Driving Arbitration Efficiency: Proactive Arbitration to Achieve Party Objectives[i]

Joel Richler[1]

It is unquestioned that, in Canada, the use of commercial arbitration as a means of resolving commercial disputes is growing. There is an increasing number of properly-trained and experienced arbitrators, and there is a concomitant growth in the number of lawyers who are well-versed in the art and principles of commercial arbitration. Nonetheless, as good as arbitrators and arbitration counsel now are, in too many instances counsel fail to take full advantage of the wide range of benefits and attributes of arbitration, and many arbitrators often do not do enough to use their experience and power of persuasion to force party representatives to do so.

Why is this so? Quite simply, arbitrators are typically former litigation lawyers or retired judges; and, in Canada at least, arbitrator counsel are typically trained as litigation lawyers. We all find it very easy to default to our long-standing court-based experiences in dispute resolution, forgetting the fundamental principle that arbitration is, not simply a "litigation-light" process in which the parties choose and pay for their own adjudicator. Arbitration is more than that. It is an autonomous, self-contained, self-sufficient process by which parties agree to have their disputes resolved by a neutral that they have selected – without recourse to the over-burdened and inefficient public court system. Bluntly, too many practitioners bring litigation baggage to arbitrations – and that affects the way they behave.

As a former dispute resolution counsel, I have tried to instill in the parties and lawyers who appear as counsel in the arbitrations that I conduct sensitivity to and awareness of the principles of arbitration that, properly used, work to the parties' advantage and mutual objectives: achieving a resolution of their disputes in a time-efficient and economical manner that produces final awards that, if required, can be properly and completely recognized and

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[1] Joel Richler practices as an independent arbitrator at Bay Street Chambers, located at Arbitration Place in Toronto, Ontario. Mr. Richler was, for almost 40 years, a senior dispute resolution practitioner at Blake, Cassels & Graydon LLP.

enforced. This can, and very often is, achieved through the "front ended" approach described in this article.

All practitioners should remember that arbitration is driven by parties who have exercised their contractual rights to private dispute resolution to the exclusion of the public court system. Contracting parties opt for arbitration and they pay for it. The starting point in any arbitration should always be: what do the parties want?

Party expectations are not difficult to discern. There are a number of regularly-published surveys,[ii] and user panels are a regular feature of many arbitration conferences. Often, user preferences are a function of their most recent experiences. Recent winners will laud the arbitration process, and recent losers will point to features of the process that they found wanting. Losers comments can be most instructive. If arbitration is to remain vibrant, arbitrators and lawyers should pay to what users believe and say.

At the risk of over-generalization, the thrust of user comments is that, where they have decided to arbitrate, they want, amongst other things:

- a process that is not "judicialized"; - arbitration too often resembles nothing more than a litigation-type process conducted in private – with expensive arbitrators replacing free public court judges;
- finality: they want enforceable awards that finally and comprehensively deal with all of the issues that they have submitted to arbitration without the need for any further court recourse (whether by appeal of judicial review);
- arbitrator expertise: they want arbitrators who have experience and expertise not only in the subject-matter of their disputes, but also in the practice of arbitration itself;
- time-efficiency: they want their disputes determined as quickly as the circumstances will permit, so that they can get back to their businesses;
- financial-efficiency: they do not want the enormous financial costs that are associated with the seemingly endless multiple stages of court litigation that ensure that trials will take place several years after the commencement of any lawsuit;

- procedural efficiency: they do not favour and are not wedded to
    - the arcane niceties of court pleadings;
    - the grossly disproportionate and overbearing procedures associated with eDiscovery and documentary production in a system where everything is relevant and producible;
    - oral discovery of unlimited scope and duration designed to ensure the investigation of any and all facts and issues that may be presented at trial;
    - adherence to the formal rules of evidence that evolved when jury trials were prevalent; and,
    - traditional trial formats that resemble trials conducted in the late 19th century.

If these objectives and expectations are not met, users often say that they will resort back to traditional court litigation. How do we avoid this, and how do we promote arbitral processes that parties will find responsive to their needs?

