

Effective Advocacy in Commercial Arbitration

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Overview of Arbitration Advocacy

- Is arbitration the same as litigation?
- Why arbitrate rather than litigate?
- Arbitration is a consensual process
- Similarities can be deceptive
- Arbitration binds only parties to the agreement
- Designing the arbitral process
- Selecting the arbitrator or arbitral panel
- Rules affecting the arbitration
- Motions in the arbitration
- Written advocacy and pleadings
- Taking evidence in the arbitration
- Documentary evidence
- Witnesses in the arbitration
- Expert witnesses
- Conducting the hearing
- Interpreting and correcting the award
- Remedies - Rights of appeal and court intervention
- The anti-suit and anti-arbitration injunction

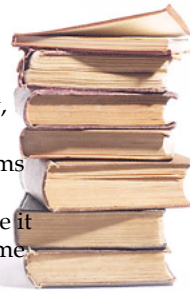


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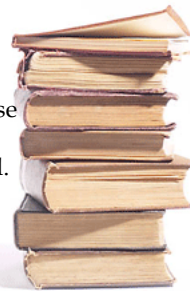
Is arbitration the same as litigation?

- Basic concepts are the same:
 - An adversarial process to resolve a dispute.
 - Requires pleadings, documents, discovery.
 - Evidence has to be adduced at a hearing.
 - A neutral person makes a binding decision.
 - Resolution of the dispute requires interpretation of the facts and application of legal principles.
- BUT
 - Judge's role is to decide on the facts and law with regard to *stare decisis*, inherent jurisdiction, comity, constitution and other interests of the state.
 - Arbitrator must decide in accordance with the terms of the contract: UNCITRAL Arb. Rules Art. 35-3.
 - The arbitrator will know a lot about the case before it reaches the hearing. A judge sees it for the first time when s/he receives the trial record.



Similarities can be deceptive

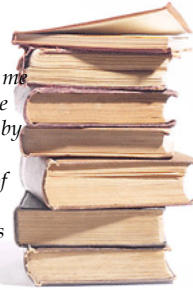
- An action in Court is authorized by statute or common law.
- The litigants are subject to the process of the Court and the authority of Judge or Master.
- Judge has inherent jurisdiction, statutory and constitutional authority.
- A Judge has contempt power to enforce orders and control the court process.
- The Court selects the judge. "Judge shopping" is discouraged and considered improper.
- The judge may have no experience in this type of case especially in courts in smaller centres.
- Courts are public. Most arbitrations are confidential.
- Arbitration award require a court order for enforcement: Arbitration Act, s. 50, ICAA, Model Law, Art. 35.



Difference in approach between court and arbitrator

- In an arbitration under UNCITRAL Arbitration Rules in Toronto under Ontario law, the arbitral tribunal dismissed a claim to apply a mandatory provision of English law.
- On application to the English Court for the same relief, Tugendhat J. held that the English law applied: (*Accentuate v. Asigra* [2009] EWHC 2655 (30 Oct 2009))

"...nothing in this judgment should be taken as a criticism by me of the conduct or reasoning of the arbitral Tribunal. . .it was the duty of the Tribunal to apply the law which . . .was designated by the parties as the law applicable to the substance of the dispute: see UNCITRAL Art 33. The . . .Tribunal was fully conscious of the relevant considerations. They were clearly aware that the English court might approach the matter differently for reasons which do not reflect adversely upon the Tribunal."



Why arbitrate?

- Is arbitration “the flavour of the month” or is it a step forward to resolving business disputes?
 - Have the parties already agreed to arbitrate?
 - What issues will be arbitrated?
 - Do you need remedies that an arbitrator cannot give?
 - Are there other parties who have not agreed to arbitrate?
 - Is the arbitration process too expensive for the dispute?
 - Should the parties agree to arbitrate even if there is no existing arbitration agreement?
 - Can the parties agree on an arbitrator?
 - Can adducing the evidence and argument be streamlined compared to an action in court?
 - How much will the arbitrator charge?
 - Will arbitration take less time than an action in court?



What is to be arbitrated?

- What does the arbitration agreement say about the scope of the arbitration?
- Some arbitration clauses provide court proceedings for equitable remedies and urgent injunctive relief.
- Courts are deferential to a mandatory arbitration provision unless statutory relief is sought that could not be granted by the arbitrator.
- In *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131, Blair J. (as he then was) allowed an oppression claim to continue in the face of an arbitration clause.
- Arbitrator's jurisdiction is circumscribed by the arbitration agreement.
- The parties can agree to expand or narrow its terms even after the dispute arises.



