The Role of Arbitration in International Business

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The Role of Arbitration in International Business

- What is international commercial arbitration?
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- How does arbitration differ from other forms of dispute resolution?
- How is arbitration used in international business?
- The ABCs of arbitration: Ajudicative, Binding and Consensual
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What is international commercial arbitration?

- International arbitration is the most common method for resolving disputes arising from commercial agreements between businesses from different countries.
- International arbitration is based on an agreement between the parties that if a dispute arises on any matter under the contract,
  - They will submit their dispute to an arbitral tribunal instead of going to court
  - The arbitrator(s) will resolve the dispute according to certain parameters and according to the governing law of the contract; and
  - The decision will be final and binding on the parties
- In international arbitration, the parties are free to modify the terms of the dispute resolution process to suit their needs.

As an entrepreneur, not a lawyer, why do I need to know about international commercial arbitration?

- As an international entrepreneur, your success will be driven by the agreements you make with customers, dealers and suppliers.
- You will be dealing with people in different countries who speak other languages and whose approaches and interpretations differ from yours.
- Each party's objective is to make a profit and to maximize its self-interest.
- Each party will instruct their lawyers to draft an agreement slanted to their own advantage, sometimes radically so.
- Not every party is fair, scrupulous or honest. In some countries, corruption and fraud are rampant. This may include the justice system.
- Business people often try to take advantage of one another.
- Business people elsewhere may speak another language.
- Cultural differences may affect the approach to arbitration.*
- The implementation of the agreement often does not turn out as planned.
- With all of this, it is very likely that some disputes will arise.

As an entrepreneur, not a lawyer, why do I need to know about arbitration? #2

- ***Consider this scenario:***
- You are a Canadian entrepreneur with a global outlook.
- Your most important supplier is in Qingdao, China.
- The supplier wants your business, or so the interpreter told you.
- If this contract works well, you will have many larger orders.
- The Chinese supplier has a good product at a very favourable price.
- You don't speak or read Mandarin. The supplier doesn't speak English.
- You don't know anything about the Chinese legal system.
- You can't even read the menu in the local restaurants.
- If there is a disagreement between you and the Chinese supplier, how would you feel about a Court in China revolving your dispute?
- Would litigation in a Chinese court put you at a strategic disadvantage?
- The more control you have over the subject-matter of the contract, the more control you will have over the dispute resolution process.

As an entrepreneur, not a lawyer, why do I need to know about arbitration? #3

- More than 400 years ago, the British philosopher, Sir Francis Bacon, famously wrote: "Knowledge is power."
- As an international entrepreneur, you are better equipped for your business deal if you have a good idea of the dispute resolution process which will maximize your chances in the event of a dispute.
- Knowledge of arbitration involves:
  - A general understanding of how arbitration works
  - An appreciation of how arbitration differs from litigation and mediation
  - An appreciation of the choice of law, language and location issues
  - An understanding of how arbitrators are selected and rejected
  - Some insights into how the evidence is obtained and presented
  - An understanding of the role of expert witnesses in arbitration
  - Some appreciation of how arbitrators decide cases
  - An understanding of how courts can oversee the arbitration
  - An understanding of how arbitration awards are enforced internationally.

How does arbitration differ from litigation?

- **Litigation -** a legal process which requires commencing an action in court.
- The claim is filed in accordance with the rules of procedure of the court and under the local law of the jurisdiction.
- The process is not consensual but some matters can be agreed upon.
- Decisions of the court are binding under the law of the jurisdiction.
- Multiple claimants may sue multiple defendants. The participation of the defendants is mandated by the law and procedure of the jurisdiction.
- Judges of the Court have statutory and inherent jurisdiction to uphold the law, customs and public policy of the country, state or province.
- The judge is assigned by the court. The parties have no choice.
- In some cases, the facts are decided by a jury.
- Procedural matters are usually not heard by the trial judge.
- There are rights of appeal in the same jurisdiction.
- The court has a judgment enforcement process and a contempt power.

How does arbitration differ from mediation?

- **Mediation –** a process of settlement negotiation in which the parties are assisted in reaching a resolution of all or part of their dispute by a neutral third party, the mediator, who is selected on the agreement of the parties.
- The mediator has no power to make any decision. S/he typically shuttles between the parties and tries to move the parties closer to settlement.
- Skilled mediators, usually senior lawyers or retired judges, have a high settlement rate, even in complicated disputes.
- Mediation does not replace arbitration but if the parties settle the case by direct negotiation or mediation, the arbitration may not be required.
- With rare exceptions, the mediator cannot arbitrate the same case.

How does arbitration differ from other types of dispute resolution?

