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Perspectives on alternative dispute resolution for ADR parties and their lawyers.

Perspectives sur la résolution des différends pour les parties et leurs avocats.

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When the Honeymoon is Over

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Someone brought to arbitration for breach of contract may try to defeat the arbitration by driving up costs and causing delay through court applications and appeals. These tactics can often be avoided through careful drafting of the arbitration clause in the contract.

Lawyers drafting arbitration clauses in contracts often assume that if a dispute arises both parties will voluntarily comply with the arbitration clause. When both parties are working cooperatively to make the deal happen neither may want to plan for a breach. The arbitration clause is usually drafted on the "honeymoon" assumption that both parties will proceed to arbitration as intended by the agreement. This assumption may be a costly mistake.

What if, due to a change in circumstances, one of the parties no longer values the business relationship? If that party breaches the contract, thereby creating a dispute, how likely is it that it will abide by the dispute resolution part of the contract? Then, the honeymoon over. And so is the marriage.

A respondent that recognizes that it will probably lose the arbitration may well try to avoid or delay it by going to court. Although judges ultimately uphold arbitration clauses in most cases, a party that wants to proceed with arbitration, faced with a determined opponent in court, may just give up.

Let us consider some drafting techniques that could help to avoid protracted judicial proceedings about the arbitration process.

1. Unless both sides of a dispute are willing to go to arbitration at the time the dispute arises, getting to a final award can take long enough and cost enough to cause a party to give up, and absorb the business loss itself. Consider whether you want an arbitration clause at all.

2. The common multi-tiered dispute resolution provision (executives, mediation, arbitration) is less likely to work if one of the parties no longer wants to preserve the business relationship. It may not be the contract that determines whether ADR will be successful, but the attitudes of the parties at the time of the dispute. Consider whether an arbitration provision alone might be better than the multi-tiered approach.

3. Arbitrators have the power to award urgent interim relief, such as an injunction. But what if an arbitrator has not yet been appointed when an injunction is needed? ADRIC has addressed this problem in its Rule 3.7. However, this access to quick interim relief will only be available if the arbitration clause explicitly provides for it or provides that the Rules apply to any dispute.

4. Disputes about the selection of arbitrators are common. One way to avoid them is to designate an institution to make the appointment. Another is naming a particular arbitrator in the arbitration clause. But, by the time of the arbitration the named arbitrator may no longer be available. Naming a second person as an alternative is prudent.

5. Specifying the ADRIC Arbitration Rules in the arbitration clause provides certainty and reduces the scope for disputes about rules.

6. Specifying the seat of the arbitration is necessary because the selection of the seat determines the law governing the arbitration procedure and the rights in the enforcement of the arbitration award.

7. A final offer process requires the arbitrator to choose between one of the parties' final offers, without making any changes to it. To make the process even quicker and less costly, the arbitration clause may make it unnecessary for the arbitrator to provide reasons for the award.

8. Consider requiring a hearing entirely in writing, via a clause saying "There shall be no oral hearing in an arbitration under this contract." Most commercial disputes involve the interpretation or the implementation of a contract. In such cases the credibility of witnesses is rarely a central issue, so cross-examination is often unnecessary.

9. If the parties want the arbitration to be resolved quickly and inexpensively, they should consider the expedited arbitrations available through ADRIC's simplified procedure in its Rule 6.2. A fairly simple contractual provision requiring the use of this rule can make an expedited arbitration mandatory.

Conclusion

The benefits of arbitration may not be realized if the responding party is determined to drive up cost and increase delay. The time the parties are entering into a contract is the best time to consider what may happen if one of the parties finds that it would be better off by breaching the contract.

To increase the likelihood of obtaining the benefits of arbitration, the lawyers drafting the arbitration clause should consider both the best case scenario and the worst case scenario. The simplified procedure will be the quickest, and gives rise to fewer opportunities for obstruction and delay.

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