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In-House Counsel

Penny-wise, pound-foolishness in arbitration

By **Barry Leon**

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(February 10, 2021, 8:29 AM EST) -- Writing for the B.C. Court of Appeal in *Nolin v. Ramirez* 2020 BCCA 274, Justice Elizabeth Bennett, with the concurrence of Justices Mary Saunders and David Harris, observed at the outset that:

"By agreement, the arbitrator issued brief or "summary reasons" for his conclusions. The idea was to save money. Unfortunately, the brevity of those reasons led to an appeal in the Supreme Court, and now to an appeal in this Court. The phrase "penny-wise and pound-foolish" comes to mind."

Lisa Munro of Lerners LLP, in her recent blog about the judgment, wrote that this case shows the dangers of deviating too far from procedural basics in an arbitration.

Indeed, it does.

A less expensive but still costly danger of requiring short or "summary" reasons may be an increase in the cost of the arbitration itself, which the choice was designed to save.

Once, as counsel, I had an arbitrator say, when faced with the parties' agreement for him to issue no more than five pages of reasons on a motion, that he had written 10 pages. He asked whether the parties wanted to pay him to shorten the reasons to five pages. They did not.

A lesson from *Nolin* is that if there is the possibility of an appeal or review, let the arbitral tribunal explain its decision, or provide in the arbitration agreement that inadequate reasons shall not be a basis to challenge the award by way or appeal or review.

There are other penny-wise and pound-foolish things — and just plain foolish things — that sometimes we do in arbitration.

We do these foolish kinds of things when drafting arbitration clauses, when choosing arbitrators, when agreeing to arbitration procedures and when structuring arbitrations.

Usually, we do those things because we have not thought through the potential consequences — we have not asked ourselves "What happens if ...?"

Here are some other examples of arbitration foolishness.

Simply not using arbitration

A businessperson or in-house counsel may decide not to use arbitration at all because:

- he or she once had a bad experience in an arbitration — as if the person has never had a bad experience in court;
- the person does not really understand how arbitration works, so he or she is not comfortable with it; or
- the person believes that arbitration does not provide for an appeal — yes it can.

Drafting defective arbitration clauses

Too often contract drafters will draft arbitration clauses that:

- are insufficiently clear on the type or scope of disputes to be arbitrated; or
- have other defects that will lead to a dispute among the parties before they even "get out of the gate."

Too specific arbitrator qualifications

Parties may specify clause qualifications for the arbitral tribunal in an arbitration that are difficult, if not impossible, to fulfil with a qualified arbitrator.

Award time limits

In a desire for a speedy result, parties may set clause time limits for delivery of the award in the arbitration that in the result prove to be unrealistic.

Managing the arbitration

A party or in-house counsel may:

- retain counsel for an arbitration who lacks an understanding of arbitration; and/or
- not pay attention to the arbitration to ensure that cost efficiencies are achieved, and that counsel understands and pursues the client's objectives for the case.

Arbitrator's case management abilities

Parties tend to pay insufficient, or sometimes even no attention, to an arbitrator's case management abilities when choosing a sole arbitrator or chair of an arbitral tribunal. Case management can be critical to an efficient and effective arbitration.

Arbitrators who lean to 'arbitration efficiency'

Parties sometimes choose a sole arbitrator or arbitral tribunal chair without regard to whether she or he is going to lean toward realistic and customized "arbitration efficiency" rather than just default to court procedures (unless, of course, the parties just want a private trial).

Not remembering that an arbitration begins at beginning

Some counsel fail to appreciate that an arbitration begins when the arbitral tribunal is appointed, so they take an unnecessarily aggressive or unco-operative position at case management conferences and on procedural matters — forgetting that unlike in many courts, the tribunal is going to be deciding the case and is forming impressions of the parties' cases from the outset.

Not bringing client to the first case management conference

Some counsel will not have their client attend the first case management conference, even when invited by the arbitral tribunal to do so. Almost invariably, the client will lose the opportunity to gain a better understanding of the case and ensure that the procedures and timetable fit with the client's objectives. Absent the client's presence, counsel may have a more difficult time managing the client's expectations and the client will not have as good a feel for what is going on, the arbitral tribunal, the other side, and other pertinent matters.

No reporter

Sometimes in the pursuit of false economies, parties will not engage a court reporter for the hearing

— and later the parties wind up in court arguing over what transpired, whether in the evidence, or in relation to a procedural ruling or comment by the tribunal. Likewise, the arbitral tribunal can wind up in an awkward position (or worse) where what it has said or done cannot be established clearly.

Virtual proceedings

For virtual proceedings, parties and their counsel may pursue false economies by having a law firm or arbitrator manage the technology — because "anybody can run Zoom" — rather than engaging the most experienced, independent and professional virtual proceedings provider available. Then:

- the arbitrator or counsel wind up pivoting between doing the job they were hired to do and trying to manage the technology; and
- when a technical problem occurs, all counsel and arbitrators, as well as clients and witnesses, wind up sitting around with "the meter running" at a high total hourly rate.

These and other foolish things that we do in arbitration can be easily avoided. Being aware of them is a particularly good beginning.

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