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Other changes

The Proposed Amendments also make certain other changes to NI 41-101 such as:

- providing an exemption from the incorporation by reference of certain reports or opinions that are indirectly incorporated by reference to an information circular for a special meeting of shareholders;
- clarifying the disclosure required for prior sales information and trading price and volume information;
- the successor issuer criteria for the purpose of eligibility to use a short form prospectus;
- the deadline for a successor issuer to file a notice of intention to be qualified to file a short form prospectus; and
- the deadline for filing a final prospectus, where there have been one or more amendments to the preliminary prospectus.

Interested parties must provide their comments by October 14, 2011.

COMMERCIAL PROPERTY AND LEASES

Binding arbitration common in determining renewal rent

Barbara L. Grossman
and Jordan Hill,
Fraser Milner Casgrain LLP

Binding arbitration typically determines the rent during a renewal/extension term where the parties are not in agreement.

For an option to renew or extend to be enforceable (as opposed to being a mere "agreement to agree," which is unenforceable at law), the option must include both a formula or reference standard and machinery to determine the rent during the renewal/extension term.

Binding arbitration is the typical "machinery" used to determine the rent during the extension term in the event that negotiations between the landlord and tenant fail to produce an agreement within a stipulated period.

Arbitration language

By way of example, the following is the arbitration language in the "option to extend" clause from the precedent Shopping Center Lease of intermediate complexity found in Haber's *Shopping Centre Lease*:

> If the parties are unable to agree on the Basic Rent for the Extended Term on or before the date that is sixty (60) days prior to the commencement of the Extended Term, then such Basic Rent shall be determined by arbitration before a sole arbitrator in accordance with the arbitration legislation of the province in which the Premises is located. If the Basic Rent for the Extended Term has not been determined by the commencement of such Extended Term, then the Tenant shall pay a monthly Basic Rent equal to the Basic Rent being sought by the Landlord and upon the Basic Rent for an Extended Term being determined, any adjustments in Basic Rent shall be made effective the commencement of the Extended Term within 30 days of the date of such determination. The parties shall promptly execute a Lease Extension Agreement prepared by the Landlord to reflect the terms of the Extended Term.

Arbitration Act

Arbitrations are governed by statute except to the extent the statutory provisions are permissibly superseded by the process laid out in the lease and/or in any subsequent arbitration agreement between the parties. In an Ontario lease between Canadian parties, the governing statute is the Ontario *Arbitration Act, 1991*.

Section 3 of the Act provides that,

> …the parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act, except for certain enumerated sections.

Types of arbitration

Common types of arbitration used in commercial lease rent determinations are:

(a) a single arbitrator (as in the precedent clause above);

(b) a panel of arbitrators (typically three, with each side appointing one arbitrator and those two appointees choosing a chair); and

(c) a "baseball" arbitration (in which the arbitrator must choose one proposal over the other; Solomon's justice is precluded).

Numbers and qualifications

Most arbitration clauses will set out the number of arbitrators and will

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sometimes provide for required qualifications as well (i.e., that the arbitrator is required to be an appraiser, retired judge or commercial leasing lawyer with a minimum number of years of experience). A single arbitrator will be the fastest and least expensive option.

However, it should be kept in mind that qualifications are particularly important in the case of a single arbitrator. While a three-person panel does allow for a mix of legal and appraisal expertise which the parties may find desirable, it is expensive and typically slower because of the increased scheduling complications.

Procedural matters

Many arbitration clauses, including the precedent clause above, leave all other procedural matters either to the governing statute or to be agreed upon once the arbitration begins. However, landlords and tenants may want to deal with some of these procedural matters upfront in the arbitration provision itself.

Arbitration vs. litigation

Arbitration can be just as expensive as litigation, particularly in the case of a three-person arbitration panel. Unless the lease clause provides for an alternate process which modifies or waives some of the provisions of the arbitration legislation (or the parties subsequently agree on an alternate or more streamlined process), the process will resemble litigation.

Although the rules of evidence are more relaxed (i.e., hearsay is admissible), unless an alternate process is being followed, the parties must present evidence at a hearing.

The hearing process will very much resemble what goes on in a court room (i.e., opening argument, evidence presented by each side with examination-in-chief, cross-examination, re-examination and closing argument).

Each side will present expert evidence, typically from a qualified appraiser. Expert reports (often with Reply reports) will be exchanged and provided to the arbitrator in advance of the arbitration hearing.

When the parties reach the point of arbitration, they usually will enter into an arbitration agreement that deals with procedural matters for the arbitration which were not covered by the arbitration clause in the lease.

Award and offer to settle

Subject to any restrictions in the arbitration clause in the lease, the arbitrator can make a success-based cost award, covering the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration (as per subs. 54(1) and (2) of the Act).Offers to Settle can be exchanged in advance and there can be cost consequences for failing to accept a reasonable offer to settle if the arbitrator's decision is no more favourable to the offeree than the settlement offer (subs. 54(5) of the Act).

Unless the lease clause (or a subsequent agreement) provides otherwise, the decision of the arbitrator may be appealed in accordance with s. 45.

Procedural matters

When the parties reach the point of arbitration, they usually will enter into an arbitration agreement that deals with procedural matters for the arbitration which were not covered by the arbitration clause in the lease. The parties can also agree to vary what is set out in the arbitration clause in the lease for the purposes of a particular arbitration.

However, keep in mind that by the time the parties are at the stage of the rent arbitration, they may be of different minds procedurally and may have different strategic agendas, so the ability to reach agreement at this point may be more limited.

Procedural matters that are not agreed upon between the parties (such as documentary disclosure and discovery) can give rise to pre-hearing motions. While such pre-hearing procedural motions are more informal than in-court proceedings, they do add to the cost of the arbitration. It is therefore wise to cover any key items in the lease provision.

The authors gratefully acknowledge the helpful input of P. David McCutcheon of Fraser Milner Casgrain LLP in the drafting of this article.

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