Drafting the Right ADR Clause: Risk Mitigation Strategies

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Arbitration of commercial disputes is as popular as ever. Nevertheless, arbitration can be time-consuming and expensive when it is not properly managed. This is particularly so for the 1,112 Canadian mining companies with a market cap below CA$1 billion. The smaller the amount of resources available to the mining company, the more important the ADR clause becomes. There are a number of ways that ADR clauses can be drafted to mitigate risks for junior mining companies.

Institutional vs. ad hoc

Institutional arbitration is a proceeding where the parties designate an institution to administer the arbitral process in accordance with its arbitration rules. By contrast, *ad hoc* arbitration is a proceeding that requires the parties to select the arbitrators(s), the rules and procedure and, depending on the contract, the applicable law. In an *ad hoc* arbitration, the parties can agree to designate an arbitral institution solely as an appointing authority and/or adopt an institution's arbitration rules.

The parties should undertake a detailed review of any institutional arbitration rules prior to adopting them. Institutional rules can provide many advantages, including expedited procedures, urgent interim measures and increased confidentiality, however, institutional rules can also remove the parties' ability to appoint their arbitrators or apply for leave to appeal an arbitral award.

Sole arbitrator vs. arbitral tribunal

A single arbitrator is always more cost-effective than an arbitral tribunal. Depending on the type of dispute, an ADR clause requiring the appointment of an arbitral tribunal or arbitrators with particular expertise may create unnecessary delays and increase costs. The parties to an ADR clause should weigh the necessity for multiple arbitrators and/or expertise against the time and expense of appointing same.

Many institutional rules default to a single arbitrator, barring a provision for an arbitral tribunal in the parties' ADR clause. In an *ad hoc* arbitration, the parties are free to designate the number of arbitrators and customize the appointment process. Failure of one or more parties to abide by the appointment process, however, can result in delay, higher costs and the need for court intervention, thereby compromising privacy and/or confidentiality. The designation of an arbitral institution as an appointing authority for a single arbitrator or an arbitral tribunal can expedite the appointment process.

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Interim and emergency measures

Several institutions' rules, including the ADRIC Arbitration Rules, the LCIA Arbitration Rules and the ICDR Arbitration Rules, provide for the appointment of interim arbitrators, even before a sole arbitrator or arbitral tribunal has been appointed to determine the dispute. Where a party to an arbitration requires immediate relief, the institution administering the arbitration can appoint an interim arbitrator, hear the application, and deliver an order in a matter of days. An interim arbitrator's order may be confirmed, modified, terminated or annulled, in whole or in part, by the final award.

Expedited procedures

Some institutional rules, such as the International Chamber of Commerce's Arbitration Rules, provide for an expedited procedure that shortens traditional time frames, accelerates the appointment process, and streamlines the hearing of the dispute. For example, under the ICC's Expedited Procedure, the parties may only nominate a sole arbitrator within a specified time frame, failing which, the institution will appoint an arbitrator. The arbitrator or arbitral tribunal also has half as much time to establish the Terms of Reference to be executed by all parties and the arbitrator(s).

Privacy vs. confidentiality

Ad hoc arbitrations are often mistakenly believed to be automatically confidential. The confidentiality of an *ad hoc* arbitration only extends to the parties to the arbitration, unless the parties have otherwise agreed to a confidentiality arrangement in their ADR clause. Where a party has a vested interest in keeping an arbitration confidential, the ADR clause must adopt rules that do not resort to court intervention in the event of a procedural dispute or the other party's non-compliance, in addition to forbidding either party from disclosing the arbitration or, where practicable, the fact of the dispute.

The myth of "final and binding"

In certain jurisdictions, the inclusion of the words "final and binding" does not foreclose against the possibility of an appeal. Failure to include the appropriate language for the jurisdiction of the arbitration in the ADR clause can result in lengthy appeals and substantial additional costs. Where finality, rather than legal correctness, is the primary objective, the parties to an *ad hoc* ADR clause should ensure that the applicable law prohibits, or allows the parties to opt-out of, their ability to apply for leave to appeal. Adopting certain institutional rules can also successfully bar against an appeal. M

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