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DRAFTING ADR AND ARBITRATION CLAUSES FOR COMMERCIAL CONTRACTS

Wendy J. Earle

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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, and 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 – Motions for Stay of Proceedings in Chapter 4. The Arbitration Clause.

Highlights:

- **Court Intervention — Motions for Stay of Proceedings — A party to an arbitration agreement —** The motion judge assessed the first question from the *Haas* test and concluded that there was no arbitration agreement. The Court of Appeal explained that the text of s. 7(1) makes clear that a decision on whether to stay a proceeding under s. 7 requires the existence of an arbitration agreement. The motion judge therefore did not need to proceed any further with the analysis. The evidence before the motion judge was that National Trade was never incorporated and did not exist. That fact was undisputed. The agreement for the sale of 20% of the shares of National Trade made between Abied as seller and Ismail as purchaser, was executed by Abied on behalf of both parties on June 25, 2014. Ismail's understanding was that Abied wanted to split the purchase price for the sale of 20% of his business into two agreements for tax purposes and Ismail was accommodating him. That was the reason why USD $800,000 of the purchase price was to be paid ostensibly for the shares of National Trade, while the rest was paid for the shares of FYGH. Abied denies that and claimed it was a separate deal. The two agreements were executed one week apart. However, the National Trade Agreement was never implemented or proceeded with. Given that National Trade was never incorporated and never existed, the National Trade Agreement was premised on the existence of National Trade which was warranted by the agreement, and Abied confirmed in his evidence on the original application that the National Trade deal "never transpired", the Court of Appeal concluded that it was open to the motion judge to determine that the National Trade Agreement failed for lack of subject-matter and consideration, and therefore never existed as a legally binding agreement: *Ismail v. First York Holdings Inc.*, 2023 CarswellOnt 6817, 2023 ONCA 332, 2023 A.C.W.S. 1947 (Ont. C.A.).
- **Court Intervention – Motions for Stay of Proceedings – No appeal from Court's decision —** The Court of Appeal noted that the fact that the appellant brought its stay motion relying on the *Arbitration Act*, and that the motion judge's determination was that the arbitration agreement was "invalid" under s. 7(2), was not determinative. In *Huras v. Primerica,* (2000) 137 O.A.C. (Ont. C.A.), the Court of Appeal stated that, where a court finds that there is no arbitration clause, the *Arbitration Act* has no application, and the dispute lies beyond the scope of s. 7:. The Court of Appeal noted that "it follows that if the court has decided that the Act is not applicable, then the prohibition against an appeal in s. 7(6) is equally not applicable". The Court of Appeal explained that the authority of *Huras*, and the jurisprudence that followed it, was recently confirmed by a five-judge panel in *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612 wherein Justice Jamal

addressed and rejected the argument that *Wellman* changed the law in respect of the scope and application of s. 7(6). The Court of Appeal concluded that *Wellman* "did not disturb the *Huras* line of cases on the interpretation of s. 7(6)", and that "the *Huras* line of cases was correctly decided". Here, the motion judge concluded that there was no consideration given for the two contracts containing arbitration clauses. In other words, there was no subsequent contract, and there was no arbitration clause. As such, the *Arbitration Act*, including s. 7(6) that prohibits an appeal from a decision dismissing a motion to stay, had no application: *Goberdhan v. Knights of Columbus*, 2023 CarswellOnt 6756, 2023 ONCA 327, 2023 A.C.W.S. 1868 (Ont. C.A.).

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