The Efficient Arbitrator – In the Post-Pandemic Era

by Gary L. Benton*

Arbitration in the Post-Pandemic Era:

Much has been said of efficiency in arbitration, including the need to appropriately balance time and cost efficiency with a process ensuring a fair and just result. The COVID-19 pandemic has ushered in the adoption of new technologies in arbitration, along with new protocols and practices, that merit re-examination of efficiency in arbitration.

This article addresses what it takes to be an efficient arbitrator in the post-pandemic era.

Saying Farewell to Muscular Arbitration

In the 2010's, the phrase "muscular arbitration" was in vogue. Muscular arbitration reflected the thinking that the parties agreed to arbitration to have a more economical process than litigation, and arbitrators must therefore be disciplined managers of the process to achieve that result. Muscular arbitration called upon arbitrators to actively manage the case so that costs were limited and the proceeding was completed quickly.

The concept of muscular arbitration serves a good cause, and many of the practices associated with it are routinely applied today. However, muscular arbitration connotes a brute force approach that is not always desired by parties and doesn't necessarily reflect their original or current intentions. The fact is that not every arbitration agreement is made with quick, cheap decision-making as the principal goal.

While efficiency is often sought, parties may agree to arbitration for many other reasons, including preferences for having expert decision-making, avoiding unpredictable jury outcomes, providing increased privacy and confidentiality, fostering a cooperative process or simply designing a process that works best for the parties' needs. In the international arena, arbitration is often the preferred choice because it allows for fair decision-making in a neutral forum, limits the influence of local bias and corruption, and provides for international enforcement of awards.

Accordingly, while strong case management skills, decisiveness and efficiency still top the list of desired characteristics of an arbitrator, and for good reason, there has been a growing appreciation that more is needed, particularly a more flexible and intelligent approach to arbitration.

An arbitrator who issues the same detailed form Procedural Order in every arbitration may be a muscular arbitrator ^ ot necessarily serving the parties' needs. Likewise, an arbitrator who always restricts discovery, even when it is reasona ied for and desired by counsel, is not serving the parties.

Accordingly, while the goal for efficiency remains, good arbitrators take a more nuanced approach.

A Better Approach to Time and Cost Savings

All too often arbitrators review a case file and decide how a case should proceed before meeting the parties and learning what they hope to achieve from the process. A better approach to arbitration requires listening to the parties before acting.

Even more, to truly be efficient, an arbitrator should not presume economy is the parties' principal goal. A good arbitrator will consider why the parties chose arbitration and assess what they want from it now that they have it.

The best source for what the parties' desire may not be reflected in the arbitration agreement written years earlier by a transactional team focused on a business deal but, rather, the counsel the parties have recently engaged to handle the dispute. Of course, the terms of the arbitration agreement will always govern but a good arbitrator will honor the concept of party autonomy and respect counsel for the parties by looking to them to propose what would work best for their clients. The flexible nature of arbitration allows counsel to reach agreement on the process.

One of the greatest hesitations trial court litigators have with respect to arbitration is that there are few rules to guide them. For some, there is a certain comfort zone in knowing the federal or state rules of civil procedure apply in every court case. Arbitration offers many more choices. And the key role of a good arbitrator is not to impose rules on counsel, nor leave them to guess what process lies ahead, but, instead, to collaborate with counsel in setting a process that works best for them. A good arbitrator needs to know when to step in – and when to step back. The goal, at the start of the case, is working with counsel and putting into a place with them a procedural order that efficiently addresses the issues at hand but does so putting priority on the parties' expressed preferences.

In sum, a good arbitrator does not impose one way to do things. A good arbitrator is collaborative with counsel in serving the parties – and is decisive when counsel fail to agree.

The Pandemic's Sea Change

The Covid-19 pandemic has shaken the world, including the world of dispute resolution. At the start of the pandemic, trial court proceedings came to abrupt halt. The expectation was that delays would be short lived. At the time of this writing, in late 2021, Covid-19 is still with us, and it appears it will be in some form or another for a long time ahead. Much of the world is still struggling with the pandemic, and the threat of new variants requires ongoing attention by all.