As a starting point, remember that arbitration is contractual; - arbitrations derive from parties' agreements to have their issues finally determined by neutral arbitrators to the exclusion of the courts. They bargain for processes that will be "final" and complete and that will generate an award as enforceable as a court judgment. Of course, typically these agreements are made before disputes arise, before parties become enemies, and before the inherently adversarial dispute resolution process actually starts.

An important consequence that arises from the arbitration agreement is that parties are contractually obliged to each other to do what is necessary to ensure the proper and expeditious conduct of their bargained-for dispute resolution proceedings. This is implicit in the arbitration agreement, for without that underpinning, parties will have free rein to allow their adversarial behaviour to overcome the private dispute resolution process to which they have agreed.

While this principle has yet to be included in any Canadian arbitration statute or stated in any Canadian court decision, it should not be seen as either novel or startling. It is expressed, for

example, in section 40(1) of the English Arbitration Act of 1996, which provides that: "The parties shall do all things necessary for the proper and expeditious conduct of the arbitral proceedings." Australian legislation is the same, and the 2016 Uniform Arbitration Act issued by the Uniform Law Conference of Canada suggests the following similar addition to Canadian domestic arbitration acts:

> *A party shall participate in an arbitral proceeding efficiently and in good faith, in accordance with the agreement of the parties and the orders and directions of the arbitral tribunal*

As leading arbitration scholar Gary Born writes, this principle is implicit in the notion of a positive obligation to arbitrate by virtue of *pacta sunt servanda* (treaties must be obeyed). Born writes further:

> *… an arbitration agreement is not merely a negative undertaking not to litigate, but a positive obligation to take part in a sui generis process which requires a substantial degree of cooperation (e.g., in constituting a tribunal, paying the arbitrators, agreeing upon an arbitral procedure, obeying the arbitral procedure … and complying with an award). When a party agrees to arbitrate, it impliedly, but necessarily, agrees to participate cooperatively in all aspects of the arbitral process.*

This is particularly the case because, when arbitrating, the parties are in dispute; in such circumstances, "obligations of good faith are particularly important".[iii]

The import of this is that parties are not entitled and should not be permitted to allow the adversarial process of dispute resolution to overwhelm their arbitration covenants. Of course, if parties are contractually bound to cooperate in the arbitral process, so too are their counsel.

There is also a second contract that bears on this; the contract that binds the parties and the arbitrator. In *ad hoc* arbitration, this often takes the form of terms of appointment. In institutional arbitration, it is implicit in the engagement of the institution and is expressed, in similar ways, expressly or implicitly, in the procedural rules of the institution.

In *ad hoc* arbitration, by the terms of appointment, the parties and the arbitrator contract with each other to engage in the process that will produce what the parties have already agreed to:

a complete and efficient process that will generate a final and enforceable award. By virtue of that contract, the arbitrators and parties bind each other to act cooperatively and in good faith to work towards those results. Neil Andrews recently alluded to this when he wrote:[iv]

> *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 is a project which should have a clear target date … [the issuance of an award] … It should be planned and coordinated from the outset. The governing responsibility should be sensible and effective time-management and the pursuit of judgment at proportionate cost.*

There is nothing that speaks expressly to contractual obligations in any Canadian arbitration statute, but there is some reflection of this in institutional rules. For example, ICDR Canada's rules for domestic arbitration provide that tribunals:

- shall conduct proceedings with a view to expediting the resolution of the dispute (20(2));
- may decide preliminary issues, bifurcate proceedings, direct the order of proof, exclude cumulative or irrelevant evidence, and direct the parties to focus on issues whose resolution could be dispositive (20(3)); and,
- may take steps as are necessary to protect the efficiency and integrity of the arbitration (20(7)).

To a similar effect, ICC rule 22(1) requires tribunals to "make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute", and rule 24(1) requires that tribunals start to discharge this obligation at a case management conference to be convened as soon as possible while terms of reference are drawn up or soon after their execution.

There are many such institutional rules; they reflect pro-active and coercive powers to promote arbitral efficiency and to prevent party mischief; again, to prevent adversarial behaviour from overwhelming the arbitration process.

