What are key factors when considering moving all or part of a dispute from court to arbitration?

Moving all or a part of the dispute process to a private Arbitration is a very significant change with potentially significant consequences; as such, this decision should not be made lightly.

Some reasons to consider such a change include (i) timing – is the process taking too long and there is a desire to "get this done"? (ii) the adjudicator – is there concern that the matter is very complicated and only an adjudicator with specific industry or issue experience and expertise is appropriate? (iii) confidentiality – are there trade secrets, profit details, customer information or other confidential items that neither party wants to be made public? (iv) time zones - are the various parties, experts and other witnesses outside of the local area? There are also many other reasons unique to each case.

Being a non-lawyer, I consider Arbitration a special opportunity to have your case heard by a subject matter expert – someone who will understand the financial ins and outs, the jargon and who will be able to identify and take into account the strengths and weaknesses in each party's economic damages claims and counterclaims.

Reflecting on your own experiences over the years, what advice would you offer to today's arbitration counsel?

First step is to make sure the Arbitration agreement reflects what the parties have agreed to (timing, process, reporting, experts, etc.) as well as knowing that funding has been arranged.

Knowing your client and opposing party positions, understanding expert reports, asking trusted colleagues for advice, asking questions, lots of questions.....know your case well.

Having acted as an expert witness in Court proceedings and Arbitrations for over 30 years, I have seen a lot of different approaches taken by Counsels – my advice – you can never be over prepared!

What are important considerations for counsel arbitrating disputes in the commercial real estate industry?

Litigation in the real estate industry is based heavily on the value of the underlying real estate at issue. However, the reason for the dispute can have many facets for Counsel to consider.

The involvement of a real estate appraiser(s) will be crucial, and there are often large gaps between the market values estimated in these expert reports. Taxes can have a significant effect on value and structure.

Key considerations for Counsel to take into account include (i) market values change over time, they can go up or down; (ii) changes in the status of the real estate can cause large changes in value (zoning, development plans, property assemblies, etc.) (iii) properties are often held for long periods of time so gains can be great, along with significant latent taxes; (iv) documentation of ownership entitlements and obligations for properties owned by more than one party can affect value (such as joint venture agreements, shareholder agreements, etc.); and, (v) ownership structure matters as real estate can be held personally, through a joint venture, corporation or partnership – general and limited, or in one or more Trusts. In addition to the underlying real estate value, indebtedness also needs to be taken into account in determining the equity value in dispute.

It is also very important that Counsel consider retaining a Chartered Business Valuator (CBV) and possibly a tax expert to ensure values are determined properly, and tax advantageous reorganizations are considered. As real property has often been owned for a number of generations, differing personalities and motivations of the parties need to be understood – besides hard asset values, emotions can run very high.

Given the emphasis on value in these type of cases, a business valuator with experience in these types of situations makes for a good mediator or arbitrator, either solo or as a panel member.

Q&A SERIES

Farley J. Cohen

Arbitrator/Mediator

Farley Cohen, MBA, FCPA, FCA, CIRP, FCBV, ASA, CFF, FCIArb, is a founding Principal of Cohen Hamilton Steger & Co. Inc. where he specializes in business valuations, quantification of economic damages and forensic accounting. He is a Member Arbitrator/Mediator and acts in commercial litigation cases involving shareholder transactions and disputes, matrimonial disputes, IP infringement disputes as well as breach of contract disputes.

ARBITRATION PLACE
An all-encompassing approach