- **Conciliation**
  - a process of negotiation in which the parties are assisted in resolving their dispute by a neutral third party, the conciliator. Conciliation is mediation by another name. Also used in some international commercial disputes. See *UNCITRAL Conciliation Rules* http://goo.gl/ZiD9j and section 3 of ICAA http://canlii.ca/t/5f0
- **Med-Arb**
  - A process in which the same neutral attempts to mediate the dispute. If the mediation does not result in a settlement, the same person will be the arbitrator. This process is not common in Canada and USA because of the concern that if settlement positions are disclosed in the mediation, it will cloud the arbitrator's view of the case. In some cultures, it is more common.
- **ADR**
  - Stands for Alternative Dispute Resolution
  - ADR includes any dispute resolution process outside litigation in Court.
  - Arbitration is one type of ADR.

How is arbitration used in international business?

- Most international business agreements drafted by a lawyer will have dispute resolution and governing law clauses which typically state that:
  - All disputes under the agreement will be referred to arbitration
  - The arbitration will be final and binding and not subject to appeal
  - Where the arbitration will take place
  - The language of the arbitration
  - The governing law of the contract.
- Some agreements also state:
  - A mandatory requirement for pre-arbitration mediation
  - Whether the arbitration will be ad hoc or institutional
  - How many arbitrators there will be and how the chair will be selected
  - How the arbitrators will be selected, including limitations such as nationality
  - Reserve a right to sue in court for equitable remedies or injunctive relief
  - The rules of procedure which will govern the arbitration
  - Whether there rights of appeal from the arbitration award.

The ABCs of arbitration: Ajudicative, Binding and Consensual.

- **Adjudicative** The arbitrator must
  - not have a conflict of interest.
  - not communicate with a party independently.
  - treat the parties fairly and equally and permit each party to present its case.
  - act judicially by following applicable law and procedure.
  - permit each party to respond to the opposing party's case.
  - must adhere to the agreement between the parties and the scope of the mandate.
  - render a written award with reasons within agreed time.
- **Binding**
  - The Court will turn an arbitrator's award into a judgment unless 1) one of the adjudicative principles has been breached, 2) if there is a public policy ground not to do so; or 3) if there is an appeal is pending.
- **Consensual**
  - Only the parties who agree to participate in the arbitration can be bound by the arbitrator's award. Third parties cannot be affected: *Farah v. Sauvageau 2011 ONSC 1819 (CanLII), http://canlii.ca/t/fkp0k.*

Arbitration binds only parties to the agreement

- In *Farah v. Sauvageau Holdings Inc., 2011* http://canlii.ca/t/fkp0k, *the* Ontario Superior Court held that an arbitrator lacked jurisdiction over third parties.
- An arbitrator made an order restraining the respondent from disposing of his assets until the case was over.
- The judge held that the arbitrator did not have jurisdiction to issue a Mareva injunction directed to persons, such as banks and employers because they were not parties to the arbitration. An arbitrator does not have the same authority as a judge of the court.
- This is a rare litigation procedure called a Mareva injunction granted when there is a risk that the respondent might flee the jurisdiction with his assets to avoid paying an eventual judgment.
- A Mareva injunction is usually obtained without notice and the order is also directed to the respondent's banks and employer.
- When a bank or employer gets a court order for a Mareva injunction, it must be respected and obeyed.

The agreement to arbitrate: Location, Language, Governing Law and Rules

- An arbitration agreement can take two alternate forms:
  - A series of clauses in the commercial agreement between the parties before any dispute has arisen
  - An agreement as to the scope, rules, presentation of documentary and oral evidence, hearing of witnesses after the dispute has arisen
  - See Art. 7, UNCITRAL Model Law attached to ICAA. http://canlii.ca/t/5f0
- A sample arbitration clause in a commercial agreement looks like this. The variations are infinite. The clause must be suited to the case:
  - *"Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally and exclusively resolved by arbitration under the UNCITRAL Arbitration Rules before a panel of three arbitrators. Each party shall select a nominee. The nominees will within 30 days select a Chair. The arbitration shall take place in Toronto, Ontario. The arbitration shall be conducted in English. This agreement shall be governed and interpreted according to the laws of the province of Ontario and the laws of Canada applicable therein."*

Designing the arbitral process

- In litigation, the parties are subject to the rules of Court. In arbitration, the parties may modify and streamline the dispute resolution process to save time and expense. Typical modifications from litigation include:
  - Documents are exchanged electronically. Hard copies not required.
  - Communications with the arbitrator about procedure are by email and telephone. Personal attendances are rarely required except for the hearing.
  - Evidence-in-chief is given by witness statement. Oral evidence is limited to cross-examination and re-examination.
  - Evidence can sometimes be given by Skype or live video conference.
  - Oral examinations for discovery are abridged or avoided completely.
  - The case can be bifurcated into liability and damages phases so that evidence about damages --- which usually requires a forensic accountant or valuator --- will be limited to the issues which are still in play.
- The *UNCITRAL Notes on Organizing Arbitral Proceedings* http://goo.gl/wKt75 are a helpful guide to organizing an international arbitration.

