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# The End of Arbitration?
# Or a New Beginning?

Richard Susskind, in his latest book, "The End of Lawyers?", in speaking of the asymmetry between lawyers and clients said:

> **While the engagement of lawyers is not always a necessary evil or a distress purchase, it is fair to say that most clients would prefer to avoid or minimize legal expenses, whether for the resolution of disputes, assistance with transactions, or from some more general or particular advice.**
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> **. . .**
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> **Contrast this cost consciousness of clients with the very different cost consciousness of most lawyers when a client or potential client walks into their offices with new work. It is hard for lawyers in this situation to suppress the hope that the circumstances that have precipitated the visit are those that require extended and detailed attention by a serious team of legal advisers.**
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> (emphasis added)

Professor Susskind goes on to say:

> **On the strength of extended involvement with General Counsel and other in-house lawyers over the past twenty years or so, I have come to the view that the ideal law firm is one that not only exhibits and brings to bear technical excellence but is one that also strives to align its commercial interests with those of its clients. A firm that, in the spirit of the lawyer advising a friend or family, has a shared hope of keeping clients' legal difficulties and expenses to a minimum, is a legal business that could create enormous, even unprecedented, levels of confidence and would deserve the often misplaced honorific of 'trusted adviser'.**
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> (emphasis added)

The challenge in arbitration is to redirect the lawyers cognitive reasoning, with their competitive spirit in advising their clients towards resolving issues – a paradigm shift – a change from one way of thinking to another – to be a problem solver, not a problem maker.

This shift is driven in part by in-house lawyers who face increasing pressure to spend less on outside counsel, to reduce in size, and to deal with increased government regulations.

While there has been a significant decrease in disputes entering the public dispute resolution system (the courts), a growing number of stakeholders (users of arbitration) have become increasingly frustrated at its failure to live up to its proclaimed purpose.

Complaints of increased costs and lengthy delays, along with inordinately long hearings, once the exclusive criticism of litigation has now become the common place criticism of arbitration.

The 2010 International Arbitration Survey, sponsored by White & Case (formerly sponsored by PWC) found that:

> **Disclosure of documents, written submissions, constitution of the tribunal and hearings are the main stages of the arbitral process that contribute to delay.**
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> **According to respondents, parties contribute most to the length of proceedings, but it is the tribunal and the arbitration institution that should exert control over them to keep the arbitral process moving quickly.**

Recently two organizations have stepped up to the plate to provide guidance and give some meaning, in part, to Professor Susskind's phrase:

> **Clients want a fence at the top of the cliff not an ambulance at the bottom.**

In April of 2010, Debevoise & Plimpton LLP unilaterally declared and published their protocols to promote efficiency in International Arbitration. While framed in the context of International Arbitration, 23 of the 25 points apply to the domestic scene.

***Formation of the Tribunal:***

1. *Before appointing arbitrators, we will ask them to confirm their availability for hearings on an efficient and reasonably expeditious schedule.*

2. *We will ask arbitrators for a commitment that the award will be issued within three months of the merits hearing or post-hearing briefs, if any.*

3. *We will work with our opposing counsel to appoint a sole arbitrator for smaller disputes or where issues do not need the analysis of three arbitrators.*

***Establishing the Case and the Procedure:***

4. *We will encourage consolidation and joinder of parties and disputes to avoid multiple proceedings when possible.*

5. *When possible, we will include a detailed statement of claim with the request for arbitration, so that briefing can proceed promptly once the procedural calendar is established.*

6. *We will propose and encourage the arbitral tribunal to adopt procedures that are appropriate for the particular case and that are designed to lead to an efficient resolution. We will use our experience in crafting such procedures, and we will not simply adopt procedures that follow the format of prior cases.*

7. *We will request the arbitral tribunal to hold an early procedural conference, usually in-person, to establish procedures for the case. Although in-person meetings may cost more because of travel time and expense, they often ultimately save costs by allowing a more complete discussion of the procedural issues that may arise. We will seek to set the merits hearing date, as well as all other procedural deadlines, in this first procedural conference.*

8. *We will request our clients and opposing clients to attend any procedural meetings and hearings with the arbitral tribunal, so that they can have meaningful input on the procedures being adopted and consider what is best for the parties at that time.*

9. *When appropriate to the needs of the case, we will consider a fast track schedule with fixed deadlines.*

10. *We will explore whether bifurcation or a determination of preliminary issues may lead to a quicker and more efficient resolution.*

***Evidence:***

11. *We will limit and focus requests for the production of documents. We believe that the standards set forth in the IBA Rules of Evidence generally provide an appropriate balance of interests.*

12. *We will work with opposing counsel to determine the most cost-effective means of dealing with electronic documents.*

13. *We will, when possible, make filings electronically and encourage paperless arbitrations. When cost-effective, we will use hyperlinks between documentary exhibits and their references in memoranda.*

14. *We will use written witness statements as direct testimony to focus the evidence and hearings.*

