

Navigating Disputes: Dispute Resolution Clauses in Contracts

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Background

Due to the cost of litigation arising from contractual disputes, it has become commonplace for contracts to include a dispute resolution clause. The dispute resolution clause provides a roadmap for resolving conflicts outside of the courtroom. It specifies pre-determined steps to follow in case of a dispute. This clause is designed to promote efficient resolutions and curb costs. Depending on the nature of the contract and the structure of the deal, it can include multi-step de-escalation strategies, procedures for mediation and/or arbitration.

Parties rely on the terms and conditions of a contract to protect their interests, define obligations and navigate conflict. The strength of any contract lies not only in its ability to clearly articulate the terms governing the parties' relationship but in its capacity to avoid and resolve disputes.

In order to draft a comprehensive dispute resolution provision, the parties must consider conflict avoidance strategies in the early stages of the negotiation process. Addressing conflict resolution at the outset, when each party holds greater negotiating power, also provides for stronger dispute avoidance strategies. This can prevent delays, reduce expenses, and minimize disruption of business operations. With the above in mind, this paper will highlight several issues to consider when drafting a dispute resolution clause. This is not a conclusive list of factors as each contract is different with its own unique subtleties.

1. *Dispute Avoidance*

Preparing a roadmap to mitigate disputes *before* they arise strengthens a party's ability to respond effectively when they occur. Grounds for conflict may include a breakdown in communications, delayed performance and changes in delivery or payments.

A proactive approach to dispute resolution that accounts for the nuances of a contract is an effective cost saving mechanism and a means of preserving the parties' relationship. Consider the following example. An enterprise signs a technology contract with a supplier to implement a solution with minimal discussion about dispute resolution. The parties hastily adopt boilerplate dispute resolution language. As the work unfolds, it proves to be expensive and more complex than originally thought. Rising costs, dissatisfaction with performance and delayed payment deteriorate the parties' relationship. In the absence of a well drafted dispute resolution clause and faced with an increasingly strained relationship, the parties are forced to contemplate litigation.

Courts are generally reluctant to interpret ambiguous terms in a manner that imposes obligations on the parties. It is therefore imperative that this provision sets out the parties' intentions clearly and accurately. This will help avoid disagreements over the interpretation of the dispute resolution clause itself. A prompt and pre-determined response to issues that may arise fosters open communication prompts timely discussion. If necessary, it also encourages legal advice on how best to resolve or renegotiate the terms to mitigate the likelihood of future disputes.

2. The Multi-Step Clause

Multi-step or escalation clauses are provisions that require the parties to engage in specific steps prior to commencing arbitration. These actions can include escalating the dispute to senior management for discussion, engaging in negotiation and attending mediation within predefined timeframes. A common underlying theme across all such steps is the parties' commitment to resolving the dispute in good faith.

To be effective, this clause must explicitly outline the steps required as conditions precedent. For example, if the parties have agreed to negotiate before resorting to arbitration, their agreement must expressly state that negotiation is a condition precedent to arbitration. If the parties agree to "make all reasonable efforts" to resolve their conflict by negotiation, a timeframe within which the negotiation must be conducted should be stated in the agreement to allow the parties to move from one step to another without delay.¹ Other areas that are helpful to specify include the timeframe to complete certain steps of the negotiation, potential areas of disagreement and how to communicate the issues throughout the negotiation process.

Additional conditions may include the requirement to provide a notice of dispute within a specific timeframe. This notice must set out the nature of the dispute, provide full particulars of it along with supporting documents. The defaulting party is then granted an opportunity to cure the default or issue at the core of the dispute within an agreed upon period. Incorporating a cure period is imperative for the party alleged to be in default and can be an efficient method of de-escalation. Each of these conditions should be negotiated and expressly stated in the agreement.

3. The Arbitration Clause

The delays and exorbitant legal fees associated with litigation lead businesses to seek more efficient and economical alternatives. When it comes to controlling costs, choosing alternative dispute resolution strategies such as arbitration can be very effective. It is worth noting that while arbitration is less expensive than litigation - avoiding arbitration using the strategies previously discussed will be an even more meaningful cost-saving measure.

¹ *Alberici Western Constructors Ltd. v. Saskatchewan Power Corporation*, 2015 SKQB 74, aff'd 2016 SKCA 46.

The arbitration clause sets the pace at which the parties proceed to and participate in an arbitration. It must articulate the process to be followed once the conditions precedent for initiating arbitration have been met. For example, the clause will state that if a dispute cannot be resolved by way of negotiation or mediation within a set timeframe, it will be resolved fully and finally by way of arbitration. Further, while the provisions of the contract shall not operate to prevent recourse to the courts as permitted by the *Arbitration Act, 1991*, S.O. 1991, c. 17, in all other respects, there shall be no appeal from the arbitrator's award on questions of law or any other questions provided that the arbitrator has followed the rules of the contract in good faith. This language will grant an arbitrator the jurisdiction to preside over the dispute and to issue a binding order while leaving the door open to further litigation if certain conditions are not followed, there is an error of jurisdictions or evidence has not been properly considered, etc. Identifying the venue for the arbitration, the language it will be conducted in and the number of arbitrators presiding over it are equally important.

Procedural ambiguities will add to the delay, increase costs and can further frustrate the parties. It is imperative that the parties take the time to agree on the processes such as the appointment of the arbitral tribunal, the timeline for submission of pleading, parameters for documentary requests and discoveries, as well as the form and impact of the arbitrator's decision, including costs awards and the costs of the arbitration itself.

Concluding Remarks

Canvassing potential areas of conflict is much more manageable during the initial stages of a contractual negotiation before a dispute arises. This approach is particularly effective for fostering successful long-term business relationships based on mutual understanding and prompt dispute resolution. Incorporating a well-defined dispute resolution mechanism, including conditions precedent to an alternative dispute resolution practice (ie. arbitration), not only establishes clarity in contractual agreements but also promotes efficient conflict resolution. It also encourages lawyers to continually look for new ways to develop a better understanding of the client's objectives. By promoting lower costs, eliminating surprises and keeping clients well-informed, the dispute resolution clause can improve the client relationship.