ALTERNATIVE DISPUTE RESOLUTION

How to draft effective arbitration clauses

William Horton explains how a carefully drafted clause can help avoid the arbitration process from being undermined.

By William Horton

"We agreed to a simple arbitration clause, but we have spent over a year in court trying to enforce it. How did that happen?"

While there are an infinite number of ways for any human endeavour (including arbitration) to go awry, the most common problem in arbitration is that the arbitration is based on a flawed arbitration clause.

Here are some suggestions for avoiding the most common design flaws in arbitration clauses:

Make it clear that *all* disputes arising out of or relating in any way to the agreement or business relationship must be decided by binding arbitration. While the parties may be tempted to make only certain types of disputes subject to arbitration, they must realize that they run the risk of spawning litigation about where the boundaries exist between disputes which can be arbitrated and those which cannot.

Although multi-step disputes resolution clauses (which require the parties to try mediation or "good faith" negotiations before arbitrating) serve very useful purposes, you should be aware of the risk that they might be used to improperly delay an arbitration. If the parties do want to require a multi-step process it should be made clear that any dispute regarding the non-fulfillment of a precondition to arbitration will not prevent the arbitration from proceeding but that the tribunal has the power to adjourn the arbitration to allow the condition to be satisfied.

Be sure to provide a mechanism whereby an arbitrator or tribunal can be appointed without the participation of an uncooperative party or the intervention of the court. Where arbitration clauses have failed to provide such a mechanism, it is not unheard of for the court process for the appointment of an arbitrator to take many months.

Provide a mechanism, other then an application to the court, by which a challenge to an arbitrator (based on conflict of interest etc.) can be determined. Again, a contested court challenge to an arbitrator may delay the arbitration for many months and add significant costs to the overall dispute resolution process.

The best way to deal with the last two points is to name an arbitral institution to administer an arbitration. Naming a recognized arbitral institution is a highly recommended way of addressing the appointment and challenge issues mentioned above. However, it is important to ensure that the arbitration institution has these capabilities under its own rules if these functions are desired. Arbitral institutions charge a wide range of fees for these services, so make sure the fees will be acceptable to your client. And, needless to say, the institution should be properly named. There is no "Canadian Arbitration Association"!

Name the place and language of the arbitration where there is any doubt about these matters. This is particularly important in international agreements.

Do not specify completely unrealistic deadlines for the completion of an arbitration. If you do specify deadlines, provide for reasonable extensions if they are required by the exigencies of the case. This is a particular problem where arbitration agreements are entered into before any dispute has arisen and before it can be known what procedures will be appropriate. Where rigid time frames are expressly prescribed, an obstructive party can take the position that an arbitrator has lost jurisdiction once the time limits have expired or that the arbitration clause is no longer effective.

Expressly exclude any appeal to the court. Of course, parties in Ontario may wish to preserve the right granted by s. 45 of Ontario's *Arbitration Act* for a party to seek leave to appeal an award to the court on a question of law. More often, the parties intend to exclude any recourse to the courts but forget that it is necessary to expressly contract out of that section. This point is not applicable to international arbitration governed by the Ontario *International Commercial Arbitration Act* ("ICAA"), since no right of appeal on the merits exists with respect to international arbitrations.

Do not specify that the arbitration will be governed by the Ontario *Arbitration Act*, when it is in fact an international arbitration governed by ICAA. Under the terms of article 1 (3) of the UNCITRAL Model Law on International Commercial Arbitration, which is adopted by ICAA, an arbitration is international if the parties to an arbitration agreement have their places of business in different countries or the place of arbitration or the place of performance of the contract is different

see HORTON p. 11

Careful consideration will help

HORTON
–continued from p. 10–

to the country in which the parties have their place of business. Although fascinating arguments may arise as to whether or not the parties intentionally or validly opted out of ICAA, few clients will thank you when the resolution of their dispute has been sidelined by court proceedings to determine the issue.

A careful consideration of these matters will go a long way toward ensuring that parties who have agreed to arbitration get what they bargained for. As with any dispute process – especially one which is adversarial based – things can always go wrong. However, with a bit of attention to the arbitration clause, most tactics which are aimed at undermining the arbitration process itself can be avoided.

William Horton practises as a barrister, arbitrator and mediator in commercial and complex disputes. He is resident at ADR Chambers in Toronto.