



Business people and their advisors, such as Certified General Accountants, know that resolving commercial disputes through litigation can often be expensive and time consuming. Recent difficult economic conditions have highlighted this fact, and as a result, interest in commercial arbitration has grown.

Arbitration can be a more satisfactory commercial dispute resolution mechanism than litigation. However, busi-

nesses seeking the benefits of arbitration must take the time to design an appropriate arbitration process. Too often, businesses agree on inappropriate arbitration provisions, with the resulting arbitration lasting longer and costing more than the litigation they were trying to avoid. But with experienced legal advice, businesses can design arbitrations that realize important benefits.

What are the potential benefits of arbitration?

1. Because arbitration can be simpler than litigation, it can resolve disputes more quickly and less expensively.
2. Rights of appeal from arbitral awards are more limited than those from court judgments.
3. Businesses can generally choose their arbitrator (or at least influence that choice). This can result in arbitral awards that are more predictable than

court judgments.

4. Arbitrations are confidential, whereas litigation is generally open to the public. This may be important if sensitive financial information, business strategies or trade secrets are involved.

If these potential benefits are important to your business clients, you will want to consider how to design an arbitration to ensure these benefits are realized.

The first design considera-

tion is the scope of the disputes to be arbitrated. When the parties define that scope, they define their arbitrator's jurisdiction. The issue is often whether arbitration will be limited to claims for breach of a particular contract or extend to all disputes arising from a business relationship, including claims like negligence. If the parties use limiting language, the arbitrator may not have jurisdiction to deal with important aspects of the parties' relationship. The parties may have to arbitrate and litigate at the same time, negating the potential benefits of arbitration. Generally, more comprehensive language is preferable. If there is good reason to limit the arbitrator's scope, that limitation should be clearly stated.

Arbitrations are usually adjudicated either by one arbitrator or a panel of three. Arbitration legislation usually provides the default of one. Nevertheless, the parties

should state the number of arbitrators they wish to use. Different factors may lead you to favour one arbitrator or a panel of three. Keep in mind that the parties must pay their arbitrators, and the more people involved in the arbitration, the more calendars must be coordinated. As a result, a panel is generally more expensive and slower than one arbitrator.

However, there is some logic to the proposition that "three heads are better than one." A panel of three reduces the risk of a fundamentally ill-conceived award. Generally, each party will appoint one arbitrator, and together they will appoint a chair. This permits a blend of experience — for example, you might have a chair with legal and arbitral experience, and arbitrators with relevant technical, business or cultural backgrounds.

One potential advantage of arbitration is that the businesses have input into choosing their decision maker. To realize this advantage, you should help the businesses determine what arbitrator qualifications they agree upon.

Generally, arbitrators are

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required by the applicable legislation or rules to be "independent" and "impartial." Independence means arbitrators can have no financial, professional or personal connection with any party. Impartiality means they must have an open mind about the parties and the issues. If the legislation or rules don't address these issues, the businesses must do so in their arbitration agreement.

Arbitration is an adversarial legal process. Awards must, with rare exceptions, be based on the application of the law to the evidence. Arbitrators should therefore have legal and arbitral training, and this should be specified by the businesses.

Businesses often mistakenly believe that it is important for arbitrators to have specific commercial, technical or scientific backgrounds. However, arbitrators cannot resolve disputes according to their own experience, knowledge or opinions. The businesses should choose an arbitrator with the necessary legal experience, and prove necessary background through the opinion evidence of qualified experts.

The businesses must also choose a set of procedural rules for their arbitration. Canadian and international arbitral institutions have their own sets of rules. The best way to proceed is usually to adopt one of these and agree on any modifications required by the nature of the dispute.

Many potential benefits of arbitration can be realized when designing the procedural rules, mainly by streamlining the process. You should consider:

- Should there be the equivalent of litigation

How to avoid litigation when resolving commercial disputes.

Realizing the benefits of commercial arbitration

pleadings, and if so, how elaborate should they be?

- What should be the scope of any exchange of documents?
- Should there be any pre-hearing questioning of witnesses?
- What should be the time frames for the steps leading to the hearing?
- Should witnesses testify at the hearing by written statement or affidavit and cross-examination, rather than live testimony?
- Should the arbitrator be required to deliver the award within a specified time?
- Should the parties be able to go to court and appeal the award?

It is obvious that arbitral procedure can differ significantly from litigation. That is precisely the point! The parties can design an arbitration that incorporates only what is essential to resolve their dispute, and so realize the benefits of arbitration.

Another choice the parties must make is whether their arbitration is to be administered by an arbitral institution or the arbitrator. Institutions offer administrative services for a fee. You must consider whether those services are worth the cost. For a complex dispute, or one involving a large amount of money, they may be. For simpler disputes, they may not. A small amount

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of money at stake may make these services unaffordable. However, if the arbitration is to be administered by the arbitrator, the businesses will have to pay the arbitrator for that work.

If the arbitration is to be administered by an institution, the arbitration agreement should identify it and state that it will do so.

If the arbitration is to be administered by the arbitrator, the businesses must still specify procedural rules. There are suitable rules. Another option is to delete from the rules of an arbitral institution references to its administering the arbitration.

If preserving the businesses' confidentiality is an important benefit, you should carefully consider how to realize it. While the applicable legislation and rules will likely deal with confidentiality, you should consider whether that is sufficient, or whether the arbitration agreement should incorporate a more detailed confidentiality agreement.

Choosing the "seat" of an arbitration is important, as the laws of that jurisdiction will govern the arbitration, including when and how the parties can go to court. If it is necessary to go to court it will almost certainly be in the courts of that jurisdiction, with lawyers authorized to practice there. So you want the seat of arbitration to have courts that are "arbitration-friendly," and to be comfortable with local counsel.

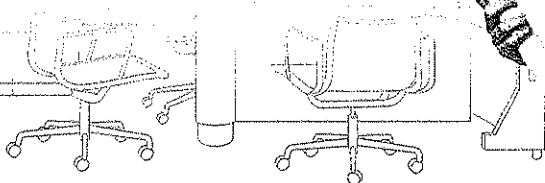
Commercial arbitration can be a cost-effective alternative to litigation, if proper care is taken to design an arbitration that is more than just compressed litigation. Businesses and their advisors should take that care, and should retain experienced lawyers to assist them in doing so. □

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