

PDF 6-10

"ARBITRATION CLAUSES: WHAT SHOULD THEY SAY AND HOW DO I USE IT?"

Prepared By: Wolfgang Kaufmann & Gasper Galati
2010 ICSC Canadian Shopping Centre Law Conference
Breakfast Roundtable
February 25-26, 2010



ARBITRATION CLAUSES

“WHAT SHOULD THEY SAY AND HOW DO I USE IT?”

2010 ICSC CANADIAN SHOPPING CENTRE LAW CONFERENCE
BREAKFAST ROUNDTABLE
FEBRUARY 25-26, 2010
HILTON TORONTO HOTEL

PRESENTERS:

WOLFGANG KAUFMANN

Daoust Vukovich LLP
3000-20 Queen Street West
Toronto, ON M5H 3R3
Tel: (416) 597-6888
Fax: (416) 597-8897
Direct: (416) 597-3952
wolfgang@dv-law.com

GASPER GALATI

Daoust Vukovich LLP
3000-20 Queen Street West
Toronto, ON M5H 3R3
Tel: (416) 597-6888
Fax: (416) 597-8897
Direct: (416) 598-7050
ggalati@dv-law.com

SAMPLE ARBITRATION CLAUSES

SIMPLE:

The Minimum Rent for each Extension Period shall be the fair market rent which will be agreed to by the Landlord and the Tenant, both of whom will use reasonable commercial efforts to negotiate the applicable Minimum Rent as expeditiously as possible. If the Landlord and the Tenant are unable to agree upon the Minimum Rent payable for an Extension Period, then it will be arbitrated using a single arbitrator in Toronto.

- or -

Where any question or matter in dispute between the Landlord and the Tenant under this Lease cannot be determined, settled, or agreed between them, then the question or matter in dispute shall be determined by arbitration, pursuant the *Arbitration Act* (Ontario).

DETAILED:

- (1) If the parties fail to agree, within three (3) months after the Tenant gives the Option Notice to the Landlord, as to the Minimum Rent payable during the upcoming Extension Term, the annual Minimum Rent payable during the upcoming Extension Term shall be determined using the same terms of reference described above, by arbitration.
- (2) The arbitration shall be conducted before an arbitral panel of three persons; one to be appointed by each of the Tenant and the Landlord and the third to be chosen by the two arbitrators so appointed. The decision of the three arbitrators appointed as herein provided or the majority of them shall be binding upon the parties subject to any appeal rights. All costs and expenses of any such arbitration shall be borne by the Tenant and the Landlord equally, unless a majority of the arbitrators in their decision otherwise directs. Any such arbitration shall take place in the City of Toronto, in the Province of Ontario.
- (3) "Fair Market Rent" means, at any given time, the then current fair market rent paid for comparable premises, as if leased to a new tenancy, without attributing any value to the Leasehold Improvements, if any, which have been effected to the Leased Premises.

MORE DETAILED:

Wherever any question or matter in dispute between the Landlord and the Tenant under this Lease cannot be determined, settled, or agreed between them, then the question or dispute shall be determined by arbitration, as follows:

- (1) Either party may give written notice to the other of its desire to arbitrate such dispute, and shall in such written notice give notice of the appointment of an arbitrator chosen by the party giving such notice. The party receiving such notice shall within fifteen (15) days after the receipt thereof give a written notice to the party giving the first notice of the appointment of an arbitrator chosen by the party giving the second notice. The two arbitrators so chosen shall jointly appoint a third arbitrator;
- (2) If a party required to appoint an arbitrator shall fail to do so within such period of fifteen (15) days, or if each party has appointed an arbitrator and such arbitrators fail to agree upon a third arbitrator within fifteen (15) days after both have been appointed, then any party not in default in so appointing may apply to a Judge of the Ontario Court (General Division), for the appointment of an arbitrator on behalf of the party in default, or the appointment of the third arbitrator, as the case may require;
- (3) The three arbitrators so appointed shall determine the dispute having regard to the provisions of this Lease and to any other agreements which the parties may have made respecting the arbitration or the matter in dispute and the decision of and any costs awarded by any two of them shall be final and shall bind the parties. Subject to the provisions of this clause, the arbitration shall be conducted in accordance with the provisions (if any) of the laws of Ontario from time to time in effect pertaining to arbitration;
- (4) The fees and expenses of the arbitrators and all other expenses of such proceedings shall be borne in such manner as the arbitrators may determine; and
- (5) The provisions of this section regarding the determination of certain questions or matters in dispute by arbitration are acknowledged by the parties to have the intended purpose of providing, where applicable, an equitable and rapid determination, but are not intended and shall not be interpreted as excluding recourse by any party to the Courts, or recourse by any party to any of the remedies available at law or in equity including damages or injunction, and such recourse may be taken notwithstanding the provisions of this section in respect of any matter where the substantial rights of a party are involved and might be prejudiced or impaired if such recourse is not taken, notwithstanding that the determination of such matter may involve a question for determination by the Court which would otherwise fall for its determination within the provisions of

this section, but in any such case any determination which has already been made pursuant to this section shall be binding upon the parties.

