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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. This release also includes the addition of an updated version of Appendix § L:3—ADRIC Arbitration Rules in Appendix L. Arbitration Rules of Leading Arbitration Institutions in Canada II. ADR Institute of Canada.

Highlight:

- **Applications for Leave to Appeal Arbitral Awards—British Columbia—Timing of Application—**The *Arbitration Act* does not provide any statutory authority to extend the time to file an appeal or an application for leave to appeal. Decisions in British Columbia and courts in other provinces have determined that if there is no authority in legislation that creates an appeal procedure to grant an extension of time to appeal, then there is no jurisdiction in the court to do so. In *Desert Properties Inc. v. G&T Martini Holdings Ltd.*, 2024 BCCA 24, Justice Newbury examined the issue in the context of the Arbitration Act and whether the time to file was affected by corrections made by the arbitrator resulting in a second issuance of the decision. While concluding that the issuance of a corrected decision will affect the 30-day time limit, Justice Newbury confirmed that "[o]nce the 30-day period in s. 60(1) has expired, it is not open to the Court to extend it". The appellants raised fraud seeking to invoke s. 58(1)(i) of the *Arbitration Act*. They contended that the time limit commenced when they learned of or could reasonably have known of the fraud, relying on s. 60(2). The Chambers Justice noted that the difficulty with that submission was that the fraud exception related to setting aside arbitral awards in the Supreme Court pursuant to s. 58, not to an appeal. The appellants had not commenced an application in the Supreme Court to set aside the award. The Court allowed the application to dismiss the application for leave to appeal for want of jurisdiction and quashed the application for leave to appeal and the concomitant application for an extension of time to file the application for leave: *Math4Me Learning Inc. v. 1099615 B.C. Ltd.*, 2024 CarswellBC 3268, 2024 BCCA 369, 2024 A.C.W.S. 5633 (B.C.C.A.).
- **Applications for Leave to Appeal Arbitral Awards—British Columbia—Question of Law—**The Chambers Justice noted that whether the Tribunal's failure to consider the Phase I PA in its interpretation of the Phase II PA constituted a question of law would likely turn on whether the Phase I PA was necessary to resolve any doubt about the meaning of the Phase II PA, and if the Tribunal therefore failed to consider relevant factors in its analysis. In the Chambers Justice's view, this error was "so tied to the factual matrix" that it raised a question of mixed fact and law, not a question of law. Further, the Tribunal had determined that the Phase I PA was of little value as it was formed in different circumstances and instead considered the "overall intent and purpose" of the Phase II PA in its analysis. The Chambers Justice noted that the Award, when read functionally, contextually, and in light of the issues made clear that the Tribunal fully considered the surrounding

circumstances. The Tribunal accurately set out the principles of contractual interpretation, including the requirement to consider surrounding circumstances and explained, " . . . the first task . . . is to interpret those key provisions in the context of the Phase II PA read as a whole, taking into account the above-noted principles of contract interpretation. The Tribunal correctly considered the "overall intent and purpose" of the Phase II PA. Further, the Tribunal was not persuaded that either the Phase I PA or the December 14, 2011, Agreement were of much value because the Phase II PA had not been formed at that time. The Chambers Justice could not conclude that the Tribunal failed to take into account the surrounding circumstances when it embarked on the interpretation of the Management Fee Provision. As such, the GP had not demonstrated an extricable question of law on that point: *Seylynn (North Shore) Phase II GP Ltd. v. Seylynn (North Shore) Properties Phase II Limited Partnership*, 2025 CarswellBC 259, 2025 BCCA 36, 2025 A.C.W.S. 561 (B.C.C.A.).