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Whose Arbitration Is It Anyway? The Evolving Role of the Arbitrator in Determining Commercial Arbitration Procedure

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Whose arbitration is it anyway? Reflections on the role of the arbitrator, counsel and the parties in expeditiously resolving disputes.

A fundamental attribute of commercial arbitration is party autonomy; the ability of the parties to agree on what will be arbitrated, the choice of arbitrator, and the procedure to be followed. The concept of party autonomy sometimes breaks down when it presumes there is party agreement on procedure. Where an *ad hoc* procedure is used instead of a set of arbitration rules, there is no obvious agreed procedure and the question becomes what procedure did the parties anticipate when they agreed to arbitrate.

In purely domestic arbitrations, there may be a large discrepancy between the parties as to how they expect any arbitration will be conducted. In international arbitration, there may be even more of a disconnect, depending upon the parties' nationality, legal traditions and arbitration experience.

Generally, parties or counsel more experienced in arbitration are less likely to expect a procedure that follows local court rules. Less experienced counsel, however, may well expect that the arbitration will mirror local court procedure. Enter the arbitrator, who will have his or her own view as to how the arbitration should proceed.

It has been said that there are three types of arbitrators: the referee, the dictator and the active case manager.[1]

The referee arbitrator does not get involved with procedure at all, unless there is a real fight between counsel. He or she is content to leave all procedural issues and the timetable for the arbitration to counsel and the parties. This is the "call me if you need me" approach.

The dictator is the opposite. He or she believes in not only the efficacy but the purity of the arbitral process and is concerned that if matters are left to counsel, they will deliver an arbitration procedure that completely negates the objectives of speed, efficiency and cost effectiveness. The dictator arbitrator is particularly suspicious of so called "name" or "good" counsel who, if possible, will attempt to game the system to gain for their client any advantage that they possibly can. The dictator arbitrator will, regardless of the views of counsel, attempt to impose an arbitral process that is true to his or her pure view of what arbitration should be.

The case manager arbitrator is between these two extremes and is where we appear to be in Canada in the majority of cases. The case manager arbitrator will not leave it to the parties and counsel to run the arbitration, but will recognize the ultimate right of the parties to agree on the procedure and timetable.

The case manager arbitrator's job is to make sure that the parties understand that the process they have agreed to carries with it the obligation to conduct this adversarial but consensual process in good faith and with efficiency. He or she will remind the parties that this is not a coercive court ordered process, but

[1] First posited by *Albert Bates, vice chair of the Construction Group of Duane Morris, LLP*

an agreed upon contractual process. Specifically, the case manager arbitrator will make it clear that local court rules have no application to the arbitration unless both sides agree.[2] The case manager arbitrator recognizes the obligation to push back and challenge the parties, or more likely their counsel, when it appears the procedure sought to be adopted is not necessary.

In many cases, the case management arbitrator is up against a litigation business model that has been in place for years. Canadian domestic litigation is a "back-end load" model where lawyers are moderately engaged in a case over a two to four year period, with periodic bursts of activity, while working towards the ultimate trial. Each case is staggered to avoid having two cases culminate at the same time. Like circus jugglers, the lawyer keeps each plate spinning just enough to ensure it doesn't fall. Arbitration on the other hand, in order to deliver on the promise of an expeditious and cost effective procedure, demands a front-end load and a measure of continued effort to have the case over as soon as possible and usually within 12 months. To achieve this, the case manager arbitrator moves the parties along where possible, while recognizing this may well be going against the lawyers' established business model.

If the parties (or more likely their counsel) are adamant that they are going to adopt a litigation style procedure, then the arbitrator is bound to acquiesce. At the end of the day it is the parties' arbitration, but this should not stop the arbitrator from making suggestions and, if necessary, pointed comments where he or she believes another procedure might be more appropriate.

If the parties are going to the extra expense of hiring their own adjudicator, it makes sense that they get their monies' worth, which means input from the arbitrator at each step of the procedure as to how the dispute can be expeditiously resolved.

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[2] This point is often lost on common law lawyers. Canada, as a result of consistent Supreme Court decisions, is a jurisdiction in which arbitration is not part of any province's judicial system and there is no legal obligation, absent some specific provincial legislation, that requires parties to adopt local court rules.