Ad hoc and institutional arbitrations

- The popularity of arbitration for the resolution of commercial disputes has spawned numerous national and international sponsors of arbitration.
- Some of these have been involved in international arbitration for many years. The **ICC Court of Arbitration** (http://goo.gl/gL8ty) has provided arbitration services since 1923. It is not a court but an arbitration body organized by the International Chamber of Commerce, based in Paris.
- Many of the ICC cases involve large infrastructure projects, foreign trade, IT, shipping , and oil disputes often involving governments and multi-nationals. Private disputants can also select the ICC Court of Arbitration.
- ICC Court has national committees around the world. In Canada, the national arbitration committee is operated by the **Canadian Chamber of Commerce** (www.chamber.ca).
- Disputants can choose an arbitrator either before or after the dispute arises or they can ask the Chamber to select the arbitral panel.

ICC Court of Arbitration

- When disputants choose the ICC Court as their arbitration resource, the Tribunal's Paris office provides support and panel selection services.
- There is a significant cost for this service. The arbitrators are paid on a sliding scale based on the amount involved in the dispute.
- As the ICC Arbitration 2010 Cost Calculator (http://goo.gl/LF3Qg) shows, the cost of arbitrating a $5million dispute before 3 arbitrators will exceed USD $300,000, not including arbitrator travel expenses, the lawyers and expert witness fees of each party and other disbursements. For a $20 million case, the cost increases by 150%. About 20% is for the ICC's case administration.
- An ICC arbitration can be conducted anywhere in the world but the case is administrated from Paris. The arbitrators approved by ICC are senior internationally-respected arbitrators.
- Despite the high cost, the services offered by the ICC Court of Arbitration are convenient for multiple parties of different nationalities in large infrastructure, government, oiland gas other or high-profile cases.

Other institutional arbitration bodies

- Another arbitration body is LCIA, the **London Court of International Arbitration** (http://www.lcia.org). Like ICC, it is not a court.
- LCIA operates similarly to the ICC Court from its head office in London but does not have national committees. Arbitrations can be heard anywhere.
- LCIA does not charge based on the amount in dispute. The panel and administration fees are on an hourly schedule (http://goo.gl/p8FpX).
- There are many arbitration organizations: AAA, ICDR, ADRIO, ADR Chambers, SIAC and national groups in nearly every country.
- There are also arbitration education and accreditation organizations such as CIA, the Chartered Institute of Arbitrators based in London and the ADR Institute of Canada. These organizations also provide arbitration services.
- TCAS is a new organization which promotes Toronto as an arbitration destination and provides arbitrator resources to interested parties.
- Most of the arbitration bodies have their own rules of procedure. More about rules of procedure later in this presentation.

Ad hoc arbitrations

- In an ad hoc arbitration, the parties select the arbitrator or arbitral panel without the assistance of an arbitral body.
- Their is no case support office. All documents are filed directly with the arbitrator or the Chair of the arbitral panel.
- The rules of procedure are determined by the arbitration agreement before the dispute or they may be agreed upon after he dispute arises.
- No administration are fees payable but the arbitrators have to be paid.
- The arbitration may be held at a neutral location such as the office of a shorthand reporter, who may charge for the room and AV equipment.
- If the parties decide to have a verbatim transcript of the evidence, there is a fee for the reporter and for the transcript.
- Most commercial arbitrations between private corporations are ad hoc.
- Most of them are before a single arbitrator because a 3-arbitrator panel can be very expensive about $2,000 or more per hour for all three.
- A three-arbitrator panel is common in disputes involving large amounts.

Confidentiality and loss of confidentiality in arbitration

- One of the main attractions of commercial arbitration is that arbitrations are confidential. Court proceedings and the decision are public and accessible.
- Some arbitration bodies report their awards but parties are not identified.
- In some public arbitrations, like NAFTA, the decisions are published.
- The Anglo-Canadian-American tradition of arbitration confidentiality is not recognized everywhere. See article by On & Khoon: http://goo.gl/OJjK2
- Confidentially is difficult to enforce. What do you do if the party discloses? It depends on whether the confidentiality is a part of the arbitration agreement and what damages are actually suffered as a result of the disclosure.
- Confidentiality is lost if there are court proceedings.
- In the court case, the arbitrator's decision becomes part of the public record.

Selecting and paying the arbitrator or arbitral panel

- In court, judge-shopping (looking for the most favourable judge to hear your case) is frowned upon. In arbitration, it is just what counsel is supposed to do: find the best, non-conflicted, ethical arbitrator who will decide in your favour after a fair hearing in which all parties have a chance to present their case.
- The best arbitrator will have most of the following qualities:
  - Competent and knowledgeable in the subject-matter, especially if technical
  - Experience in arbitration and knowledgeable in the law
  - Known for fairness and good ethical values
  - Will patiently listen to the evidence and arguments of all parties
  - Does not have a conflict of interest
  - Has respect for the ability and trustworthiness of your legal counsel
  - A sensible decision-maker who will render an award on time.
- Experienced arbitration lawyers know where to find good arbitrators.
- There are many excellent senior arbitrators happy to take on most cases.