How do these contractual obligations translate into practical measures that will ensure that parties get what they have bargained for? The rubber hits the road in the time that passes between the appointment of arbitrators and the quintessentially important first pre-hearing meeting that typically culminates in Procedural Order #1. That is where the arbitral procedure best-suited to the case will be created and it is there that arbitrators should act proactively to ensure that procedures best suited to the parties and their disputes are adopted.

With the above-described contractual underpinning understood, I now make some suggestions as for arbitration procedure. While these are not invariable, and while other arbitrators will have different preferences, the following reflect my view of "best arbitration practice".

1. The arbitrator should have, very soon after her appointment, copies of the commercial agreements in issue, the arbitration agreement and the notice of arbitration and any reply that may have been delivered. This ensures that the arbitrator can prepare efficiently for the upcoming pre-hearing conference and engage in any preliminary communications with counsel that may be required.
2. The arbitrator should convene the case conference as soon as possible after he is appointed. This should not be left to the parties themselves. As a corollary, the arbitrator should not allow a resisting respondent to unreasonably delay the start of an arbitration. If there are preliminary issues that require determination either by the tribunal or the courts, convening the first meeting will kick-start that process.
3. The arbitrator should have circulated, for comment and approval, the terms of appointment, which should then be signed by or on behalf of the parties by no later than the start of the first meeting. Without this, the arbitrator will not have authority to issue any order or direction.
4. The arbitrator should, in advance, circulate a detailed agenda for the pre-hearing conference, and should direct counsel to confer on each and every item on that agenda with a view to coming to some understanding of the process to follow. (An alternative approach followed by some arbitrators is to circulate a draft procedural order for review by counsel and parties prior to the first case conference.) This is subject to one

important caveat. The parties should be told that any agreements that they may make will be subject to the comments, suggestions and directions of the arbitrator. Under our arbitration statutes and under institutional rules, the arbitrator is the "master of the procedure" and her role in that regard should not be pre-empted by the parties or their lawyers, notwithstanding the principle of party autonomy. (As a good example of this, arbitrators should not allow ill-informed parties to adopt court rules of civil procedure for their arbitrations.)

5. The arbitrator should suggest that parties attend the first case conference (if not all meetings). Why? It is their proceeding and there is no principled reason to exclude them from any event in the process. The parties will benefit from early exposure to the arbitrator and to the process and the arbitrator's messages to the parties need not be filtered through counsel. Party presence will enhance the civil and businesslike nature of the meeting and, indeed, the entire process. Finally, party presence ensures that instructions to counsel may be given in real time.
6. The arbitrator should invariably schedule the evidentiary hearing, even where there are preliminary or interim issues that may have to be determined prior to the start of the hearing. Doing this will be the best insurance against delay and gamesmanship during the course of the proceedings and will promote diligent and cooperative behaviour. Where the parties raise the possibility of interlocutory steps (e.g., summary judgment, jurisdictional issues, bifurcation, interim relief) that could affect the timing or duration of the hearing, alternative hearing dates should be scheduled.
7. The pre-hearing conference should be followed by the delivery of Procedural Order No. 1, which sets out the mandatory procedural rules and timetable for the arbitration. This must in the form of an order (as opposed to an agreement) for at least two reasons: first, the tribunal must be in a position to enforce the order in the event of any non-compliance; and second, putting matters of procedure into an arbitration agreement presents problems in the event of any deviation: - arbitrations that are not conducted as agreed upon by the parties may result in set aside applications (especially

in international arbitrations that are governed by the Model Law as enacted by the provinces and territories).

8. The first pre-hearing conference (and all other case conferences) should be followed by the arbitrator's issuance of a memorandum that summarizes matters that were discussed but that do not find their way into the procedural order. This serves a useful purpose in the event that parties later disagree as to statements made or positions taken at the case conference. To avoid any misunderstandings, these memoranda should promptly be provided to counsel with an invitation to correct any points of disagreement within a reasonably short period of time.

