DAVIS MOLDAVER LLP
BARRISTERS

Arbitration of Commercial Leasing Disputes – In Brief

By Milton Davis

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Introduction

Alternatives to litigation should be considered for many disputes that arise between parties to commercial leases. This paper is designed to give an overview of the arbitration process. Hopefully it will help to determine when and how commercial landlords and tenants should use an arbitration provision in a commercial lease.

The Arbitration Act

In Ontario, private arbitrations of commercial leases are governed by the *Arbitration Act, 1991* (the "***Act***")[1], which sets out default and mandatory[2] provisions for the conduct of arbitrations. As such, parties are virtually unlimited in the type of arbitration and its process.

Benefits of Arbitration

Arbitration can be a better way to resolve disputes than litigation.[3] Litigation is often protracted, expensive and uncertain. Arbitration affords the opportunity for parties to draft the dispute resolution process having regard to the subject-matter and quantum of the matters at issue. The type and quantum of awards, the process, legal fees, and appeals may all be prescribed by a well-drafted arbitration agreement.

Arbitration agreements may be entered into before or after disputes arise. The agreement should explicitly state that arbitration is the dispute resolution process for any or all disputes. To avoid negotiations after the conflict surfaces it may be preferable to address arbitration in the lease for certain types of disputes[4]. For example: the proper calculation of common area expenses ("CAMS"), the quantum of renewal rent, or breaches of restrictive covenants. Appropriately used, arbitration is potentially an expeditious and more cost-effective way to resolve disputes that arise between landlords and tenants.

Drafting the Arbitration Agreement

Counsel should consider the types of disputes that may arise in light of whether and how to arbitrate them. It is a mistake to have an all-encompassing arbitration clause. When drafting the agreement parties should tailor the arbitration to the nature and subject-matter of the dispute.

Well-drafted arbitration clauses will address procedure, and scheduling. Provisions for strict timeframes in conjunction with a "stream-lined" resolution process (e.g., limited written submissions) will result in a cost-efficient and expeditious result. Parties should also agree to provisions for the timely and easily determinable appointment of the arbitrator.

The agreement may provide for all or some of the procedures used in litigation. Thus, if arbitration is required to determine the calculation of CAMS, there may be no need to set out a format for arbitration that includes formal discovery. Alternatively, the parties can agree that the *Rules of Civil Procedure* shall (or shall not) govern. They can agree that hearsay is admissible, or that evidence in chief may be entered by way of affidavit.

At a minimum, arbitration clauses for complex disputes should provide for, the following:

1. the scope of the dispute(s) to be arbitrated;
2. the choice of arbitrator(s);

3. the law of the dispute;
4. the place of Arbitration;
5. pre-Hearing procedures;
6. the procedure for hearings; and
7. appeal rights (if any).

In litigation (and in arbitrations with poorly drafted arbitration clauses) a party may employ many tactics that unduly delay and complicate matters. The arbitration agreement must provide specific provisions to minimize (if not eliminate) the use of such tactics. Protracted dispute resolution may be avoided by a well-drafted arbitration agreement and should enable the resolution of disputes as soon as possible after they arise.

The procedure can be as formal or as informal as the parties wish. What is important is that the parties *clearly* set out the agreement to arbitrate, the subject-matter/scope of the arbitration and the processes/remedies that will or will not be available to the parties. Arbitration clauses should provide for only the necessary processes to resolve the disputes in a timely and cost-effective manner. Thus the parties can agree that the arbitrator can decide what procedure can govern.

Selecting the Arbitrator or Panel

There are no restrictions as to the identity of the arbitrator or panel who will decide the dispute. Parties may determine the process for the appointment of an arbitrator (or a panel, “the tribunal”) to determine the dispute. [5] Parties should ensure the appointment provisions will permit the selection of an experienced and knowledgeable arbitrator in light of the subject matter of the dispute.

It is open to the parties to choose whether to have a single arbitrator, or more than one. A panel of three arbitrators is not uncommon for significant disputes. All arbitrators may be appointed by a set of criteria, or the parties may each select one arbitrator, who in turn, appoint the third.

The Award

The arbitration agreement and the *Act* will determine the types of awards that are granted. Under the *Act*, the arbitrator may make interim orders, and render a final decision – an “award”. An arbitration award binds the parties, unless it is set aside or varied by way of appeal. [6] An arbitration award may be enforced in Ontario. [7] A party seeking enforcement of an award must apply to the Superior Court. Finally, the court may set aside or vary an arbitration award on certain enumerated grounds.

