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DRAFTING ADR AND ARBITRATION CLAUSES FOR COMMERCIAL CONTRACTS

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This publication provides, to counsel drafting a commercial agreement, all the tools and information necessary to design and draft an effective ADR/arbitration clause that accomplishes the intentions and desires of the parties who have chosen ADR/arbitration to resolve their disputes. It canvasses the various forms of ADR, including ones on the cutting edge, such as "collaboration" and "cybersettle.com." It considers some of the pitfalls and dangers in poorly drafted clauses, which only become apparent when the ADR/arbitration process is underway. Issues specific to ADR/arbitration clauses in commercial agreements that are addressed include: Rent renewals, Shareholder agreements, Options to purchase land, Agreements involving parties outside Canada. This publication also features appendices containing numerous precedent arbitration, mediation and different types of ADR clauses, as well as summaries of the procedural rules of the major arbitration institutions and legislation governing arbitrations in place across Canada.

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What's New in this Update:

This release features updates to Appendix 4D. Court Intervention – Application to Set Aside Arbitration Award in Chapter 4. The Arbitration Clause.

Highlight:

- **Court Intervention—Application to Set Aside Arbitration Award—The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator—**The Moscone Parties submitted that the Arbitrator treated them unfairly by re-opening and re-interpreting his earlier awards when he handed down the display wall award and rent adjustment award. Justice Parghi did not agree that the Arbitrator' statement that even though the Moscone Parties had complied with his December 2021 award, they had violated the "purpose, spirit, and intention" of that award, represented an unfair re-opening of the December 2021 award that introduced new, and subjective, criteria, resulting in prejudice to them. Justice Parghi explained that the Moscone Parties' submission was grounded in a selective and incorrect reading of the Decision. In fact, the Arbitrator described the Moscone Parties' placement of the display wall as "wholly antithetical to the model provided for" in his December 2021 decision. He concluded that the Moscone Parties had violated the "purpose, spirit, and intention" of the December 2021 decision. Importantly, he went on, in the same sentence, to conclude that they had also violated the actual substantive terms of the December 2021 decision: [Moscone Tile's] placement of the Tile wall displays around Area A . . . is not only contrary to the purpose, spirit, and intention of the December 2021 Award; it is contrary to the terms of that Award as well. It was clear that the Arbitrator concluded that Moscone Tile's erection of the display wall was contrary to the terms (and not just the "purpose, spirit, and intention") of the December 2021 decision. The Moscone Parties' assertion to the contrary was predicated on a partial reading of this sentence was untenable: *Edenrock Holdings Inc. v. Moscone*, 2025 CarswellOnt 115, 2025 ONSC 32 (Ont. S.C.J.).
- **Court Intervention—Application to Set Aside Arbitration Award—Reasonable Apprehension of Bias—**Justice Zarnett took the application judge's conclusion that there was a duty to disclose to rest primarily on the view she took of the IBA Guidelines and the correspondence between the parties. In Justice Zarnett's view, that conclusion reflected legal errors such that the application judge's conclusion was not entitled to deference. She never asked, or answered, what a fair-minded and objective person would consider as likely to give rise to justifiable doubts about the Arbitrator's impartiality or independence. Rather, she said she was applying the IBA Guidelines without acknowledging the pivotal distinction between the rule about disclosure in the IBA Guidelines —which uses a subjective test—and the legal obligation about disclosure in the Model Law—which uses an objective test. Applying the objective test, in Justice Zarnett's view the Arbitrator

did not have a legal duty to disclose that he was being engaged in the Sotos Arbitration since, as the application judge concluded, it did not involve any party to the MFA Arbitration and there was no meaningful overlap of issues—it was, as the application judge described it, an unrelated arbitration. In Justice Zarnett's view, the application judge erred in finding a reasonable apprehension of bias. Justice Zarnett observed that although the application judge articulated the objective test, and cited the principle that the subjective views of the parties were not relevant, she took such a broad view of the context that she ended up treating the subjective views not only as relevant, but determinative. The result was to change the test. That was an error of law. The application judge failed to consider that the parties did not share their correspondence with the Arbitrator or otherwise make him aware of the claimed expectation or the source from which it could be drawn, and that they instead approached the Arbitrator based on an agreed letter limited to asking him about whether he met the MFA qualifications, without any statement concerning future appointments. That did not mean that it was "open season" for the Arbitrator to accept appointments that would objectively give rise to justifiable doubts about his impartiality, but the unshared correspondence and expectation could not form the basis for a reasonable apprehension of bias on his part that would not otherwise objectively arise. The application judge's conclusion that a fair-minded and informed person, considering the facts and circumstances of the matter, would conclude that circumstances existed that gave rise to a reasonable apprehension of bias was rooted in circumstances that were incomplete and not objective. A fair-minded and informed person would consider the facts and circumstances objectively known—they would focus on what the Arbitrator was told. What the parties chose, vis-à-vis the Arbitrator, to keep to themselves falls into the category of subjective views: *Aroma Franchise Company, Inc. v. Aroma Espresso Bar Canada Inc.*, 2024 CarswellOnt 17813, 2024 ONCA 839 (Ont. C.A.).