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Top Five Tips for Drafting Arbitration Agreements

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A badly drafted arbitration clause can cause confusion, delay and costly court applications. A well drafted one can avoid these issues and result in the process that you hoped to achieve by agreeing to arbitrate. This article discusses the top five areas where good drafting can be of most benefit and how to avoid common drafting missteps.

Entire courses are taught on this topic, but nothing proves the effectiveness (or ineffectiveness) of arbitration clauses like years of experience in applying them in a broad range of situations. Over the years of my practice, my views on some of the traditional strategies used in drafting these clauses have changed 180 degrees. Based on that experience, my top five tips for getting the most out of your arbitration clause are discussed below.

1. Set out clearly how one commences the arbitration.

In most jurisdictions, limitation periods apply to arbitrations the same way they apply to litigation. If your agreement is not clear on how an arbitration is started, you may miss a limitation period without even realizing it. Further, even if you do properly commence the arbitration within the limitation period, you may experience significant delay, cost and uncertainty while that issue is fought. These issues can be easily avoided by clearly stating in your arbitration agreement that either party may commence an arbitration by serving upon the other a Notice of Arbitration.

2. Do not set an arbitrary timeline that is unlikely to be met.

Many older arbitration agreements set out very unrealistic timelines, such as giving 90 days to complete the arbitration from the time it is commenced. Some modern agreements still contain them on the belief that they allow a party to "hold the other parties feet to the fire" and obtain a quick resolution. In practice, such quick timelines are almost invariably ignored as unachievable. Further, as an arbitrator only has the jurisdiction given by the parties, not meeting the timeframe may result in a loss of jurisdiction. The arbitrator will usually ask for an extension of time, which is often agreed by the parties, but a party is not obligated to grant such an extension. Some Arbitration Acts contain saving provisions in such circumstances (see for example section 39 of the *Alberta Arbitration Act*), however having to resort to the courts to save your process is costly and time consuming.

A better practice is to give the arbitrator the power to set a reasonable time frame for the process and then pick an arbitrator with the experience and knowledge to define and enforce appropriate deadlines.

3. Limit detailed procedures in the arbitration agreement.

Closely tied to the last point and picking up from there, it is impossible to imagine when you are drafting your commercial agreement what types of disputes may arise and what the tenor of those disputes will be. As such, rather than trying to draft a procedure to cover what might be imagined, a better practice is to adopt a set of rules for general procedure (such as the ADRIC Arbitration Rules: http://adric.ca/wp-content/uploads/2015/11/ADRIC_Arbitration_Rules_Booklet.pdf) and then give the arbitrator the jurisdiction to determine the appropriate process and timeline for your specific dispute. Avoid at all costs the old practice of adopting the Rules of Court of any jurisdiction. That will tie the hands of the parties and the arbitrators to a court process which is presumably exactly what you are trying to avoid by arbitrating.

4. Clearly identify the seat of the arbitration.

There may be several different references to jurisdictions in your agreement and this can be confusing. There is usually a reference to the law to be applied in interpreting and applying the agreement. That however may be different than the "seat" of the arbitration. The seat in turn may be different than the actual place of arbitration (i.e., where the physical hearing may be held). Clearly setting out the seat of the arbitration, as distinct from the other two, is important as the seat determines the procedural law applicable and the court that you will go to in the event that court assistance is required at any point in the process. You will always want to ensure that you have access to a court that understands arbitration and is supportive of its role in dispute resolution.

5. Avoid detailed qualifications for arbitrators but do clearly address how they will be appointed.

Finally, while one of the major advantages of arbitration is being able to pick your decision maker, the temptation to set out detailed subject qualifications should be avoided. Arbitrations have been delayed for months when it proved impossible to find an individual who met detailed qualifications required by an arbitration agreement. Also, caution should be exercised when appointing subject matter experts with limited litigation or arbitration experience or training. One of the very few bases upon which an arbitration award can be set aside by a court is on procedural unfairness. It is therefore risky to have an arbitrator who may not appreciate the content and importance of the rules of process that are familiar to those with a litigation or arbitration background.

Your agreement should also deal with how arbitrators will be appointed, particularly where the parties either cannot agree or refuse to participate as required. While it is common to have the default be an appointment by a local court, in some jurisdictions there can be months of delay trying to get such an application heard. Referral to an institution such as ADRIC is usually much faster and such institutes keep lists of qualified arbitrators, which the courts will not have access to.

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