DISPUTE RESOLUTION JOURNAL

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A PRACTICAL PERSPECTIVE

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American Arbitration Association
Dispute Resolution Services Worldwide

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Claude R. Thomson is an arbitrator, mediator and independent advocacy coach. A chartered arbitrator and a former partner of Fasken Martineau DuMoulin LLP, in Toronto, Canada, he chairs ADR Chambers International in Toronto. He may be reached through the Internet at www.claudethomson.com or via e-mail at claude@claudethomson.com. Annie M.K. Finn, a partner in Fasken Martineau DuMoulin LLP., assisted Mr. Thomson in the preparation of this article.

Businesses are demanding fair rules and procedures to resolve international commercial disputes in a prompt and cost-effective manner. The author explains why international commercial arbitration fits that bill. His article looks at the advantages of international arbitration and highlights issues that should be addressed during the preliminary conference to maximize efficiency. He also touches on arbitration in Canada and the rules applicable to domestic and international awards.

Freer and more accessible trading opportunities have generated a myriad of multinational commercial agreements that demand effective, fair and prompt mechanisms for the settlement of disputed rights and obligations. The speed and sophistication of these transactions does not tolerate resolution through traditional legal means developed by and for the convenience of the legal and accounting professions. It is often essential that relationships be preserved while acrimonious disputes are resolved. Litigation, while it has certain advantages, is not known for this. Businesses are demanding procedures for the resolution of disputes that are fair,

Reprinted from the *Dispute Resolution Journal*, vol. 60, no. 2 (May-July 2005), a publication of the American Arbitration Association, 335 Madison Avenue, New York, NY 10017-4605, 212.716.5800, www.adr.org.

prompt and crafted to serve the interests of the parties. This article discusses the advantages of international arbitration over litigation and identifies issues the arbitrator and the parties can address in the preliminary conference in order to ensure a fair and efficient proceeding.

Litigation v. Arbitration

An analysis of dispute resolution procedures must begin with litigation, the dispute resolution system provided by the government and paid for through taxation. Its strengths are too obvious to be ignored. Judges are independent and made available without charge to the parties, since they are government employees. The process is public and there is a right to appeal. There are, however, a number of factors that militate against the choice of litigation for international commercial disputes.

Principles of international law provide guidelines for the circumstances in which judgments in national courts will be recognized and enforced in other countries. A party who wins a lawsuit conducted in its home country may have to seek enforcement of the judgment in a foreign country where the defendant has assets. The outcome of litigation is always uncertain but when the litigation is conducted in the adversary's home country, it is even more up in the air because of the possibility that the adversary could enjoy a "home court advantage." Litigating in a foreign country could be quite expensive. Litigation in the United States, for example, suffers from skyrocketing costs due to the long, drawn-out discovery process allowed under U.S. law. In addition, in many judicial systems, there may be delays due to a backlog of cases or a lack of available judges.

Another disadvantage of litigation is its inflexibility. Litigation is governed by legislative rules of procedure and court rules, so the parties have little ability to control the process. They cannot determine the judge who will hear the case. Furthermore, there are legitimate concerns about the integrity of some foreign judicial systems. In addition, the legal principles that apply in a foreign jurisdiction could be unclear.

The primary function of litigation in even the most developed countries is to resolve national and domestic disputes. The rules and procedures are not primarily directed at the resolution of complex international commercial issues.

Compared to litigation, international arbitration has numerous strengths and few, if any weaknesses. Arguably, the most important strength is that international arbitration awards are enforceable in almost all countries around the world. This is due to the fact that the governments of most countries, including the vast majority of the developing world, have become signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Since the New York Convention provides for the reciprocal enforcement of foreign arbitral awards, it completely eliminates the need to resort to national courts to resolve international disputes. Because of the relative ease of enforcement of these awards, international commercial arbitration has become the process of choice.