Selecting and paying the arbitrator or arbitral panel #2

- How the arbitrator is selected depends on what the arbitration clause states. The first step is to follow the agreement. The parties can agree to change what the agreement states.
- If there are three arbitrators, each party selects a nominee. The nominees select the third arbitrator. Once appointed, nominees are neutral. In some U.S. arbitrations, nominees are advocates for their nominators.
- If the agreement calls for one arbitrator and the other party refuses to agree to an arbitrator, a judge will appoint the arbitrator. Sometimes, the agreement provides a mechanism for appointing the arbitrator.
- If the arbitration clause specifies arbitration before a specific arbitration body, the case must filed with the correct body or the arbitration will be invalid.
- This is what occurred in *OEMSDF Inc. v. Europe Israel Ltd.* 1999 CarswellOnt 3047. The agreement referred to the 'Court of International Arbitration sitting in London'. The claimant filed the arbitration with LCIA. That was the wrong body according to the agreement. The arbitration had to be restarted before the ICC Court of Arbitration. The change led to a settlement of the case.

Selecting and paying the arbitrator or arbitral panel #3

- When counsel calls an arbitrator to determine if s/he is available and has no conflicts of interest, the arbitrator's hourly rate will also be discussed.
- Counsel may also ask about the arbitrator's experience and suitability. It is not proper to discuss the merits of the case unless all counsel are present.
- Some agreements require that the arbitrator not have the same nationality as any party but this is not binding in Ontario: ICAA s. 7.
- Once the arbitrator or arbitral panel have been appointed, each side provides a deposit on account of the arbitrator's fees. The deposit depends on the anticipated length and complexity of the case. The first deposit does not necessarily cover all of the arbitrator's fees.
- The deposit does not cover the cost of a reporter to transcribe the evidence (if the parties want it), the hearing room or any equipment.
- The arbitrator is not formally appointed until s/he accepts the assignment in writing and the terms of the arbitration are agreed upon.

Laws affecting arbitration

- In Ontario, commercial arbitration is governed by the following statutes:
  - ***Arbitration Act, 1991***, SO 1991, c 17, http://canlii.ca/t/kpjm
  - ***International Commercial Arbitration Act***, RSO 1990, c I.9, http://canlii.ca/t/5f0
- The ICAA applies to arbitrations in which one party is not resident in Canada. Domestic arbitrations are under the Arbitration Act.
- The key part of the ICAA is the UNCITRAL Model Law – see next slide.
- There is also a federal ***Commercial Arbitration Act,*** RSC 1985, c 17 (2nd Supp), http://canlii.ca/t/lc7z which applies only to arbitrations involving the government of Canada, a federal Crown corporation or in relation to maritime or shipping matters.
- Apart from these statutes, courts have established many precedents about arbitration, including, when a case must be referred to arbitration (forum selection), the jurisdiction of the arbitral panel, removal of the arbitrator, setting aside the arbitral award and enforcement of the award.

UNCITRAL Model Law and UNCITRAL Arbitration Rules

- The United Nations has been very active in helping members harmonize the law in commercial matters. The UN Commission on International Trade Law (UNCITRAL) developed a model law on commercial arbitration in 1985 and amended it in 2006.
- The **UNCITRAL Model Law** (http://goo.gl/hhYcF) is designed to assist UN states in modernizing their laws on arbitral procedure to take into account the features and needs of international commercial arbitration.
- All Canadian provinces have adopted the UNCITRAL Model Law.*
- There are also **UNCITRAL Arbitration Rules**, (approved 1976, amended 2010) (http://goo.gl/ePKqD), which are similar to the Model Law. These are intended to guide the procedure of the arbitration.
- Some agreements specify that the arbitration is to be conducted under the UNCITRAL Arbitration Rules, which are known to international commercial arbitration practitioners.

Rules of Procedure of the arbitration

- Even though arbitration permits the parties to agree on the process for resolution of the dispute, the procedure has to be identified at the outset.
- The rules of the arbitration cannot be made up as the case proceeds (unless both parties agree) because that would be unfair to a party.
- Arbitration rules of procedure deal with matters such as:
  - Timing for delivery of claims, defences and documents
  - Contents of pleadings and amendments
  - How the arbitral tribunal is appointed
  - Challenges to appointment and replacement of arbitrators
  - Objections to the arbitrator's jurisdiction
  - Interim, conservatory measures and arguments on a point of law
  - How evidence is adduced and how hearings are conducted
  - When awards must be delivered
  - Security for costs and costs of the arbitration
  - Arbitrator's right to withhold the award until the fees are paid.

