THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA
CLE BC

REAL ESTATE LITIGATION
PAPER 7.1

An Introduction to Real Estate Arbitration

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AN INTRODUCTION TO REAL ESTATE ARBITRATION

I. What is Arbitration?

Unlike litigation, arbitration cannot be imposed on a party. No party can be compelled to participate in arbitration in the absence of an agreement to arbitrate a dispute. . Where a dispute falls under an arbitration clause or agreement (i.e. arbitration by agreement) or, after a dispute has arisen, where the parties to a dispute choose to submit the dispute to arbitration (i.e. arbitration by submission), the dispute will be resolved by arbitration.

Arbitration is not a trial process. It is a private adjudication process that can be adapted to suit the needs of the parties. It can be designed by the parties to focus on the issue in dispute. However in designing a process the parties should be aware of the distinction between arbitration and valuation.

Arbitration is a process by which an independent decision maker hears the parties and decides a dispute. The rules of natural justice, and usually, the provisions of the *Arbitration Act*[1] apply. An arbitrator, except in the case of fraud or other serious misconduct, is immune from suit.[2]

Valuation on the other hand is a process by which the parties jointly engage a third party to decide the issue using that party's own skill and judgment[3]. A valuation is sometimes used to resolve a rent dispute when the parties agree to engage jointly an appraiser who will prepare an appraisal to determine the "fair market rent" for premises by which the parties agree to be bound. The *Arbitration Act* does not apply to a valuation and no appeal or application to set aside a valuation

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1 R.S.B.C. 1996 c. 55

2 *Sport Maska Inc.* v. *Zittrer*, [1988] 1 SCR 564

3 *Sport Maska Inc.* v. *Zittrer*, [1988] 1 SCR 564

award is available. It may be possible to seek a declaration that the valuer's opinion is not applicable because the valuer failed to value the interest in issue. Otherwise the only remedy an unhappy party has is to bring an action in negligence against the valuer.

Many leases have provisions that disputes about operating costs or the area of premises will be decided by an accountant or architect issuing a "certificate" which will be "deemed conclusive". It is unlikely that such persons realize they are performing the role of a valuer and are liable in negligence to both the landlord and the tenant.

II. Advantages and Disadvantages of Arbitration

Arbitration has a number of advantages over litigation:

(a) it is private if conducted under the British Columbia International Commercial Arbitration Centre ("BCICAC") Rules[4];

(b) it can be faster than litigation, but not always;

(c) the parties participate in the selection of the arbitrator;

(d) many pre-hearing procedures are shortened or abridged, or not available;

(e) there is a limited right of appeal, and the courts generally give considerable deference to an arbitrator; and

(f) a decision is easily enforceable under the *Arbitration Act*, R.S.B.C. 1996, c. 55.

Arbitration has some disadvantages compared to litigation:

(a) in some cases, usually valuations, an arbitrator may be less inclined to make a hard decision and more inclined to find some "middle ground";

(b) many pre-hearing procedures are shortened or abridged, or not available;

(c) there is a limited right of appeal, and the courts generally give considerable deference to an arbitrator[5]; and

(d) there can be opportunities for one party to delay through procedural objections and refusal to co-operate.

III. How to Get to Arbitration

The *Arbitration Act* provides:

> '*arbitration agreement*" means a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the International Commercial Arbitration Act applies;
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> ...

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4 See Rule 25. Note that there is no provision in the *Arbitration Act* with respect to confidentiality but, an arbitration to which the *BC Arbitration Act* applies must be commenced under the BCICAC Rules unless the parties agree to some other procedure. An arbitration conducted under ADR Institute of Canada *Arbitration Rules* is also confidential under Rule 4.18.

