SIMPLIFYING THE ARBITRATION PROCESS FOR RENEWAL OR EXTENSION RENT: ACHIEVING A SIMPLE, EFFECTIVE AND COST-EFFICIENT PROCESS FOR DETERMINING RENT

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Simplifying the Arbitration Process for Renewal or Extension Rent: Achieving a simple, effective and cost-efficient process for determining rent[1]

In order for an option to renew or extend to be enforceable (as opposed to being a mere "agreement to agree", which is unenforceable at law), there are two required elements:

(1) a formula or reference standard to fix the new rent; and

(2) procedural machinery to determine the new rent in the event that the parties don't agree (i.e. an ADR process)[2].

Formula/Reference Standard

The formula or reference standard should specify the valuation date for the rent determination, whether it is for a restricted or unrestricted use (e.g. "market rent for a financial institution" vs. "market rent"), and any geographic restrictions (e.g. the plaza/complex, within a particular radius of the subject location, within a specified city3). Sometimes the reference standard includes a "floor" e.g. not less than the rent for the prior term. The valuation date and the terms of the valuation are critical and should be specified in the Lease clause as part of the formula or reference standard. The valuation date could matter in a rapidly changing market or where the renewal notice is permitted to be served very far in advance of the commencement of the renewal term[4]. The terms of the valuation should indicate whether it is the premises in the condition at the time of the original demise, or with the improvements made by the tenant or landlord during the last term. If all the improvements would otherwise revert to the Landlord at the end of the lease term, there is an argument that they should be included in the valuation. The language used in the Lease clause will determine whether the standard is objective (e.g. "fair market rent", "fair market value", "market value" or "market rent") or subjective (e.g. "fair value", "rent", "worth").

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[1] This paper refers to the author's earlier paper, "Arbitrating Renewal Rent: Drafting The Appropriate Renewal Arbitration Provision", presented at the Six-Minute Commercial Leasing Lawyer 2011 program ("Arbitrating Renewal Rent").

[*] The helpful assistance of my associate, Nalin Sahni, is gratefully acknowledged.

[2] There are some cases that indicate so long as the Lease provides the reference standard, the Court can supply the missing machinery to determine the rent: See *Dagny Development Corp v. Ocean Fisheries Ltd.*, 1991 CANLII 528 (B.C.S.C.).

[3] e.g. if the tenant is a bank in the financial district of downtown Toronto: the fair market rent for a financial institution in the financial district of downtown Toronto.

[4] Where the renewal notice is permitted to be served very far in advance of the commencement of the renewal term and the reference standard is the "*then* prevailing market rent", this would likely be interpreted as the date the notice to renew/extend is served, factoring in any then known trends that reasonable parties would take into account in determining a rental rate for a renewal term to commence in the future: *Triple D Holdings Ltd. v. Autotrol Technology (Canada) Ltd.*, 2000 CANLII 195 (ABCA).

ADR Processes

The typical ADR processes for determining the new rent are:

Two Step – negotiate, arbitrate

Three Step – negotiate, mediate, arbitrate

Some sample clauses for these alternatives are set out in the Appendix to this paper.

A mediation is a negotiation facilitated by a third party neutral, the mediator, who has no decision making power. If a mediation is successful, the outcome is a binding consensual agreement between the parties, not a binding third party decision. By contrast, in an arbitration, the arbitrator is a neutral binding decision-maker chosen by the parties, and the outcome is a binding decision imposed upon the parties.

Mediation

Although it may seem counter-intuitive, a three step ADR process is likely to be more cost efficient. With the assistance of a skilled mediator who has substantive expertise (e.g. an appraiser) there is a greater likelihood of avoiding a costly arbitration. The mediator can explore terms, agreements and concessions that might go beyond what would be determinable in an arbitration. Further, the mediator can make settlement proposals (unless the parties agree otherwise). Under a three step process, you have to decide and specify whether you want (or it is permissible for) the mediator to become the arbitrator if the mediation fails to produce an agreement (this is generally referred to as a "med-arb" process).

