The Proactive Arbitrator: Part 2[1]

In Part 1 of this article[2] I wrote that commercial arbitrators should encourage parties to apply a "front end" approach and customize the process if participants are to truly enjoy the benefits that arbitration has to offer. Recognizing that all cases are different, the following is a process that, in my experience, balances full and fair disclosure with efficiency. This model covers ten aspects of the typical arbitration process.

Party Statements

Written statements, not "pleadings," should be delivered early on. They should be advocacy documents containing statements of what the evidence will be and legal submissions. Key documents or excerpts should be attached. "Less is more" does *not* apply. For full and fair disclosure, statements should be delivered sequentially, not simultaneously, with provision for reply and sur-reply.

Evidence in Chief

A critical decision is whether evidence will be put forward orally or in writing, but no case requires that all—or even most—evidence be oral. Front-end arbitration compels the use of written evidence, delivered early, with counsel and the arbitrator working together to determine whether parol evidence is necessary or desirable. Arbitrators should reserve discretion to ask for oral evidence on important issues, such as issues of credibility.

Witness Statements

Sworn witness statements should cover the entirety of each witness's evidence, and the reader should be safe in assuming that no new evidence will be presented at the hearing. A sequential exchange of witness statements should begin early, contemporaneous with or shortly after delivery of the party statements. Reliance documents or excerpts that form part of the witness's evidence should be physically annexed or electronically linked. Provision should be made for reply and sur-reply statements to minimize any need for *viva voce* testimony.

Expert/Opinion Evidence

The procedure for the exchange of expert evidence should closely resemble the procedure for fact evidence, except that expert evidence will typically take the form of a written report. All procedural and scheduling matters pertaining 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 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, that should be at the same time as witness statements. There are, however, cases where delivery of expert reports is best deferred until document and witness statement exchanges are complete. As well, the process should allow for the possibility of expert consultations (with or without participation of counsel) in order to define the issues that the experts will cover.

After the complete exchange of expert reports, it should be determined when the experts will testify. Will it be as part of each party's case, sequentially after the fact evidence in both cases is completed, or in "hot tub"[3] 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 International Bar Association Rules on the Taking of Evidence in International Arbitration[4] is often adopted *per se* or as a guide. The best procedure is this: Parties are entitled to make document requests by no later than a fixed number of days before the start of the hearing. The requesting party should, in the form of a Redfern Schedule[5], precisely identify the document (or class of documents), explain why they are relevant and material to the outcome, and attest that it does not already have them, have access to them, or that they are not publicly available. Within a specified short number of days after that, the responding party should agree to deliver the documents or provide a reasoned

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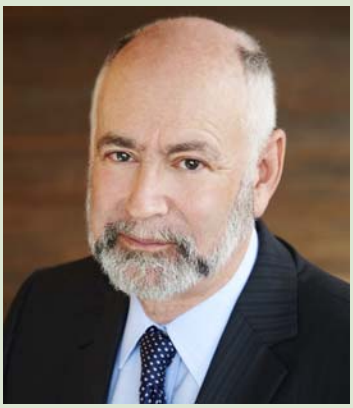

refusal. The arbitrator should rule on any contested requests within a specified short number of days thereafter.

Oral Discovery

I am not dogmatic about whether or not parties should engage in oral discovery, but I do adhere to the following principle articulated by the International Centre for Dispute Resolution, and suggest that it also 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...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, or in the UNCITRAL Rules for *ad hoc* arbitration. Atypically, ADRIC's Rules[6] allow for tribunal-ordered discovery, but only where necessary for a party to present its case (rule 4.4). That said, oral discovery (or alternatively written interrogatories) may be the most efficient means to obtain information that has not been reduced to writing.

If parties agree to oral discovery, the arbitrator should manage the process by directing who will be examined and on what issues or events and by setting time limits and a completion date for each examination that is well before the start date of the hearing. Where one party asks for oral discovery and the other refuses, the requesting party should satisfy the arbitrator that the examinations are necessary to present a case or defence on specific issues. There must also be certainty as to how discovery transcripts will be used. Are they for impeachment or in lieu of witness testimony?

Motions

Extensive motions should be discouraged, although some motions, such as those for summary disposition or bifurcation, can maximize arbitration efficiency. 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 one, but the arbitrator should serve as gatekeeper, determining whether to permit the motion. A date should be set in advance of the hearing after which no motions will be allowed. In all cases, the motion procedure should be tailored to fit the relief requested, and the formality associated with motions under court rules of practice should not be adopted. Not all motions require formal evidence, an oral hearing, or a personal attendance before the arbitrator.

Opening Statements

In an arbitration that proceeds as described above, formal opening statements are usually not needed. The tribunal will know what it needs to know in order to commence the hearing. An introduction to the case can be accomplished by page-limited written statements delivered within a few days of the start of the hearing, or by very short oral openings of, say, 15 to 30 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 hearing starts. As a result of

this meeting, the parties and the arbitrator should know, if they don't already, who will be called to testify and/or be cross examined, the order of witnesses, and the expected duration of each witness. While I do not subscribe to the use of "chess clock" procedures in most cases, that type of regimen can be useful to ensure the timely completion of hearings.

Planning the Evidentiary Hearing

Canadian arbitrators have much to learn from other jurisdictions where arbitrators and judges adopt a far more pro-active and inquisitorial role. For instance, the parties should expect that arbitrator questioning is part of the process, not an interference in the hearing. But arbitrators can, and should, be even more creative when it comes to planning for and conducting hearings. There are, after all, neither statutory provisions nor international rules that mandate particular hearing formats. Notably, in this regard, statutes and rules refer to "hearings," not "trials."

There is no particular magic to the sequential presentation of cases by claimant followed by respondent. By the time a hearing starts in a front-end loaded arbitration, the properly-briefed and properly-prepared tribunal will be 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. It may very well be easier for arbitrators to properly and efficiently weigh and assess the evidence in relation to discrete issues if witnesses are called in a sequence that suits the case.

There are also cases that would benefit from a collegial hearing that takes 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, all of the issues were highly technical and related to the parties' particular business. The arbitration agreement required that the panel members appointed by the parties had to be retired industry executives. As a result, the appointees had no prior arbitration experience. The hearing proceeded in a traditional trial format, but it was clear to me that it would have been far more efficient and beneficial to the parties and the tribunal if fact and opinion evidence were to have been discussed iteratively in a boardroom setting.

So, as a final comment, the litigation model should not serve as the foundation for the arbitration. Arbitrators and lawyers who represent parties at arbitration should (as many do) structure the process as creatively as possible, drawing from past arbitration experience.

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 http://adric.ca/wp-content/uploads/2019/09/ADRIC_JOURNAL_2019_Vol28_No1.pdf
3 "'Hot-tubbing" refers to the practice of experts testifying concurrently rather than one after the other.
4 See https://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx
5 See, for instance, https://law.academic.ru/6270/Redfern_Schedule
6 See http://adric.ca/rules-codes/arbrules/

Correction

In the first part of this article published in Vol. 28, No. 1, Summer/Fall 2019 of this publication, I wrote that Canadian arbitration statutes do not explicitly recognize the parties' obligation to participate in arbitrations in good faith or the arbitrator's power to manage time and costs. While this is true of the statutes in Common Law Canada, it is not the case in Quebec. There, article 2 of the Code of Civil Procedure imposes an obligation to participate in arbitrations in good faith, and an obligation to ensure that time and costs of arbitral steps are proportionate to the nature and complexity of the dispute.