Although US and international arbitration slowed at the start of the pandemic, it thrived once new techniques were adopted. Most notably, new videoconference technologies proved to provide many benefits. Videoconferencing of hearings saves considerable time and travel cost. It has allowed parties, counsel, witnesses and arbitrators to participate from the safety and comfort of their remote offices without the need to travel for a day or weeks at a time. Concerns over how best to handle exhibits and avoid witness coaching when testifying remotely have proven to be minor issues in the large majority of business cases.

While many counsel still prefer in-person argument and examination – and who doesn't enjoy getting together with our fellow human beings for civilized discourse – there is no doubt that videoconferencing will be an ongoing feature of many arbitrations. And not just for hearings; many have found that it is productive for counsel and arbitrators to see and not just hear each other in preliminary proceedings. No doubt as the pandemic phases out, we will see more hybrid proceedings where some participants attend together and others attend remotely. Leading arbitration providers in the US and internationally have developed guides and protocols to ensure remote hearings work seamlessly.

Zoom is here to stay. But whether it is to be used or not should not be a choice made at the whim of an arbitrator; it is a choice for the parties. In many cases, corporate counsel are now insisting on remote hearings. That is not to say in-person hearings will go away. There will be many instances where the the parties prefer an in-person hearing or where the hearing length, number of attendees, time-zones, security or other complexities may dictate an in-person hearing. But the idea that counsel and arbitrators will be getting an all-expense paid trip for every new arbitration is now history. Old (and young) arbitrators who refuse to adapt will eventually be phased out of the process.

The pandemic has brought more than videoconferencing technology to arbitration. A variety of new document mana technologies have come into focus, including cloud solutions for signing documents and managing hearing exhibits. Ste

step arbitration providers are implementing full online dispute resolution (ODR) systems that will eventually allow complete handling of major arbitrations online.

A Look at the Post-Pandemic Arbitrator

Given the decade long shift to a more nuanced approach to efficiency and the abrupt shift in the use of new technologies and practices as a result of the pandemic, what should we expect from the efficient arbitrator in the post-pandemic arbitrator? The following are some key expectations:

1. **Getting to Know Your Arbitrator**

Prior to the pandemic, most arbitrators were selected by referral or from a provider's list. Parties rarely took the opportunity to interview arbitrators except in very large cases. The rise of videoconference technology is changing that approach. Increasingly, parties and their counsel are interviewing potential arbitrators. While ethical rules preclude any specific discussion of the merits, a good arbitrator will not hesitate to agree an interview and respond to questions on training, experience, practice style and availability.

Interviews benefit both the parties and the arbitrator. For parties, an interview can help ensure the parties that they are selecting an arbitrator who is best suited for the case. For the arbitrator, an Interview allows the arbitrator to present more than a dry resume. In addition to focusing on credentials, the parties receive insight into the arbitrator's style and personality. Early contact allows everyone involved to begin processing how best to proceed with the case.

As well, as technology solutions take hold in the field, we can expect that parties will increasingly want direct contact with arbitrators on compensation arrangements as well, so that they may receive estimates or discuss fixed fee arrangements. These discussions can take place with the assistance of providers or by means of online solutions. The outcome for both sides will be fee arrangements that are more certain and appropriate for the case.

2. **Going Green – Farewell Needless Travel**

The rise of videoconferencing ends the need to travel for many hearings. As noted, there will be many circumstances where in-person hearings are appropriate. But the dynamic has now changed. Corporate counsel will be looking for efficiency from their outside counsel and arbitrators, and limiting travel is a reasonable way to find it.

For most cases, the presumption will be that the hearings will be conducted remotely. The technology is proven and case law is trending heavily in rejecting due process objections and upholding the power of arbitrators to require videoconference hearings, Although, a good arbitrator would never impose a videoconference hearing where the parties don't want it, there will be cases where the parties disagree and, there, a thoughtful case-specific analysis is required.

The greatest change will be for those arbitrators who are not prepared or willing to handle remote hearings. The arbitrator who insists on in-person hearings and all-expense paid travel risks being passed over. Arbitrators who lack the willingness or technical skill set to participate in remote hearings will undoubtedly lose out to arbitrators who know how to manage proceedings online and are willing to do so to meet party demands for efficiency.

The "Green" movement in arbitration calls for other climate and energy-saving innovations. Whether all of these innovations will be readily adopted remains to be seen. But there is no doubt cost-savings will be a priority.

