GET BACK – RETURN ARBITRATION TO ITS ADR ROOTS

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Introduction

Arbitration has become a warmed-over version of litigation, rather than the truly alternative procedure it once was. While there are still creative in-house counsel and law-firm draftspersons who provide for innovative procedures that save time and money while arriving at a fair and just result, too often arbitration has become a somewhat less formal shadow of a court trial. The innovation for which America is rightfully famous is largely absent in the arbitration arena.

Anyone involved in international arbitration has heard the recurring complaint from civil-law lawyers that international arbitration has been afflicted with "Americanization": the creeping assimilation of American litigation practices. Discovery, which was almost unheard of in international arbitration, is now threatening to become a normal antecedent. The aggressive cross-examination conducted by common-law practitioners, unknown in civil law practice, is finding its way into almost all cases where a party is represented by American counsel. Motion practice, both as to procedural and substantive matters, is ever-increasing, resulting in additional time and expense in both domestic and international arbitration. Yet, while condemned by a chorus of objections and complaints, the infiltration of American litigation practice and tactics continues unabated.

Once, arbitration was THE alternative dispute resolution. Now it is rarely thought of as a part of the ADR pantheon. What can be done to restore arbitration to the place it once held as a process controlled by the parties to meet the needs of their particular commercial dispute, rather than the needs of their counsel or of the arbitrators? It requires nothing less than a revolution in thinking.

Arbitration is Fundamentally Different from Litigation

The American litigation process is a product of the legislature, designed to meet the needs of society as a whole. It was never viewed as the primary means of resolving commercial disputes. It evolved to provide citizens a peaceful way to resolve disputes that might otherwise threaten the peace of the society as a whole. The general civil procedures were not designed for the resolution of business disputes, but are rather procedures intended for family disputes, boundary disputes, aggression between citizens (assault, battery, and certain other intentional torts), disputes over real and personal property rights, civil rights, and many other categories of disputes whose resolution might otherwise threaten the social fabric of the nation.

Commercial arbitration was intended to be a true "alternative" to the catch-all procedures of the American courtroom. It is a process that was created by and for the business community to

deal with particular business disputes. The parties were given the ability to agree on the procedures that they would follow in resolving a particular dispute. While it may be convenient to adopt institutional rules, that solution was never intended; commercial arbitration began long before any arbitration institutions existed. And the procedural rules of almost all commercial arbitration institutions permit the parties to modify the procedures contained therein and give the arbitral tribunal almost unlimited freedom in the conduct of the process. Parties may make such modifications either at the time that they enter a commercial contract, by including an arbitration provision that spells out the process by which they will resolve any disputes that arise in connection with their contract, or by agreement to procedures that are crafted at the time a particular dispute arises, through what is called a "submission agreement." Of course, the common default mechanism has become a passing reference incorporating the procedural rules of a particular arbitral institution, without more.

If arbitration is to return to its alternative roots, it must become again a creative, cost-effective means of resolving disputes, one that is decidedly distinct from litigation. If this requires the creation and education of "arbitrationists," who specialize in creating alternative means of resolving particular commercial disputes, who draft arbitration provisions and submission agreements, and who represent parties in arbitration proceedings, so be it. If counsel and arbitrators must learn anew that arbitration is intended to serve the needs of the parties, so be it. The parties already have the power to control the arbitration process through their agreement. Of course, by definition the parties are or will be in fundamental disagreement concerning their dispute. But this should not prevent them from agreeing on a process that saves time, money, executive resources, and not a little anguish. Disagreement on substance need not lead to disagreement on procedure. There is no need to cut off one's nose to spite one's face.

There are certain procedural areas that lend themselves to revolutionary change; change intended to return arbitration to its status as a flexible system, responsive to the desires of its users. Parties can agree on these solutions, and they are encouraged to develop others that meet the needs of their specific dispute. Despite what clothing manufacturers like to tell us, one size does not fit all. The ideas that follow are simply some of the alternatives available to those who are committed to make arbitration the servant of the parties. Creative arbitration practitioners will think of many others.