International arbitration has other well-known strengths. First, since arbitration is a creature of contract, it can be customized to meet the parties' needs. Second, the parties can determine the qualifications of the arbitrator or panel and even select the arbitrators who will serve. This means that they can select individuals with expertise in the subject matter of the dispute, or persons with legal experience or both. Third, national courts are reluctant to interfere in an ongoing international arbitration and any interference is usually quite limited scope. Fourth, if the parties select administered arbitration under the aegis of a well-established arbitral institution,[1] the parties can obtain assistance from the institution in managing the arbitration and maintaining the neutrality of the arbitrator. Arbitration is quicker and more efficient than litigation, so it generates cost savings over litigation. It also produces a final award without the delay and expense of appeal to appellate courts, another factor that controls costs. The parties can also agree in advance that the proceeding will be kept confidential so the companies' business does not have to become public knowledge.

International commercial arbitration is flexible because it is consensual in nature and takes place outside the constraints of the court process. While its strengths far outweigh any weaknesses, its very flexibility makes the parties vulnerable to delays, costs or unfairness.

Administered v. Ad Hoc Arbitration

Most commercial arbitration proceedings are administered by arbitral institutions. The well-known arbitral institutions have promulgated rules of procedure to govern the conduct of the proceedings, including the selection of arbitrators, if not specifically provided in the parties' agreement. The institution generally serves as a buffer between the parties and the arbitrator or arbitral tribunal. This helps preserve the neutrality of the arbitrator or tribunal, which is critically important to maintaining the integrity of the

arbitration process. The ADR institution's staff can help the arbitrator in assorted ways with keeping the proceeding on track.

Administered international arbitration proceedings should be conducted efficiently. Often, however, the parties themselves are the barrier to an efficient process, making timely resolution of the dispute more of a challenge for the arbitrator.

For cost reasons, some parties select *ad hoc* arbitration. The New York-based CPR Institute for Dispute Resolution promotes *ad hoc* arbitration using its rules.

Ad hoc international arbitration proceedings are sometimes conducted under the Model Law on International Commercial Arbitration prepared by the United Nations Commission on International Trade Law (UNCITRAL Model Law) and the UNCITRAL Arbitration Rules. The International Centre for Dispute Resolution, a division of the American Arbitration Association (AAA), has its own international arbitration rules, but it will administer international cases using the UNCITRAL Arbitration Rules if that is what the parties want. In an *ad hoc* arbitration not involving the AAA, the proceeding is administered by the arbitrator on whom the parties are dependent for the success of the process.

Canadian Arbitral Institutions Compete with ADR Providers Around the Globe

The four leading Canadian arbitral institutions are as follows:

1. **The British Columbia International Commercial Arbitration Centre (the most active of the Canadian institutions), headquartered in Vancouver, British Columbia. It has user-friendly rules of procedure for international arbitration. www.bcicac.com.**
2. **The ADR Institute of Canada., headquartered in Toronto, emphasizes training arbitrators and mediators and promoting their availability in Canada. www.adrinstitute.ca and www.adrcanada.ca.**
3. **The Canadian Commercial Arbitration Centre (formerly known as the Quebec National and International Commercial Arbitration Centre), headquartered in Quebec City, provides arbitration and mediation services and training in English and French. It also has facilities in Montreal. www.cacniq.org and www.ccac-adr.org.**
4. **The ADR Chambers, headquartered in Toronto, and the largest supplier of arbitration and mediation services in Canada. ADR Chambers of Toronto has recently established ADR Chambers International to provide international arbitration and mediation services. www.adrchambers.com.**

The extra costs involved in having arbitration administered by a recognized arbitral institution are justified by the neutrality these institutions bring to the process, as well as their administrative assistance. Having this extra assurance of neutrality may be particularly importantly when the prevailing party finds it necessary to bring an action to enforce the award in a country where the losing party has assets that have no relation to the arbitration.

Appointing the Right Arbitrator

A distinctive feature of international arbitration is the parties' ability to select the decision maker and the process and rules that will be followed at the hearing. Once that process has been completed, the parties are in the hands of the arbitrator or tribunal and little can be done to control or change the process. Thus, the selection of the "right" arbitrator is absolutely essential.

The understandable initial reaction of a party who has to find an arbitrator for an international arbitration is to identify one who is likely to be sympathetic to (or at least not biased against) its case. However, in my experience, biases of an experienced international arbitrator are difficult, if not impossible, to detect from their resumes. So parties should look for an arbitrator with superb credentials and a reputation for efficiency, promptness and fairness. This means talking to other users of international arbitration to find out about their experiences and to other international arbitrators to find out whether a proposed arbitrator has a reputation for managing the process efficiently and forcing it ahead.