In 2010, Ontario's new *Commercial Mediation Act, 2010*, S.O. 2010, c.16, Sched. 3 came into force, which makes a three step ADR process an even more attractive option. The Ontario statute is based on the UNCITRAL 2002 Model Law on International Commercial Conciliation. It applies to mediations commenced on or after October 25, 2010. The parties can contract out of almost all the provisions except for those related to fair procedure and recognition of international principles (s. 2(2)). Absent contracting out, the statute establishes a default regime applicable to the mediation of commercial disputes, whether contractual or not. The key provisions are:

- Easier Enforcement
    - Allows parties that have mediated a commercial dispute to register their settlement with Superior Court giving it the same force as a judgment (s. 13(7)).
        - Costs of registration are recoverable (s. 13(7)(b)).
        - Faster access to obtain a remedy both in Ontario and elsewhere.
        - Before this statute, you would have to sue for breach of contract for the failure to abide by the settlement agreement achieved through mediation.
- Fairness
    - Mediators are explicitly required to treat the parties fairly throughout the process.
        - Recourse to the Courts for unfair treatment.
- Conflicts of Interest

- Mediators must now consider whether they have a current or potential conflict of interest that may give rise to a reasonable apprehension of bias.
    - The mediator has an ongoing duty to disclose this information to all parties without delay (s. 6(3)).
- Confidentiality
    - Explicit obligation for all persons involved to keep all information confidential unless: the parties agree otherwise; disclosure is required by law; it is necessary to enforce the agreement, to protect the health and safety of any person, or for the mediator to respond to a claim of misconduct. (s. 8).
- Information Cannot be Used in Other Proceedings
    - Lengthy list of information that cannot be used in other legal proceedings whether related or not (s. 9).
- Mediator cannot also act as an arbitrator unless the parties agree otherwise (s. 10).
- Gives mediators the power to make settlement proposals (s. 7(3)(b)).

Arbitration

The common types of arbitration used in commercial lease rent determinations are:

(a) single arbitrator - the qualifications of a single arbitrator will be very important;

(b) panel of arbitrators - typically three, with each side appointing one arbitrator and those two appointees choosing a chair (each member of the arbitration panel, even those appointed by one side, is a neutral decision-maker). A panel is expensive and typically slower because of the increased scheduling complications, but it does allow for a mix of legal and appraisal qualifications and expertise which the parties may find desirable in some circumstances; and

(c) "baseball" arbitration - in which the arbitrator must choose one proposal over the other; generally, "Solomon's justice" is precluded although it is possible to specify that the arbitrator is allowed to pick a middle ground if it is considered just.

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*, S.O. 1991, c. 17 (all statutory references in this paper are to this Ontario statute)[5]. Section 3 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" the enumerated sections.[6]

[5] If an arbitration is to take place in Ontario and one party to the lease is not Canadian, then the governing statute in Ontario will be the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 which adopts the 1985 UNCITRAL Model Law on International Commercial Arbitration, as set out in the Schedule to the Act.

[6] In the case of non-family law arbitrations, the following six enumerated sections cannot be excluded or varied:

i. subsection 5(4) ("Scott v. Avery" clauses),

Arbitration can be just as expensive as litigation, particularly in the case of a three person arbitration panel, and unless the Lease clause provides for an alternate process or the parties subsequently agree upon an alternate or more streamlined process, the process will resemble litigation. Although the rules of evidence are more relaxed (e.g. hearsay is admissible), unless something different is provided for in the Lease arbitration clause or by subsequent arbitration agreement between the parties, the parties must present evidence at a hearing and 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, followed by closing argument). Each side will present expert evidence, typically from a qualified appraiser, and expert reports (often with Reply reports) will be exchanged and provided to the arbitrator in advance of the arbitration hearing.

If what is desired is something simpler, faster and less costly than a litigation style arbitration hearing, that has to be specified in the Lease clause or by subsequent arbitration agreement, e.g. expert reports submitted to an appraiser who can ask questions and write an Arbitration Award without a hearing, is one type of procedure to limit costs. The parties can specify in advance that the arbitrator will view the subject premises and/or comparables, with or without counsel, or can leave that up to the discretion of the arbitrator to be decided during the course of the arbitration. Procedural directives limiting documentary and oral discovery and/or requiring the arbitrator to adopt a procedure that will result in the most inexpensive and expeditious arbitration, can also make the arbitration more streamlined and less costly. The procedural directives can include "hot-tubbing" of experts, where both appraisal experts testify at the same time and jointly state the points on which they agree and disagree.

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 (s. 54 (1) and (2)). 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 (s. 54(5)). An alternative to success based cost awards is to agree in advance to an equal sharing of some (or all) of the expenses e.g., arbitrator's charges, reporter's charges, room charges, and to provide that each side will bear its own costs of legal counsel and experts, or alternatively, that any success based costs award will be limited to legal counsel and expert charges.

Unless the Lease clause or subsequent arbitration agreement waives appeal rights or provides for appeal rights, the parties will have limited appeal rights to the Ontario Superior Court as specified in s. 45 of the Act[7].