5 See: *Sattva Capital Corp.* v. *Creston Moly Corp.*, [2014] 2 SCR 633, 2014 SCC 53

> **2** (1) Subject to subsection (4), this Act applies to the following:
>
> (a) an arbitration agreement in a commercial agreement;
>
> (b) an arbitration *under an enactment that refers to this Act*, except insofar as this Act is inconsistent with the enactment regulating the arbitration, or with any rules or procedure authorized or recognized by that enactment;
>
> (c) any other arbitration agreement.
>
> (emphasis added)

Accordingly arbitration may be invoked:

(a) as a term of an agreement;

(b) by submission to arbitration (i.e. an agreement after a dispute has arisen);

(c) by a Reference by Court under s.36 of the *Arbitration Act*:

> **36** The court may order at any time that the whole matter, or a question of fact arising in a proceeding, other than a criminal proceeding, be tried before an arbitrator agreed on by the parties if
>
> (a) all parties interested, and not under disability, consent,
>
> (b) the proceeding requires a prolonged examination of documents, or a scientific or local investigation that cannot, in the opinion of the court, conveniently be made before a jury or conducted by the court through its other ordinary officers, or
>
> (c) the question in dispute consists wholly or partly of matters of account.

(d) by Statute, such as:

Property Transfer Tax Act, s. 22[6];

Library Act s. 29[7] – refers to the *Arbitration Act*

ICBC UMP claims (Under insured motorist)

Note that Treaty legislation expressly excludes the *Arbitration Act*.

Arbitration clauses can often be problematic if they are drafted without a clear understanding of both the process of arbitration and the nature of the dispute. Frequently by the time a dispute has arisen it is too late to do anything about a poorly drafted provision.[8]

IV. How to Start an Arbitration

Under s.22 of the *Arbitration Act* if the parties have not agreed (either in the arbitration provision or subsequently) an arbitration must be commenced through the BCICAC.[9] In rent arbitrations

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6 There are no regulations under the *Property Transfer Act* R.S.B.C. 1996 c. 378 dealing with arbitrations.

7 R.S.B.C. 1996 c. 264

8 It is beyond the scope of this paper to discuss drafting arbitration clauses. Two useful resources are a paper by Stephen Antle: "Commercial Arbitration Design Considerations" in the CLE course Commercial Arbitration 2012 and the paper of Peter J. Anderson and Catherine Gibson: "Drafting Arbitration Clauses" in the CLE course Commercial Leasing: Arbitration and Remedies 2011.

9 22 (1) Unless the parties to an arbitration otherwise agree, the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations apply to that arbitration.

parties usually agree to have the arbitrator administer the arbitration. The BCICAC can be useful for dealing with an uncooperative party as will be discussed below.

There are a number of other organizations which provide arbitration rules of procedure such as:

(a) British Columbia Arbitration & Mediation Institute; or

(b) ADR Institute of Canada ("ADRIC").

V. Staying Court Proceedings Involving a Dispute Subject to Arbitration

Generally speaking, if a dispute is covered by an arbitration agreement, court proceedings will be stayed unless the defendant has taken a step in the proceeding. Section 15 of the *Arbitration Act* states:

> **15** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
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> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
>
> (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.

The prerequisites to the application for a stay of proceedings under s. 15 were summarized by the BC Court of Appeal, in *Prince George (City) v. McElhanney Engineering Services Ltd.*[10], as follows:

(i) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;

(ii) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and

(iii) the application must be brought in a timely manner, and before the applicant takes a step in the proceeding.

The rational for the timeliness rule was addressed by Griffin J. in *Bodnar v. Payroll Loans Ltd.*[11], as follows:

> 45 One can assume that the policy rationale for the strict requirements of s.15 of the CAA is similar to the rationale that prevents a party from contesting a court's jurisdiction once the party has attorned to that jurisdiction. Once a party takes steps in the proceeding that appear to accept the court's jurisdiction, whether by asking the court to rule on matters or by invoking the court's procedures to advance that party's position, and without following available procedures to preserve the right to contest the court's jurisdiction, the party has given up the right to contest the court's jurisdiction.

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10 (1995), 9 B.C.L.R. (3d) 368, at para. 22 (C.A.), leave to appeal to S.C.C. refused, [1995] S.C.C.A. No 467.