If the parties are very anxious is to have a prompt award, a very busy arbitrator should not be selected. Even if the arbitrator is not a "celebrity" arbitrator with a jammed-up calendar, the parties should expect delays because of the arbitrator's schedule.

Counsel should always ask themselves, "What sort of arbitrator suits my client's case?" Often the best choice is a lawyer who also has expertise in the subject matter of the dispute. A person with both of these qualifications should be able to quickly understand difficult the legal and factual issues.

Established arbitral institutions can greatly help the parties with arbitrator selection. They can provide the parties with a list of qualified arbitrators and, to a limited extent, assist the arbitrators in organizing the arbitration. In order to ensure that arbitrators on their panel are competent, many institutions provide arbitrator training and seek feedback from the parties. The AAA has training requirements for neutrals who wish to remain on its panel.

It is up to the parties to decide whether to have a single arbitrator or a panel of three. For reasons of cost, a single arbitrator usually is selected unless the amounts involved are substantial. Obviously, there are fewer scheduling problems to overcome with a single arbitrator. Nevertheless, there are distinct advantages to having a panel of arbitrators, the most important of which is that it brings more experience, good judgment and skill. Having three heads is better than one, and it prevents a so-called "rogue" arbitrator from running off in the wrong direction. A panel also may do a better job of assessing credibility, which can be discussed during deliberations. There are no such discussions when there is only one arbitrator.

The Place of Arbitration

Deciding where to have an international arbitration should not be taken lightly because the venue can have a critical impact on the parties' rights and, thus, on procedural and substantive fairness. The place of arbitration dictates the procedural law governing the arbitration, including such important matters as the scope of the parties' freedom to design their own process, the arbitrator's discretion to determine the arbitration procedures, and recourse to the courts. For example, the procedural law of the venue will determine: (i) the availability of interim measures of protection; (ii) the availability of recourse to local courts during and after the arbitration, (iii) the ability to challenge the award based on procedural defects or the merits; (iv) who can be an arbitrator; (v) the parties' ability to choose the rules of procedure; (vi) the arbitrator's discretion with respect to the conduct of proceedings; (vii) whether the arbitrator can rule on his or her own jurisdiction; and (viii) the arbitrability of the dispute. Moreover, the law of the seat of arbitration may contain provisions affecting or limiting discovery.

The importance of having the right place for the arbitration is often overlooked by counsel when drafting the arbitration clause or later negotiating an arbitration agreement after a dispute has arisen. For instance, to make the arbitration worthwhile, it is vital to arbitrate in a country that has signed onto the New York Convention so that the award can be enforced through its reciprocal enforcement provisions. It is also useful to arbitrate in a venue with a modern arbitration act, such as one based on the UNCITRAL Model Law, which gives deference to international arbitration and limits judicial intervention in the arbitration process.

Arbitration in Canada: Recourse to Local Courts

Canada's federal Commercial Arbitration Act[3] applies to both domestic and international commercial arbitration in which a Canadian governmental entity or agency is a party as well as to maritime and admiralty matters.

Since application of the Canadian Act is limited, all Canadian provinces and territories have their own domestic[4] and international[5] arbitration schemes. So, in general, when commercial parties agree to arbitrate in Canada, whether the dispute is domestic or international, they will be subject to the procedural law of the province in which the arbitration will take place (unless the parties provided otherwise).

The majority of provinces have domestic arbitration statutes that are based on the UNCITRAL Model Law[6] (with some important differences discussed below), while the minority (Prince Edward Island, Newfoundland and Labrador, the Northwest Territories, and the Nunavut and Yukon Territories) have domestic arbitration laws based on the English Arbitration Act of 1889.

Most international commercial arbitration statutes enacted in the provinces implement or incorporate (with minor modifications) the UNCITRAL Model Law. The main differences between the provincial domestic and international statutes are that the domestic laws do not allow as much party autonomy, arbitrator discretion and appeal rights as the international arbitration laws do. For example, the UNCITRAL Model Law provisions limiting appeals do not apply to provincial domestic arbitration. Under most provincial laws, a party may appeal a domestic arbitration award based on a question of law with leave of the court, even when the parties' arbitration agreement does not authorize judicial review. Leave of court is not needed if the agreement authorizes an appeal on a question of fact or a mixed question of law and fact. As a result, appeals of domestic arbitration awards are not uncommon.