Arbitrations are not free-for-alls. An arbitrator must be impartial and independent. An arbitrator *shall* (unless the parties otherwise agree) decide a dispute in accordance with law, including equity, and may order specific performance, injunctions and other equitable remedies. [8] An arbitrator has the power to make an order for the detention, preservation or inspection of property and documents and may order a party to provide security. [9]

The Act makes arbitration awards legally enforceable and subject to limited resort to the Superior Court. An award binds the parties (subject to being set aside or varied on appeal). Parties may empower the arbitrator to determine matters according to specified parameters (legal or otherwise). [10]

The resolution of disputes by way of arbitration pursuant to the Act does not wholly oust the court's jurisdiction. The Superior Court may intervene[11] in accordance with provisions of the Act (see section 6), including to: ensure the arbitration is conducted in accordance with the arbitration agreement; prevent unequal or unfair treatment of parties; and enforce awards.[12]

Costs

An arbitrator has the power to award costs of the arbitration.[13] An arbitration agreement should address the issue of costs of the arbitration (including legal fees and the arbitrator's fees); failing which the default provisions of the *Act* will be applied. Parties are thus able to control, amongst other things, the scale of costs – be it on a "partial", "substantial", "complete", or other basis.

Types of Arbitration

Arbitration is not just "private litigation". In litigation, the remedies provided are a result of what the court deems just in the circumstances. Sometimes this does not accord with *either* party's expectations. Parties may adopt an arbitration structure that leaves the award in sole discretion of the tribunal. There are other options.

"Baseball Arbitration" allows the parties to submit their desired results from which the tribunal must make its award. Alternatively the parties may submit their desired results that will serve as the "high" and "low" range that the tribunal may award. These restrictions may or may not be revealed to the arbitrator prior to the determination of the merits of the arbitration. Similar restrictions may be placed on legal fees awarded. The type of arbitration is limited only by the imagination of counsel.

Appeals

Litigation affords parties an appeal as of right from all final orders of a judge. [14] If an arbitration agreement is silent as to appeal rights with respect to questions of law, a party may seek leave to appeal to the Superior Court of Justice only questions of law. Leave is not easily obtained. All other appeals must be expressly provided for in the arbitration agreement. Accordingly, the arbitration agreement should be drafted to reflect the parties' intentions with respect to appeals.

Conclusions

If arbitration is agreed to be the preferred route for dispute resolution, then serious consideration of appointment provisions, timelines, procedures and appeal rights (amongst other things) must be addressed in the arbitration agreement. Parties should, in appropriate cases – contract for, and embrace the freedom, from the formalities and constraints of civil litigation. Litigation is often considered by many business people and solicitors to be a short-term strategy or a last resort to solve problems.[15] An arbitration agreement can ensure that the arbitration process is not in and of itself used to leverage a resolution of a dispute.

Sample Arbitration Clauses

The following clauses are suggested forms of arbitration clauses. They are meant to suggest terms for consideration. They should not be copied or used as precedents without careful review and analysis. Needless to say, the authors of this article take no responsibility for

these clauses. The prudent lawyer will remember that the authors are litigation lawyers, who would never consider drafting a lease.

1. **Appointment of Arbitrator**

Where a party is permitted pursuant to the provisions of this Lease to refer a matter to arbitration for determination, after a party gives notice that it is referring such matter to arbitration, each party shall at once appoint an arbitrator and such appointees shall jointly appoint a third. The decision of any two of the three arbitrators so appointed shall be final and binding upon the parties hereto who covenant one with the other that their disputes shall be so decided by arbitration alone and not by recourse to any Court by action of law. If within a reasonable time the two arbitrators appointed by the parties hereto do not agree upon a third, or if the party who has been notified of a dispute fails to appoint an arbitrator, then a third arbitrator or an arbitrator to represent the party in default may, upon petition of the party not in default, be appointed by a Judge in the Province of Ontario. The cost of arbitration shall be apportioned between the parties hereto as the arbitrators may decide. Any arbitration shall be conducted in accordance with the *Arbitration Act of Ontario* and any statutory modification or re-enactment thereof.

2. **Arbitration of Disputes**

The parties agree that if during the Term there is **any** dispute between them in respect of the provisions of this Lease an addendum or amendment hereof or by agreement of the parties hereto to be arbitrable, such dispute shall be submitted for arbitration under the provisions of the *Arbitration Act of Ontario* and any statutory modification or re-enactment thereof.