11 2009 BCSC 1205

In *Friesen v. Lam*[12], a defendant sought a stay of proceedings after filing a statement of defence. The Statement of Defence pleaded that the court had no jurisdiction to decide the dispute by reason of an arbitration agreement but did not seek a stay. The Court analyzed the issue crisply when it said this:

> [15]…a defendant must apply for a stay of proceedings after the writ has been issued but before he or she files a Statement of Defence (see Prince George, supra at para. 28). A defendant forgoes his or her right to have a matter arbitrated once he or she files a Statement of Defence.
>
> …
>
> [18] However, the court must consider whether the defendant has lost his right to have the matter arbitrated because he has filed his Statement of Defence. Although the defendant, in his Statement of Defence, pled that the B.C. Supreme Court has no jurisdiction to decide the parties' dispute because of the arbitration clause, he has filed his Statement of Defence. In it, the defendant does not request a stay of proceedings, but instead asks the court to dismiss the plaintiff's claim. Such steps indicate an acceptance of the court's jurisdiction.
>
> [19] In my view, by filing his Statement of Defence and seeking the court's intervention to dismiss the plaintiff's claim, the defendant has lost his right to have the parties' dispute arbitrated. Because the defendant has failed to meet the three prerequisites for a stay of proceedings, his application is dismissed…

A stay of proceedings cannot be refused merely because multiple parties and multiple issues arise in litigation. The mere fact that there are multiple parties and multiple issues which are interrelated, and that some but not all defendants are bound by an arbitration clause, is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke that agreement. Section 15 of the *Arbitration Act* does not give the Court any residual discretion to refuse a stay against one defendant on the basis that other defendants are non-parties to the arbitration agreement.[13]

However, notwithstanding that there is an arbitration agreement a party may seek interim relief through the Court pursuant to s. 15(4) of the *Arbitration Act*:

> 15 (4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.

The most common types of interim relief sought are injunctions and garnishing orders before judgment. An arbitrator may make interim protective awards but only in respect of parties to the arbitration agreement. A court order will bind non-parties as well.

VI. Selecting an Arbitrator or a Panel

The *Arbitration Act* provides:

> **4** (1) If an arbitration agreement does not provide for the appointment of an arbitrator, an arbitration under that agreement is before a single arbitrator.
>
> (2) If an arbitration agreement provides for the appointment of an even number of arbitrators, the arbitrators may appoint an additional person to act as an umpire.

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12 2007 BCSC 1124

13 *McElhanney,* at para. 37*; Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708, at paras. 116 to 130

> (3) If arbitrators who have appointed an umpire cannot reach a majority decision on any matter before them, the umpire must decide the matter, and the umpire's decision is for all purposes the decision of the arbitrators.

The appointment of most single arbitrators is reached by agreement of the parties. Generally the parties will exchange lists of proposed candidates and reach agreement on one of the candidates. If the parties cannot agree then there are two main routes to have an arbitrator appointed:

(a) An application to the BCICAC pursuant to Rule 14[14]; or

(b) An application to the BC Supreme Court under the *Arbitration Act,* s. 17.

Where a panel of 3 arbitrators is appointed, generally each party appoints an arbitrator and the two "wingers" appoint the chair after consultation with the parties. Rule 13 of the BCICAC Rules, requires every arbitrator to be wholly independent and impartial. Rule 3.3 of the ADRIC Rules requires every arbitrator to be independent and impartial, unless the parties agree otherwise.[15]

Counsel should be careful in interviewing a prospective candidate for appointment as arbitrator to limit the discussion to:

(a) the general nature or subject matter of the dispute;

(b) the names of the parties, counsel and experts;

(c) the anticipated schedule; and

(d) the proposed arbitrator's fee or hourly rate

but not stray into either the merits or their client's position. Ideally a candidate should be interviewed jointly by counsel but this is not always possible.

Once an arbitrator is appointed, any and all communications with the arbitrator should be copied to the other counsel (or party if unrepresented) and be limited to the administration of the arbitration. Correspondence between counsel should not be copied to the arbitrator. An arbitrator is not interested in debates about production of documents or other procedural issues. If there is a dispute then an application should be made to the arbitrator. Generally a party should request a pre-hearing conference (usually by telephone) to discuss a proposed application in respect of the particular issue. The arbitrator will then give directions about the proposed application. In many arbitrations this can be done less formally subject to the directions of the arbitrator.

