Administrative & Government

It's time for an arbitration revolution

Recent trends and literature showing that arbitration has increasingly become a carbon copy of litigation requires an "arbitration revolution," says Toronto commercial arbitrator Marvin J. Huberman.

"Looking at what arbitration has become as opposed to what arbitration really needs to be, it seems to be a shadow of what a trial is," he says. "Arbitration has assimilated all kinds of litigation practices and tactics."

Huberman points to the increase in discoveries, which — particularly in the international arbitration world — was previously unheard of.

"There are also more aggressive cross-examinations and ever-increasing motions," Huberman tells AdvocateDaily.com. "Basically, what you end up with is a procedure that is essentially a duplication of traditional court litigation.

"That's a problem. That's why you see fewer people going to arbitration, and why fewer corporate counsel are including arbitration clauses in commercial agreements. What they're seeing is it's not less expensive, faster, or more effective because in my view arbitration is not being used effectively," says Huberman, a committee chair of the Toronto Commercial Arbitration Society.

"We really need to revolutionize the way we think about and use arbitration," he says.

One size does not fit all — the process needs to be tailor-made to be a true alternative procedure to litigation. A process that's flexible, creative, and responsive to the desires of its user will save time and money and executive resources, Huberman says.

"It'll result in less anguish and anxiety for the parties, for counsel and maybe even for the arbitrator," he says. "Ultimately, arbitration can lead to a fair and just result to meet the needs of the particular dispute and the needs of the parties," says Huberman, who was recently recognized by Global Law Experts as Commercial Arbitration Law Firm of the Year in Canada — 2015.

The arbitration revolution starts with the promotion of arbitrationists — essentially arbitration specialists/advocates who promote its effective use. This includes those who are able to devise an appropriate process and who can draft more effective arbitration clauses and submission agreements, he says.

Other components of the revolutionary change could include:

— pre-arbitration mediation with an independent mediator, not the arbitrator;

— mandatory scheduling conference to establish an arbitration timetable;

— limiting or excluding discovery;

— imposing time limits on the presentation of a party's case;

— limiting page numbers for written submissions;

— allowing motions to be conducted via teleconference;

— allowing for expert witnesses to testify together on a panel (hot tubbing);

— considering final offer arbitration or baseball arbitration; and/or

— placing limits on the appealability of the award.

Huberman says it's natural that lawyers representing parties — particularly those lawyers who don't have much arbitration experience — will bring litigation baggage to the arbitration process.

"Essentially that's what they know and that's what they are comfortable with," he says. "Many times they will simply default to the Rules of Civil Procedure as the governing rules.

"So how do we promote arbitration as a viable alternative? We have to promote it by making it more effective, and show people how they should be rethinking arbitration," he says.

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