Usually, when the parties reach the point of the rent arbitration, they will enter into an arbitration agreement dealing with the procedure for the arbitration. In that arbitration agreement, the parties can

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ii. section 19 (equality and fairness),

iii. section 39 (extension of time limits),

iv. section 46 (setting aside award),

v. section 48 (declaration of invalidity of arbitration),

vi. section 50 (enforcement of award).

[7] Unless the Lease arbitration clause or subsequent arbitration agreement provides for appeals as of right on questions of law, fact, or mixed fact and law, an appeal will lie only on questions of law and only with leave of the Court.

agree upon procedural matters that have not already been specified in the Lease arbitration clause. They can also agree to vary what is set out in the arbitration clause in the Lease for the purposes of this particular arbitration.[8] Remember, that by the time you are at the stage of the rent arbitration, the parties 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. For this reason, important matters, including the amount of rent payable pending the Arbitration Award, are best dealt with in the Lease clause. It should also be noted that no interest will be payable on any underpayment or overpayment of rent pending release of the Arbitration Award unless it is stipulated for in the Lease clause[9] or in the subsequent arbitration agreement. Procedural matters such as documentary disclosure and discovery that the parties do not agree upon[10], 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 the key items in the Lease clause[11].

Three Step ADR: General Considerations

- Agree on procedure in the initial lease
    - Ability to reach agreement at the time of rent negotiation may be more limited
    - Agreeing upfront prevents strategic agendas from influencing procedure and limits pre-hearing motions.
- Agree on timeline in the initial lease
    - Example:

[8] Two samples of such arbitration agreements for rent arbitrations are attached as an appendix to the author's 2011 paper, Arbitrating Renewal Rents. The first sample spells out a full blown litigation style process, with discovery rights etc., and is based on a Lease clause (excerpted in paragraph 1 of the agreement) which is also very detailed. The second sample is a much briefer arbitration agreement.

[9] *Toronto (City) v. Toronto Terminal Railway Co.*, 1999 CanLII 9291 (ONCA)

[10] Is there to be advance production of documents and pre-hearing discovery of the parties (oral examination under oath or written questions), or is that to be left to the discretion of the arbitrator (s. 18(1) and 24(6))? Note that under sections 29 and 30, the arbitrator can also issue witness summonses to non-parties to produce documents and/or give evidence at the hearing (e.g. produce the actual lease documentation for non-party leases that the experts are relying on as comparables based on hearsay information). While this is not the same as obtaining advance documentary discovery from non-parties, in practical terms it can be similar as it is possible for the summonses to be returnable on the first morning of the hearing with a planned adjournment of the hearing for a period thereafter to allow for a review of the non-party documents. The only possible right to obtain documentary discovery from a non-party would be under the very narrow power in s. 18(1) for the arbitrator to make an order at a party's request for the inspection of documents " that are the subject of the arbitration".

[11] The author's 2011 paper "Arbitrating Renewal Rent" lists and discusses 21 considerations in drafting the Lease rent arbitration clause and the subsequent Arbitration Agreement. For a general discussion of arbitration and other alternatives to litigation in the context of lease disputes, see the paper by my colleagues: Sheldon Disenhouse and Jordan Hill, "Settling Lease Disputes through Arbitration" (Paper delivered at *Practicing Commercial Real Estate in an Changing Environment*. Toronto: Osgoode Professional Development Centre, 22 September 2009).

- Notice of the exercise of the rent renewal option must be given in to the landlord in writing at least 9 months before expiry.
- If no agreement, mediation of the parties begins 6 months before expiry.
- If mediation is unsuccessful, arbitration begins 3 months before expiry.
- Arbitrator must give decision within 30 days after the conclusion of the arbitration.

- Negotiation
  - Can avoid both mediation and arbitration by agreeing to split the difference if proposed rents differ by less than 5% (this recognizes that appraisal is more of an art, not a precise science).
  - Lease should specify that negotiations and mediation are "without prejudice".
- Appointment of an appraiser
  - Each party could submit an appraisal report prepared by their appraiser. Mediator / arbitrator could have the right to conduct a separate appraisal.
  - More cost-effective: Mediator could select an independent appraiser, based on their commercial leasing experience, and disclose the report to both parties.
    - The sooner in the process the appraisal is available the easier it will be for the parties to agree.
    - Terms of reference for the appraisal should be set out in writing, reflect the language of the lease and provide any assumptions the appraiser has to make.
    - Specify that all comparables should be assessed on a "net effective rent" basis that includes gross up provisions (to add the tenant's proportionate share of common area expenses); management/administration fees; other charges tenant bears.
    - Agree that both parties should be present at the property inspection and on any conference calls with the appraiser.
    - Any "adjustments" to comparables by the appraiser should be fully explained.
- Very cost-effective: both parties could agree to be bound by the appraiser's rental study (this would be the second step of a two-step process).
  - No hearing or submissions, though the parties could provide information to the appraiser.
  - Need to have an experienced, well qualified appraiser so that both parties have confidence in the appointment.
- Mediation Required before Arbitration
  - Skilled mediator can avoid a more costly arbitration and can explore terms, agreements and concession that might not be available in arbitration.
    - Mediators can make settlement proposals under s. 7(3)(b) of the *Commercial Mediation Act, 2010*, though the parties can contract out of this provision.

