ARBITRATION WITHOUT HEARINGS

We all know that court cases that do not settle have to proceed to trial. So it makes sense that a contested, private arbitration before an arbitrator who acts like a judge also end in a formal hearing at which the parties present their evidence. And once the evidence is presented and the parties have an opportunity to argue their cases, the arbitrator considers his decision and makes an award setting out who wins, who loses, the damages that have to be paid, or other kinds of relief, legal costs and pre and post judgment interest. At the end of the day, the arbitrator generally has the same powers as a judge in a court of law.

In many cases, the parties have a preliminary first meeting with the arbitrator to set all of the procedural ground rules such as the delivery of documents; examinations for discovery; preparation and exchange of document books; exchange of expert reports; preparation of the parties' affidavits containing their evidence, and the rules for the formal hearing. However, not all arbitrations are that involved. In a number of situations, these procedures are waived and the arbitrator deals with all of the evidence without any meeting, with no formality and without a hearing.

A 'no hearing' arbitration can be held when the issue or issues that need to be decided are narrow and most importantly when the parties agree themselves, usually in writing, that they are looking for a quick resolution of their dispute, without formality. They agree to arbitrate, name the arbitrator, and set out the arbitrator's powers. The arbitrator generally has the same powers as a Judge unless they agree otherwise. In a They can also waive any appeals so that the arbitrator's decision is final and binding. Appeals can take another year or more to be heard.

Some years ago, I arbitrated a claim involving a store owner's loss of profit arising from a break-in at his store. He made a claim on his commercial insurance policy and supported it with financial statements dating back five years before the break-in, income tax returns and notices of assessment. His accountant prepared detailed lists of

the costs of his merchandise [ie leather jackets] and his customary selling price for these jackets.

The insurer retained an accountant as well who provided his own valuation of the loss and each of these valuations were exchanged and delivered to my office. Each of the valuations contained not only the expert's loss calculations, but more importantly the reasons for those calculations.

Based on the parties prior, written agreement that they would not appear and were content to have me determine the loss based on the two sets of opinions, I read and considered all of the materials. After that, I researched some case law to determine which of the two different valuation approaches made more sense. The insured party based his approach on his usual selling price minus cost of inventory. The insurer's accountant offered a valuation theory which, however interesting it was, did not take into account the way in which retailers customarily operate. My instructions were to find for the one party or the other based on 'final offer selection'. I was directed not to use any discretion meaning that I was not allowed to find a dollar value somewhere in the middle. Based on my own professional experience dealing with retailers, and my research, I found for the retailer and awarded him all of his proven loss. Each party, at the outset agreed to pay my fees equally and I was able to release an 11 page written award three days after receiving their materials. The arbitration ended with delivery of my written award.

The same approach is available where commercial landlords and their tenants are negotiating fair market value for rent at the time of lease renewal. In much the same way that the parties in the insurance arbitration proceeded, the commercial landlord and tenant would need to engage the services of a qualified valuer. The valuer might be an accredited valuer or an experienced real estate agent with substantial experience in valuation. While a professionally accredited valuer's opinion should carry more weight than that of a real estate representative, that isn't always the case. The agent's hands on experience can prove to be more persuasive than a theoretical opinion. The decision as to which opinion to accept lies with the arbitrator. And the arbitrator must provide reasons for his findings in the same way a judge does in court.

Having said this, a few other points need to be made. Where there are other issues such as the landlord's obligation to repair or replace items in the premises, these may have to be dealt with by way of a formal hearing if both sides insist on appearing to testify. However, even here, no hearing arbitration is still possible if the parties agree to provide their evidence purely in documentary form. One other point needs to be considered. If after the arbitrator make his decision and gives his award, one party is unhappy and refuses to comply, a court order can be obtained certifying the award as a court judgment.

So, if any of your clients are involved in a dispute about the fair market value of commercial rental property, or other issues that are narrow and can be dealt with strictly in documentary form, remember that private arbitration can provide a quick, and inexpensive solution.

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