Rules of Procedure of the arbitration #2

- The UNCITRAL Arbitration Rules (http://goo.gl/CiX9g) are a popular choice in international arbitrations.
- ICC Court of Arbitration and LCIA have their own arbitration rules as do most arbitration bodies. Most of the rules are quite similar.
- Establishing a set of arbitration rules are a way for an arbitration body to market itself as a serious player in international commercial arbitration.
- Parties to an arbitration can use any arbitration rules. You do not have to conduct the arbitration through ICC to use ICC Rules.
- In litigation before a court, the rules of court mandate how documents must be produced and procedures pre-trial examinations. Much of this streamlined in international commercial arbitration.
- In arbitration, each party is entitled to a hearing if demanded.

The arbitrator's jurisdiction

- Jurisdiction refers to the scope of the arbitrator(s) mandate in the arbitration.
- The arbitrator's decision must be limited to the matters permitted by the arbitration agreement. That sounds simple but there are disagreements as to interpretation of agreements.
- In commercial arbitration, jurisdiction is determined on the "kompetenz-kompetenz" principle. This German term means that the arbitral tribunal has the right to hear and determine objections to its own jurisdiction.
- The applicability of this principle in Canada was recently upheld by the SCC in *Dell Computer Corp. v Union des consommateurs* 2007 http://canlii.ca/t/1s2f2.
- An arbitral tribunal's decision as to jurisdiction is reviewable by the Court.
- If the arbitral panel exceeded its jurisdiction, the award it rendered is invalid and not binding.

The arbitrator's jurisdiction #2

- An interesting case about an arbitral panel's jurisdiction is *Accentuate Ltd. v. Asigra Inc.* 2009 UK HC http://goo.gl/PGjAd:
  - There was an arbitration in Toronto under Ontario law between a Canadian software supplier and a UK distributor over the termination of a contract. The distributor had no territory but did most of his selling in the UK and Ireland.
  - UK distributor argued that the arbitrators could not hear his compensation claim under the *UK Commercial Agents Regulation* http://goo.gl/MNZOA *("CAR")* because CAR is mandatory and only the English Courts could hear it. The second option was to apply English law contrary to the agreement.
  - The arbitrators ruled that the parties had agreed to determine all disputes by arbitration under Ontario law. CAR did not apply under Ontario law. They dismissed the UK distributor's compensation claim under CAR.
  - UK distributor then sued in England for the same CAR compensation which the arbitrators had dismissed in Ontario. A UK High Court judge held that even though the Canadian arbitrators were right to decide as they did in the arbitration, the UK Court saw matters differently. Because CAR has mandatory provisions, the distributor had a right to a hearing in UK to determine whether he was entitled to compensation under CAR.

How the arbitration is conducted

- The lawyer for a party who intends to commence an arbitration will contact potential arbitrators to check on availability and conflicts of interest.
- An arbitration begins when one party to an agreement sends a Notice of Arbitration to the other party. The Notice contains reference to the agreement, identification of the parties, a brief summary of the claim and usually, a proposed arbitrator or the nominee to the arbitral tribunal.
- If there is a three-artbitrator panel, the Respondent selects an arbitrator after receiving the Notice. The two nominees will select a third arbitrator.
- There is usually a teleconference with the arbitrators and the lawyers to discuss the delivery of written claims and defences, exchanges of relevant documents, whether there will be oral examinations before the hearing and whether any intermediate or conservatory measures are required.
- There is also discussion about how long the hearing will take, whether expert witnesses will be required and scheduling of the hearing.
- Sometimes, bifurcation of the cases into phases is also discussed.

Procedural matters during the arbitration: preservation, security, procedure

- In most cases, there are interim matters which must be decided before the hearing on the merits. These can include but are not limited to:
  - A motion for an interlocutory injunction to prevent some activity pending the hearing.
  - A motion to determine an issue of law before the hearing where the facts are agreed.
  - A motion to preserve some property to prevent dissipation pending the hearing.
  - A motion to require the claimant to post security for costs.
  - A disagreement over whether privilege attaches to a document.
  - An extension of the time for doing something in the arbitration.
  - A motion to permit a witness to testify by Skype.
  - A motion to bifurcate the arbitration into phases.
- In court proceedings, motions are usually heard by a judge or master who will not be the trial judge. In arbitration, the same arbitrator(s) hear everything.
- Motions are usually dealt with less formally than in Court, often by telephone.
- As the same arbitrator(s) will hear the arbitration itself, care must be taken on motions not to give the arbitrator(s) an adverse impression of the party's case.