Arbitration is consensual

- No one can be forced to arbitrate without an agreement to do so.
- Parties are free to agree on: identity of the Arbitrator, governing law, number of arbitrators, rules of procedure, seat of the arbitration and method of adducing evidence and timing.
- If arbitration is agreed to in principle but details are left out, the *Arbitration Act* and the *International Commercial Arbitration Act* fill in the gaps.
- The Court can resolve an impasse or a party's refusal to participate if the terms of the arbitration agreement allow it.



Arbitration binds only the parties to the arbitration agreement

- Arbitration is not available if there are parties to the dispute who have not agreed to arbitrate unless the parties agree.
- The arbitrator cannot make an order which binds non-parties to the arbitration.
- An arbitrator can give injunctive relief but only a court can bind third parties.
- *Farah v. Sauvageau Holdings Inc.*, 2011 ONSC 1819 (Perell J.) See E. Perez, O. Niedzwiecki and I. Ellyn, QC, *Canadian Arbitrator Lacks Jurisdiction to Make Orders Affecting Rights of Third Parties*
<http://www.hg.org/article.asp?id=21431>



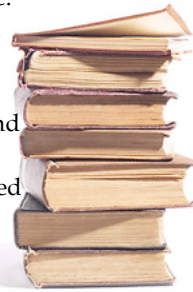
Designing the arbitral process

- Parties can design the process to suit the requirements of the case
- Motions are less formal. Usually teleconferences with the arbitrator
- Witness statements are typically used in place of examinations-in-chief
- Oral evidence is often limited to cross-examination
- Bifurcation of issues is common
- Parties can agree on the timing of the arbitrator's award. An award delivered out of time could be outside arbitrator's jurisdiction.
- Scope of appeal rights. If there is a right of appeal at all, it is usually limited to issues of law only but this is distinct from an application to set aside an award for lack of jurisdiction, bias or other factors.



Selecting the arbitrator or panel

- What does the agreement say about the number or arbitrators and the selection of the panel?
- Arbitration encourages "judge-shopping".
- Select an arbitrator whose combination of attributes increase the chances of success.
- How is the arbitrator selected if parties cannot agree: Sometimes a judge makes an order.
- Parties can select nominees to choose the arbitrator and be bound by their selection.
- Motion to a judge: Propose competent arbitrators and the judge will choose.
- The parties must select the arbitral tribunal mandated by the agreement unless they agree otherwise:
OEMSDF Inc. v. Europe Israel Ltd. (1999) 42 CPC (4th) 229 (SCJ).



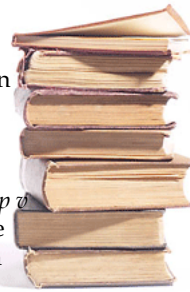
Factors to consider in selecting an arbitrator or panel nominee

- Number of arbitrators
- Expertise in the subject-matter of the dispute
- Nationality and Citizenship – many arbitration agreements have limiting provisions but see ICAA s.5, re any national can be an arbitrator
- Familiarity with subject-matter
- Language ability and cultural sensitivity
- Seat of the arbitration
- Other cases in which the arbitrator was involved
- Conflicts and potential conflicts
- Who does the other side want and why?
- Creating a list of acceptable arbitrators
- Intangibles



Intangible factors affecting selection of an arbitrator

- We presume all arbitrators are knowledgeable, ethical, even-handed, unbiased and will decide the case only on the evidence presented at the hearing.
- BUT arbitrators are also human. They enter the arbitration with their unique blend of personal biases and experiences which may influence the outcome of the case favourably or negatively.
- A careful check of the arbitrator's background is an important part of the advocate's role. Who is the arbitrator? What cases has s/he had as counsel or arbitrator that may influence the outcome?
- Conduct a thorough conflict check: See *AT&T Corp v Saudi Cable Co* [2000] 2 All E.R. (Comm) 625 where the former directorship of a well-known Canadian arbitrator led to extensive litigation.