VII. Conducting an Arbitration

The first step after the appointment of the arbitrator or panel is a pre-hearing conference which will usually deal with:

(a) a time table for the exchange of pleadings;

(b) a hearing date;

(c) a time table for the exchange of expert reports and rebuttal reports;

(d) a time table for the exchange of witness statements;

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14 The BCICAC will be introducing revised Rules of Procedure in the Fall of 2016 which will include a process for hearing such applications.

15 Note that there are some arbitrations in which the wingers are not expected to be impartial.

(e) an agreed statement of facts;

(f) the venue for the hearing; and

(g) the arbitrator's or panel's retainer.

It is important to keep in mind the differences between an arbitration and a trial:

(a) an arbitration subject to the BCICAC Rules is commenced by delivering to the opposing party, and to the BCICAC, an Arbitration Notice in accordance with the requirements of the arbitration agreement or a Joint Submission to Arbitrate. An action is commenced by the filing of a Notice of Civil Claim in the appropriate Registry;

(b) pleadings in an arbitration are usually shorter and do not require the detail of current Supreme Court pleadings;

(c) there are no default judgment processes in arbitration, other than to proceed with the hearing if one party fails to respond;

(d) in an arbitration the production of documents is limited to:

(i) documents on which the party will rely; and

(ii) relevant documents sought by a party that the arbitrator orders produced whereas in a court proceeding each party must produce a list of documents that are being relied upon or which could prove or disprove a material fact;

(e) in an arbitration there are no examinations for discovery unless the parties agree or the arbitrator orders there be examinations for discovery, whereas in a Supreme Court action parties have a right to conduct an examination for discovery;

(f) in an arbitration generally evidence in chief is led by either sworn statements or "will say statements"[16] so that the examination in chief is brief, limited to correcting errors or briefly explaining difficult issues. In a trial, evidence in chief is rarely in writing;

(g) expert reports are often exchanged simultaneously in real estate arbitrations with rebuttal reports also exchanged simultaneously;

(h) hearings days are generally longer than court days;

(i) written argument is often directed with shorter oral argument, although this depends on the nature of the arbitration and the views of both the parties and the arbitrator;

(j) arbitral awards are generally delivered more promptly. An Award must be in writing and signed by the arbitrator.[17] If the arbitration agreement has a time limit for the delivery of an Award the arbitrator or the Supreme Court may extend the time limit.[18]

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16 A "will say" statement is an unsworn statement that the witness will be asked to verify under oath at the hearing.

17 *Arbitration Act* s. 25

18 *Arbitration Act* s. 13

An arbitration is a flexible procedure. There are a number of modes of arbitration:

(a) documents and written submissions only;

(b) a full hearing with witnesses;

(c) written evidence and submissions with some oral argument; or

(d) "baseball" style, where the arbitrator must choose one of the positions presented by the parties.

The Rules applicable to an arbitration are the BCICAC Rules pursuant to s. 22 of the *Arbitration Act* but the parties may agree to other rules of procedure.

VIII. Cost Awards in Arbitration Proceedings

An arbitration agreement may stipulate the basis on which the costs will be borne by the parties but, if the matter is not referenced in the arbitration agreement then costs are left in the discretion of the arbitrator. Section 41 of the *Arbitration Act* states:

> **41.** An order under this Act may be made on terms, as to costs or otherwise, that the Authority making the order thinks just.