By contrast, provincial international arbitration statutes allow appeals to a court to set aside an award only on the grounds set forth in Article 5 of the UNCITRAL Model law,[7] unless the parties have expressly provided otherwise in their agreement. Thus, provincial international arbitration laws provide arbitral tribunals sitting in Canada and their awards with greater protection from supervision or interference by local courts.

Obtaining the Best Procedures

The inherent flexibility of arbitration creates opportunities for parties to agree on the proce-

dures that they would like to have. Assuming that the parties want to have a fair, cost-effective and efficient process, they should adopt procedures that will facilitate this result during the negotiation of the arbitration clause. They should not commit to procedures used in commercial litigation that are likely to lengthen the arbitration process and increase its cost.

If the parties have not identified particular procedures in their arbitration agreement and have not selected administered arbitration under an institution's rules, they should discuss this with the arbitrator in an early pre-hearing conference. The preliminary conference is the time to tackle issues of importance in the arbitration. But before that happens, the parties should consider using mediation. Mediation is often fruitful if it occurs before an adversarial process, like arbitration begins.

At the preliminary conference, the arbitrator will discuss the structure of the arbitration with the parties. The arbitrator's agenda should anticipate the issues that could arise, especially the issue of the arbitrator's jurisdiction or the need for interim measures of protection. In addition, the agenda should cover the numerous procedures that make up the arbitration.

There is much that the arbitrator can do during an early preliminary conference (there can be more than one) to expedite the arbitration. For example, the following tasks should be on the agenda at a preliminary conference:

- Ask the parties to reach an agreement about undisputed facts and the issues in dispute. Defining the scope and issues for the arbitration is useful. Typically an arbitration clause is broad and vague and allows all disputes to proceed to arbitration. Often the claims and defenses are themselves vague and general, as the parties' lawyers are reluctant to abandon opportunities to gain an advantage. Having the parties focus at an early stage on agreed facts and disputed issues, like the ICC Terms of Reference, can help make discovery simpler, avoid jurisdictional disputes and facilitate settlement of some or all issues.
- Ask the parties to agree on a core bundle of documents to be submitted into evidence. This does not mean that other documents cannot be submitted by a party if it helps its case.
- Ask the parties to agree with the arbitrator on the scope of discovery. Often the parties' lawyers assume that discovery in arbitration will mirror litigation in the country they come from. Thus, American attorneys expect to conduct virtually unlimited document discovery and depose many witnesses. European attorneys from civil-law countries expect that each party has to produce only evidence that helps prove its case and that it has no obligation to incriminate itself or provide evidence benefiting an adversary. Most international arbitrators succeed in finding a balance between these two extremes so that it is now generally accepted that parties should produce all non-privileged documents that are directly related to the issues in dispute. In striking that balance it is also usual for an arbitrator in a complex case to permit depositions of a few key witnesses or some written interrogatories as to relevant matters. Most arbitrators discourage burdensome pre-hearing discovery while attempting to allow relevant evidence to be exchanged. This facilitates a more orderly hearing on the merits at which the parties will have a fair opportunity to present their case. Without some discovery before the merits hearing, important evidence could take a party by surprise and unfairly deny it an opportunity to prepare its response to that evidence.

Administered international arbitration proceedings should be conducted efficiently. Often, however, the parties themselves are the barrier to an efficient process, making timely resolution of the dispute more of a challenge for the arbitrator.

- Establish a limit on the number of witnesses who will be called to testify and the date for the exchange of witness lists. Because of the difficulties created by the distances between the parties and witnesses, it would be inappropriate for arbitration to proceed without some control over the number of witnesses called, the time that each will be examined and cross-examined, and the total time available for the hearing. The need to accommodate the schedules of many different people requires a discipline that is not as necessary in ordinary commercial litigation because the judge can simply order an appearance. Arbitrators cannot.
- Ask the parties to decide whether they wish to use witness statements for particular witnesses

in order to expedite the process. Some arbitrators encourage this type of evidence, which involves obtaining a signed statement of the facts from each witness in lieu of direct examination. While the procedure sounds attractive, in my view there are two serious drawbacks. First, witness statements usually are prepared by lawyers with the witness's assistance. Thus, they do not substitute for a proper examination-in-chief. Second, having a direct examination affords the arbitrator an opportunity to assess the credibility of the witness while presenting evidence in his or her own words, without leading by counsel. An alternative is to accept witness statements and allow the witness to be examined for a short time on direct to introduce the main evidence.