Written advocacy and pleadings

- The claimant's lawyer prepares a Statement of Claim which contains the facts, the breach, a damages estimate and a summary of legal principles.
- Key documents are attached to the Statement of Claim. These include the agreement, important emails and documents which support the case.
- The Statement of Defence responds to the Statement of Claim. The Respondent might also have a counterclaim. Unlike litigation in court, third parties cannot be included in the arbitration unless they agree.
- Preparing the pleadings is more complicated than even a sophisticated business person might think.
- The Statement of Claim is the document which gives the arbitrator and the opposing party a first impression of the claimant's case. It must set the right tone and create a favourable impression.
- For more insights on the Statement of Claim, see I. Ellyn and E. Perez, *Litigating in the Enlightened Age of Mediation: Drafting Persuasive Pleadings* http://goo.gl/8l11K

How documentary and oral evidence are adduced in the arbitration

- The exchange of documents is an important part of arbitration.
- Each party will have relevant documents, many of which are in electronic format. Documents include agreements, emails, photos, diagrams , etc.
- A useful guide to documents and evidence in the arbitration is in the *IBA Rules on the Taking of Evidence in International Arbitration* http://goo.gl/ztZqI
- These rules are intended to provide an efficient, economical and fair process for the taking of evidence in international arbitrations, particularly between parties from different legal traditions. They deal with exchanges of documents, witnesses, expert witnesses and other matters.
- Where documents are in another language, they must be translated into the language of the arbitration. Oral interpretation of evidence might also be required if a witness is unable to testify in the agreed language.
- Before the hearing, each party`s witnesses submit a written statement summarizing their evidence, which prepared by the party's lawyers.
- This does not apply to witnesses who must be subpoenaed. Oral evidence is limited to cross-examination and re-examination.

Expert evidence in the arbitration

- An expert witness is a person with expertise in a particular field who is asked by a party or the Tribunal to examine actual issues and express an opinion about the conclusions to be drawn. Typical expert evidence includes:
  - Engineering analysis of an equipment malfunction or cause of a disaster
  - Environmental expert re air or soil quality
  - Business valuator as to valuation of shares of a business
  - Forensic accountant as to the damages or loss of profit suffered
  - Real estate appraiser as to value of property
  - Construction expert or architect as to the construction of a building
- Experts are intended to be independent even when hired by a party.
- The expert assess the facts and submits a written opinion before the hearing.
- The expert must submit his qualifications and a statement of independence.
- The other party has an opportunity to respond with their own expert report.
- In technical or scientific matters, 'hot-tubbing' is encouraged. This allows opposing experts to testify together and provide instant commentary.

The arbitral award and its interpretation

- Art. 31 of the **UNCITRAL Model Law** http://canlii.ca/t/5f0 states that:
  - The award must be in writing and signed by the arbitrators.
  - The award shall state the reasons upon which it is based, unless the parties agree that no reasons are to be given or the award is a consent award.
  - The award shall be dated and state the place where it was made.
  - A copy of the award has to be sent to each party.

- Arts. 33-38 of the **UNCITRAL Arbitration Rules** http://goo.gl/7OLzu state:
  - All of the matters mentioned above in the UNCITRAL Model Law
  - If there are three arbitrators, majority rules.
  - The arbitrators may make separate decisions on separate issues.
  - The Tribunal shall decide in accordance with the terms of the contract and shall take into account any usage of trade applicable to the transaction.

The arbitral award and its interpretation

- Arts. 33-38 of the **UNCITRAL Arbitration Rules** http://goo.gl/7OLzu also state:
  - Within 30 days after issuing an award, the arbitrators may be asked to interpret or clarify any terms or correct any errors. The Tribunal must respond within 45 days.
  - The Tribunal can also make a correction on its own initiative within 30 days.
  - If there is a settlement, the Tribunal can terminate the arbitration or at the request of the parties, can issue an award in the terms of the settlement.
  - Within 30 days after the final award, a party may ask the Tribunal to make a further award as to matters which were not determined by the Tribunal.
- In addition to the award on the merits of the case, the Tribunal has authority to award costs. A costs order requires the losing party to pay part or all of the successful party's legal and arbitration expenses. See Arts. 40-43.
- The parties may modify the rules. For example, they can agree to divide the arbitrator's fees equally regardless of the result. They can agree on how much time the Tribunal has to release the award. They can agree on how much time each party will have to present its case.

Rights of appeal and court intervention

- The arbitration agreement often provides that the decision of the arbitrator is final. That means there is no appeal. The parties may agree to provide a a right to appeal to a court or to another arbitral panel.
- In international arbitration, the right of the Court to intervene before or after the award is limited.
- Where the arbitration agreement exists, the court will refer the case to arbitration and stay the proceedings: ICAA, section 8. http://canlii.ca/t/5f0.
- Where the parties have chosen arbitration as the forum to resolve their dispute to the exclusion of the court, the court must respect their choice. *GreCon Dimter inc. v. J. R. Normand inc.*, 2005 SCC 46 http://canlii.ca/t/1l6wn
- Where the arbitrator does not have jurisdiction to award the relief sought by a party, the court action will be not be stayed: *Deluce Holdings Inc. v. Air Canada, [1992] 12 O.R. (3d) 121.* Deluce sought relief from oppression, a remedy the arbitrator did not have authority to grant and the court case was permitted to continue.

