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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 4B. Applications for Leave to Appeal Arbitral Awards in Chapter 4. The Arbitration Clause.

Highlight:

- **Applications for Leave to Appeal Arbitral Awards — British Columbia — Timing of Application —**The respondents objected to the hearing of the application for leave to appeal arguing that it was premature. Justice Fitch explained that the arbitrator had issued what amounted to an interim award, although it did finally dispose of some of the issues raised in the arbitration. Having filed the notice of application for leave to appeal within application premised on an additional award, was preserved. Justice Fitch did not believe that the applicant would be unduly prejudiced by the time that would pass between now and the conclusion of the arbitration. Justice Fitch accepted that the Court has the discretion to entertain the leave application at this time. Justice Fitch did not know of any hard and fast rule that a court will not hear an application for leave to appeal from an interim arbitral award. There may well be cases where the demands of justice and efficiency will weigh in favour of early intervention by a court. However, the policy of the law and the general rule is against it, in both civil and criminal proceedings Justice Fitch explained that there are a number of ways in which the public interest commends the general rule that cautions against entertaining appeals at an interlocutory stage of the proceedings. Some were evident in the circumstances. First, early judicial intervention will interrupt and fragment continuation of the arbitration. Granting leave at this stage would, therefore, interfere with the conclusion of a process the parties agreed to. Second, it was not obvious to Justice Fitch that the delivery of submissions on the quantification of the debt would entail such a large expenditure of resources that the interests of justice, viewed in their totality, could be said to clearly favour allowing the leave application to go forward. Justice Fitch was not aware of any other circumstances that suggest it would be desirable in the interests of justice to entertain the leave application now. Third, it may be that the applicant's interest in pursuing leave would be diminished depending on the outcome of the arbitration as it related to quantification of the debt. Fourth, Justice Fitch reiterated the absence of demonstrated prejudice to the applicant in holding his leave application in abeyance until the arbitration was concluded. Fifth, entertaining the application at this time raised the spectre of more than one application for leave to appeal arising out of the same matter. The practice of litigating in slices should be avoided, as should the unnecessary expenditure of judicial resources that would flow from hearing one leave application now and, potentially, a second application upon conclusion of the arbitration. Finally, the concern was not confined to this case. It was not unusual for arbitrations to be concluded following the issuance of one or more interim awards. Both judicial economy and the public interest in avoiding a multiplicity of proceedings suggested to Justice Fitch that the court's discretion to adjourn the leave

application to the conclusion of the arbitration should be exercised. The application was adjourned pending conclusion of the arbitration: *Brown v. Smithwick,* 2024 CarswellBC 571, 2024 BCCA 83, 2024 A.C.W.S. 957 (B.C.C.A.).

The Arbitration Clause — Applications for Leave to Appeal Arbitral Awards — British Columbia — Determination of the Point of Law May Prevent a Miscarriage of Justice —Seller and purchaser entered purchase agreement for sale of land. Purchaser applied for leave to appeal arbitral tribunal's decision in commercial dispute over interpretation of land purchase agreement. Applicant raised five grounds of appeal in relation to tribunal's interpretative exercise. Leave to appeal granted. Purchaser identified extricable question of law, being whether tribunal erred in allowing evidence of factual matrix, including evidence of post-contracting conduct, to overwhelm text of agreement and create new one. Legal question involved careful consideration of tribunal's reasoning and evidentiary record. Importance of award to parties justified granting leave, because determination of question may have prevented miscarriage of justice: Creative Energy *Vancouver Platforms Inc. v. Concord Pacific Developments Ltd.*, 2024 BCCA 128, 2024 CarswellBC 900, 2024 A.C.W.S. 1564.