ADR and Choice of Law Clauses in Online and Cloud Computing Agreements

Prepared For: Legal Education Society of Alberta

Technology Contracts

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For presentation in:

Edmonton, Alberta– September 15, 2015

Calgary, Alberta – September 22, 2015

Acknowledgments:

I would like to thank my colleagues at Dentons Canada LLP, Michael Beard and Rani Berg, for their assistance in researching and preparing this paper.

ADR AND CHOICE OF LAW CLAUSES IN ONLINE AND CLOUD COMPUTING AGREEMENTS

1. ADR CLAUSES IN INTERNET-BASED AGREEMENTS

a. Drafting ADR Clauses

Alternative Dispute Resolution ("ADR") has often been defined as the use of different tools to divert disputes away from the courts. Today, however, most lawyers view the various forms of dispute resolution mechanisms on a continuous spectrum with litigation placed on one end and negotiations placed on the other. Moving through different dispute resolution techniques provides different advantages and disadvantages. The primary advantages of negotiation and mediation are flexibility and the chance to develop creative or "win-win" solutions, preserve relationships, and create possible time-efficiencies and cost savings. As parties move to the other end of the spectrum, they sacrifice most of these advantages but in return gain greater certainty and finality in their conflict resolution.

When discussing ADR clauses within commercial agreements, expert commentary and academic articles generally carry two main themes. Firstly, all commercial agreements should contain express provisions on dispute resolution, and secondly, it is imprudent legal practice to rely solely on standard-form or boiler-plate clauses in these agreements, as it is impossible to develop a dispute resolution clause that has universal application. As such, specific language should be used depending on the circumstances.

There are a variety of issues that a drafter should consider prior to drafting a dispute resolution clause. Firstly, the drafter should contemplate if they want to remove, or substantially remove, the possibility of litigation altogether, as well as the type of alternative dispute methods to be used. This includes a determination of whether negotiation, mediation, arbitration, or another form of ADR is best suited to the particular situation. While litigation is often time-consuming, costly, and damaging to future relationships, there are times where it is the best course to choose to resolve disputes. It may be that the drafter wants a very brief period of mediation or arbitration before jumping to litigation, as this may actually be the most resource-efficient practice. Conversely, the drafter may want to limit the use of litigation to only specific and rare circumstances. Some of the factors to consider when making this decision include:

- whether there will be a desire to maintain a business relationship following a dispute;
- if there is a need to maintain confidentiality;
- if there is a benefit to solving the problem with a business solution as opposed to a legal determination;
- the likelihood the parties will share liability;
- the specific subject matter at hand;
- whether the parties will need a broad production of documents and discovery of witnesses;
- what types of remedies the client may require; and
- potential time restrictions.

In determining the optimal approach, a drafter also has the choice to incorporate a multi-tier ADR clause into the agreement. Multi-tier clauses provide mandatory steps the parties must go through in their dispute resolution. For example:

> "Before starting arbitration, the parties will try to resolve their differences through mediation. If mediation does not result in a conclusion within 30 days of a party giving written notice to mediate to the other, they are unable to resolve their dispute by mediation, then either party may initiate arbitration proceedings."

There are benefits and disadvantages to incorporating multi-tier ADR clauses into an online or cloud computing agreement. A survey conducted by the World Intellectual Property Organization ("**WIPO**") found a main advantage was that cases where mediation occurred at the beginning of a dispute generally correlated with high settlement rates at little cost. Even in cases where mediation was not successful, it increased the chances of reaching a settlement later on in the dispute resolution process due to the ongoing discussions and exchange of information facilitated by the mediation.[1] This is especially valuable where the parties are two businesses seeking to salvage their relationship through finding a mutually-agreeable solution between themselves.

Multi-tier clauses may also provide a "filtering" system for disputes, such that some of the smaller issues may be able to be agreed to amongst the parties, resulting in only one or two issues being put before an arbitrator. Another potential benefit is that these clauses can be drafted in such a way that

[1] WIPO Arbitration and Mediation Center, "Results of the WIPO Arbitration and Mediation Center International Survey on Dispute Resolution in Technology Transactions" (March 2013) online: WIPO.int http://www.wipo.int/export/sites/www/amc/en/docs/surveyresults.pdf.