Challenging the arbitrator's award in Court

- ***UNCITRAL Model Law, Art. 34 , ICAA*** http://canlii.ca/t/5f0 set out the basis for challenging an arbitral award where there is no specific appeal right in the agreement. An arbitration award may only be set aside only on proof that:
  - A party to the arbitration agreement was under a legal incapacity;
  - The agreement is invalid;
  - The party was not given notice of the arbitration;
  - The party was not permitted to present his/her/its case
  - The decision is outside the arbitrator's jurisdiction under the agreement
  - The subject matter of the dispute cannot be settled by arbitration; or
  - The award is in conflict with the public policy of Ontario or Canada.
- An application to set aside must be made within 3 months after the award is made by the Tribunal.
- The Court may suspend the application to set aside to give the Tribunal an opportunity to correct the subject of the complaint against the award.

Challenging the arbitrator's award in Court #2

- There is a strong judicial tendency to uphold arbitration awards and not to set them aside on the grounds of invalidity except in extreme cases.
- In the 2007 UK HL case, *Premium Nafta v. Fiji Shipping Co.* http://goo.gl/LIlvf, the Court held that business people are presumed to intend to have all disputes determined by a single tribunal.
- So, even if the agreement is invalid because of a serious fraud, the arbitration clause may still be held valid and the decision of the arbitrator is binding.
- The logic behind this decision is in Lord Hoffman's judgment:

  The parties have entered into a relationship, an agreement . . .which may give rise to disputes. They want those disputes decided by a tribunal which they have chosen, commonly on the grounds of such matters as its neutrality, expertise and privacy, the availability of legal services at the seat of the arbitration and the unobtrusive efficiency of its supervisory law. Particularly in the case of international contracts, they want a quick and efficient adjudication and do not want to take the risks of delay and, in too many cases, partiality, in proceedings before a national jurisdiction.

Rights of appeal under the Ontario Arbitration Act

- In an Ontario arbitration, if the agreement is silent on appeals, the **Arbitration Act, section 45** http://canlii.ca/t/kpjm allows limited appeals from an arbitration award:
  - The appeal must be on a question of law
  - The court has to grant leave to appeal, which is granted only if the court is satisfied that
    - the importance to the parties of the matters in the arbitration justifies an appeal; and
    - determination of the question of law will significantly affect the rights of the parties.

The arbitrator has decided. How do I collect the money?

- To enforce an arbitration award, it must first be converted into a judgment of a Court where the claimant believes the respondent has assets. In Ontario, the enforcement claim must be made within 2 years of the award.
- An arbitration award cannot be enforced until an application is made to the Court. Under the **ICAA Model Law, Art. 36**. The grounds for refusing enforcement are the same as the grounds for setting aside an award.
- In domestic arbitrations, the application for enforcement is under the **Arbitration Act, s. 50** http://canlii.ca/t/kpjm, which states that the court shall give judgment enforcing the award after 30 days unless 1) there is an appeal; 2) the award has been aside; or 3) the award is declared invalid.
- An Ontario Court must also enforce awards from other Canadian provinces and territories on the same basis.
- Once the award has been converted into a judgment, the claimant can take enforcement steps in the same way as if the award were a trial judgment of the court. Collection procedures are beyond the scope of this presentation.

Enforcement of the arbitration award: The New York Convention on recognition and enforcement

- Enforcement of international commercial arbitration awards is assisted by the **1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards**. http://goo.gl/Y5cgI
- The New York Convention has been recognized by 148 countries around the world including the all provinces of Canada and all the US states.
- In summary, a contracting state will recognize the written international arbitration awards of another contracting state as if the arbitration award was made locally if
  - The award is in writing;
  - The time for appeal has expired;
  - The award has not been set aside; and
  - The grounds for setting aside an award are not present.
- The *New York Convention* is applicable in Canada by the *United Nations Foreign Arbitral Awards Convention Act*, http://canlii.ca/t/hxzb and in Ontario by the *ICAA* s. 11(1) and Model Law, Arts. 36-37.

Refusal of enforcement on public policy grounds

- In *Znamensky Selekcionno-Gibridny Center LLC v. Donaldson Intl Livestock Ltd., 2010 ONCA 303* http://canlii.ca/t/29gsx , the Court of Appeal refused to enforce an arbitral award issued by an arbitral court in Moscow, Russia (ICAC):
  - Donaldson sold $7m of pork to Z Co. in Russia. The agreement called for disputes to be resolved by arbitration at ICAC in Moscow.
  - Donaldson did not attend the hearing. Z Co. succeeded in the arbitration.
  - When Z Co. sought to enforce the award in Ontario, Donaldson claimed that before the hearing Moscow, one of the Z Co. owners issued a death threat against him which he took seriously. That is why he did not attend the hearing in Moscow.
- The ONCA held that the application judge wrongly refused to consider the death threats. ONCA refused to enforce the arbitral award on the basis that it was contrary to Ontario public policy to do so. The case was remitted to the judge to hear evidence about the death threats.
- This was the one of the first times an Ontario court refused enforcement of a foreign arbitration award on a public policy ground related to the conduct of the party seeking enforcement of the foreign arbitral award.