3. **Arbitration – Annual Basic Rent**

If under the foregoing provisions the Landlord and the Tenant have failed to agree as to the Annual Basic Rent payable for the Premises the determination of such Annual Basic Rent shall be referred to a Board of three arbitrators, one to be appointed by each of the Landlord and the Tenant and a third arbitrator to be appointed in writing by the first two-named arbitrators; if the Landlord or the Tenant shall refuse or neglect to appoint an arbitrator within 10 days after the other shall have served a written notice upon the party so refusing or neglecting to make such appointment, the arbitrator first appointed shall, at the request of the party appointing him, proceed to determine such rent as if he were a single arbitrator appointed by both the Landlord and the Tenant for the purpose. If two arbitrators are so appointed within the time prescribed and they do not agree within a period of 10 days from the date of appointment of the second arbitrator upon the appointment of the third arbitrator, the third arbitrator shall be appointed by a judge of the Supreme Court of British Columbia. The determination by the arbitrators or the majority of them or by the single arbitrator, as the case may be, shall be final and binding upon the Landlord and the Tenant and their respective successors and assigns. Each party shall pay the fees and expenses of the arbitrator appointed by it and one-half of the fees and expenses of the third arbitrator. The provisions of the section shall be deemed to be submission to arbitration within the provisions of the *Arbitration* Act and any statutory modifications or re-enactment thereof, provided that any limitation on the remuneration of the arbitrators imposed by such legislation shall not be applicable.

4. **Dispute Resolution – Conciliation and Arbitration**

If a dispute between the parties shall arise hereunder, the parties agree to work in good faith to resolve such dispute in a timely manner. If the parties are unable to resolve the dispute at the operations level, either party may provide a notice in writing to the other setting forth the nature of the dispute and requesting that the matter be considered by an **arbitrator of their choosing**. These individuals will work in good faith to resolve the dispute, provided however, that if the dispute is not resolved within 10 days of receipt of the original dispute notice, either party may request in writing that the matter be referred to a **third arbitrator**. **A majority of these three arbitrators** will determine the dispute. There shall be no right of appeal from this determination.

5. **Arbitration Rules**

Jurisdiction and Scope

i. As provided for in Section[X] of the agreement, any dispute between the parties may be submitted to arbitration (the "**Arbitration**"). The rules governing the Arbitration (the "**Rules**") are set out below.
ii. The Arbitration shall be governed by the *Arbitration Act* (Ontario).
iii. Each of the parties expressly acknowledges and agrees that:
    a. it shall not apply to the courts of Ontario or any other jurisdiction to attempt to enjoin, delay, impede or otherwise interfere with or limit the scope of the Arbitration or the powers of the arbitrator appointed under these Rules to hear the Arbitration (the "**Arbitrator**") as defined in Section ix of these Rules;
    b. the award of the Arbitrator shall be final and conclusive and there shall be no appeal therefrom of whatsoever nature or kind to any court, tribunal or other authority, except as set out below; and
    c. the award of the Arbitrator may be entered and enforced by any court in any jurisdiction having jurisdiction over the parties and/or the subject matter of the award and/or the properties or assets of either of the parties as set out in the *Arbitration Act* (Ontario);

    provided, however, that the foregoing shall not prevent either party from applying to the courts of Ontario for a determination with respect to any matter or challenge provided for in the Arbitration Act (Ontario).

iv. The Arbitrator has the jurisdiction to deal with all matters relating to a Dispute as provided for by the *Arbitration Act* (Ontario) including, without limitation, the jurisdiction:
    a. to determine any question of law, including equity, arising in the Arbitration in accordance with Sections vi and vii of these Rules;
    b. to determine any question of fact including questions of good faith, dishonesty or fraud arising in the Arbitration;
    c. to order any party to furnish such further details of that party's case, as to fact or law, as it may require;
    d. to require or permit the parties to give evidence under oath or solemn affirmation;
    e. to order the parties or either of them to make interim payments towards the costs of the Arbitration; and
    f. to award interest on any sum from and to any date at such rates as it determines to be appropriate.
v. Unless the parties shall at any time otherwise agree in writing, the Arbitrator shall have the power, on the application of either of the parties or of its own motion (but in either case only after hearing or receiving any representations from the parties concerned which it determines in its discretion to be appropriate:

a. To allow other parties to be joined in the Arbitration with their express consent, and make a single final award determining all disputes between them;
b. to allow any party, upon such terms (as to costs and otherwise) as it shall determine, to amend its claim, defence, reply, counter-claim or defence to counter-claim;
c. to extend or abbreviate any time limits provided by these Rules or by its directions;
d. to direct the parties to exchange written statements, whether or not verified by oath or affirmation, of the evidence of witnesses, and direct which of the makers of such statements are to attend before it for oral examinations;
e. to determine what witnesses (if any) are to attend before it, and the order and manner (including cross-examination, as recognized under the laws of Ontario) in which, and by whom, they are to be orally examined;
f. to conduct such further or other inquiries as may appear to it to be necessary or expedient;
g. to order the parties to make any property or thing available for its inspection or inspection by the other party and inspect it in their presence;
h. to order the parties to produce to it, and to each other for inspection, and to supply copies of, any documents or classes of documents in their respective possession, control or power which it determines to be relevant;
i. to order the preservation, storage, sale or other disposal of any property or thing under the control of any of the parties relevant to the Dispute before it; and
j. to make interim orders for security for costs for any party's own costs, and to secure all or part of any amount in dispute in the Arbitration.

Law of Dispute

vi. The Arbitrator shall determine a Dispute in accordance with the substantive law as set out in Section 10 of the agreement.

Applicable Law

vii. The law governing the Arbitration shall be that of the Province of Ontario.

Place of Arbitration

viii. The place of the Arbitration shall be Toronto, Canada.

Appointment of Arbitrator

ix. The Arbitration shall be commenced, pursuant to the *Arbitration Act* (Ontario), by delivery of a written complaint (the "**Complaint**").
x. The Complaint shall describe the Dispute and nominate an Arbitrator. Within 15 days of the receipt of the Complaint, the Respondent may, by notice to the Applicant, concur in the appointment of that Arbitrator or may disagree with the nomination of the Arbitrator, and failing the delivery of such notice by the Respondent, the Respondent shall be deemed to have concurred in the appointment of the Arbitrator nominated by the Applicant and such Arbitrator shall determine the Dispute acting alone.
xi. If the Respondent disagrees with the nomination of the Arbitrator pursuant to Section 10 of these Rules, then, within 15 days delivery of the Respondent's notice to that effect, the Respondent and the Applicant shall agree on the appointment of an Arbitrator, failing

which each party shall designate a qualified arbitrator and those two arbitrators will agree on an Arbitrator. Upon such appointment, such Arbitrator shall constitute the Arbitrator.

xii. Any decision of the Arbitrator made with respect to a Dispute or with respect to any aspect of, or any matter related to, the Arbitration (including, without limitation, the procedures of the Arbitration) shall be made by the Arbitrator as set out in the *Arbitration Act* (Ontario). All decisions of the Arbitrator with respect to a Dispute, except procedural decisions, shall be rendered in writing and shall contain a brief recital of the facts upon which the decision is made and the reasons therefore.

Pleadings

xiii. The following shall apply to the Arbitration of any Dispute:

a. within 30 days of the appointment of the Arbitrator, the Applicant shall deliver to the Respondent and the Arbitrator a written statement (the "**Claim**") concerning a Dispute setting forth, with particularity, its position with respect to the Dispute and the material facts upon which it intends to rely;
b. if the Applicant fails to deliver a claim within the time limits referred to in (a) above, the Arbitrator shall proceed pursuant to the procedures relating to default set out in the *Arbitration Act* (Ontario);
c. within 30 days after the delivery of the Claim, the Respondent shall deliver to the Applicant and the Arbitrator a written response (the "**Defence**") setting forth, with particularity, its position on the Dispute and the material facts upon which it intends to rely;
d. if the Respondent fails to deliver a Defence within the time limit referred to in (c) above, the Arbitrator shall proceed pursuant to the procedures relating to default set out in the *Arbitration Act* (Ontario);
e. within 10 days after delivery of the Defence, the Applicant may deliver to the Respondent and the Arbitrator a written reply (the "**Reply**") to the Defence, setting forth, with particularity, its response, if any, to the Defence;
f. within the time provided for the delivery of the Defence to the Claim, the Respondent may also deliver to the Applicant and the Arbitrator a counter-claim (the "**Counter-Claim**") setting forth, with particularity, any additional Dispute for the Arbitrator to decide;
g. within 30 days of the delivery of a Counter-Claim, the Applicant shall deliver to the Respondent and the Arbitrator a Defence to such Counter-Claim. If the Applicant fails to deliver a Defence to the Counter-Claim within such 30 day period, the Arbitrator shall proceed pursuant to the procedures relating to default of a party set out in the *Arbitration Act* (Ontario);
h. within 10 days after the delivery of a Defence to the Counter-Claim, the Respondent may deliver to the Applicant and the Arbitrator a Reply to such Defence to Counter-Claim; and
i. any Dispute submitted to Arbitration in accordance with (f) above shall be governed by, and dealt with as if it were the subject of a Complaint in accordance with these Rules, except that it shall be deemed a submission to the Arbitrator already appointed, and shall be determined by the Arbitrator accordingly.