The importance of Procedural Order No. 1 cannot be overstated; counsel too often treat scheduling provisions set out in arbitration orders as optional directions as opposed to mandatory orders. Counsel often agree to extend timelines other changes to procedures, often without any disclosure to the arbitrators. Counsel may feel free to do this because, in their view, party autonomy entitles them to do so. This attitude is far from pervasive, but it is not atypical. It is far from good practice and it can be ruinous of an efficient and timely arbitration process.

As noted above, an important arbitrator responsibility is to ensure that procedural orders are discharged and that once a timetable is set, it is followed. While there will often be situations where timetable changes will be required, this always has to be done under the arbitrator's control and with a view to maintaining the scheduled commencement of the hearing. To deal with this potential problem effectively, Procedural Order No. 1 should provide that the parties are not at liberty to deviate from any aspect of the case timetable without prior notification to the arbitrator, and without the arbitrator's prior approval. To be sure, this will not always work, and arbitrators will often be presented with after-the-fact timetable change requests. Nevertheless, an order to this effect will have a salutary effect on party and counsel behaviour by establishing the arbitrator's expectations.

Procedural orders should also provide that whenever material is exchanged between the parties, copies are to be sent to the arbitrator. This will satisfy the arbitrator that the schedule

is being maintained without having to repeatedly ask for confirmation of that from counsel. Receipt of the material when delivered will also have the beneficial effect of allowing the arbitrator to easily gain some sense of the proceeding as the case moves forward to hearing.

Space does not permit an extensive review of any and all matters that should be covered in the first pre-hearing conference and Procedural Order No. 1. There are a number of suitable checklists that are available in arbitration texts and publications and elsewhere in the public domain. The following are a few important points that relate to pre-hearing procedure.

First and foremost, as an overriding principle, all cases should be "front-ended". The typical sequence of court litigation is that cases are developed very gradually over a protracted period of time. Lawyers start to learn about their cases when pleadings are exchanged, they learn more when they go through documentary and oral discovery, and they ultimately plan their trial strategy in the many months that pass between discovery and trial. It is only when trials are about to start that lawyers tell each other who the witnesses will be, what the key documents are and what issues will actually be tried.

This is not the arbitration way. A properly conducted arbitration will be case managed by the arbitrator working with counsel from start to finish. Arbitrators should insist and expect that though the delivery of meaningful and relevant information at all stages of the process, they and counsel will be well-armed to ultimately conduct an efficient hearing.

Consistent with front end case management, I commend the following as a model arbitration process, recognizing that all cases are different and that all arbitrations should be tailored by counsel and the arbitrator to their case at hand.

Party Statements: Written statements (not "pleadings") should be delivered early in the process. They should be far more comprehensive than court pleadings. Advocacy starts at the very beginning, with comprehensive statements delivered by each party. Statements should be written as advocacy documents. They should contain statements of evidence and legal submissions. They should also be accompanied by key documents or document excerpts that are relied upon by the writing party. In this regard, the principle "less is more" does not apply.

In order to ensure that all issues are properly and fairly disclosed, provision should be made for sequential (as opposed to simultaneous) delivery of statements and provision should be made for reply and sur-reply.

Evidence in Chief: A critical decision that must be is whether evidence in chief will be adduced orally (as in traditional trials) or in writing. Front ended arbitration compels the use of written evidence, delivered early in the process, as the almost invariable rule. Notably, this is not to say that in any given case, all evidence must be either written or oral. In any case, counsel and the arbitrator can identify issues, facts or events in respect of which parol evidence may be desirable. Further, arbitrators should reserve discretion to ask that evidence on important issues (e.g., those that may require findings of credibility) be heard orally. There is no case, however, where all or even most evidence should be adduced orally.

Witness Statements: As a guiding principle, witness statements (which should be sworn when they are delivered) should constitute the entirety of each witness' evidence. While there may be some room for very brief introductory questions and answers, the reader of the statements should be safe in assuming that no new evidence will be adduced at the hearing.

