

●●● Arbitration becomes more like litigation

Gap between two models of dealing with disputes narrowing

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The gap between litigation and arbitration, it appears, is constantly narrowing.

"There has been a kind of merger in the processes so there's no longer that much to choose between litigation and arbitration," says John Laskin of Torys LLP.

"People now realize more that some of the asserted advantages of arbitration were not real or at least a bit overblown."

On the other hand, litigation-related horror stories are legend and continue to proliferate. But close examination also reveals a growing number of successes for the court system.

Still, arbitration has lost its lustre as a panacea for lengthy and drawn-out litigation. As many disappointed parties have discovered, arbitration can be slow and expensive, so much so that there aren't many proponents left who base their case for arbitration solely on cost saving and efficacy.

"In many cases, arbitration is not cheaper and not quicker," Laskin says. "One reason is that the people we hire as arbitrators tend to have other things to do, and in cases involving three-member panels, scheduling is a nightmare that can really slow things down.

Also, the discovery process can be much the same as in court because when it comes down to it, counsel are reluctant to give up the knowledge that comes with discovery."

There's also the fact that arbitrators must get paid and the parties have to absorb the cost of all of the things that the public system provides for free such as a venue and a stenographer.

Nowadays, boosters of arbitration rest their case on a number of perceived advantages.

"The primary reasons for arbitration are choice of decision-maker, a more business-like approach to dispute resolution, and tailoring the rules to suit the parties and the disputes," says Joel Richler of Blake Cassels & Graydon LLP.

But the 2010 international arbitration survey, sponsored by White & Case LLP, found that 50 per cent of respondents were disappointed with arbitrator performance.

What the survey doesn't pinpoint is whether the 50 per cent were composed solely of the losers. If that's the case, the results might not be very different if a similar poll studied the attitude of litigants.

But if that's not the case, 50 per cent is a remarkably high dissatisfaction rate given that choice of decision-maker so often comes up as a reason to arbitrate.

As for tailoring the rules to suit the parties, litigation is much less formal and structured than it used to be. That's not to say that arbitration doesn't have considerably greater scope in this regard, but it does point out that the issue isn't entirely one-sided.

"However flexible the judicial system tries to be, it never has the flexibility of ad hoc arbitration where parties can design their own process, choose their own judge, have a much greater influence on when things will happen, and have the same decision-maker organize each step in the process, including the supervision of discoveries if necessary," says Wendy Earle of Borden Ladner Gervais LLP.

The argument is that arbitrators, seized of a case in its entirety, have greater scope to keep the parties in check.

"Arbitration can get down to the same kind of fighting that occurs in litigation, but arbitrators have more room and more motivation to rein in the process," says Barry Leon of Ottawa's Perley-Robertson Hill & McDougall LLP.

The problem is that they don't always do so. "The arbitration process breaks down when people choose arbitrators who let counsel run the arbitration process like a private trial," Richler says.

What arbitration does do, however, is ensure confidentiality, something that's a very limited commodity in the courts.

"Confidentiality can be important in a variety of settings, particularly where the parties have a relationship and want to keep its terms confidential," Laskin says.



"When the parties have agreed on how to resolve a dispute, there tends to be far less procedural messing about," says Wendy Earle.

Arbitration is also preferable when big business meets the underdog. "My view is that companies should favour arbitration in David versus Goliath situations," Earle says.

"Those are the situations that businesses want behind closed doors, out of the public eye, and out of the courts where a judicial decision might set a precedent."

What the survey revealed, however, was that while confidentiality was important to users of arbitration, it wasn't the essential reason for resorting to it.

Whatever the reasons justifying arbitration, there's no doubt that it's the preferred avenue for many lawyers.

By way of example, Richler has two favourite stories that he relies on to back up his fondness for arbitration. One relates to a Vancouver case with some \$25 million involved and presided over by a retired judge and two senior lawyers.

"The hearing took less than two days, and the whole thing took a year overall," says Richler. "But the loser went to the courts to seek leave to appeal.

The hearing on the application took two days to argue, as long as the argument on the merits before the arbitrator, and the judge reserved for five months before denying leave. Now the other side is appealing the decision denying leave."

The second involves an \$85-million case between two brothers before a retired judge sitting as a single arbitrator. "The matter was bitterly contested with many motions," Richler says.

"But we were done in less than a year, and again, the hearing took two days." According to Richler, these aren't exceptional instances.

"I have never had an arbitration where I thought that the court process would take less time," he says.

"I would say that arbitration is always faster than litigation, where procedural rules are written to suit the lowest common denominator of cases that might come before the courts, so much so that I have done multimillion-dollar cases in a number of weeks by resorting to arbitration."

But not all domestic arbitration goes so smoothly. "Domestic arbitration is much more likely than international arbitration to resemble litigation, particularly because many domestic arbitration [cases] use the Rules of Civil Procedure as their framework," says Michael Schafler of Fraser Milner Casgrain LLP.

Then there's the question of whether the arbitration process encourages settlement. Lawyers seem to be all over the map on this question with responses ranging from very low settlement rates to estimates that approximate litigation's record on the issue.

Because arbitration is confidential, meaningful statistics are few and far between. But at least one arbitrator believes the settlement rate in litigation is much higher than in arbitration. His explanation is most interesting.

"An arbitrator who does virtually only domestic arbitration told me that 90 per cent of cases go to hearing, whereas 90 per cent of litigation settles," Richler says.

"He believes arbitrations don't settle more frequently because the parties don't get fed up with the process as often as litigants do."

For his part, Laskin offers another explanation. "It's not unusual for arbitration clauses to have provisions for pre-arbitration conciliation and mediation," he says. "So in custom-built arbitration, parties may be reluctant to settle because most likely they have already tried to do so."

Despite the convergence of litigation and arbitration, the greatest divide between the two may be psychological in nature.

Alternatively, it may just be that old habits die hard. "Once they get into the courtroom in a civil litigation context, counsel tend to put on their flak jackets and batten down the hatches," says Lisa Constantine of McCarthy Tétrault LLP.

There's also the argument that arbitrations tend to go more smoothly because they're consensual in nature. "When the parties have agreed on how to resolve a dispute, there tends to be far less procedural messing about," Earle says.

"The mere fact that they've decided to send something to arbitration means that they envisage an efficient process."