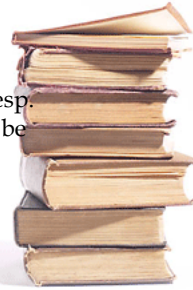
More intangible factors affecting selection of an arbitrator

- Search Cannily for cases. You may find a case where the arbitrator was challenged
- Review arbitrator's c.v. carefully
- Check clients of the arbitrator's firm
- Directorships and former directorships
- Cases in which arbitrator acted as counsel
- Cases which arbitrator heard as a judge
- Appeals from the arbitrator's awards (if they can be located)
- Unspoken "bias" in favour of a particular group, e.g. union-management, employers and employees, "David and Goliath"



Rules affecting the arbitration

- Counsel new to arbitration assume that the rules of the arbitration are the same as *Rules of Civil Procedure* but this generally not the case.
- What does the arbitration agreement says about the rules applicable to the arbitration.
- If the agreement does not specify the rules, the appointing body (if there is one) usually has arbitration rules: ADR Chambers, ADRIO, ICC, LCIA.
- UNCITRAL Arbitration Rules often used in international arbitrations (amended in 2010)
- For domestic arbitrations, check the *Arbitration Act*, esp. ss. 19-30. It has provisions as to what can and cannot be done, except by agreement.
- For example, there is no summary judgment in arbitration . A party can request a hearing and the arbitrator must grant it: *Arbitration Act*, s.26(1) and UNCITRAL Arbitration Rules, Art. 17.3.



Rules affecting the arbitration #2

- Counsel can agree to modify the rules in an arbitration agreement, including:
 - Scope of Arbitrator's jurisdiction
 - Pleadings
 - Motions
 - Production of Documents
 - Discovery
 - How witnesses will testify
 - How expert evidence will be adduced
 - Bifurcation between liability and quantum
 - Bifurcation of other discrete issues in the case
 - How long arbitrator has to deliver a decision
 - Rights of appeal



Rules affecting the arbitration #3

- In international commercial arbitrations, see if arbitration agreement designates ICC, LCIA, ICSID, AAA/ICDR, NAFTA, UNCITRAL or others.
- *International Commercial Arbitration Act (ICAA)* applies where one of the parties (individual or corporate) is not resident in Canada when the arbitration agreement was made.
- ICAA incorporates the UNCITRAL Model Law with some modifications.
- Under ICAA s. 6, arbitrator can decide what rules to apply if the parties do not select the applicable rules.



Pleadings and Written Advocacy

- Is a Notice of Mediation required before commencing the arbitration?
- What to put in the Notice to Arbitrate?
- Claim should be according to format specified by the institution governing the arbitration.
- Format and content of Claim must be according to the rules applicable to the arbitration.
- If governing law is not Ontario, identify and plead the applicable foreign law.
- Scope of the claim is usually broader than under Ontario *Rules of Civil Procedure*.
- Pleadings in arbitration are typically not subject to the restrictions of the Court Rules of Civil Procedure.



Pleadings and Written Advocacy #2

- Pleading evidence is permitted.
- Pleading the theory of the case is helpful.
- Plead argument and refer to key case law.
- The Claim should be persuasive and interesting.
- Pleadings should be a succinct statement that introduces the arbitrator to strength of the case.
- Particularize the claim: it will sound weak if pleading is too skimpy on details.
- Plead only what you can prove at the hearing.
- Local customs matter: An unproved allegation of fraud will still attract a higher costs sanction.
- Even in arbitration, most cases settle. Remember the audience and plead persuasively: I. Ellyn and E. Perez, *Litigating in the Enlightened Age of Mediation in Ontario Canada: Drafting Pleadings*, <http://www.hg.org/article.asp?id=7844>



Motions in the arbitration

- The arbitrator hears all the motions except that the Chair can hear procedure motions where there is a panel. (UNCITRAL Arbitration Rules, Art. 33-2)
- Motions are often by conference call.
- Arbitrator has jurisdiction to determine the scope of his/her jurisdiction, including what is arbitrable (Arbitration Act, s. 17, ICAA, Model Law, Art. 16).
- This is known as the “kompetenz-kompetenz” principle. In international arbitration “competence” often means “jurisdiction” (from French and German).
- A party can challenge the arbitrator on the basis of bias or lack of qualifications. Arbitrator rules first. (Arbitration Act, s.13, ICAA, Model Law, Art. 12(2))
- Court remedies re jurisdiction, bias and unfair treatment, setting aside: Arb. Act ss. 6-7, 46-47; ICAA, Model Law Art. 34. Note 3-month time limit: Art.34(3).



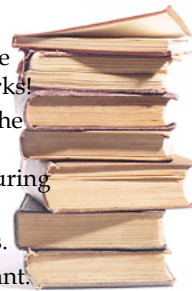
Opening Statements

- In arbitration, an opening statement is usually superfluous unless it is just a 5-minute warm-up.
- By the time the case gets to the arbitral hearing, the arbitrator already knows a lot about it.
- This differs from a trial where the trial judge sees only the trial record just before the trial, does not see the documents and has not heard the motions.
- If counsel agree on opening statements, brevity is critical. Tell the arbitrators succinctly what will be proved to make out your case.
- Do not overstate. Understatement is far more persuasive. Do not promise or puff up evidence which cannot be delivered by a credible witness.
- Justice Laskin famously said: *"Forget the wind-up and make the pitch."* <http://tinyurl.com/9g5hwvv>.



