

## A Case for Commercial Arbitration

The focus of the civil justice system over the past number of years has, in large measure, been driven by a desire to both reduce the skyrocketing costs associated with litigation as well as the time frame for rendering a decision. As may be readily seen, these two goals are inter-related.

Despite the best efforts by the judiciary and the legal profession to accomplish the foregoing goals, the results have been far from satisfactory. As a result, more and more clients are asking their counsel “Is there a better way?”

The logical and rational answer is yes, through the means of alternative dispute resolution. The two aspects of alternative dispute resolution are mediation and arbitration. There are a number of differences between mediation and arbitration – some of them obvious and others more subtle. The main difference, however, is that mediation is a consensual process – in essence a form of controlled negotiation, while arbitration, while consensual at the outset, the ultimate result is an imposed resolution.

While the benefits of arbitration versus litigation may, at first blush, appear obvious (and will be referenced shortly), the over arching caveat is that an arbitration, in my opinion, requires more skillful and adroit participants by way of an arbitrator and counsel than one may well expect in the litigation process. A judge by virtue of having been vetted prior to his appointment and for historical reasons has a certain stature that both counsel and clients may acknowledge at the outset. On the other hand, an arbitrator has had to “earn that respect” both in terms of their past performance and the conduct of the current arbitration. It is therefore important that in selecting an arbitrator, due regard must be given to not only his competency, his ethical standards and intellectual honesty, but also, common sense and commitment to the practical. Only in this way, will the twin benefits that are seen in arbitration, i.e. savings of time and costs, likely to be achieved.

Moreover, as an arbitration does not have the “trappings” that a court proceeding would have, it is all that more important that the clients come away from the process feeling that win or lose, the case has been fairly and assiduously addressed by the arbitrator. They must walk away with a “good taste in their mouth”.

As well, because of the important consensual aspects of arbitration such as the selection of the arbitrator and the input into the process, the choice of counsel is also important. He or she must be a person who is capable, practical and have in mind at all times the ultimate goal as to why their clients have selected arbitration – to achieve a fair result by minimizing the cost and maximizing the timeline.

Arbitration presents an effective dispute resolution mechanism in the right hands. Otherwise, it can prove to be a more destructive process than litigation because the parties will generally have had higher expectations as to the benefits of arbitration over the litigation process. If those expectations prove to be illusory, their disappointment will be palpable.



Herb Silber brings a strong combination of experience, expertise and empathy to his role as arbitrator. Herb’s approach creates the positive, respectful atmosphere critical to an expedited arbitration process.

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