COMPLEX:

If the Tenant gives notice to extend to the Landlord, the Rent payable for the Premises during the Option Term shall be at the then current Annual Market Rental Value for the Premises as mutually agreed by the Landlord and the Tenant or failing agreement as determined prior to the beginning of such Option Term as follows:

- (1) The Rent for the Option Term will be based on the then applicable market rental rates for the Brampton, Ontario area for similar purposes and of the approximate size as the Premises but excluding the value of the Tenant's Work and any other improvements and additions to the Premises made by or on behalf of the Landlord or the Tenant (herein called the "Annual Market Rental Value");
- (2) The parties will attempt to agree on the Annual Market Rental Value for the Option Term not later than ninety (90) days before the end of the Original Term. If the parties are unable to agree on same within that time, the matter will be determined by arbitration by appraisers as set out herein. Either party may serve the other with a notice to arbitrate and each party will within fifteen (15) days after service of such notice, appoint an appraiser and advise the other party in writing of such appointment;
- (3) If either party fails to so appoint an appraiser or to advise the other party of such appointment, the person who has been appointed appraiser may appoint a second appraiser to represent the party in default. The two appraisers will then promptly attempt to jointly establish the Annual Market Rental Value for the Option Term;
- (4) If within thirty (30) days after attempting to do so, the two appraisers are unable to agree on the Annual Market Rental Value, they will each notify the parties in writing of their individual determinations. If the difference between the amounts determined by the two appraisers is not greater than seven and one-half percent (7.5%) of the higher of the two amounts so determined, the Annual Market Rental Value will be the average of the two amounts;
- (5) If the difference between the two amounts is greater than seven and one-half percent (7.5%) of the higher of the two amounts so determined, upon application of either party, the incumbent presiding officer of the Appraisal Institute of Canada or its successor in the province in which the Premises are located will appoint a third appraiser. In such case, the Annual Market Rental Value for the Option Term will be the mean of the amount determined by the third appraiser and that of the lower of the first two amounts determined by the first and second

appraisers;

- (6) The expense of all appraisals will be borne equally by the Landlord and the Tenant. All appraisers will be disinterested persons who are members in good standing of the Appraisal Institute of Canada, or its successor. In the event of any dispute as to the procedure to be followed by the appraisers, the *Arbitration Act* of Ontario (or any successor or replacement statute thereto) will govern; and
- (7) If the Rent for the Option Term has not been determined by the commencement of the applicable Option Term, the Tenant shall pay Rent equal to the Rent payable in the last year of the immediately preceding term until the Rent has been determined in accordance with the provisions of this Section and, upon such determination, the Rent for the applicable Option Term shall be adjusted from the applicable commencement date of the Option Term.

THE ARBITRATION PROCESS

Arbitration is a legal procedure for resolving disputes using one to three neutral, private persons called “arbitrators”. The arbitrator is a decision-maker appointed by or on behalf of the parties to decide the issues in dispute by applying rules of law and equity, unless the parties have agreed that some other rules or format will apply. The decision of the arbitrator is final and binding, unless otherwise agreed.

STEP 1: Identify the dispute or issue between the Landlord and the Tenant.

STEP 2: Does your commercial lease have an arbitration clause?

- What does the arbitration clause say?
- Does the dispute which exists between the Landlord and the Tenant fall under the arbitration clause agreed to between the parties?
- What is the jurisdiction which governs the arbitration?

STEP 3: The Claimant should serve a Notice of Arbitration to the other party advising that you are invoking your right to arbitration in order for the dispute between the parties to be resolved.

- The plaintiff in arbitration is called the “Claimant”.
While the defendant in arbitration is called the

“Respondent”.

STEP 4: The Landlord and the Tenant must appoint an arbitrator.

- Does the arbitration clause in the Lease provide a procedure for appointing the arbitrator?
- Does the arbitration clause contemplate whether or not the arbitration is to be heard by a single arbitrator or a panel of arbitrators?

STEP 5: Once an arbitrator has been appointed, the arbitrator will hold a preliminary hearing, usually by telephone conference, to discuss the following issues:

- the arbitration agreement;
- a timetable for the arbitration;
- the procedure to be used at the arbitration;
- the language of proceedings;
- the location of the arbitration;
- the exchange of written submission;
- the exchange of documentary evidence;
- a list of witnesses for the arbitration;
- whether or not any experts will be used at the arbitration; and
- procedure for appeal.

STEP 6: The claimant is to serve the respondent with its Arbitration Submissions. The respondent is to serve the claimant with its Reply Submissions. At this time, the parties are also responsible for ensuring that the arbitrator receives a copy of each party’s submissions.

STEP 7: The parties are to exchange all documentary evidence, any expert reports and witness statements. Witness statements outline the oral evidence to be given by each party’s witnesses.

STEP 8: The arbitration takes place.

STEP 9: The arbitrator, after taking into account all documentary evidence, oral

evidence and the arguments put forward by each party renders her “Award”. The Award may or may not include an Award for costs.

- In arbitration, the final outcome is called an “Award” and not a judgment.

STEP 10: Once the appeal period has expired, the successful party may enforce the Award. If the respondent fails to pay any Award made against it by the arbitrator, the claimant may bring an Application to the Ontario Superior Court of Justice to have the Award transferred to the Courts for enforcement purposes.

- Enforcement of the Award may include: registering a writ of seizure and sale against the respondent; issuing a garnishment against the respondent; and / or conducting an examination in aid of execution in order to determine if the respondent has any assets worth garnishing and if so, determining where they are located.