The time is right for court-facilitated arbitration

Now more than ever, courts should assist parties to move cases to arbitration, writes Barry Leon

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Since COVID-19 forced courts to significantly curtail operations in recent weeks and to move their limited proceedings to virtual hearings, there have been numerous client memoranda and social media postings from law firms pointing out the advantages of moving all or part of a court proceeding to arbitration.

Will it happen?

In an earlier column I urged Canadian courts to implement court-facilitated arbitration as an effective and efficient mechanism to encourage and assist parties in litigation to consider seriously moving their dispute to arbitration.

Without healthy encouragement by judges, I fear that disputes will languish because one party does not understand or appreciate arbitration, worries a suggested move to arbitration is to secure a tactical advantage, or itself has a tactical interest in delay.

Since my 2018 column was written there has been no great improvement in getting matters to court in a timely fashion, while commercial arbitration has been expanding in Canada. Now, unfortunately, court delays have turned into a material immobilization of the courts.

Recently, Quebec Superior Court Justice Frédéric Bachand, who has a deep understanding of arbitration, demonstrated a simple way for judges to encourage parties to consider moving to arbitration. In dismissing a provisional injunction application in *Équipements de gardien de but Michel Lefebvre inc. v. Sport Maska inc.*, 2020 QCCS 44, he encouraged the parties to undertake mediation and arbitration to avoid bogging themselves down in complex and costly judicial procedures, and reminded them of their contract's mediation and arbitration provisions.

Even without such a contractual provision, judges can do the same sensible thing and encourage parties to avoid complex and costly judicial procedures — and overcome the current limited ability of courts to hear cases — by arbitrating their dispute.

Arbitrations can and are being conducted virtually. Participants who are not yet comfortable with virtual arbitrations soon will be.

The critical challenge is to get parties to consider moving to arbitration.

Often parties embroiled in litigation would benefit from independent encouragement and assistance to consider moving the dispute to arbitration. Through court-facilitated arbitration, courts can get parties to consider arbitration's advantages, and, if they agree, assist them to plan their arbitration and implement the move.

Court-facilitated arbitration While the decision to arbitrate must be voluntary, the process to get parties to consider arbitration need not be entirely voluntary.

Court-facilitated arbitration does not offend party autonomy, one of the hallmarks of arbitration, nor any fundamental aspects of arbitration. Arbitration occurs only if parties agree.

Courts can identify suitable cases and invite the parties and counsel to a case conference to consider moving to arbitration. The case conference would need to be conducted by an experienced judge who understands arbitration, has good facilitation skills and is committed to make court-facilitated arbitration work.

When parties are receptive, the judge then assists counsel in developing a protocol for the move.

If parties want certain – or even all – features of court litigation, those features can be preserved in arbitration.

Topics to be considered and agreed would include:

Privacy and confidentiality: If desired, the arbitration can be open, just as the court proceedings would have been.

Judgment versus award: If parties want a court judgment, it may be possible for the arbitration to be a reference, with the referee's report going back to the court to become a judgment.

Otherwise, parties may prefer an arbitral award, which would be more readily enforceable worldwide under the New York Convention.

Precedent: If parties want a publicly available precedent – for their own purposes or to help develop the law, the protocol can provide for it. Certainly, the reference mechanism can achieve this. Other mechanisms might be possible.

Procedural and evidentiary rules: If parties are wedded to using court procedural and evidentiary rules, they can do so in the arbitration. However, before deciding on that, the case conference judge can assist parties in appreciating the benefits of a more customized and efficient approach.

Costs: The case's costs through to the move to arbitration could be left to the arbitral tribunal. Further, parties could agree that the tribunal will apply the court's approach to costs (including settlement offers).

Arbitral tribunal: Parties would decide whether to engage one or three arbitrators, and a process to select the tribunal. Commonly used processes to appoint an arbitral tribunal would be considered, including that the judge serve as appointing authority to select the tribunal in the absence of agreement.

Appeals: If parties wish to preserve appeal rights as they would exist following a trial, the reference mechanism could achieve that objective. Or parties could choose an appeal by way of an appellate arbitration. Rules exist for such appeals, including Arbitration Place's Arbitration Appeal and Review Rules.

Other topics: Nothing would preclude the case conference considering other matters —including the use of mediation and other forms of ADR — to take place before or during the arbitration.

Begin now! Court-facilitated arbitration should be able to be implemented under most existing court rules and practices. With the COVID-19 situation, parties wishing their disputes to be resolved and counsel wishing to continue their practices have every incentive to support the process.

The main cost of implementation would be some judicial time devoted to cases that otherwise will have lengthy waits for trial and ultimately consume many days, if not weeks, of court time and resources.

To succeed, court-facilitated arbitration will need appropriate judicial awareness and commitment. Also, it will need litigation lawyers to seriously consider the advantages to their clients.

Let's begin now!