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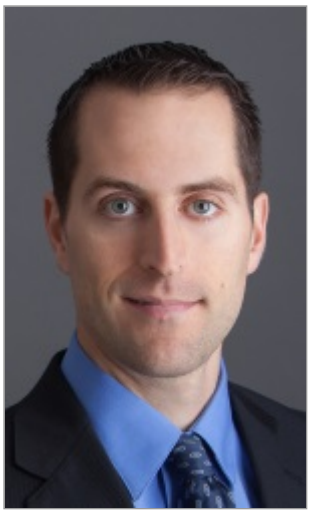
Arbitration

What virtual arbitrations can teach courts | Michael Lesage

By **Michael Lesage**



Michael Lesage

(June 1, 2020, 10:53 AM EDT) -- Recently I concluded a million-dollar-plus commercial arbitration over Zoom for a corporate client. The matter was heard over two days, involved five witnesses and several thousand pages of documents. To be fair, the hearing could have concluded half a day earlier, had the final witness then been available. Conversely, had the same proceedings taken place in court, the hearing itself would have been at minimum three times as long.

While the arbitration proceeding bore some resemblance to what would have transpired in court, all parts thereof were conducted in a much more efficient, streamlined manner. Each side remained entitled to "tell its side of the story" and was vigorously cross-examined thereon. However, formal proving of documents was essentially absent, as detailed below. Despite some modification to the traditional process, at the conclusion of the hearing, the arbitrator remained in a position to render a decision on the merits.

Further, while the parties were required to pay the arbitrator, they still likely realized substantial savings in time and money over having the matter determined in court. As such, arbitration is an increasingly attractive means of dispute resolution for those with the means to pay private arbitrators.

Perhaps the most significant procedural improvement related to the treatment of documents and the importance (or lack thereof) of the *Rules of Evidence*. Traditionally, (well prepared) counsel are required to spend significant prep time analyzing every document.

For those documents that counsel intend to rely upon, counsel must then categorize each one, generally in terms of an exception to the hearsay rule, and if not committed to memory, locate the "magic words" required to have each properly admitted into evidence. However, this ritualistic practice is time consuming, and in many cases, adds little of value.

Conversely, the arbitration protocol employed required the parties to assemble a joint book in PDF format, containing all documents either intended to rely upon, roughly one month in advance of hearing. Shortly thereafter, counsel were required to inform each other as to any specific documents to which they objected, either as to authenticity or admissibility.

Perhaps due to the admonitions of the arbitrator along the way, the professionalism of counsel, or a combination thereof, the end result was that challenges were raised to four documents, total. As a result, both prep time and time at hearing were substantially reduced.

The hearing itself was likewise streamlined. Brief openings were provided in writing and each party's case in chief came in via affidavit. As a result, the hearing was limited to the cross-examination of the witnesses, followed by redirect. Also, as the affidavits were provided in advance of the hearing, the potential for surprise (and resulting delays) was further minimized.

At the conclusion of the evidence, each side was permitted to give brief oral closings, followed by more detailed written submissions several days later. As the proceedings were recorded, it was

possible to provide exact witness quotes (along with the time stamp of each), without the need to incur additional transcript expense.

Likewise, the joint book allowed the parties to point the arbitrator to the key documents, which could be marshalled much faster from a PDF than flipping through paper books.

The fact that the arbitration took place at a time when trials are not going forward is itself telling. By adapting, both as to technology and procedure, our legal system has shown it can continue to play a relevant role in society. Whether this adaptation will be embraced by our courts (which have made great strides over the last two months) or law schools remains to be seen.

Michael Lesage is a trial lawyer and the founder of Michael's Law Firm*, a litigation boutique that specializes in complex cases involving professional negligence, business litigation, insurance coverage disputes and cases of serious injury. When not representing clients, he can often be found playing competitive sports. You can e-mail him at* michael@michaelsfirm.ca*.*

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