- Specify place and time of mediation to reduce conflict and expense
    - Specifying that the mediation must take place in Ontario or according to Ontario law will give both parties the benefit of the *Commercial Mediation Act, 2010*.
- Administered vs. *ad hoc* selection of the mediator
    - Administered: the mediator is appointed by an external body – avoids selection difficulties
    - *Ad hoc* selection of a mediator by the parties
- Qualifications of the mediator
    - e.g. appraiser, retired judge, commercial leasing lawyer with minimum years of experience.
    - Is legal training required? Only if legal issues are likely to arise.
- Med-Arb – Can the arbitrator be the mediator first?
    - If mediation fails, the mediator becomes the arbitrator (reduces cost).
    - This is prohibited by s. 10 of the *Commercial Mediation Act, 2010* unless all parties agree.

APPENDIX: SAMPLE RENT DETERMINATION ADR CLAUSES

[Note: the sample three-step clauses pre-date the *Commercial Mediation Act, 2010*, S.O. 2010, c.16, Sched. 3]

SAMPLE #1 (Two-Step)[12]

Option To Extend

1.1 Provided that the Tenant (a) is • ***[name of initial Tenant]***, (b) is itself in physical occupation of the whole of the Premises; (c) paid Percentage Rent in at least the last two (2) Lease Years of the Term of this Lease, if Percentage Rent is payable under this Lease; and (d) is not in default and has not been in default during the Term, then, upon delivery of written notice exercising this right given to the Landlord not more than • ***[maximum period for notice]*** months and not less than • ***[minimum period for notice]*** months before the expiration of the Term, the Tenant shall have the right to extend the Term of this Lease for the whole of the Premises at the expiration of the Term for a period of • ***[length of extension period]*** years (the **"Extended Term"**). The Extended Term shall be on the same terms and conditions as the Term save and except:

(a) there will be no further right to extend the Term;

(b) the Basic Rent rate for the Extended Term shall be the then prevailing Basic Rent rate in the Shopping Centre for comparable premises available for lease, provided that in no event shall such rate be less than the Basic Rent [and Percentage Rent, if applicable] payable during the last twelve (12) month period immediately preceding the commencement of the Extended Term; and

(c) there shall be no leasehold improvement allowance, Landlord's Work, rent-free period or other inducements.

1.2 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.

1.3 If the Tenant fails to give the appropriate notice within the time limit set out herein for extending the Term, then the within option to extend the Term shall be null and void and of no further force and effect, and the Tenant shall surrender the Premises to the Landlord upon the expiry of the original Term of this Lease.

[12] This clause is from the precedent Shopping Centre Lease of intermediate complexity found in Haber's *Shopping Centre Leases*, Second Edition (Toronto: Canada Law Book, 2008) at 974

SAMPLE #2 (Two-Step)

OPTION TO EXTEND

Provided the Tenant is then in good standing under the terms and conditions of this Lease, the Tenant shall have the option to extend the Term of the lease for one (1) additional five (5) year period on the same terms and conditions except for the amount of Basic Rent, any rent-free period, leasehold improvements, allowance or other tenant inducements and except that there shall be no further option to extend beyond June 30, 2020. The Tenant may exercise this option to extend by giving the Landlord notice in writing at least six (6) months prior to the expiry of the Term herein. If the Tenant exercises this option to extend, the Basic Rent payable on a per square foot per annum basis during such extension period shall be negotiated between the Landlord and the Tenant based on the then current fair market net rental, but in no event less than the Basic Rent payable during the last year of the immediately preceding Term of the Lease, and failing such agreement within three (3) months prior to the expiry date of the term, the Basic Rent shall be determined by a single arbitrator, appointed and proceeding under the Arbitration Act of the Province having jurisdiction or any replacement or successor legislation. If the parties cannot agree on the arbitrator, within fifteen (15) days after the matter is to be submitted to arbitration, then the parties shall submit the matter to the Arbitration and Mediation Institute of Ontario Inc., which shall choose the arbitrator. The decision of the arbitrator shall be final and binding without appeal on questions for law or fact or for any reason whatsoever. Costs of the arbitration shall be shared equally.