- Ask the parties to agree on the date for the exchange of expert witness reports. Expert witnesses are needed in complex cases. Their reports must be exchanged prior to the hearing. This date should be established at a preliminary conference.

Expert witness reports usually conflict, with each side's expert offering an opinion that supports its side's case. This makes the arbitrator's job more difficult. The parties should be asked to simplify the evidence and narrow the differences between them as much as possible. While arbitrators could retain their own expert, they rarely do so because the cost would be passed along to the parties. To deal with conflicts in expert testimony, the arbitrators may decide to examine the experts at one time and even encourage them to meet in order to narrow areas of difference.

- Establish the order of party presentations at the hearing. The claimant's case will usually proceed first followed by the defense and counterclaim if any. This is also the time to find out from counsel the number of days each needs to present the client's case.

Counsel often underestimate the amount of time they need, which can lead to delays in concluding the arbitration. During an early preliminary conference, an experienced arbitrator will scrutinize counsel's time estimates to ensure that they are realistic. The time allotted for the hearing should include a reasonable estimate for all proceedings, including evidence presentations and submissions.

To efficiently manage the hearing on the merits, it is customary to limit the time for each side to make its presentations and arguments and to examine and cross-examine witnesses. Some arbitrators use a time clock to keep things going. Generally time limits are subject to extension at the discretion of the arbitrator. I believe it is essential to find a balance between the need for an expeditious and cost-effective process with the parties' need for a fair hearing and a reasonable opportunity to present their case. To achieve the former goal, the tribunal should be prepared to exercise its authority to limit irrelevant and repetitious evidence.

- Decide where the hearings will be held. Although the arbitration agreement may have stipulated a place of arbitration, the parties may agree to change the seat to a location that is more convenient or less expensive. Even if it is not desirable to change the seat of the arbitration, it is always possible for the arbitrator to hold hearings in another place in the interest of making the proceedings more cost-effective.
- Schedule a consecutive block of dates for the hearing on the merits. It is not too early to do this in the first preliminary conference, in order to encourage the parties to proceed expeditiously. The scheduled dates can be changed if absolutely necessary, although every effort should be made to meet them.
- Decide whether a transcript of the hearing will be needed.
- Determine the language of the arbitration. In cases involving parties from different cultures, it will be necessary to settle on the language of the arbitration and whether translators will be necessary.
- Determine whether post-hearing briefs will be needed.

Preliminary Arbitral Determinations

It is appropriate for preliminary issues of jurisdiction and arbitrability to be raised as early as possible, since resolution of these issues may make discovery and hearings unnecessary. Arbitrator will often take the initiative in raising such issues. They may also ask the parties to consent to giving them additional powers that would facilitate efficient management of the case.

It is often useful to consider adopting rules at the preliminary hearing that can be used to settle questions that arise during the course of the arbitration. Many arbitrators propose using the International Bar Association Rules on the Taking of Evidence in International Commercial Arbitration, adopted in 1999, which followed consultation between common law and civil law practitioners.

Conclusion

Counsel and arbitrators who practice international arbitration continue to seek procedures and develop skills to make the process fair and cost-effective. The challenge to improve the process persists and is recognized by all who work in the area. ■

ENDNOTES

[1] Well-known ADR institutions include (1) the London Court of International Arbitration, (2) the American Arbitration Association (AAA), (3) the International Chambers of Commerce Court (ICC) of Arbitration, (4) and the Stockholm Chamber of Commerce, which is regarded by many as a neutral venue for arbitration of private commercial disputes involving parties from East and West. Canadian arbitral institutions are listed in the sidebar on page 76.

[2] An exception is Quebec, where the same legislation applies to both domestic and international arbitration.