Arbitrator Selection

One of the primary benefits of arbitration is that the parties are free to select their decision makers, arbitrators who are suitable resolvers of their dispute, who have some understanding of the industry, the technology, and/or the specific area of the law involved in the parties' particular dispute. Why should the process of arbitrator selection be reduced to a practice where each side received the same list of ten names, where each party is asked to strike some number of names and rank the rest, and then return those lists to the institution who advises the parties of the highest ranked candidates? Of course, when the parties cannot agree on a

procedure, the list procedure works to insure that each has a modicum of input on the selection process and that the end result is not biased toward one side or the other.

Parties who wish to control the process can, however, do so much more. They can obtain recommendations from friends and colleagues, from a number of arbitral institutions, from law societies and bar associations, etc. They can each suggest a certain number of candidates, say fifteen apiece. They can devise a written, mutually agreed upon questionnaire whose questions are designed to determine who among them has the knowledge and experience that fits the particular dispute. Then the parties, by whatever method agreed, can narrow the field to say, five candidates. The parties can then jointly interview the candidates, either by telephone, or where the amount in dispute justifies the expense, in person. Joint personal communication with the candidates enable the parties to evaluate each candidate's personality, demeanor, and "arbitral temperament," qualities that are otherwise difficult to glean, even from conversations with those who have used the candidates as arbitrators. By an agreed method, they can thereafter select one or a panel of three. Then, when the parties walk into the room on the first day of arbitration, they will already have a degree of comfort with their decision maker.

Discovery

The use of interrogatories, requests for admission, document requests, and depositions, the common discovery tools, and the resolution of disputes concerning their use are generally the most expensive part of any civil litigation. However, any civil litigator will be forced to admit that the return on the investment of the discovery process is very small indeed, at least in the case of a business dispute. Generally, very little that is not already known from the correspondence and documents exchanged by the parties is ever "discovered," and the mythical "smoking gun" is almost always just that: "mythical."

The parties can (and sometimes do) agree that there shall be no or only very limited discovery in conjunction with their arbitration. Clauses I have seen in cases I have arbitrated have gone so far as to exclude all discovery, or have permitted only discovery that can be shown to be "absolutely essential to the presentation of a party's case," or prohibited the use of interrogatories and requests for admission, or permitted no or only specifically limited deposition discovery. Where the parties have failed to agree on such limitations in advance, the tribunal should exercise its influence to forge such an agreement, and in any event impose acceptable limitations.

Time Limitations

How often do two, three, even four or more witnesses testify to the same facts, facts that are frequently not in dispute? Certainly this can be controlled through objections, argument and rulings thereon, but this practice is time consuming and disruptive. It would be better if such repetition did not occur: but how to prevent it?

The parties should be encouraged to agree on time limits on the presentation of their case. If they have not agreed in advance, the tribunal should work to encourage such an agreement. Rather than a mere agreement on days, it would be better to agree on the total number of hours each side has to present its case. Each side's remaining hours would be determined at the end of each hearing day, so that the parties can tailor their case prior to the resumption of the hearing the following day.

Perhaps one example of the benefits of this approach should suffice. In a case in which I served as arbitrator, the amount in dispute was in the tens of millions of dollars. In their arbitration provision, the parties had agreed that each side would have five hours over the course of two days to present its case. Needless to say, repetition was not a problem. Even better, at the end of the ten hours of presentation, I had more than enough factual information to determine the case. It is amazing how focused attorneys become when time is of the essence.

Written Submissions

With apologies to Shakespeare, brevity is the soul of persuasion. If one can say something in two pages, one can express it more persuasively in one. The tribunal should strictly limit the number of submissions and number of pages per submission. If written submissions are deemed absolutely necessary to the resolution of a discovery dispute, the submission should be limited to no more than one page. If a party requests a hearing on a discovery motion, the hearing should be telephonic. But if the arbitrator feels that the hearing would provide little if anything additional, she should so advise the parties and agree to a hearing only if both parties continue to insist.

Expert Witnesses

There is probably nothing closer to live theatre in American litigation, save perhaps closing arguments made to the jury, than the testimony of expert witnesses. In theory, each expert is independent of the party who retained him, each has arrived at his opinion based on the facts of the case and the expert's special knowledge of his discipline, and is giving the trier of fact his unbiased scientific view. However, to accept this scenario as reality requires the same willing suspension of disbelief that is required of theatre patrons.

