Dispute Resolution Clauses Can't Be Ignored

Proceed with caution!

By Steven Z. Raber

It is not uncommon to find dispute resolution clauses in contracts of all kinds. They often lurk towards the end of commercial contracts, or in the "fine print" of consumer agreements. Many folks do not give them much, if any, notice until it's too late.

What do these clauses say? Sometimes, dispute resolution clauses are specifically intended to ensure that all possible steps are taken, or at least explored, before either party may seek the assistance of the courts.

Such clauses may simply require that the aggrieved party give notice to the other party of the complaint and provide a limited time for the other party to "cure" the alleged breach. Other clauses may require that the parties attempt to resolve any issues between them cooperatively through mediation. Yet other clauses may require that all disputes be resolved out of court through binding arbitration, often invoking the regimes set out in the relevant legislation (for example, in Manitoba, The Arbitration Act).

Finally, some contracts may include all of these clauses, to be followed in order.

Why should one be wary of dispute resolution clauses in contracts? After all, we commonly encourage our clients to use settlement mechanisms to resolve disputes. The problem is that an aggrieved party may find that its hands are tied and that it must go through every contractual hoop before being able to sue the other party. Worse yet, under certain circumstances, dispute resolution clauses may work to oust the jurisdiction of the courts in their entirety, forcing the wronged party to live with the results of a flawed or inappropriate process.

It is sometimes the case that these clauses are constructed to favour the interests of one party over another. For example, a service provider may include in its standard agreement that any disputes are to be arbitrated by a person to be selected by the service provider, rather than by a wholly disinterested neutral person.

What can parties do to avoid these problems? Care must be taken at the outset to consider what dispute resolution provisions are properly adapted to the parties' needs. If urgent court-ordered relief might be required – such as an injunction to prevent further wrongful activities – one might want either to scrap the inclusion of dispute resolution clauses or carve out exceptions where they are not to apply.

Consideration also has to be given to the possibility of uneven bargaining power. Sometimes only the threat of legal action, and the attendant negative publicity it might engender, will be of benefit. Removing the opportunity to go to court through a dispute resolution provision may unduly reduce the aggrieved party's negotiating position. Alternatively, both parties might well benefit from closed and confidential processes such as mediation and/or private arbitration.

In other words, boilerplate language must be avoided and all parties must review proposed dispute resolution provisions carefully to ensure they are suitable to meet the parties' needs.

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