[3] R.S.C. 1985, c. 17 (2nd Supp.).

[4] The domestic arbitration legislation in force in the province in which the arbitration is brought applies to domestic arbitrations, in some cases whether commercial or not, unless excluded by law, or where the international arbitration act of the province applies.

The Canadian provincial domestic arbitrations acts are as follows: Alberta Arbitration Act, R.S.A. 2000, c. A-43; British Columbia Commercial Arbitration Act, R.S.B.C. 1996, c. 55 (as amended by S.B.C. 1998, c. 9, s. 97); Manitoba Arbitration Act, C.C.S.M. c. A 120; New Brunswick Arbitration Act, S.N.B. 1992, c. A-10.1; Newfoundland and Labrador Arbitration Act, R.S.N. 1990, c. A-14, as am. R.S.N. 1995 c. 13 s.2; Northwest Territories Arbitration Act, R.S.N. W.T. 1988, c. A-5, (as amended by S.N.W.T. 1995, c. 11); Nova Scotia Commercial Arbitration Act, S.N.S. 1999, c. 5; Nunavut Arbitration Act, R.S.N.W.T. 1988, c. A-5, (as amended by S.N.W.T. 1995, c. 11 as duplicated for Nunavut by s. 29 of the Nunavut Act, S.C. 1993, c. 28); Ontario Arbitration Act, 1991, S.O. 1991, c. 17; Prince Edward Island Arbitration Act, R.S.P.E.I., 1988, c. A-16; Quebec: An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, S.Q. 1986, c. 73; Saskatchewan Arbitration Act, 1992, S.S. 1992, c. A-24.1 (as amended by S.S. 1993, c. 17, s. 5); and the Yukon Territory Arbitration Act, R.S.Y. 2002 c. 8.

[5] The term "international" for purposes of the provincial arbitration acts is defined by Article 1(3) of the UNCITRAL Model Law, to mean that at the time the arbitration is concluded, the parties have their places of business in different countries, or one party has its place of business outside Canada, or a substantial part of the obligations of the commercial relationship is to be performed or the subject matter of the dispute is most closely connected to a place outside Canada.

The following provincial international arbitration acts incorporate the UNCITRAL Model Law: Alberta International Commercial Arbitration Act, R.S.A. 2000, c. I-5; British Columbia International Commercial Arbitration Act, R.S.B.C. 1996, c. 233; Manitoba International Commercial Arbitration Act, C.C.S.M., c. C151; New Brunswick International Commercial Arbitration Act, S.N.B. 1986, c. I-12.2; Newfoundland and Labrador International Commercial Arbitration Act, R.S.N. 1990, c. I-15; Northwest Territories International Commercial Arbitration Act, R.S.N.W.T. 1988, c. I-6; Nova Scotia International Commercial Arbitration Act, R.S.N.S. 1989, c. 234; Nunavut International Commercial Arbitration Act, R.S.N. W.T. 1988, c. I-6, (as duplicated for Nunavut by s. 29 of the Nunavut Act, S.C. 1993, c. 28); Ontario International Commercial Arbitration Act, R.S.O. 1990, c. I.9; Prince Edward Island International Commercial Arbitration Act, R.S.P.E.I. 1988, c. I-5; Quebec: An Act to Amend the Civil Code and the Code of Civil Procedure in Respect of Arbitration, S.Q. 1986, c. 73; Saskatchewan International Commercial Arbitration Act, S.S. 1988-89, c. I-10.2; and the Yukon Territory International Commercial Arbitration Act, R.S.Y. 2002, c. 123.

[6] The grounds to set aside a foreign arbitration award in Article 5 of the UNCITRAL Model Law on International Commercial Arbitration can be briefly summarized as follows:

1. A party to an arbitration agreement was under some incapacity or that agreement is not valid for some other reason.
2. The applicant was not given proper notice of the arbitrator's appointment or was otherwise unable to present his case.
3. The award dealt with a dispute outside the arbitrator's jurisdiction.
4. Composition of the tribunal or the appointment procedure was not in accordance with the arbitration agreement.
5. The subject matter of the dispute is not arbitrable under the law of the place of arbitration.
6. The award conflicts with the public policy of the place of the arbitration.