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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, 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.

What’s New in this Update:

This release features updates to Appendix 4C. Court Intervention – Motions for Stay of Proceedings in Chapter 4 (The Arbitration Clause)

Highlights:

- **Court Intervention – Motions for Stay of Proceedings – Court may refuse to stay the proceeding where the matter is a proper one for default or summary judgment** – An application to stay a civil action so that a matter can proceed to arbitration is typically made at the earliest stage of the proceedings. Most applications for Summary Judgment are made when a proceeding is much further along in terms of oral and documentary disclosure. At this stage, there was only a Statement of Claim and a set of admitted facts. It was not difficult to envision how his matter could neatly be packaged for a Summary Judgment application. The facts were not really in dispute. The central issue has to do with the scope of the Public Health orders and the interpretation of a contract. The terms and the circumstances are not in dispute. At its core, this dispute is really about the interpretation of a contract and the issue is primarily a legal one. The breach of the duty of good faith, however, was something of a wild card. It was easy to see that this type of allegation and this type of relief might require a full trial. Accordingly, even if the Master were to go beyond the requirement in *Medicine Shoppe* case that a Summary Judgment application actually be before the court for the exception in 7(2)(e) to apply, and even if the Master were to adopt an expansive meaning of the subsection, it was doubtful that the Master could conclude with any confidence that this was a proper matter for Summary Judgment. The Master observed that circumstances permitting this exception to apply will be rare since most stay applications will be brought at the earliest opportunity and it will be an unusual case when the court can say so early on that it can be determined summarily. The arbitration clause in the lease is mandatory. Section 7.1 of the Arbitration Act is mandatory. Where it applies, the jurisdiction of the court is ousted. The Master was not satisfied that this was an appropriate case to exercise a discretion to decline to stay the action based on Section 7(2)(e) of the Act. An application to stay based on the Summary Judgment Exception was at the very least premature:

Melcor Reit Limited Partnership (Melcor Reit GP Inc.) v. TDL Group Corp (Tim Hortons), 2021 CarswellAlta 1178, 2021 ABQB 379, [2021] A.W.L.D. 2344, 18 B.L.R. (6th) 1, 332 A.C.W.S. (3d) 423 (Alta. Q.B.).

- **Court Intervention – Motions for Stay of Proceedings – Partial Stay** – There was no risk of a multiplicity of proceedings. The issues as between the parties as shareholders of Sarajevo were irrelevant to the calculation of both Elma's and Kabir's net family property in the family law proceeding, as Elma and Kabir had the same number on his/her NFP statement for his/her interest in Sarajevo. The two preconditions set out in s.7(5) of the *Arbitration Act* were met. The arbitration agreement found in the Shareholder's Agreement deals with the corporate issues, and all claims against Kozo. It was on this basis that Kozo asked the court to stay the corporate claims and separate these claims from the family law claims Elma makes against Kabir. Kozo submitted that denying the stay of the corporate matters would require Kozo's business dispute to be part of the family dispute which would create further complexity and delays. In all of these circumstances, Justice Kraft concluded that there were no circumstances in which the Court could exercise its discretion to refuse the stay of Elma's claims against Kozo in favour of arbitration. All disputes between Elma, Kozo and Sarajevo arising as a result of the Shareholder's Agreement shall be arbitrated. The family law issues as between Elma and Kabir shall be determined after the corporate arbitration is complete and a decision has been rendered by the arbitrator: *Pezo v. Pezo et. al.*, 2021 CarswellOnt 11452, 2021 ONSC 5406, 336 A.C.W.S. (3d) 77 (Ont. S.C.J.).

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