Table of References

- *Canadian Chamber of Commerce*, ICC Canada Arbitration http://goo.gl/MHCKR
- J. B. Casey, Arbitration Law of Canada: Practice and Procedure - 2nd Ed. http://goo.gl/2yrUQ
- I. Ellyn, QC, *Effective Advocacy in Commercial Arbitration,* October 2012 http://goo.gl/YD8eK
- I. Ellyn, E. Perez, *Litigating in the Enlightened Age of Mediation* October 2009 http://goo.gl/8l11K
- I. Ellyn, QC, *Tension Between Choice of Law and Mandatory Rules* March 2008, *http://goo.gl/qepBt*
- *IBA Rules on the Taking of Evidence in International Arbitration* http://goo.gl/ztZqI
- *International Chamber of Commerce Court of Arbitration http://goo.gl/gL8ty*
- *London Court of International Arbitration* http://www.lcia.org
- *NY Convention on the Recognition & Enforcement of Foreign Arbitral Awards http://goo.gl/Y5cgI*
- Q.L.S. On & E. L. P. Khoon, *Confidentiality in Arbitration: How Far Does It Extend?* http://goo.gl/OJjK2
- J. Richler, *Framework for Arbitration Advocacy, Adv. Soc. Mar. 27/2012 www.advocates.ca*
- *W. Slate II, Paying Attention to Culture in Int. Comm. Arb.* Disp. Res. J. 8/2004 http://goo.gl/G2O6Q
- *Toronto Commercial Arbitration Society* website http://goo.gl/lTtXM
- *UNCITRAL Conciliation Rules http://goo.gl/ZiD9j*
- *UNCITRAL Model Law on International Commercial Arbitration http://goo.gl/QJz8h*
- *UNCITRAL Model Law*, Sch. A to Ontario ICAA http://canlii.ca/t/5f0
- *UNCITRAL Arbitration Rules* http://goo.gl/7OLzu
- *UNCITRAL Notes on Organizing Arbitral Proceedings http://goo.gl/wKt75*

Table of Statutes and Cases

- *Arbitration Act, 1991, SO 1991, c 17 (Ontario)* http://canlii.ca/t/kpjm#sec51
- *Code of Civil Procedure, RSQ, c C-25, Book VII Arts. 940-952 (Arbitration)* http://canlii.ca/t/51xjt
- *Commercial Agents (Council Directive) Regulations 1993 No. 3053 (UK)* http://goo.gl/MNZOA
- *Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp) (Canada)* http://canlii.ca/t/lc7z
- *International Commercial Arbitration Act, RSO 1990, c I.9 (Ontario)* http://canlii.ca/t/5f0
- *United Nations Foreign Arbitral Awards Convention Act, RSC 1985, c 16 (2nd Supp),* http://canlii.ca/t/hxzb

- *Accentuate Ltd. v. Asigra Inc.* 2009 UK HC http://goo.gl/U6nEK
- *Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34* http://canlii.ca/t/1s2f2
- *Deluce Holdings Inc. v. Air Canada*, [1992] 12 OR (3d) 121 as ref'd to in *Bouchan v. Slipacoff*, 2009 CanLII 728, http://canlii.ca/t/224jn
- *Farah v. Sauvageau Holdings Inc.,* 2011 ONSC 1819, http://canlii.ca/t/fkp0k
- *GreCon Dimter Inc. v. J. R. Normand Inc.*, 2005 SCC 46 http://canlii.ca/t/1l6wn
- *Premium Nafta v. Fiji Shipping Co.* 2007 UK HL 40 http://goo.gl/LIlvf
- *Znamensky Selekcionno-Gibridny Center LLC v. Donaldson International Livestock Ltd.,* 2010 ONCA 303 http://canlii.ca/t/29gsx

Conclusion

- International entrepreneurs want predictable, fair processes to resolve disputes.
- Arbitration laws and procedures are designed to achieve these objectives.
- Armed with these points, you will be better equipped to challenge your lawyer to draft a better arbitration agreement.
- If you are involved in an arbitration, you will be able to ask your lawyer to devise a process to increase your prospects for a good result at the hearing or position you better for a good settlement.
- But these points are just the tip of the iceberg. Even if "knowledge is power," ---- as Alexander Pope famously said "a little knowledge is a dangerous thing."

Thank you for your attention. I will be pleased to answer your questions.

Igor Ellyn