnesses to be examined, the issues upon which examinations should proceed, and whether the examinations should precede or follow the exchange of documents. On this last point, some will argue that by exchanging documents first, oral examinations may be minimized or obviated; others will argue that having oral examinations first may assist in narrowing the scope of documentary production. The parties should also come to agreement on the uses to which discovery evidence can be used at the hearing. For example, it often happens that discovery evidence can obviate the need to have discovery deponents as witnesses at the hearing. Further, while arbitrators should be loath to allow them-

selves to be drawn into adjudication of the propriety of discovery questions, the timetable in a case in which discoveries are permitted should provide for time to deal with any issues that do arise on those examinations. To the extent that the parties can agree on any of these matters at the meeting, all such terms should be set out in the Procedural Order.

- *Identification of fact witnesses*: while it may not be possible in all cases, by the time a first meeting occurs, the parties may well know who their hearing witnesses will be. If so, that information should be disclosed. If not, the case schedule should provide for disclosure of fact witnesses as early as possible in the process, and the disclosure dates should be set out in the Procedural Order.
- *Compelling witness attendance*: arbitrators have the power to compel witness attendance.[95] On occasion, the parties will be aware of the need to issue formal summons to witnesses by the time of the first meeting. If so, the requests for summons should be made at that time.
- *Expert witnesses*: the same considerations should apply to expert witnesses. Their names should be disclosed, as should the issues in respect of which the opinion evidence will be adduced. Again, a premium should be placed upon early disclosure. Depending on the nature of the case, it may be efficacious to provide for a simultaneous exchange of reports and reply reports. In other cases, sequential delivery may be preferred. It may also be advisable to provide for a meeting of the experts prior to the hearing, with a view to coming to consensus on aspects of their evidence. The schedule for all aspects of expert evidence should be set out in the Procedural Order.
- *Opening submissions and document briefs*: the first meeting is an opportunity to discuss time-saving measures that will apply to the hearing. The use of oral opening statements is one aspect of a hearing that can be eliminated, or substantially shortened, by the pre-delivery of written openings. This is typically done in international arbitration and should more often be done in domestic cases. The mutual or sequential delivery of written openings should be made part of the case schedule and so recorded in the Procedural Order. A good

95. See Ontario Domestic Act, s. 29(1); under article 27 of the Model Law, a tribunal is empowered to ask the state court to compel the attendance of witnesses.

practice would be to deliver the parties' respective document briefs, and/or a set of common documents, at the same time, with this also recorded in the Procedural Order.

- *Hearing Arrangements*: while final arrangements for the hearing are usually deferred to a case management conference held just prior to the hearing (for example, time limits for witnesses, witness exclusions and the order of witness testimony and expert witness testimony), there are certain aspects of the hearing that can and should be discussed at the first meeting. For example, the parties should be made aware that they will have to make arrangements for the hearing venue, and they should commit to do so by a date certain. Parties will often prefer a neutral location, and the arbitrators can make useful suggestions in this regard. The parties and arbitrators should discuss the need for a transcript of the hearing proceedings, with the use of at least draft transcripts much preferred over simple note-taking by the arbitrators and counsel. To the extent that such matters are agreed, they should be recorded in the Procedural Order.
- *Closing submissions*: while there might be some discussion of this at the first meeting, the form, substance and timing of closing submissions is usually deferred to later in the proceedings. As a cautionary note, this should be addressed as early as possible in the proceedings and, to avoid delay, should not be deferred to the hearing itself.
- *The award*: in some instances, arbitration agreements will provide that the arbitrators deliver reasoned awards; in others, the parties may stipulate that no reasons for decision be delivered. Generally speaking, the use of reasoned awards is much preferred, if only to satisfy the parties (the losing party in particular) that their positions have been properly heard and considered. More important, the use of reasons will help ensure that the awards will not be susceptible to attack on procedural fairness grounds and jurisdictional issues. Whether specified or not, this issue should be canvassed at the first meeting and any decisions made should be recorded in the Procedural Order. Also, if there are to be any time limits on the issuance of an award, it should be understood that the specified time should run from the delivery of final submissions (whether oral or written) and the deadline should be expressed by a number of days following that event. This should be set out in the Procedural Order as well.

