The Proactive Arbitrator: Duty Bound![1]

Part I

The use of arbitration to resolve commercial disputes in Canada is growing. The number of properly-trained and experienced arbitrators is increasing, as is the number of lawyers knowledgeable about commercial arbitration. Even so, counsel often fail to take full advantage of arbitration's benefits and attributes, and arbitrators fail to use their persuasive powers to force them to do so. Why?

Typically, arbitrators are former litigation lawyers or retired judges, and arbitration counsel —in Canada, at least—are litigation lawyers. They easily default to their court experiences, forgetting that arbitration is more than "litigation-light." It is an autonomous, self-contained, self-sufficient process where a neutral selected by the parties resolves their dispute outside of the court system. Bluntly put, too much litigation baggage is brought to arbitration.

Arbitration is driven by parties exercising contractual rights to private dispute resolution, to the exclusion of the courts. They opt for arbitration and they pay for it. Thus, the starting point should always be: *What do the parties want?* This is not difficult to discern from regularly-published surveys[2] and user panels regularly featured at conferences. Arbitrators and lawyers should attend to what users say. At the risk of over-generalization, users who decide to arbitrate want:

- a non-judicial process, not a duplication of litigation where paid arbitrators replace free judges
- finality in the form of enforceable awards that deal with all of the issues, without the need for appeals or judicial review
- arbitrator expertise in that the decision maker knows the subject matter *and* the practice of arbitration
- time-efficiency so that disputes are determined as quickly as the circumstances permit
- financial-efficiency so they do not pay for seemingly endless, multi-staged process that culminates in a trial-like hearing years hence
- procedural efficiency and *not*
- formalistic court-style pleadings that serve no real purpose
- disproportionate and overbearing production and discovery procedures that assume almost everything is relevant and producible
- oral discovery of unlimited scope and duration
- adherence to the formal rules of evidence that evolved to suit jury trials; and
- antiquated hearing formats.

How do we promote arbitral processes that give parties what they want? As a former dispute resolution counsel who now serves as an arbitrator, I do this by following the norms of international arbitration and using a "front end" approach to the process. I take the initiative to help the parties adapt the process to deliver a time-efficient and economical resolution by means of a final award that can be recognized and enforced.

A properly conducted arbitration is case managed by the arbitrator, working with counsel from start to finish. Arbitrators should insist and expect that through the delivery of meaningful and relevant information at all stages, they and counsel will be positioned to conduct an efficient hearing. But it is the arbitrator, not counsel, who must take the initiative and lead the process.

My front-end approach, while activist in nature, is completely consistent with party autonomy. When commercial parties contract for arbitration, that contract implies that they will do what is necessary to ensure the proper and expeditious conduct of the process. This is key, for without that underpinning, the unchecked adversarial behaviour of the parties could derail the arbitration, and it is the arbitrator's responsibility to make sure that does not happen.

Canadian arbitration statutes do not explicitly recognize the parties' obligation to participate in good faith, but both English and Australian statutes do, as does the 2016 Uniform Arbitration Act issued by the Uniform Law Conference of Canada[3]. Arbitration scholar Gary Born links

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the parties' implied obligation to the maxim *pacta sunt servanda* (treaties must be obeyed), and he is of the view that arbitration agreements are not simply promises not to litigate. They are also positive obligations to cooperate in the arbitration process itself.[4] And, of course, if parties are contractually bound to cooperate in the arbitral process, their counsel are too.

My front-end approach to arbitration is also grounded in the contract between the parties and the arbitrator. In *ad hoc* arbitration, contractual terms are expressed in terms of appointment, and in institutional arbitration they are found in the institution's procedural rules. By virtue of their contract, the arbitrators and parties bind each other to act cooperatively and in good faith to work towards those results. Author Neil Andrews identifies two managerial responsibilities that arbitrators have: timing and planning, and cost containment. "The governing responsibility should be sensible and effective time-management and the pursuit of judgment at proportionate cost," he wrote.[5]

No Canadian arbitration statute speaks to this power on the part of arbitrators, but some institutional rules do. 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 and "may take steps necessary to protect the efficiency and integrity of arbitration." ICC rule 22(1) has provisions to a similar effect. Such institutional rules reflect pro-active and coercive powers that promote arbitral efficiency and prevent adversarial behaviour from overwhelming the arbitration process.

