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DRAFTING ADR AND ARBITRATION CLAUSES FOR COMMERCIAL CONTRACTS

Wendy J. Earle

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Publisher's Special Release Note 2020

The pages in this work were reissued in September 2020 and all the pages carry that date in the release line. Please note that we have not reviewed the content on every page of this work in this current release. We will continue to review and update the content according to the work's publication schedule. This will ensure that subscribers are reading commentary that incorporates developments in the law as soon as possible after they have happened or as the author deems them significant.

Changes to chapter and heading numbering may have occurred. Please refer to the Correlation Table in the front matter if you wish to confirm references.

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This publication provides, to counsel drafting a commercial agreement, all the tools and information necessary to design and draft an effective ADR/arbitration clause that accomplishes the intentions and desires of the parties who have chosen ADR/arbitration to resolve their disputes. It canvasses the various forms of ADR, including ones on the cutting edge, such as “collaboration” and “cybersettle.com.” It considers some of the pitfalls and dangers in poorly drafted clauses, which only become apparent when the ADR/arbitration process is underway. Issues specific to ADR/arbitration clauses in commercial agreements that are addressed include: Rent renewals, Shareholder agreements, Options to purchase land, and Agreements involving parties outside Canada. This publication also features appendices containing numerous precedent arbitration, mediation, and different types of ADR clauses, as well as summaries of the procedural rules of the major arbitration institutions and legislation governing arbitrations in place across Canada.

This release features the addition of the ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement (with annotations), including also Annex A – Text of the Code of Conduct, and Annex B – Summary of Code of Conducts in Free Trade Agreements (Updated as of May 8, 2020 including new treaties and updated references, to Appendix O – International Centre for Settlement of Investment Disputes (ICSID). This release also features the addition of The Forum’s Supplemental Rules to ICANN’s Domain Name Dispute Resolution Policy (Effective October 1, 2019) to Appendix Q – Domain Name Dispute Resolution.

Highlights:

- **ICSID and UNCITRAL Draft Code of Conduct for Adjudicators in Investor – State Dispute Settlement** – On May 1, 2020, the Secretariats of the ICSID and UNCITRAL released the draft Code of Conduct for Adjudicators in Investor-State Dispute Settlement. On some issues, the Draft Code of Conduct is designed to lay down general principles and obligations. On others, the Draft Code of Conduct provides suggestions and optional rules of conduct to be discussed further by Member States. Article 3 of the Draft Code of Conduct, designed as a non-optional set of rules, provides an overview of the adjudicators’ obligations that include the duty to be independent and impartial, avoid conflicts of interest, bias and appearance of bias, display the highest standards of integrity and competence, act with diligence, and comply with confidentiality and non-disclosure obligations. The next three articles emphasize the adjudicators’ obligation to be independent, impartial and transparent on potential conflicts of interest, proposing both non-optional and optional rules to better ensure the management of conflicts of interest and appearance of same. The Draft Code of Conduct proposes an extensive approach of the adjudicators’ duty to disclose potential conflicts of interest, including the obligation to disclose their relationships with the parties and other persons involved in the arbitration, and to disclose instances where the adjudicator has previously taken a position on matters relevant to the case. Following the deadline of October 15, 2020, for the receipt of public comments, the UNCITRAL Working Group III and Member States will be in position to work on a finalized Code of Conduct.

ProView Developments

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- The Table of Cases, Table of Statutes and Index are now in PDF with no searching and linking
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- Images are generally greyscale and size is now adjustable