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COMMERCIAL ARBITRATION IN CANADA

J. Kenneth McEwan, Q.C.
Ludmila B. Herbst, B.A., M.A., LL.B., Q.C.
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Publisher's Special Release Note 2020

The pages in this work were reissued in November 2020 and all the pages carry that date in the release line. Please note that we have not reviewed the content on every page of this work in this current release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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What's New in this Update:

This release features updates to case law and commentary in all 12 chapters and an updated *Arbitration Act* in Appendix C.

Highlights:

- **Chapter 2 — Providing for Arbitration — What is an Arbitration Agreement? — Whether Arbitration Agreement Must be in Writing** — In *Razar Contracting Services Ltd. v. Evoqua Water*, the Manitoba Court of Queen's Bench considered whether an agreement in writing under Article 7(2) of the Model Law existed where a link in a purchase order would have led to a website containing terms and conditions that included an arbitration clause. The court found it did not, noting that while Article 7(2) referred to an "exchange", when "the words of that statute are read in their grammatical and ordinary sense, harmoniously with the objects of the statute, it is clear to me there must be 'an exchange' of documents where both parties signify their agreement to refer matters to arbitration. It is not to be left to happenstance. More than what occurred in this case is required". Further, the reference in one party's purchase order "to a website showing multiple categories of terms and conditions with no real guidance does not amount to a written arbitration agreement as contemplated by Article 7", as the evidence did not support an understanding by the other that it would be bound.14.50 Additionally, turning to the common law, the evidence did not establish an intention to contract, settlement of essential terms, and sufficiently certain terms: *Razar Contracting Services Ltd. v. Evoqua Water*, 2021 MBQB 69 (Man.Q.B.).
- **Chapter 3 — Commencement of Arbitration and Stays of Proceedings — Limitation Periods — Statutory Limitation — Generally** — In *Agrium Inc v. Colt Engineering Corporation*, Madam Justice N. Dilts of the Alberta Court of Queen's Bench held that the court "has jurisdiction to consider the question of waiver and attornment after the limitation period has expired to commence arbitration", finding that "[t]o conclude otherwise would be inconsistent with both the *Hnatiuk* and *Lafarge CA* decisions", and permit potential mischief. The court expressed caution, however, about whether to import factors from s. 7(2)(d) (undue delay) of the *Arbitration Act*, stating:

  > …the court must [undertake] an objective analysis of the defendant's conduct and participation in the litigation to determine whether it has waived reliance on the mandatory arbitration provision. That includes reviewing the

> pleadings, looking at when the mandatory arbitration provisions were raised by the defendants, and considering the nature and extent of the defendants' participation in the litigation. It also includes considering the timeliness of the defendant's application to strike the action. An analysis of waiver may also include consideration of the plaintiff's conduct, particularly if the plaintiff relied on the defendant's conduct to its detriment. I am of the view, however, that the absence of reliance by the plaintiff is not determinative.
>
> It may also be relevant to consider whether there are provisions in the agreement between the parties that define how waiver of a provision in that agreement can be achieved. And it will be relevant to consider what actions the defendant took prior to the expiry of the limitation period, if any, to indicate an agreement to litigate or the intention not to arbitrate. In my view, it is necessary to consider the quality of the evidence that the defendant voluntarily placed the matters in dispute in the hands of the court, particularly when by agreeing to litigate the defendants will have given up a limitation defence. In such circumstances, the defendant's conduct cannot be equivocal but must clearly waive the mandatory arbitration provision.
>
> Finally, the analysis of waiver and attornment must not be undertaken as if it is an analysis of undue delay under s. 7(2)(d). Nor is it a fairness assessment as suggested by the Master. Waiver and delay are distinct considerations, although delay may be a factor in assessing waiver. As a result, a court should be cautious about approaching a discussion of waiver in the context of the factors identified in a s. 7(2) analysis.

Madam Justice Dilts struck the action against the defendants, finding that when examined in the context of waiver, the facts did not support the conclusion that they had waived reliance on the arbitration provision: *Agrium Inc. v. Colt Engineering Corporation*, 2020 ABQB 807 (Alta. Q.B.).

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