

ADR and its Role in the Commercial Lease



Alternate Dispute Resolution (ADR) provides both landlords and tenants with an equitable, fair, and timely procedure to resolve disputes arising during the performance of the commercial lease contract.

ADR, when employed in a timely and efficient manner—in addition to bringing final resolution to a dispute—should continue to foster and preserve the good will and business relationship of the parties while allowing them to carry forward and complete the performance of the terms of their lease contract.

Common Types of Arbitration

1. **Binding Arbitration**
Most common form of commercial lease arbitration: the parties are bound by the arbitrator's award.
2. **Documents Only**
Voluntary or compulsory: Arbitrator bases his award upon written submissions only from the parties.
3. **Oral Evidence Only**
Voluntary or compulsory: Arbitrator bases his decision on oral presentations from the parties.
4. **Final Offer Arbitration**
Arbitrator, at the conclusion of the

hearing process, receives final offers from both parties and is required to choose which offer will form all or part of his award.

Copies of the *Commercial Arbitration Act* are available on the Government of BC Website at www.gov.bc.ca.

Commercial Arbitration Act

Commercial arbitration in British Columbia is governed by the *Commercial Arbitration Act* [RSBC 1996]. The Act clearly sets out the terms that apply to commercial arbitrations conducted in the Province of British Columbia.

Copies of the *Commercial Arbitration Act* are available on the Government of BC Website at www.gov.bc.ca.

Commercial Lease Arbitration: How does it really work?

Commercial Lease Contracts—commonly with terms to 25+ years, including renewal terms—that require future periodic lease term interpretations, reviews, adjustments, and agreement by the parties are now rapidly becoming the norm in the commercial real estate marketplace. Common examples of lease terms requiring periodic adjustment include the following.

- a. **Rent Adjustments**
Rents for lease renewal terms, additional rent including real estate taxes, common area expenses (CAM costs), operating expenses, utility expenses, marketing, and advertising expenses
- b. **Performance Covenants**
Payment of rent and additional rent, hours of operation, payment of fees and charges, specific “permitted use” and services
- c. **Conformance Covenants**
Permitted “use” occupancy requirements, rules, and regulations; assignment and subletting of premises; conforming to applicable government or municipal statutes and bylaws
- d. **Mutual Covenants**
Indemnity provisions, options to renew, options to expand or relocate premises, dispute resolution (arbitration clause)
- e. **Interpretation of Lease Terms**

Typical Arbitration Clause

All disputes arising from or in connection with this contract or in respect of any legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration administered by British Columbia International Commercial Arbitration Centre

(BCICAC) pursuant to its Rules.
The place of the arbitration shall be
Vancouver, British Columbia, Canada.
*Published by British Columbia International
Commercial Arbitration Centre*

Arbitration: Rules of Procedure

The BCICAC Arbitration Rules of Procedure are posted on their Website at www.bcicac.com under “Rules of Procedure.”

Agreement to Arbitrate

It may be voluntary, compulsory, and/or binding.

Defining the “Dispute”

Parties must agree on the definition of the “dispute” to be arbitrated.

Arbitration under What Rules: BCAMI, BCICAC, or ?

Where an Arbitration Clause in a commercial lease requires the arbitration be conducted in accordance with the *BC Commercial Arbitration Act*, section 22 of the Act specifies:

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

Other Rules may be substituted where the parties agree.

Selecting and Appointing an Arbitrator: Third Party Assistance

The parties to a dispute by agreement may select and agree upon a single arbitrator or a panel of arbitrators (usually three arbitrators) to be appointed to hear their dispute or, failing agreement, may request that BCAMI (British Columbia Arbitration and Mediation Institute) or BCICAC assist them in the appointment of an arbitrator or arbitrators and the conduct of their arbitration.

The selection and appointment of a qualified professional arbitrator is paramount to achieving a timely and equitable resolution of their dispute.

Procedures, Timelines, and Costs

Procedures for the conduct of arbitrations can be as simple as:

- the parties informally meeting with a single arbitrator in a formal hearing in a rented facility, e.g., hotel,
- before one or more arbitrators,
- with the parties represented by one or more counsel,
- and expert witnesses retained to provide evidence and be cross examined.

The arbitrator is required to visit “on site” to receive and examine evidence, etc.

Arbitration proceedings need not be confrontational in that arbitration represents final resolution of a dispute, allowing the parties to get past their disagreement and carry on with their business relationship and activities.

The arbitrator may issue interim orders or awards binding upon one or more of the parties to expedite the orderly conduct and resolution of the arbitration.

Arbitration costs are normally borne by the parties. At the commencement of the arbitration procedure, the arbitrator may require that the parties place on deposit funds with the coordinating institute or the arbitrator, prior to the commencement of the arbitration proceedings.

Rule of Natural Justice Must Prevail!

The rule of natural justice imposes two obligations upon the arbitrator:

- i) the arbitrator must give those affected by the decision a chance to know the allegations against them and the facts to support those allegations before the decision is made; must listen to both parties; must allow each party to present its case fully and to answer the case of the other side;
- ii) the decision-maker (arbitrator) must be unbiased (and conduct himself or herself in an unbiased manner at all times) and **make a decision based upon the evidence presented.**

Arbitrators, in undertaking an appointment and conducting an arbitration, must at all times be seen to be and remain neutral in their conduct and demeanor without showing favour to either of the parties.

Arbitration, properly employed, should provide the landlords and tenants with an equitable, fair, efficient, timely, and cost-effective method of resolving commercial lease contract disputes while fostering, preserving, and strengthening ongoing business relationships, to facilitate and encourage the parties to cooperate and fully perform their contract.

The time is at hand for employing ADR as a method of fairly and equitably resolving commercial lease disputes during the life of a commercial lease.

We strongly recommend that all commercial landlords and tenants include an ADR clause in their commercial leases.

Commercial Leases are becoming ever more complex, leading to disputes arising during the performance of the lease terms. ADR represents an opportunity to provide for the fair and equitable performance and administration of the obligations of both the tenant and the landlord in our ever-changing and challenging new international business marketplace. ▲

R. A. (Rod) Adam, RI, FRI, is President of R. A. Adam & Associates Ltd., Real Estate Management and Investment Consultants, and Arbor Commercial Real Estate Services Inc. He manages commercial real estate assets, negotiates and administers a large portfolio of commercial leases for clients, and provides dispute resolution services. He is an Associate Member of BCAMI, a member of the Professional Division of the Real Estate Institute of BC, and a long-serving member of the Commercial Division of the Real Estate Board of Greater Vancouver.

Voice: 604 240-6220
Fax: 604 574-2681
radam@telus.net