3. **Say Goodbye to Paper Submissions**

The long-standing practice of arbitrators receiving boxes containing thousands of printed pages of briefs, reports, witness statements and exhibits is dying. For years, litigation and arbitration submissions were printed and served by hand. In recent years, many courts implemented electronic filing and service mechanisms. Arbitration providers were slow to follow t have finally caught up and taken more steps forward. Arbitration providers are now rapidly moving to implement ele filing systems and other new technologies.

But many arbitrators are not content receiving submissions by email (or other online systems) and continue to insist that they be provided hard copies of briefs and exhibits. At some point in the not too far future, parties and counsel are going to say no.

And for good reason – why should parties and counsel endure the burden and expense of printing and shipping hard copies to arbitrators? Some arbitrators will answer that hard copies are easier to read and manage and they prefer hard copies so they can make annotations. But that begs the question – technology has reached the stage that arbitrators have no justification to demand hard copies. (And if they want hard copies so badly, it only seems fair they should print the hard copies themselves).

With increased transparency on individual arbitrator practice and style, parties and counsel will avoid arbitrators who insist on this inefficiency.

4. **Pre-Hearing Procedures *for the Parties* – Discovery and Motion Practice**

Preliminary proceedings are being impacted by new mindsets and new technologies. We can expect less show of muscle and more show of intellect and practicality in preliminary hearings. Good arbitrators will be focused on the parties' needs – and engage in a dialogue with counsel rather than automatically rejecting requests for interim relief, discovery and dispositive motion practice. The goal will be to give focused consideration as to what is needed and appropriate, while still keeping economy a top priority.

Most of the expense in arbitration comes from counsel who want to litigate rather than arbitrate cases. If done right, most business arbitrations can be completed six months to a year after the arbitrator is appointed. That is a significant time and cost-saving improvement over the many years required to bring a court case to conclusion. If the parties select arbitration, they should give due consideration to efficiency, and keep these time considerations in mind. At the same time, a good arbitrator will be responsive to both sides' expectations, desires and needs, and will set a schedule to suit the case.

The good arbitrator will allow information exchange or discovery that is appropriate under the circumstances. In US arbitration, efficiency mandates that discovery should still be limited, ideally just to narrow document requests, and depositions and written discovery should be discouraged. But if it makes sense to have broader discovery, particularly when both sides call for it, economy should not be a ground to hold back. On the other hand, in arbitration under international arbitration rules, where, customarily, information exchange is strictly limited, US-style discovery should be allowed only when agreed to by both sides.

On a similar front, efficient arbitrators should be open to early dispute resolution. Parties and trial counsel in the US find considerable benefit in summary judgment practice and most arbitration providers have revised their rules over the years to allow early issue resolution or dispositive motion practice where it is likely to provide cost efficiencies in the case. Arbitration offers the opportunity for more accessible early dispute than in court as relief can be granted on disputed facts without a jury. Where dispositive motion practice is likely to save time and cost, including assisting the parties in reaching a settlement, there is no reason not to allow it.

Arbitrators who are stuck in their old ways have been protected by a lack of transparency in arbitration. That is changing. Those who insist on refusing to serve party's needs will inevitably be exposed as data on individual arbitrator practices becomes more readily available online.

5. **More Practical Hearings – Witness and Expert Testimony**

As more evidentiary hearings are conducted online, good arbitrators will encourage efficient online practices and procedures. The parties may choose to conduct hearings over an extended period of days or at particular hours of the day to accommodate the schedules of party executives or the needs of participants in other time zones.

In some cases, the parties may choose to save hearing time by submitting witness statements prior to the evidentiary hearing and limiting the hearing to cross-examination and re-direct. This saves costs and gives both sides a clear view of the opposing parties' evidence prior to the hearing allowing counsel to better prepare for the presentation of their case.

There are many views on expert witness testimony. Some counsel like expert conferencing ('hot-tubbing") to highlight expert's views against the opponent's views. Others have a concern about lack of process and control. Either way, examining

experts by videoconference can provide efficiencies, allowing experts to be remote and available when needed. As well, relying on expert reports in lieu of direct examination, or allowing for presentations by the experts, instead of a lengthy counsel-led examinations, may be good approaches in particular cases.

