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"Time is Money!"

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The cost of litigation has increased dramatically due to vastly expanded discovery and an enormous increase in the number of motions, with the result that it is often years before a case reaches trial. Cost has put litigation out of reach of many. With counsel experienced in arbitration and a tribunal to actively shepherd the process, a procedure can be custom designed to shorten the time required to resolve the dispute. The time savings translate into dollars saved.

Having litigated in various courts for almost 50 years, I am struck by how everything now seems to be so complex procedurally and how long it takes to get resolved through trial and appeal(s). "Back in the day", a long trial lasted a week, seldom more than two. Discoveries seldom ran more than a couple of days and undertakings were rare. Litigation today takes much longer with much greater focus on process including motions and case management. Review of electronic records for relevant documents has vastly expanded the scope of document discovery. Even when the preliminaries are over, getting and holding onto a trial date presents additional challenges. Just ask anyone whose case has been "bumped" at the last minute because a judge was not available.

All of this has resulted in litigation being extremely costly. Major corporations and governments can afford it, but not anyone else. This leads one to question whether all this enormous time expenditure and attendant cost produces better results than might be achieved using a more streamlined system.

Arbitration offers an alternative process. While it too can be bogged down in procedural wrangling and litigation-type discovery of fact and expert witnesses and document production, that only seems to be the case if counsel on both sides view arbitration as simply litigation with a paid judge and the tribunal is not prepared to take charge of the process.

The beauty of arbitration is that it starts from the perspective that less can be more. Less complexity can achieve a just result while saving both time and money. The aim is to save time and expense by curtailing endless discovery and motions. It starts, of course, with the agreement to arbitrate. DO NOT UNDER ANY CIRCUMSTANCES provide that the arbitration is to be conducted under the Rules of Court. If you go down that path, what you will get is a very expensive "trial" before a tribunal that you are paying for. Well drafted agreements to arbitrate specify rules that give the tribunal significant discretion in establishing the procedure to be followed and the procedure can be tailor-made for the dispute at hand.

Selection of counsel and of the arbitration tribunal is key to conducting an expeditious arbitration. Parties should select counsel experienced in arbitration that appreciate the benefits and cost savings it can bring to their clients. Arbitrators known to work cooperatively with counsel to develop procedures that are fair but which lead to the expeditious conduct of the arbitration should be selected.

Once counsel are engaged and the tribunal is in place, a preliminary procedural conference is called. This generally is introductory and is intended to identify the procedural issues to be determined, the likely timing of the proceeding, the steps required prior to the hearing and possible hearing dates. Early establishment of a schedule (confirmed by a procedural order) is critical to ensure the tribunal is in a position to ensure the arbitration stays on track.

Increasingly, document production is done utilizing the IBA Rules for the Taking of Evidence in International Arbitrations. Each party lists the documents on which they intend to rely and the other party

can make specific requests to the tribunal to order additional production. Tribunals often encourage parties, at an early stage, to identify categories of documents or specific documents they want the other side to produce, before formal document disclosure is made. This is particularly helpful if documents subject to confidentiality agreements are being requested.

Discovery of fact and expert witnesses, if done at all, is restricted to a specified number of hours for each side. Motions (dealing with procedural issues, document productions, schedule, etc.) are typically done by conference call, with the chairman often being delegated the task of handling them. Typically this can be done on quite short notice, unlike the requirement for formal notice or case management appearances in matters being litigated.

With respect to hearings, arbitrators, being in a service role, are generally very flexible concerning hearing dates and hours. Long sitting days and weekend sittings are not uncommon. Generally, the date by which the Award must be issued is set out in a procedural order.

Properly run, an arbitration can be completed in far less time than a trial would take. Typically, evidence is filed by way of witness statements and expert reports, thus limiting the time in the hearing itself to cross-examination. Evidence of minor witnesses (or those unable or unwilling to travel) can be taken by video conferencing. Expert witness conferencing or "hot tubing" can be very effective in focusing the tribunal on the key issues in dispute.

All dispute resolution, whether involving arbitration or a trial, is uncertain. In most cases, what is of paramount importance is to have a dispute resolved as quickly as reasonably possible. Time is money, and it goes far beyond the fees paid to counsel, experts and arbitrators. The opportunity cost of resolving disputes is often ignored but is of major importance as long running litigation often ties up key personnel in a company for extended periods. Arbitration provides a proven means of keeping that to a minimum. Even though the cost of paying the tribunal is a factor, the time savings often more than make up for that.

I have been involved in arbitrations lasting a week that would have taken four weeks to try. A long trial today may take 3-4 months to be heard whereas "big ticket" arbitrations seldom exceed two weeks. Finally, quick resolution of disputes helps enormously to repair business relations that prolonged litigation leave open and unresolved, often for several years. The message is: "arbitrate, don't litigate – save time, save money"

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