How do these contractual obligations translate into practical measures that ensure the parties get what they bargained for? Firstly, by the arbitrator taking process leadership immediately. In the time between their appointment and the first pre-hearing meeting that culminates in an arbitral direction, arbitrators should act proactively to ensure that the parties adopt suitable procedures.

Over time I have developed practices that promote an efficient arbitration process. They are not invariable, and other arbitrators will have different preferences, but they reflect my experiences as an arbitrator and my conclusions about "best arbitration practice."

1. Very soon after appointment, the arbitrator should have copies of the commercial agreements in issue, the arbitration agreement, the notice of arbitration, and any reply. This lets the arbitrator prepare for the pre-hearing conference and engage in preliminary communications with counsel.
2. The arbitrator (not the parties) should convene the case conference as soon as possible after appointment, and a resisting respondent should not be allowed to unreasonably delay the start of an arbitration. If there are preliminary issues that require determination, convening the first meeting will kick-start that process.
3. The arbitrator should circulate, for comment and approval, the terms of appointment, to be signed by or on behalf of the parties no later than the start of the first meeting. Without this, the arbitrator will lack authority to issue orders or directions.
4. The arbitrator should, in advance, circulate a detailed agenda for the pre-hearing conference and direct counsel to confer on each and every item with a view to coming to some understanding of the process. Alternatively, the arbitrator can circulate a draft procedural order. Whatever the document, everyone must understand that their input will be subject to the comments, suggestions, and directions of the arbitrator who, as "master of the procedure," is not to be pre-empted by the parties or their counsel. For instance, arbitrators should not allow ill-informed parties to adopt rules of civil procedure.
5. The arbitrator should suggest that parties themselves attend the first case conference, if not all meetings. Why? It is their proceeding. There is no principled reason to exclude them. They will benefit from early, unfiltered exposure to the arbitrator and to the process.

Their presence will enhance the businesslike nature of the process. Finally, party presence ensures that instructions to counsel can be given immediately.

6. The arbitrator should schedule the evidentiary hearing at the front end of the process, even if preliminary or interim issues need to be determined first. Doing this insures against delay and gamesmanship, and promotes 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. Procedural Order No.1 should immediately follow the pre-hearing meeting, setting out the mandatory procedural rules and timetable. This must be in the form of an order not an agreement so that, in the event of non-compliance, the arbitrator can enforce it.
8. After the first pre-hearing conference and all other case conferences, the arbitrator should circulate a memorandum summarizing any discussions that did not find their way into the procedural order. The arbitrator should invite counsel to promptly correct any points of disagreement.
9. There are a number of suitable checklists that are available in arbitration texts and publications and elsewhere in the public domain.

Checklists are available in arbitration texts and publications and elsewhere in the public domain for matters that should be covered in the first pre-hearing conference and Procedural Order No. 1. That said, the importance and authority of this first order cannot be overstated. For one thing, it deters counsel from treating scheduling as optional. Without advising the arbitrator, they may agree to extend timelines or make changes to procedures, believing that party autonomy entitles them to do so. Allowing counsel to do this can ruin an efficient and timely arbitration.

The arbitrator is responsible to ensure that procedural orders are discharged and that once a timetable is set, it is followed. While timetable changes may at times be required, they must be made under the arbitrator's control and with a view to maintaining the start date of the hearing. Procedural Order No. 1 should provide that the parties are not at liberty to deviate from the timetable without prior notification to the arbitrator, and without the arbitrator's prior approval. This will not always work, and arbitrators will often be presented with after-the-fact change requests. Nevertheless, an explicit prohibition will establish 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 allows the arbitrator to monitor the schedule without having to repeatedly ask and gives the arbitrator a sense of how the proceeding are progressing.

Front-end arbitration management also entails the design of the arbitration process itself, a critically important activity that the arbitrator must manage. Through trial and error, I have evolved an arbitration model that, in my experience, balances full and fair disclosure with efficiency. I will describe this model in more detail in the next issue of this journal.

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1 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)

2 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*

3 See, for instance, 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."

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

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