The parties should expect that a sequential exchange of witness statements will begin as early as possible in the arbitration, contemporaneous with or shortly after delivery of the party statements. As with party statements, reliance documents or excerpts thereof that form part of the witness' evidence should be physically annexed or electronically linked to the statements. As with party statements, provision should be made for reply and sur-reply statements to minimize any need for *viva voce* hearing testimony.

Expert/Opinion Evidence: The procedure for the exchange of expert evidence should closely resemble the procedure for fact evidence, save that expert evidence will typically be filed as reports. All procedural and scheduling matters that pertain to expert evidence should be settled at the first pre-hearing conference with the same objective of front ending that evidence. Experts and the subject-matter of their intended evidence should be identified early in the process, preferably no later than the delivery of party statements. At the first pre-hearing

conference, it should be determined when the opinion evidence should be exchanged. In most cases, it should be delivered at the same time as witness statements. There are, however, cases in which it may be appropriate to defer delivery of reports until after the document exchange process is completed. After the complete exchange of expert reports, it should be determined whether the experts will testify as part of each party's case, sequentially after the fact evidence in both cases is completed, or in "hot tub" fashion after the completion of the fact evidence. Logically and ideally, one of the two latter options should be pursued.

Document Exchange: With rare exception, the parties will require some means for the exchange of further documents following the exchange of fact evidence (and perhaps even after the delivery of expert reports). For this purpose, Rule 3 of the IBA Rules on the Taking of Evidence in International Arbitration is often adopted *per se* or as a guide. The best procedure for this is summarized as follows. Parties are entitled to make document requests by no later than a fixed number of days prior to the scheduled start of the hearing. The requesting party should, in the form of a Redfern Schedule, identify the document (or class of documents) as precisely as possible, should explain why the documents are relevant and material to the outcome of the case, and attest that it does not, itself, already have the documents. Within a specified short number of days thereafter, the responding party should agree to deliver the requested documents or provide a reasoned refusal. Within a specified short number of days thereafter, the arbitrator will deliver her rulings on the contested requests.

Oral Discovery: While I am not dogmatic in my view as to whether parties should engage in oral discovery as part of their pre-hearing exchange of information, I do adhere to the following statement of principle articulated by the ICDR, and I suggest that the same equally applies to domestic arbitration:

> *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.*

Notably, oral discovery is not mentioned in Canadian domestic or international arbitration legislation, in any of the rules of the major arbitration institutions (e.g., ICC, ICDR, LCIA) or in the UNCITRAL Rules for *ad hoc* arbitration. (Atypically, ADRIC's Rules do allow for tribunal-ordered discovery, but only where necessary for a party to present its case (rule 4.4)). There are cases, however, in which exchanges of information are required, and where information is not reduced to writing, oral discovery may be the most efficient means by which to obtain that information (the obvious alternative being written interrogatories).

If parties agree to oral discovery, the arbitrator should nevertheless order or direct that they further agree upon the identity of witnesses to be examined, issues or events which will be the subject of the examinations, time limits for each examination and a date well in advance of the start date of the hearing by which the examinations should be complete. Where one party asks for oral discovery and the other refuses, the arbitrator should require that the requesting party establish to his satisfaction that the requested examinations are truly necessary to permit a fair opportunity to present a case or defence. It is also very important that there be certainty as to the uses to which discovery transcripts may be put. For example, they may be limited to use as impeachment devices; or, parties may wish to file transcripts in lieu of witness testimony.

Motions: extensive motions practice should be discouraged. There are, however, situations where motions can serve the interest of the parties in maximizing arbitration efficiency. Important examples of this include motions for summary disposition of some or all issues and bifurcation motions. In other instances, motions may be suggested where the parties have encountered issues in their pre-hearing procedure. Wherever motions are to be made, the following procedural principles should be adopted. Motions should be treated as measures of

last resort. Notice of an intention to bring a motion should be given as soon as possible after the moving party has decided to bring its motion. The arbitrator should exercise a gatekeeper function in determining whether or not the motion should be permitted. A date should be set in advance of the hearing after which no motions should be permitted. In all cases, the procedure for a particular motion should be tailored to fit the nature of the relief that is being requested, and the formality associated with motion procedure under court rules of practice should not be incorporated into the arbitration. Not all motions require formal evidence, not all motions require oral hearing, not all motions require personal attendance before the arbitrator, and not all motions require oral submissions.