An important consideration and consequence of arbitration conducted under the BCICAC Rules is the authority of an arbitration tribunal to award costs and to specify the basis on which those costs are to be assessed. Rule 38 of the BCICAC domestic commercial arbitration rules of procedure states:

> 38. Costs
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> (1) The arbitration tribunal shall determine liability for costs and may apportion costs between the parties.
>
> (2) In awarding costs, the arbitration tribunal shall take into account the principles set out in Rule 19(2), and the failure of any party to comply with these Rules or the orders of the tribunal. The tribunal shall provide reasons in the event it departs from the principle that costs follow the event.
>
> (3) In the event the arbitration tribunal awards costs, it shall specify the amounts of the fees and expenses so awarded or the method for the determination of those amounts.
>
> (4) Costs include:
>
> (a) the fees of the arbitration tribunal which shall be separately determined and stated for each member of the tribunal, together with reasonable travel and other expenses incurred by the tribunal;
>
> (b) the fees of any expert appointed by the arbitration tribunal, including travel and other reasonable expenses incurred;
>
> (c) **the legal and other expenses reasonably incurred in relation to the arbitration by a party determined by the arbitrati**on tribunal to be entitled to recover such costs; and
>
> (d) the commencement fee, administration fees, and the expenses incurred by the Centre.
>
> (5) *The liability of parties for the tribunal's fees and expenses is joint and several between the arbitration tribunal and the parties. (emphasis added)*

In British Columbia, the following cases offer assistance in the interpretation of the scope of an arbitrator's ability to award costs under the Arbitration Act and the BCICAC Rules:

- Teal Cedar Products Ltd v British Columbia (Ministry of Forests), 2011 BCSC 360, reversed in part on other grounds 2012 BCCA 70, leave to appeal to the SCC refused 2012 SCCA No. 156
- Williston Navigation Inc. v. BCR Finav No. 3, 2007 BCSC 190

Typically, indemnification costs rather than party and party costs should be granted in an arbitration.[19] At the same time, a party is not entitled to recover more than its objectively reasonable legal fees determined in light of the particulars of what the solicitor did.[20] The court has wide discretion in determining factors to assess what are the reasonable legal fees.[21]

Note that historically, Ridley Terminals Inc. v. Minette Bay Ship Docking Ltd., (1990) 45 BCLR (2d) 367 (BCCA), was the leading authority in British Columbia; however, as that case applied before the Arbitration Act was amended to specifically refer to costs it is currently less helpful in analyzing costs awards.

IX. Appealing an Arbitral Award

An appeal of an arbitral award is limited to a question of law. As a result of the decision of the Supreme Court of Canada in *Sattva Capital Corp.* v. *Creston Moly Corp.*[22] the scope of appeal is now extremely limited as most issues of interpretation of a contract are questions of mixed fact and law not pure questions of law. In real estate matters, valuation issues rarely raise questions of law. The right of appeal is found in s.31 of the *Arbitration Act*:

> **31** (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if
>
> (a) all of the parties to the arbitration consent, or
>
> (b) the court grants leave to appeal.
>
> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.
>
> (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
>
> (3.1) A party to an arbitration in respect of a family law dispute may appeal to the court on any question of law, or on any question of mixed law and fact, arising out of the award.
>
> (4) On an appeal to the court, the court may

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19 Teal Cedar Products Ltd v British Columbia (Ministry of Forests), 2011 BCSC 360 at para. 72

20 Williston Navigation Inc. v. BCR Finav No. 3, 2007 BCSC 190 at para. 51

21 Encorp Pacific (Canada) v BC Bottle Depot Assn., 2009 BCSC 1657 at para. 10

22 [2014] 2 SCR 633, 2014 SCC 53

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

X. Trends in Arbitration Theory

There is an ongoing debate in arbitration circles about whether there should there be any right of appeal at all. There is no appeal in an international appeal. There is however a right to set aside an international award or to decline to enforce an award on essentially the same grounds as a domestic award. Section 30 of the *Arbitration Act* states:

> **30** (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may
>
> (a set aside the award, or
>
> (b) remit the award to the arbitrator for reconsideration.
>
> (2) The court may refuse to set aside an award on the grounds of arbitral error if
>
> (a) the error consists of a defect in form or a technical irregularity, and
>
> (b) the refusal would not constitute a substantial wrong or miscarriage of justice.
>
> (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

A committee of the Uniform Law Conference of Canada, chaired by Gerry Ghikas Q.C. has prepared a Report for an updated *Domestic Uniform Commercial Arbitration Act*. It is anticipated that it will be presented to the Conference in August 2106 for approval.