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Real Estate

Arbitration clauses may be difficult to enforce

By **David Taub and Anisha Samat**

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(August 2, 2022, 2:09 PM EDT) -- Commercial contracts often contain mandatory arbitration clauses, which compel parties to use this alternative dispute resolution (ADR) method to resolve disputes arising under the contract and bar parties from the courts.

Although these clauses are intended to provide the parties with a quick and efficient method of resolving conflict, they are not always as straightforward as they seem and can require court intervention to enforce them.

This spring, we — Robins Appleby LLP partner David Taub and associate Anisha Samat — successfully enforced an arbitration clause in a limited partnership contract. Justice Cory Gilmore of the Ontario Superior Court's Commercial List ruled firmly in favour of our clients and directed the parties to proceed to arbitration (*VHGCC-14 LP v. 2308451 Ontario Inc.* [2022] O.J. No. 676.)

Problem

We represented two limited partners (LP3 and LP4) in a limited partnership that was created as an investment vehicle for a real estate development. The limited partners invested $6.5 million for the purchase of a property intended to be a golf course community in Ontario's Victoria Harbour (near Midland).

The property was never developed and sold in 2021 for close to $9.5 million.

Despite the significant appreciation in value, however, LP3 and LP4 received a fraction of their original investment when the sale proceeds were distributed in April 2021.

LP3 and LP4 decided to resolve this issue via arbitration, relying upon the limited partnership agreement's arbitration clause. The arbitration clause clearly stated that all disputes under the contract would be resolved through arbitration.

Reneged on arbitration, subsequent litigation

Upon being retained, we served the General Partner (GP) with a Notice of Arbitration in May 2021. The GP and their counsel initially agreed to move forward with arbitration. The GP's counsel was holding the sale proceeds in trust, and undertook to preserve the proceeds until the resolution of the arbitration.

Shortly afterwards, the GP and their counsel reneged and refused to proceed to arbitration, also declaring that they would no longer preserve the sale proceeds in trust.

We were forced to act quickly again to move the arbitration forward and preserve the remaining sale proceeds. In July 2021, we were able to obtain an injunction preserving the sale proceeds in trust until the hearing of the application. The first available court date to hear the application was Jan. 21, 2022, a significant delay.

In early January 2022, the GP scheduled an "urgent" hearing seeking to adjourn the application, one week before the application's scheduled hearing date. The GP argued that there were several threshold issues that needed to be resolved before the arbitration could take place. We successfully counter-argued that the application's hearing should not be adjourned, and any threshold issues could be effectively dealt with either at the application or at the arbitration.

The application was ultimately heard as scheduled on Jan. 21, 2022, and was a resounding success for LP3 and LP4. Justice Gilmore ordered that the arbitration was to proceed as per the arbitration clause in the limited partnership contract.

Justice Gilmore also acknowledged that there had been significant delay caused by the GP and their counsel, and awarded LP3 and LP4 costs in the amount of $25,000. The injunction freezing the sale proceeds was also extended.

Outcome, lessons learned

While we succeeded at every step, it was not without a price. A straightforward arbitration clause that was intended to provide the parties with a quick and efficient means of resolving their disputes took significant time, effort, costs and judicial intervention to be enforced, delaying the arbitration itself by nearly a year.

While arbitration clauses can still be an excellent tool in commercial contracts and can often provide parties with a cost-effective and speedy means of dispute resolution, this may not always be the case when parties acting in bad faith abuse the legal system.

Lawyers drafting such contracts should ensure that such arbitration clauses are constructed to be as unambiguous as possible and provide clarity on timelines where practicable.

In our case, the goal of the GP was to stonewall, hoping that the legal fees needed to enforce their clear rights would deter LP3 and LP4 from moving forward. In this case, the GP failed, but less resilient investors may well have given up.

The arbitration is now underway. LP3 and LP4 look forward to a judgment in their favour.

David Taub, a litigator with Toronto business law firm Robins Appleby LLP*, works with developers and builders, retailers and major landlords, private corporations, manufacturers, financial institutions including chartered banks and commercial lenders successfully representing them at all levels of court in Ontario. Anisha Samat is an associate in the litigation department at Robins Appleby LLP. She joined the firm in November 2021. She holds a J.D. from Montreal's McGill University.*

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