Opening Statements: In an arbitration that proceeds as described above, the need for formal opening statements is largely obviated. The tribunal will know, on the basis of written material already delivered, what she has to know to commence the hearing. There will almost always be some benefit in receiving some introductions to the case. This can be accomplished by page-limited written statements delivered within a few days of the start of the hearing, or in allowing each party a very short oral opening (say 15 minutes).

Final Pre-hearing Conference: It is a good practice to schedule a final pre-hearing conference no later than 10 to 15 days before the start of the hearing. If not determined before this meeting, the parties and the arbitrator should, as a result of this meeting, know who will be called to testify and/or to be cross examined, the order of witness presentation, the expected duration of each witness. As well, practical matters relating to the hearing, including time limits and allocation of time, can be settled.

I close this presentation with some comments on planning for the evidentiary hearing. I am reminded of the observation that if one were to compare a typical common law trial process in the late 19th century with a typical commercial trial now, the process would be largely the same, subject of course to the introduction of modern technology. The plaintiff presents its case through fact and opinion witnesses called in sequence; the defendant then answers – there is legal argument and, the hearing then closes.

While that may still be regarded as best trial practice, there is no reason that that should be the invariable practice in commercial arbitration. Canadian arbitrators have much to learn from our colleagues in other jurisdictions, where arbitrators and judges adopt a far more pro-active and inquisitorial role. The parties should expect that arbitrator questioning is part of the process; not an interference in the hearing.

But apart from the possible adoption of some international hearing techniques, I suggest that arbitrators can, and should, be far more creative in the adoption of hearing techniques for special types of cases. There are, after all, no statutory provisions that guide us as to how hearings should be structured, and there are no institutional rules that mandate particular hearing formats. Notably in this regard, statutes and rules all refer to “hearings”; not “trials”.

There is, for example, no particular magic to the sequential presentation of cases by claimant followed by respondent. By the time that a hearing starts in a front-end loaded case, the properly-briefed and properly-prepared tribunal will be very well familiar with the case and the factual assertions of each side. In any given case, logic might dictate that witnesses be called out of sequence to respond to the evidence of each other. There may be key contested events in the chronology of a case that would be suitable for this type of format. In such cases, it may very well be easier for arbitrators to properly and efficiently weigh and assess the evidence that they are presented with on discrete issues if witnesses are called in a sequence that suits the case.

As a second example, there are cases that would benefit from a more collegial form of hearing, conducted in the form of a discussion or meeting as opposed to an adversarial trial-like hearing. This would, in effect, be a “hot tubbing” of all witnesses, not just the expert witnesses. In one case where I acted as counsel, the issues to be determined were all highly technical and related to the unique circumstances of the particular business of the parties. The arbitration agreement required that the party appointees not be lawyers or judges; they had to be retired industry executives, and as a result they had no prior arbitration experience. After the hearing proceeded in a traditional trial format, it was clear to me that the hearing would have been far

more efficient and far more beneficial to the parties and the tribunal had all of the evidence, fact and opinion, been discussed in a boardroom setting rather than a trial setting.

So, as a final comment, lawyers and arbitrators should (as many do) structure there arbitrations as creatively as possible, drawing from past arbitration experience. The litigation model should not serve as the foundation for the arbitration.

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[i] This paper is based upon a presentation made at a November 15, 2018 meeting of the Vancouver Chapter of the Chartered Institute of Arbitrators (Canada Branch)

[ii] Most notably, the annual International Arbitration Survey conducted by Queen Mary University; see "2018 International Survey: The Evolution of International Arbitration, https://www.whitecase.com/publications/insight/2018-international-arbitration-survey-evolution-international-arbitration

[iii] Born, Gary, "International Commercial Arbitration", (2nd edition, 2014, Wolters, Kluwer) at pp. 1257-1283

[iv] "Improving Arbitration: Responsibilities and Rights", *Arbitration* (2017) Vol 83, 330 at 337