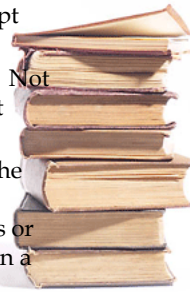
Presentation of documentary evidence during the hearing

- Counsel should consult on the brief of documents to be used at the hearing. A common electronic brief is best.
- Documents should be numbered for easy identification, such as C-1, D-1 or some other easy numbering system.
- Provide the arbitrator with a flash drive with all the documents properly numbered and identified.
- Will a projector be required so that a document can be seen by everyone at the same time? Make sure it works!
- Make sure the witness has a book or computer with the documents. Test it before the hearing to avoid time-wasting technical glitches. It might break down in during the best part of your cross-examination!
- Use hard copy, tabbed briefs if the arbitrator requests.
- If arbitrator is tech-savvy, hard copy may be redundant.



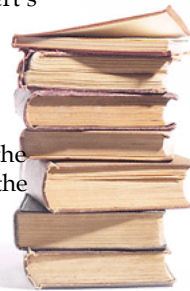
Issues affecting fact witnesses

- In domestic arbitrations, the arbitrator has the power to issue a to witness: Arbitration Act, s. 29(1).
- It is a little more cumbersome to summons witness in international arbitrations. An order of the local court be required .
- A witness testifying by Skype is not uncommon.
- Language of the arbitration and translation
- The hearsay rule is relaxed. The arbitrator may accept hearsay subject to weight.
- The time allotted to the hearing should be observed. Not allowing the opposing party enough time will reflect poorly on your case.
- Preparation of witness statements - they should be the client's evidence. A witness statement should not "sound" like counsel is testifying. Using expressions or terms the witness does not understand could result in a devastating cross-examination of the witness.



Expert Witnesses #1

- In domestic arbitrations, expert witnesses often report and testify by analogy to Rule 53.03.
- In arbitrations, the expert's report will often be the evidence in chief. This must kept in mind so that the report is a self-contained document. A witness statement from the expert is also common.
- Oral examination as to qualifications only if the expert's qualifications are in dispute.
- If liability and quantum are bifurcated damages or valuation report will not be necessary until the damages or quantum phase of the hearing.
- Arbitrator will not appoint a neutral expert unless the parties so direct. It could be more dangerous than the apparent cost saving.
- BUT, the Arbitral Tribunal can appoint an expert under Arb. Act, s. 28 and ICAA Model Law s.26.



Expert Witnesses #2

- In international arbitrations, there are established protocols for evidence from expert witnesses.
- Each of the international rules address expert witnesses. UNCITRAL Arb Rules Art. 29 deals with "Experts appointed by the Tribunal". Arbitrators seek input from parties but do not require consent.
- Focus is on the independence, neutrality and competence of the expert. Tribunal-appointed experts are the norm under the civil law tradition.
- Chartered Institute of Arbitrators has a *Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration* (2007).
- *IBA Rules on Taking Evidence in International Arbitration* (2010) are also commonly relied upon.



Expert Witnesses #3

- The issue with the evidence of an expert witness is whether the expert is "of the party" (i.e. hired to assist the arbitrator neutrally) or "for the party" (an advocate for the position of the party who hired the expert).
- CIArb Protocols specifically make this point:
 - experts should provide assistance to the Arbitral Tribunal and not advocate the position of the Party appointing them.
- IBA Rules on the taking of evidence are to the same effect.
- Expert must sign a statement of independence.
- Past or present relationship with a party must also be disclosed by the expert.



Conduct of the hearing

- The following considerations are relevant to the arbitration hearing:
 - Opening statements if required
 - Presentation of Witness Statements
 - Warming up the witness - where permitted or agreed
 - Cross-examination of opposing party's witnesses
 - Qualification of expert witnesses
 - Presentation of expert reports
 - Post-hearing Brief
 - Written Argument or Memorial
 - Oral submissions in addition to the Memorial
 - Interpretation of the award - UNCITRAL Arb Rules 37
 - Correction of the award - UNCITRAL Arb Rules 38
 - Additional award - UNCITRAL Arb Rules 39
 - Costs and Fees: Not necessarily the same as domestic arbitrations. Usually left to the end and UNCITRAL Arbitration Rules, Arts. 40-41.