Pre-Hearing Procedures

xiv. Upon completion of the foregoing steps in Section xiii, or upon expiry of the time limit provided therefore, if a step provided for in Section xiii is not taken by such time, the Arbitrator shall convene a preliminary hearing for determination of the following:

a. appointing the time and date for the hearing of a Dispute (the "**Hearing**");
b. arranging for the production of documents pertaining to a Dispute;
c. ordering or permitting either party to examine for discovery orally or submitting written interrogatories to be answered in writing by the other party and within such time limit as it may impose prior to the Hearing and requiring the other party to respond thereto through an officer or other representative who is familiar with or has fully informed himself of the facts necessary to answer the questions posed; and
d. receiving and taking into account such written or oral evidence, whether given under oath or otherwise, as it shall determine to be relevant and material, whether or not admissible in law and attributing such weight to it as it shall deem appropriate.

Meetings and Hearings

xv. The Arbitrator shall appoint the time, date and place of meetings and the Hearing in the Arbitration, and will give all the parties adequate notice of these. The place of all proceedings in the Arbitration shall be as set out in Section 8 of these Rules and all proceedings shall take place there, unless the Arbitrator otherwise directs.

xvi. All proceedings and the rendering of the award will be in private and the parties shall ensure that the conduct of the arbitration and the terms of the award shall be kept confidential unless the parties otherwise agree.

Miscellaneous

xvii. All written statements and responses thereto and other notices, requests and demands, required or permitted hereunder, shall be in writing and shall be personally delivered or sent by telex, telecopier or other means of electronic communication in writing where the identity of the sender can be verified. Mail shall not be used. All such communications shall be deemed to have been received, if actually received during the business hours applicable where received, on that business day. Addresses, telex, answerback and automatic telecopier numbers are as follows:

[LIST PARTIES AND DATA]

If none of above is found to be effective, the communication will be deemed to have been received if sent to the addressee's last-known place of business or mailing address by registered letter or any other means which provides a record of the attempt to deliver it.

xviii. The Arbitrator shall be paid his or her normal professional fees for his or her time and attendance in dealing with a Dispute, which fees, unless otherwise directed by the Arbitrator, shall be paid equally by the Applicant and the Respondent.

xix. The award shall be rendered in writing and shall contain a recital of the facts upon which the award is made and the reasons therefore. Otherwise, the award shall conform with the requirements set out in the *Arbitration Act* (Ontario).

Unless the parties otherwise permit, time is of the essence of the Arbitration pursuant to these rules.

Endnotes

[1]S.O. 1991, c. 17, as am.

[2]The following are the “mandatory” provisions: “*Scott v. Avery*" clauses (ss. 5(4)); equality and fairness (s. 19); extension of time limits (s.39); setting aside award (s. 46); declaration of invalidity of arbitration) (s.48.) and enforcement of award (s.50)

[3]In addition to arbitration parties should consider mandatory mediation as a condition precedent to arbitration or litigation of disputes.

[4]Alternatively, parties may draft a separate “arbitration agreement” – however, arbitration clauses in contracts form “distinct agreements” whose validity does not turn on the validity of the “main agreement”.

[5]Where the arbitration agreement does not provide for the appointment of an arbitrator and the parties cannot agree – the parties may seek the court’s intervention. A provision should be inserted that provides for a crystal clear appointment process both with respect to the identity of the arbitrator and the timeframe for so selecting.

[6]The *Act*, sections 37, 45, and 46.

[7] The *Act*, section 50.

[8] The *Act*, section 31.

[9] The *Act*, section 18(1).

[10] For example, the parties might determine that a specific legal authority (British or American) will be the governing law, or that the dispute will be determined by arbitrator as he or she “sees fit” without necessary regard or compliance with prevailing legal authority.

[11] The *Act*, section 6.

[12] The Superior Court retains its usual powers for the detention, preservation and inspection of property, interim injunctions, and receiverships- the *Act*, section 8(1).

[13] The *Act*, section 54(2).

[14] In addition, parties may seek leave to appeal from interlocutory orders.

[15]This view while accurate sometimes is often wrong. Litigation is part of a party’s arsenal to resolve disputes and might be the “stick” that is needed to get results when the other side does not bite at the “carrot”.