- *Administrative services*: it is becoming an increasingly common practice that, in cases of great length or complexity, the arbitrators will require the assistance of a clerk or administrative secretary. There are various ways this can be done, and such assistants can undertake a number of different tasks, from providing administrative assistance in the face of the parties at the hearing to helping the tribunal during the deliberative process. This issue has become somewhat controversial in the international arbitration world; awards have been set aside where the courts have concluded that tribunal assistants have overstepped their bounds and have become, in effect, additional arbitrators. To avoid any risk, the tribunal must secure the parties' approval to any such arrangements, and the parties must understand what the assistants are to do and how they will be paid. Where possible, this should be finalized by the end of the first meeting, and all terms relating to this should be recorded in the Terms of Appointment.
- *Financial arrangements*: quite unlike litigation, in arbitration the parties not only choose but pay for their arbitrators. In institutional arbitration, the arbitration institutions serve as intermediaries, and there are no direct financial dealings between the parties and their adjudicators. Quite obviously, this is not the case in *ad hoc* arbitration.[96] Typically, in *ad hoc* cases, arbitrators will charge hourly rates for all their case work. In most cases, arbitrators will charge for hearing days on the basis of a daily rate. Where there is to be a sole arbitrator, counsel and the arbitrator will usually have come to terms on these rates prior to the arbitrator's appointment. Where there are to be three arbitrators, it is by far best practice to have the arbitrators come to terms on common rates, and to have all billings and payments run through the tribunal chair. Once rates are established, it is usual practice for the arbitrators to ask for deposits to be paid at the start of proceedings and then, periodically, during the course of proceedings.[97] Deposits should be paid by the parties in equal amounts, recognizing that payment of arbitral expenses can

96. It should be noted that, for a relatively modest fee, the LCIA will handle all financial administrative matters for *ad hoc* arbitrations, wherever they take place.

97. The UNCITRAL Rules make specific provisions for the payment of periodic deposits as required by arbitrators. Under domestic legislation and the Model Law, the authority to ask for deposits is implicit in the power given to arbitrators to determine arbitral procedure.

be adjusted by the arbitrators in their final award (unless the parties have provided for equal payment or otherwise in their arbitration agreement). Some arbitrators will insist that the parties agree to be jointly and severally liable for their fees. It is always necessary that there be sufficient funds on deposit to cover the entire process, including all pre-hearing work, the hearing itself, and then deliberations and award writing. This will avoid delays in issuing the final award, and will eliminate the possibility of gamesmanship by a party which may believe that it has lost its case. Arbitrators should, as well, provide in their agreements that their final awards will not be issued unless and until all accounts are paid.

As well, cancellation fees are increasingly and now typically required by arbitrators. On this subject, arbitrator practices will differ, but a common cancellation fee requirement is that if a hearing is cancelled a specified number of days before scheduled commencement, a percentage of the hearing day fees will nonetheless be charged. There may be multiple time periods specified, with the percentage of the fees charged increased as the cancellation moves closer to the scheduled start date. Under current practice in Toronto, if a hearing is cancelled within 30 days of hearing commencement, the parties should expect to pay 100% of the scheduled hearing time. While the primary purpose of cancellation fees is to protect arbitrators from losing their ability to fill cancelled time, such fees do serve salutary purposes for the parties. They encourage the need to schedule hearings of reasonable duration, they encourage the parties to meet their interlocutory deadlines and, most important, they encourage timely and early settlement of cases.

As a matter of prudent practice, all financial arrangements with the arbitrators will be discussed and finalized at the first procedural meeting. Counsel should have conferred with each other and come to terms on this before that meeting so that in the event of any dispute, the positions of any particular party will be opaque to the tribunal. It is very rare that financial matters will upset an arbitration, but if that is to happen, it should happen as early in the process as possible and, ideally, before the arbitrators' appointments are confirmed. Finally, all matters relating to financial arrangements must be set out in the Terms of Appointment.

- *Case management*: case management is an inherent feature of arbitration, and it remains so throughout the process. It does

not end at the first procedural meeting. A typical Procedural Order will provide that the parties are to bring any procedural issues to the tribunal's attention as soon as possible after such issues arise. The order should, as well, provide for a schedule of further procedural meetings so as to ensure that the case is proceeding as required. In the event that proceedings have the prospect of delaying the start of the hearing, that should be addressed as soon as possible to mitigate any avoidable delay. Finally, the Procedural Order should provide for a final procedural meeting a short time before the start of the hearing in order that final hearing arrangements may be made.

Conclusion

The aim of this paper has been to outline the issues and procedures that typify arbitrations from the time of commencement to the start of the hearing. This survey is, by necessity, incomplete. Nevertheless, it should provide a basic framework for the guidance of parties and their counsel. It must be remembered at all times that the inherent precept of commercial arbitration is party autonomy. The objectives of commercial arbitration are efficiency and finality. To these ends, parties, their counsel, and of course the arbitrators should strive to be creative and to avoid the pitfalls of deferring to the norms of commercial litigation by default.