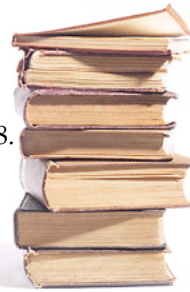
Remedies from awards

- Motions to the arbitral tribunal
 - Interpretation of the award
 - Correction of the award
 - Additional award
- Applications to the court
 - Setting Aside the award
 - Disqualification of the arbitrator
 - Remitting to the arbitrator
 - Declaration of invalidity of the arbitration
 - Recognition of the award
 - Enforcement of the award
- See Arbitration Act, ss. 6-7, 46-47, 50
- See ICAA, Model Law, Art. 34-35
- See UNCITRAL Arbitration Rules 2010, Art. 35



The anti-suit injunction and its role in commercial arbitration

- An anti-suit injunction (“ASI”) is a method for the Court to control the forum of a dispute.
- When a foreign defendant is sued here, the court can stay the action if Ontario is the wrong forum.
- When an “Ontario” defendant sues in a foreign court, the SCJ could enjoin the defendant if the foreign court is the wrong forum.
- The test is in *Speers Estate v. Reader's Digest Association*, 2009 Cannily 28404 (ONSC) para. 58.
- Technically, an ASI can be used to restrain an arbitration proceeding in another jurisdiction BUT...



The anti-suit or anti-arbitration injunction #2

- The European Court of Justice ruled in the case of *Turner v. Grovit* [2005] ICR 23 that an anti-suit injunction is an unjustifiable interference in the process of the court of a Member State, contrary to the principle of mutual trust underlying the Brussels Regulation.
- The EU Court’s decision in *Allianz & Anor v West Tankers Inc* [2009] EUECJ C-185/07 made it clear that anti-arbitration injunctions are not available between European parties.
- The remedy may still be available in Canada as an anti-arbitration injunction but it has not occurred frequently.



The anti-suit or anti-arbitration injunction #3

- Additional readings on the topic of anti-suit and anti-arbitration injunctions are found at:
 - D. Hascher, *Conflict and Cooperation: Injunctions in Favor of and against Arbitration* (2010) 21 Am. Rev. Int'l Arb. 189 <http://tinyurl.com/8qdl333>
 - C. Phull, *U.S. Anti-Suit Injunctions in Support of International Arbitration: Five Questions American Courts Ask*, *Journal of International Arbitration*, Vol. 28, No. 1, pp. 21-50, 2011 <http://tinyurl.com/8q94fey>
 - T. Nelson & C. McNerney, *Farewell to Arms? West Tankers and the Demise of the Anti-Suit Injunction in Europe*, Fall 2009 NY Dispute Resolution Lawyer <http://tinyurl.com/9k6kt5k>
 - P. Santomauro, *Sense and Sensibility: Reviewing West Tankers and Dealing with its implications in the wake of the reform of EC Regulation 44/2001*, (2010) 6 Jour. Private Int'l Law 281. <http://tinyurl.com/8b373wd>



References & Authorities

- *Arbitration Act*, 1991, SO 1991, c 17, <http://canlii.ca/t/kpjm>
- *International Commercial Arbitration Act*, RSO 1990, c I.9, <http://canlii.ca/t/5f0>
- UNCITRAL Arbitration Rules (2010) <http://tinyurl.com/9z6cu5t>
- Arbitration Advocacy Program, Advocates Society, Mar. 27/12
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- Hon. J.I. Laskin, *Forget the wind-up and make the pitch: Some suggestions for writing more persuasive factums*, ONCA website <http://tinyurl.com/9g5hwvv>
- J.B. Casey, *Arbitration Law of Canada: Practice and Procedure* - 2nd Edition, 2011, Juris Publishing <http://tinyurl.com/9mtgd4s>
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Table of Cases

- *Accentuate v. Asigra* [2009] EWHC 2655
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- *AT&T Corp v Saudi Cable Co* [2000] 2 All E.R. (Comm) 625
- *Deluce Holdings Inc. v. Air Canada* (1992), 12 O.R. (3d) 131
- *OEMSDF Inc. v. Europe Israel Ltd.* (1999) 42 CPC (4th) 229
- *Speers Estate v. Reader's Digest Assoc.* 2009 Cannily 28404
- *Turner v. Grovit* [2005] ICR 23



Conclusion

- Commercial Arbitration was developed as an alternative form of dispute resolution for many good reasons, including the cost reduction and streamlining of procedures.
- With the proliferation of commercial arbitration, it has taken on its own panoply of rules, protocols and conventions - formal and informal.
- Litigators cannot assume they know the ins and outs of arbitration without learning these.
- The arbitration advocate who understands the process well is better-equipped for success.