All in all, pandemic era arbitration allows for much of the fuss to be avoided. Often exhibits are provided in digital format in advance. Some providers are introducing cloud-based systems for exhibits and other submissions. Instead of focusing on authenticating exhibits and other court procedures at the hearing, remote arbitrations now allow arbitrators to zoom in and focus on witness testimony, counsel argument and the merits of cases.

There are legitimate concerns about confidentiality and cybersecurity in all arbitrations, and there is no doubt that cybercrime is on the rise. Arbitrations conducted online and with less paper flow offer the potential for increased privacy and confidentiality. As in any arbitration, privacy and confidentiality are the responsibilities of all participants, particularly arbitrators and counsel in ensuring that appropriate procedures, including additional protections required by the parties, are in place and being followed. All leading providers are working to provide online resources and services offering improved user experience and security. arbitrators require specialized training. Those who lack requisite technical skills and cybersecurity training will be phased out over time in favor of those who know how to manage online proceedings effectively and securely.

6. **Putting Settlement Opportunities into the Process**

Unlike many Asia-based models of dispute resolution, dispute resolution in the West draws a hard line between settlement and merits resolution. Litigation and arbitration are wholly separate from mediation and discussions of settlement. That separation remains but arbitration providers have begun actively encouraging parties to consider whether settlement makes sense for them. AAA-ICDR, for example, now includes mediation as an (optional) step in its domestic and international rules.

There is growing demand for Arb-Med and other hybrid procedures but even an arbitrator who solely wears an arbitrator hat, and will not discuss settlement communications between the parties, should provide parties the opportunities to explore settlement. Doing so may include raising the topic of mediation at the start of a case, early resolution of issues that may assist in settlement talks or setting scheduling to accommodate settlement discussions between the parties.

Whether the parties wish to pursue settlement is fully their decision. But online mediation has made opportunities for settlement easier and an efficient arbitrator will act to provide the parties opportunities to resolve the case by means other than arbitration if both sides wish to explore doing so.

7. **Demands for Reviews and Feedback**

One of the major changes that ADR providers will soon confront are the requirements of parties to see and learn from the experiences of other users. In the past, some arbitration providers sent surveys to parties at the close of a case, using the responses for their own purposes. Increasingly, parties want to see reviews of arbitration providers and arbitrators. This trend has already started to take hold in the international arbitration sector and, as more online solutions become available, more information on providers and individual arbitrators, including data analytical assessments of their performance, will be available online.

This will be a welcome change by many arbitrators who have welcomed constructive feedback from parties throughout a case but have been restricted by providers in requesting it at the conclusion of a case. As new online solutions become available, arbitrators will benefit from direct feedback from parties once a case is concluded, getting a better understanding of what they did right or wrong. This feedback is bound to improve the arbitration process. It will unmask underperforming arbitrators and highlight good arbitrators who work to serve the parties.

Conclusion – A Reasonable, Practical, Fair, Efficient and Effective Future

The pandemic has taught us to hunker down, be safe and practical. It has given us new tools and new ways of thinking, surviving and doing. In both US and international arbitration, that means increased reliance on technology and a more practical approach to getting the job done. But being a good arbitrator requires more. It requires having more than a focus on cost-savings. It requires listening to the parties, understanding the parties, and providing the parties a proce meets their needs, one that is reasonable, practical and fair.

While efficiency should always be a consideration, the post-pandemic arbitrator will be guided more by what is appropriate and effective. Parties do not arbitrate to get an arbitration award; they arbitrate to reach a resolution. The best resolution may be a settlement not a decision on the merits.

But where an arbitrator reaches a decision on the merits, parties expect a fair and just decision. That requires a fair process, proper legal analysis and sound reasoning. Whether an arbitrator can meet those requirements is often best assessed from interviewing arbitrators at the start of the process. As well, providers and arbitrators should welcome constructive feedback from the parties throughout the process and should act on it.

All in all, the pandemic has made arbitrators more focused and attentive to party requirements. The pandemic has changed nearly everything, and it promises a more effective future.

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*Gary L. Benton is a US and International Arbitrator. He is the founder and Chairman of the Silicon Valley Arbitration and Mediation Center (SVAMC), a non-profit educational foundation based in Palo Alto, California. The views expressed are solely those of the author. www.garybentonarbitration.com.