Focus

ALTERNATIVE DISPUTE RESOLUTION

Paring back procedural wrangling

An alternative to being bogged down in 'meta-disputes'

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A business person who retains a lawyer to handle a commercial dispute in court may not realize it, but before the dispute is resolved, a myriad of complex and expensive other disputes which have not even arisen yet will have to be taken care of. These disputes will be between the lawyers, regarding the procedures by which the dispute should be resolved (call them the "meta-disputes"). They will be time-consuming and costly, and the business person will be a bemused observer.

The passions ignited between the lawyers over these meta-disputes may equal or surpass the intensity of the original business dispute. The resulting costs incurred by both parties may overshadow the economic value of the original dispute, and the eventual settlement will do little to repair the financial damage to either party.

Yet at every step of the way, each side's lawyer will be able to provide convincing reasons as to why winning the meta-dispute is essential to achieving a just outcome. Indeed, it is quite likely that a one-sided outcome *would* result to the disadvantage of whichever side chooses to unilaterally disarm.

Pleadings and pleadings motions are a good example. In their pleadings, the parties essentially exchange predictions as to what facts they expect or hope the evidence will prove, and what relief the law will support at a trial that may take place several years down the road. Since there is no fear of immediate contradiction, assertions of fact may be somewhat exaggerated for bluff or intimidation, or muted and obtuse to create an element of menace and anxiety. Speculation and vague accusations may be included in order to form a basis for broader discovery on matters that are outside the knowledge of the pleading party.

Pleadings can create a vortex of lawyer-on-lawyer disputes. Often these disputes are driven by the desire to let the other side know that "we will not be pushed around" or to increase the pain of advancing a particular claim or defence. The predictive value of the pleadings is rarely improved by these costly wrangles since, like weather reports, pleadings are easily amended when conditions change—including during, or after trial.

Because pleadings do not constitute evidence or a reliable guide to what the evidence will be, each party is going to need to conduct extensive discoveries in an equally uncertain effort to find that information out before trial.

Arbitration offers the opportunity to bypass much of this wasteful procedure and procedural conflict. It can do so by reducing the role of pleadings to the bare essentials: notification of a claim to stop limitation periods from running, identification of the dispute so that it can be placed within the scope of the arbitration clause, and a brief indication of the relief sought or, in the response, the defence to be advanced.

Soon thereafter the parties can be required to put forward the evidence that is within their own knowledge or control and on which they rely in advancing their claim or defence. They do so by producing sworn witness

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Conduct: There are penalties for bad behavior

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statements and documents that immediately form part of the arbitration record. There will be at least two rounds of such exchanges to allow for reply.

The parties are given an opportunity to identify information and documents they need from the other side. Typically, this will be a combination of requests for documentary production and written interrogatories, with any disputes as to scope being determined by the arbitrator as they arise, often by informal discussion with the parties.

The option of oral examinations for discovery on some specific issues, if needed, may be kept open. However, little if any discovery is usually required by either party when this process is followed.

There are many possible variations on this approach. The arbitrator may, before the exchange of evidence, assist the parties in drawing up terms of reference which itemize the issues to be decided. Another option is to have the parties exchange "memorials," or written submissions, which summarize the evidence they have submitted and the legal conclusions to be drawn. The timing of various elements of the process can be tweaked as to when document requests are processed, third-party evidence is obtained or expert reports exchanged.

The usual result of the arbitration process is that, in no more than the time it often takes to complete pleadings and pleadings motions in a court case, the primary evidentiary record in arbitration is complete. All that is needed is a hearing which will focus on the cross-examination of the witnesses and final arguments. The relative certainty of this process allows for the final hearing date to be fixed with reasonable confidence at the beginning of the process.

If the objective is truly to provide a timely and cost-effective service in resolving business disputes, arbitration can provide a very useful alternative.

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