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Commercial Arbitration – Making It Work

Stephen Antle, LLB, C.Arb

Commercial arbitration can resolve disputes more quickly and with greater cost-efficiency, privacy and confidentiality than litigation, in addition to providing certainty of result, access to decision-makers with subject matter expertise and international enforceability. But it doesn't always work out that way. Making commercial arbitration work requires using arbitration expertise, in drafting the arbitration agreement, serving as arbitration counsel and choosing the arbitrator.

When your clients are involved in a commercial dispute about their legal rights and obligations and the parties are unable to negotiate or mediate a resolution, there are only two dispute resolution mechanisms left: litigation and arbitration. This article sets out practical tips for getting the most out of the commercial arbitration process.

Arbitration is a welcome alternative in a business world that fears endless, complicated, public, and costly litigation. Often, disputes can be resolved more quickly and with greater cost-efficiency, privacy, and confidentiality, while providing some certainty of result, access to decision-makers with subject matter expertise, and international enforceability. However, too often we hear horror stories about arbitrations that were more complex, more drawn out, and more costly than litigation likely would have been. Why? Many times, it's because the parties involved did not enlist counsel with expertise in arbitration to assist them.

Avoiding the pitfalls of a poorly drafted arbitration agreement
There are two times when you can select a dispute resolution mechanism: when you set up a contractual relationship and when a dispute arises. Either way, ensuring that a dispute is resolved by arbitration, rather than through the court system, requires an arbitration agreement. As this agreement sets out a legally binding dispute resolution mechanism, drafting it requires specific expertise. A poorly written agreement can lead to several problems , but here are two of the most common:

1. A convoluted process of negotiation and mediation
It's vital that the agreement gives the parties a clear right to resolve disputes by arbitration. This may sound obvious, but it's actually quite common to see "tiered" dispute resolution provisions instead, that require the parties to negotiate first (often at several levels) and then mediate before they can even start arbitration. These provisions can be both time consuming and costly. Moreover, they're usually unnecessary. If a dispute arises and both parties genuinely want to negotiate or mediate a solution, they can and will, regardless of whether their agreement requires them to do so. On the other hand, if one or both parties don't want to negotiate or mediate, they won't. And if that's the case, requiring the parties to go through the motions of negotiation and/or mediation will just be a waste of time.

There is another inherent challenge here, as it is technically very difficult to draft tiered dispute resolution provisions that aren't, in themselves, dispute *generators*—usually about whether a party is entitled to escalate the dispute from one mechanism to another. Subjective language is commonly used in such provisions—like requirements to negotiate "in good faith" or to use "best efforts" to mediate—and it provides the party uninterested in resolving the dispute with an easy excuse to delay.

It's important to understand that any such disputes about how the dispute resolution mechanism works generally have to be resolved through litigation. That means a loss of most of the benefits the choice of arbitration was designed to achieve.

2. An unworkable arbitration process

Another common practical problem is the failure to draft the arbitration agreement so that it actually sets up a workable process. It is particularly critical to have the assistance of counsel with arbitration expertise to deal with the scope of the dispute(s) to be arbitrated, the number and qualifications of arbitrators involved, the decision as to whether the arbitration will be administered or conducted ad hoc, and the procedural rules that are to be used.

But perhaps the most important point on which experienced counsel can advise is the "seat" of arbitration. This is not where the arbitration takes place physically, but where it takes place legally. And it is crucial. First, the law of the seat governs the procedural conduct of the arbitration (even though it may not govern the substance of the dispute), so you need to know what that law is and what it provides. Second, if it becomes necessary to go to court during the arbitration process, the parties must go to the courts of the seat. So you want the seat to be "arbitration friendly" and you need a good relationship with experienced arbitration counsel in that jurisdiction.

Choosing an arbitrator

Perhaps the most important step in the whole arbitration process is choosing the arbitrator. In fact, having the ability to even make that choice is one of the key potential advantages of choosing arbitration over litigation. So, how do you choose the right individual?

There are some basic criteria. The arbitrator is going to be determining the parties' legal rights and obligations, so you want someone with legal training. But you don't just want a retired judge, or you'd have opted for private litigation. In this case, you want someone who has been trained as an arbitrator and has some experience in the arbitration process.

Clients often seek out an arbitrator who understands the subject of their dispute—such as engineering bridges or manufacturing widgets—more so than the law. But this can be dangerous, because there's a risk that the arbitrator could decide the parties' rights and obligations based on personal experience, rather than on the facts. Instead, it's advisable to choose an arbitrator who has experience in the legal field the dispute concerns—for example, commercial leasing or asset purchases and sales.

But more important than any of these criteria are the intangibles. You want an arbitrator who has the right personality to deal with the issues and parties involved in the particular dispute. You want someone who is prepared to take control of the process if the parties don't agree on how it should proceed.

Finding an arbitrator like this takes a bit of research. You can review arbitrators' biographies online, read their publications in legal journals, attend their presentations at conferences—you may even be able to get your hands on an arbitration award they've written or interview them (to a point!). But the best way to choose an arbitrator is to seek the advice of counsel who have appeared before them or have served on arbitration tribunals with them.

Seeking proper advice

Despite its conceptual similarities to litigation, arbitration can be a very different animal. It has significant potential benefits compared to litigation, but to realize these benefits, it's vital that you involve counsel with arbitration expertise to draft the arbitration agreement, serve as counsel in the arbitration, and—most importantly—help you choose an arbitrator with arbitration expertise. This expertise can ensure that the potential benefits of arbitration are actually realized, and that the process doesn't turn into another horror story.

Stephen Antle is a dispute strategist. He is a partner in Borden Ladner Gervais LLP and a Chartered Arbitrator, with experience as both arbitrator and arbitration counsel.

http://www.blg.com/en/ourpeople/antle-stephen

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