THINKING OUTSIDE THE BOX: IDEAS TO MAKE ARBITRATION FASTER

A. THINGS THE ARBITRATOR CAN DO

1. *Preparation for and Follow-up to Mediation*

a. Mediation Briefs – consider asking for/requiring mediation briefs, outlining the parties' positions and facts, including relevant documents.
b. After mediation – identify, with counsel, what's really in dispute, seeking to stipulate the relevant facts that are not in dispute and identify exactly what remains factually in dispute and what evidence is necessary to address it, and ways to present the evidence efficiently.

2. *Pre-booking dates*

Encourage pre-booked dates with parties so that the issues coming before the arbitrator are relatively recent in origin and that suitable early resolution can be addressed.

3. *Case- Management*

Seek to engage in robust case management at the outset: convey the expectation that the hearing will be conducted efficiently and seek cooperation from counsel to ensure the same by:

a. Minimizing procedural wrangling
b. Preventing last minute disclosure
c. Limited and expediting expert evidence
d. Consider the feasibility and cost/benefits of limiting witness testimony to factual issues that are both central to the case and in dispute, epically in cases that require multi-day hearings;
e. Agreeing on a schedule for the case that includes deadlines for disclosure, witnesses timing, written submissions, if any.

4. *Active adjudication*

Explore whether the parties would be open to questioning of witnesses by the arbitrator.

5. *Early Evalution*

Is there a role for an arbitrator/mediator to conduct an early evaluation of the matter, on a without prejudice basis? Maybe more than one evaluation on a day.

6. *Decisions*

Explore whether bottom line decisions would be appropriate to the parties' needs.
Get decisions done timely.

B. THINGS COUNSEL/ADVOCATE/PARTIES CAN DO

1. Scheduling

Pre-book hearing dates – make a realistic evaluation of how many days are spent in arbitration each year – take a conservative percentage of those days and reserve them in the year ahead for use of new matters. This will enable the parties to begin to deal with current issues close to when they arise, opening the possibility of more efficient and more effective resolution of disputes.

2. Try new arbitrators

Is it really necessary to wait six to twelve months + for a particular arbitrator in most cases?

3. Preparation

Early evaluation of the grievance (this may be a role for a union representative, labour relations specialist or junior lawyer) –and discuss the case with opposing counsel.

Consider proportionality - for a $5,000 claim is it worth launching and pursuing a process that will cost 10 times that amount?

4. Rethink Preliminary Motions

What is the cost/benefit/delay factor?

5. Utilize Pre-Hearing Conferences with the Arbitrator

When: Either a month or two before the hearing or prior to scheduling the hearing date(s).
What: Discuss the nature of the case, the number of witnesses and hearing dates required, the use of will-say statements or agreed facts/stipulations; identify preliminary issues, including production of documents, particulars and any special issues – physician testimony, medical records, etc.

6. Cooperation during litigation

Work with opposing counsel throughout the hearing process: a joint book of documents, stipulated exhibits, witness sequencing, video or web testimony, affidavits, will-says, limiting expert evidence.

C. ADDRESSING SYSTEMTIC PROBLEMS

1. *Re-evaluate and Revamp the Grievance Procedure*

Rather than just accept the status quo, make the grievance procedure work for the parties. Ensure it is actually functioning and able to resolve disputes at the ground or company level. Tailor it so it works for the parties.

Consider including a mediation level – so a number of outstanding grievances may be mediated on the same day. A mediation brief/summary may be particularly useful.

2. *Identify Backlogs*

Identify clients/organizations with backlogs of grievances and/or slow flow-through to arbitration and take a targeted approach:

- Identify bottlenecks – *e.g.*, is it in the grievance procedure or in scheduling the first hearing dates?
- Consider the feasibility and cost/benefit of a temporary increase in resources to clear any backlog.
- Use expedited procedures where appropriate and pre-booked dates to clear it and/or increase the rate of flow through – get agreement to group similar issues together in one day (mass mediation) and set a sufficient amount of days to eliminate the backlog, agree to bottom line decisions where possible, consider proportionality.
- Establish expectations going forward that cases will e scheduled for hearing within a set time (*e,g*. no more than six months) and establish systems that incentivize and ensure the availability of party representatives within that time.

D. WHAT THE ARBITRATION COMMUNITY CAN DO.

1. Foster the development of new arbitrators – mentorship and salons.

2. Encourage pre-hearing discussions and collaboration to expedite hearings - training of advocates and arbitrators about the different ways to move the case along.

3. Encourage “out of the box” thinking, for example:
- Can technology be used to make proceedings more efficient?
- Can non-monetary and policy solutions resolve the issue?
- Can facilitated discussions or restorative methods be efficiently employed?
- Sharing experiences with good expedited scheduling and hearing practices.
- Supporting research into where the challenges lie and what works to fix them.