ADR Institute of Canada Inc.

ADR Perspectives
Perspectives PRD

September 2015 / *septembre 2015*

ADR – One Size Does Not Fit All

Gavin Giles, Q.C.

The insertion of a standard arbitration clause into any form of commercial agreement is very easy. It has thus become standard practice. So standard, in fact, that arbitration clauses are being inserted into commercial agreements without sufficient thought as to what they might mean in practical terms to the parties affected by them. This article explores the potential hurdles resulting from the careless use of arbitration clauses and offers some suggestions on how they can be better structured to ensure the most efficient dispute resolution process.

In the world where the prevailing mantra is often "be careful what you wish for", considerable attention must be paid to the mechanics of any ADR process when it is being proposed (or adopted) as part of any agreement. Far too often, simple, ill-defined and open-ended ADR provisions are inserted into agreements like so much "boilerplate". These provisions are often requested by clients seeking to avoid the spectre of more standard litigation but who lack sufficient practical experience with ADR to know exactly how it might, or more particularly, how it might not, work. Sometimes, these provisions are recommended by commercial solicitors operating under the same general impediment.

It is no doubt a fair observation that most proponents of a dispute resolution process restricted to ADR see such an approach as timely, compressed and cost effective. But with most provincial *Arbitration Acts* and *Commercial Arbitration Acts* being long on concepts and discretions but short on procedural rules and restrictions, even the best-intentioned ADR process can plunge the participants into a morass of lengthy and complex productions, preliminary motions, seemingly never-ending examinations for discovery and lengthy hearings before generally highly-paid arbitrators or panels of arbitrators. In my view, there is no practical benefit to such a simple approach to the adoption of the ADR model. Instead, I view all approaches to ADR as requiring comprehensive attention to applicable procedures at the time the related provisions are being adopted.[i]

In a matter in which I was recently involved as counsel, the ADR clause was limited to the following:

If any dispute or controversy shall occur amongst the Owners relating to the interpretation or implementation of any of the provisions of this Agreement, such disputes shall be resolved by mediation or other form of dispute resolution as may be agreed upon by the Owners, failing which such dispute shall be resolved by arbitration conducted by a single arbitrator. The arbitrator shall be appointed by agreement amongst the Owners or, in default of agreement, such arbitrator shall be appointed by [the Court] upon the application of any of the Owners. The arbitration shall proceed in accordance with the provisions of the *Commercial Arbitration Act* (…). ... . Each Owner shall bear its own expenses incurred in the arbitration proceedings.

Perhaps without realizing it, the solicitors who adopted that ADR provision left their respective clients open to at least three problems: arguably both mediation and, if unsuccessful, arbitration were required; there were no procedural rules agreed upon in advance to limit the scope of the arbitration; and, again arguably, any jurisdiction which the arbitrator might have had to order costs appeared from the agreement to have been eliminated. The result was a sometimes mind-numbing process which accentuated delay and mounting expense and which in the end produced legal services and arbitral expense accounts well beyond the sums which were truly in issue.

Given the pervasive extent to which similar ADR clauses are used, the thesis of this article is to serve as a warning that a better approach, and one which would likely be far more conducive to the simplified resolution of future commercial and contractual disputes, would be to consider in advance how such issues might be framed, how they could be practically pre-defined from an arbitral perspective, how issues of production and pre-hearing discovery could be limited, and how hearings could be constrained and streamlined so as to prevent the both increased delay and rising expense.

The ADR Institute of Canada Arbitration Rules, effective December 2014, provide a comprehensive framework for domestic arbitrations. They have as their stated purpose to enable parties involved in a dispute to reach a just, speedy, and cost-effective determination, taking into account the values that distinguish arbitration from litigation. The parties may amend the rules to suit their particular dispute.

Admittedly, there are agreements the natures of which are so complex and the sums they govern so significant that they may not lend themselves to any restrictive provisions. That said, commercial agreements are, for the most part, relatively simple and straightforward, involve few parties, involve limited issues and fodder for dispute, and should therefore be considered carefully by the prudent solicitor prior to the adoption for them of any open-ended boilerplate ADR clause.

Gavin Giles is a senior litigation partner at the Halifax office of McInnes Cooper, one of the Atlantic region's largest firms. He practices primarily in the resolution of construction, products liability, commercial and complex insurance disputes. In addition to serving as mediator and arbitrator, he is the Chief Adjudicator of the Small Claims Court of Nova Scotia; from which position, he has rendered more than 3,300 written decisions.

http://www.mcinnescooper.com/people/gavin-giles/

[i] See for example: "*We Agreed to What?! How the Selection of an Arbitration Clause Can Impact a Client's Legal Rights*" - Business Law News, Issue 1, 2007, The State Bar of California