15. *We will avoid having multiple witnesses testify about the same facts.*

16. *We will encourage meetings of experts, either before or after their reports are drafted, to identify points of agreement and to narrow points of disagreement before the hearing.*

17. *We will generally brief legal issues and consider presenting experts on issues of law only when the tribunal and counsel are not qualified to act under that law.*

18. *We will divide the presentation of exhibits between core exhibits and supplementary exhibits that provide necessary support for the claim or defense but are unlikely to be referenced at a hearing.*

***The Hearing:***

19. *We will consider the use of videoconferencing for testimony of witnesses who are located far from the hearing venue and whose testimony is expected to be less than two hours.*

20. *We will consider the use of a chess-clock process (fixed time limits) for hearings.*

21. *We will not automatically request post-hearing briefs, but we will consider in each case whether they would be helpful in promoting the efficient resolution of the issues. When post-hearing briefs are appropriate, we will ask the arbitral tribunal to identify the issues on which it may benefit from further exposition, and then seek to limit the briefing to such issues.*

22. *We will also consider alternative briefing formats, such as the use of detailed outlines rather than narrative briefs, to focus the issues and to make the briefs more useful to the tribunal.*

***Settlement Consideration:***

23. *We will investigate routes to settlement, including by suggesting mediation, when appropriate, either at the outset of the case or after an exchange of submissions has further clarified the issues.*

24. *Where applicable rules or law permit, we will consider making a "without prejudice except as to costs" settlement offer at an early stage. This will not only protect our client's costs position, but it may lead the opposing party to consider potential outcomes more seriously.*

25. *When appropriate, we will ask arbitrators to provide preliminary views that could facilitate settlement.*

This law firm deserves recognition from the stakeholders (in-house counsel, outside counsel, arbitrator or tribunal, and arbitration institutions) in dealing with speed, efficiency, economy, proportionality and the use of mediation towards resolving their clients' disputes – the shift from litigator (the one arrow in the quiver) to problem solver (all of the arrows in the quiver).

At the same time the College of Commercial Arbitrators, established in 2001, published its lengthy paper (over 80 pages) titled, "Protocols for Expeditious, Cost Effective Commercial

Arbitration". This companion document, although lengthy, sets out in clear and concise language the overriding principles common to all of the protocols namely:

- Be deliberate and proactive
- Control discovery
- Control motion practice
- Control the schedule
- Use the Protocols as tools, not a straitjacket
- Remember that arbitration is a consensual process

These protocols outline the failures of each stakeholder, coupled with a remedy; with emphasis placed on corporate in-house counsel who are best equipped to assess the clients' goals and provide an appropriate resolution.

One cannot synthesize this lengthy paper. One can only recommend to those who practice arbitration that this seminal paper is required reading.

Contrast the legal culture also attributed to litigation and presently attributed to arbitration as described by Professor MacFarlane in her book, "The New Lawyer" to the comments made by my colleague Peter Behie Q.C.:

> **I mean, we're trained as pit bulls, I'm not kidding you, I mean we're trained pit bulls and pit bulls just don't naturally sit down and have a chat with a fellow pit bull, the instinct is to fight and you just get it from the first phone call. I'm bigger and tougher and strong and better than you are.**

Peter delivered a paper on dispute resolution at a dispute resolution course in Vancouver in 2006. He said:

> **It is hardly controversial to suggest that you and your client should know where a file is headed. As the inimitable Yogi Berra said, "If you don't know where you're going, you'll end up somewhere else." The development of a road map will fulfill this role. More importantly, the early development of a game plan or roadmap is essential if you are to solve your clients' problems in the most efficient way and in a manner that puts the client in the driver's seat**
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> **. . .**

> **I spent the first many years of my practice transforming my clients' problems and concerns into legal issues and the advancing those legal issues through the litigation process.**
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> **. . .**
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> **I formed litigation strategies sometimes only vaguely related to clients' problems and, I am embarrassed to admit, without keen awareness of the costs (both soft and hard) of delivering these legal outcomes.**
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> **. . .**
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> **I began to realize that this approach was impoverished. It often did not deliver results that clients expected or wanted, or did so at a price that was unacceptably high.**
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> **. . .**
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> **Often disputes were not being resolved, not because the parties were not willing to resolve them, but rather because counsel, caught in the system, resisted resolution.**

Permit me one last quote on the implementation of a change in culture whether it be litigation or arbitration. I can do no better than to quote Sir Anthony Clarke, Master of the Rolls in his address on December 2, 2008 to the British Academy in a paper titled, *"The Woolf Reforms: A Singular Event of an Ongoing Process?":*

> 29. **Changing the rules is one thing; changing how the rules are interpreted and applied is another thing entirely. The most perfect system implemented imperfectly is an imperfect system.**

Cobbled together by Kenneth Glasner, QC
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*Epilogue*

*As corporate counsel (in-house counsel) are a driving force for change, it would be interesting to know their thoughts (and perhaps and their position) in moving arbitration in the direction suggested by the protocols.*