One way to bring the drama of dueling experts a little closer to reality is the practice of "hot-tubbing," a procedure that is perhaps less comfortable for the experts than the name of the practice suggests. In "hot-tubbing," the experts who testify on the same issue are seated side by side when they give their testimony. The experts than answer each question posed sequentially. Counsel (or the arbitral tribunal) poses the first question, which is first answered by the expert for party A. Following the completion of his answer, the expert for party B answers the same question. The second question posed is first answered by the expert for party B, which is immediately followed by an answer of the question by the expert for party A. The procedure continues with the same alternations. It is indeed remarkable how much closer the differing

expert opinions become, and how truly narrow the degree of difference between the expert opinions is. The procedure serves to highlight essential differences and to minimize hyperbole.

Final Offer Arbitration

Final Offer Arbitration is a form that is especially useful when the value of goods, services, contract rights, real estate, an ongoing business, or similar valuation is at issue. Because in America this form of arbitration has so often been used to determine the value of the contribution of a baseball player to his team when the player and the ball club are unable to agree on a salary figure, it is commonly known here as "baseball arbitration."

In Final Offer Arbitration, each side produces what it considers to be the reasonable value of the good or service that is in dispute, and that figure represents its "final offer." If the parties thereafter fail to agree on a number, they submit the matter to arbitration, in which each produces evidence that it believes supports the valuation it submitted as the "final offer." Once the evidence is in, the tribunal is limited to the selection of one side's valuation or that advanced by the other side. The arbitrator has no discretion to substitute her view or to modify the figures presented.

There are also variations on this theme. The parties may present a series of questions. The parties may then each present a proposed answer to each of the questions presented. As to each question so presented, the arbitrator must select the answer proposed by on or by the other of the parties. Once again, the arbitrator may not substitute her judgment as to the correct answer. The arbitrator is limited to selecting the answer proposed by party A as to a particular question or the answer proposed by party B.

In both examples, standard final offer arbitration or a modified version, each of the parties knows its best case scenario (the answer that it proposed) and its worst case scenario (the answer proposed by its counterpart). With such knowledge, the parties are in the best possible position to compromise and settle the dispute without the assistance of the arbitrator. However, where the parties are unable to effect such a settlement, each knows that the dispute will be ended by the arbitrator selecting the scenario she believes to be best supported by the evidence presented.

Form of Award

Why do the parties want a reasoned award? Because they want to be sure that the arbitral tribunal has considered and answered the questions that each party believes to be necessary to the resolution of the dispute. Secondarily, the parties want to understand that there is some reasoning behind the decision, although the losing party usually disagrees with that reasoning, or else there would not have been a dispute in the first place. Too often a reasoned award devotes time, attention, and pages and pages to explaining the reasons for the decision. The resulting opinion often approaches the length of a decision of the United States Supreme Court. However,

there are alternatives to the creation of a *magnum opus* that serve to insure that a case has been carefully considered.

Would it not be equally satisfactory, but faster, easier, and cheaper for the parties and their counsel, who are, after all, the people most familiar with the dispute, to formulate questions for the arbitrators, questions which, once answered, would resolve their dispute and serve to assure them that the questions that needed to be answered had been? The process of the joint formulation of such questions would undoubtedly increase the possibility that the parties might reach an amicable settlement. This is what all alternative dispute resolution should be about. And the settlement that results from such a joint process is subject to far less coercion than one that results from the approach of some mediators, who are determined to reach a settlement without regard to whether the mediator regards the settlement to be fair.

Conclusion

What is unique about arbitration is that the parties are given the power to shape the process. The legislature does not prescribe it. The court does not dictate it. The parties can agree to make it whatever they want. Creative in house counsel and law firm draftspersons will insert detailed arbitration provisions in their contracts, setting out a process tailored to deal with the disputes likely to arise under the agreement concerned. Where this has not happened, in-house and law firm counsel can craft a submission agreement at the time that a dispute does arise, although cooperation can be difficult to obtain at this juncture. Finally, where neither occurs, the arbitral tribunal can encourage the parties to vary the procedures to make the process as efficient and cost-effective as possible. Where necessary, the sole arbitrator or chair can impose limitations that are designed to promote such an alternative process.