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December 2015 / *décembre 2015*

Building Better Arbitrations:
Proactive Considerations to Achieve Business Objectives

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Arbitration can provide a better process than a traditional court process but it can equally be more frustrating, costly and unsatisfactory as a means of resolving disputes. To take advantage of the benefits an arbitration process offers, careful consideration should be given to the nature of the agreement and likely sources of disputes in order to tailor the arbitration process to the specific needs of the parties. This article will discuss just a few of the issues to consider when drafting the principal agreement, the arbitration agreement and the selection of panel members.

When I first started practicing law, arbitrations were rapidly being adopted as the primary means of dispute resolution. The exuberance was understandable; arbitrations promised a quicker, less costly, confidential, and more flexible process. In some ways, the arbitration process has delivered on its expectations and, in other ways, it has been fraught with challenges, causing some to revert back to a traditional court process.

In the interests of full disclosure, I do not believe arbitrations are always better. In many ways arbitrations can provide a better dispute resolution process than a traditional court process. However, this is only the case if the parties do not simply rely on boilerplate arbitration provisions. The arbitration process provides incredible flexibility but arbitration provisions do not tend to receive the same level of scrutiny from solicitors, or litigators, which can create an opportunity for astute counsel to tailor the provisions to better protect their clients.

Enforcement

An important advantage of arbitrations over the court process for international disputes is the ability to enforce decisions in a broader array of jurisdictions. Most countries in the world have ratified the New York Convention, which provides a general obligation for members to recognize and enforce foreign arbitral awards with limited scope for variance. There is no equivalent international treaty for court judgments and the parties must look to other enforcement mechanisms. Even if your home jurisdiction has not ratified the New York Convention, the flexibility of arbitration provisions allows parties to select an appropriate forum.

Discovery process

An often cited benefit of arbitration is the lack of complicated rules of evidence and a simplified procedure. This, however, is a double edged sword. Certainly it can limit the use of the discovery process as a mechanism to introduce delay and game playing. However, if there is a potential for asymmetry of information between the parties, it would be prudent to manage this risk. This can be managed in the original agreement between the parties by including: i) a more robust discovery process in the arbitration provisions; or ii) a broad access to information clause and extensive audit rights. Alternatively, a more appropriate discovery process could be adopted when drafting the arbitration agreement at the time a dispute arises.

Panel members

The choice of a panel member(s) is a very important consideration. There are an abundance of former judges and senior litigators who act as arbitrators, which in many cases are logical choices based on their experience with litigation and the legal process. Some challenges that exist with this category of panel member are they are often in high demand; their rates can be on the higher end of the spectrum; and they may not have relevant industry expertise. Judges and litigators bring an understanding of the trial process, evidence and credibility assessment, but it may also be appropriate to consider specialized knowledge that a solicitor, engineer, accountant, banker, and others would also provide in rounding out the panel's skill set.

A criticism to be cognizant of in appointing a panel member with specialized knowledge is that it may supplant the evidence of the parties with the knowledge of that member and therefore unfairly prejudice the parties. However, we must be mindful that panel members are often attempting to understand and determine complex issues during a relatively short proceeding that ordinarily would involve numerous years of education and training in the field to fully understand. This is further complicated by competing, and often conflicting, expert testimony. In my experience, having a fellow panel member with industry knowledge has proved beneficial by allowing the panel to ask the parties more detailed questions to better understand the nuances of the arguments.

Costs

Arbitrations are often held out as a more cost effective process; however, that is not always the case. Consideration needs to be given to the cost and efficiency of the hearing, frequency of disputes, possible appeals, and the final decision. I have experienced arbitration proceedings that are less costly but have equally seen several where the costs to conduct the hearing are significantly higher than a court hearing likely would have been.

Further, arbitrations are generally confidential in nature, subject to a few exceptions (*e.g.*, public company disclosure or enforcement requirements). That can encourage a party to be belligerent and arbitrate every possible issue, regardless of merit. This belligerent behaviour can further be encouraged if there is a perceived tendency of arbitration panels to issue awards approximating the midpoint of the parties' positions. The publicity of a trial, however, can act as a deterrent to such behaviour.

Moreover, in general, arbitration proceedings do not have a system of binding precedents or detailed rules regarding the ability to join issues or parties. This fact can lead to conflicting awards and duplication of proceedings. Furthermore, procedural challenges (*e.g.*, asymmetry of information) can result in unfavourable decisions, which are much more costly than the potential savings of arbitration.

Notwithstanding these challenges, the arbitration process is flexible and a carefully drafted arbitration provision or agreement can reduce some of the potential risks. For example drafting considerations may include: i) establishing a small pool of potential panel members so they can become aware of reoccurring belligerent behaviour; ii) allowing the consolidation of similar issues across several agreements (e.g. standard form agreements); iii) providing a more robust discovery process in the event of asymmetry of information; or iv) providing different procedures depending on the amount of the claim (e.g. 1 panel member if the claim is under $XXX).

This article has addressed only a few issues that can arise with respect to arbitrations. It is advantageous to obtain advice from an arbitration expert at the drafting and dispute stages to ensure business objectives are protected in the event a dispute arises.

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