For the purposes of this lease, “fair market net rental" means the annual rent which could reasonably be obtained by the Landlord for the Leased Premises from a willing tenant or willing tenants dealing at arm’s length with the Landlord in the market prevailing for a term commencing on the commencement date of the relevant period, having regard to all relevant circumstances including the age, size and location of the Leased Premises and the Building, the use of the Leased Premises as permitted herein, the facilities afforded, the terms of the lease and having regard to rent currently being obtained for space in the Building and for comparable space in other buildings comparably located.

The Tenant shall enter into the Landlord’s then standard Lease Extension Agreement which will incorporate the above terms, as well as an acknowledgement by the Tenant of the then current exclusive use provisions in the Building.

SAMPLE #3 ((Three-Step)

7. Right to Renewal

(a) Nothwithstanding anything to the contrary set forth herein, the Tenant shall have the option to renew the Lease at the expiration of the Term provided:

> (i) the Tenant has complied with and performed all of the Terms and covenants of the Lease and is not in default thereunder;
>
> (ii) the Tenant has delivered notice of the exercise of its option to the Landlord not less than six months prior to the expiration of the Term;

(iii) the Tenant is in possession of all of the Leased Premises, and has not sublet all or part of the Leased Premises or assigned the Lease.

(b) the term of the renewal lease under this Section 7 (the "Renewal Lease") shall be for one additional term of five years and the term of the Renewal Lease shall commence on the day immediately following the last day of the Term;

(c) the Basic Rent payable during the Renewal Lease shall be determined by negotiation between the parties, failing which it shall be determined in accordance with the provisions of Section 30 herein; and

(d) the Renewal Lease shall be upon the terms and conditions of this Lease, except with respect to Basic Rent, and the Tenant shall have no further right of renewal.

29. Arbitration

In case of any dispute between the parties in respect to any matter covered by this lease which cannot be settled by the parties to their mutual satisfaction, the parties agree to first use the services of a mediator acceptable to each of them, acting reasonably, to attempt to resolve their differences. If a mediator acceptable to both parties is retained but the parties are unable to agree upon the procedure to be followed for the mediation, it shall be conducted in accordance with the "Rules of Procedure for the Conduct of Mediation" of the Arbitration and Mediation Institute of Ontario.

If for any reason whatsoever mediation does not result in a settlement of the dispute, the dispute, or such portion thereof as remains unresolved, shall be submitted to any other appropriate dispute resolution process agreed to by the parties, including arbitration.

If mediation or any other dispute resolution process agreed to by the parties does not result in a settlement of the dispute, or if the parties are unable to agree upon any aspect of the mediation or other dispute resolution process, as the case may be, such dispute shall be submitted to arbitration to be determined by three arbitrators, one to be selected by the Landlord, one to be selected by the Tenant and the third to be selected by the arbitrator so selected by the Landlord and Tenant respectively. The decision of any two of the arbitrators shall be final and binding upon the Landlord and Tenant. In case of failure of the two arbitrators appointed by the Landlord and the Tenant respectively, to agree upon a third arbitrator within thirty (30) days after the selection of the second arbitrator, such third arbitrator shall be appointed in accordance with the provisions of the Arbitration Act (Ontario). If either the Landlord or the Tenant fail to select an arbitrator and advise the other thereof within fifteen (15) days after such party has been advised of the selection of an arbitrator by the first party, then the arbitrator so selected by the Landlord or Tenant, as the case may be, shall proceed with the arbitration and his decision shall be final and binding.

The arbitration shall be conducted upon the terms and conditions and subject to the provisions of the *Arbitration Act* (Ontario) except as to the arbitrator's remuneration, and no appeal by either the Landlord or Tenant shall lie from the decision of the arbitrator. The costs of the

arbitration shall be borne equally by the Landlord and the Tenant unless the arbitrator or arbitrators, as the case may, award otherwise.

SAMPLE #4 (Three-Step)

18.1 Option to Extend

Subject to the following terms hereof, the Tenant shall be entitled to extend the term of this Lease for three (3) further periods of five (5) years each (commencing on the day after the expiry date of the Lease or the previous extension term, as the case may be) (each an "Extension Term"), provided that, as preconditions to the Tenant exercising such right, the Tenant shall:

(a) not be in default of any of the provisions of the Lease; and

(b) have given written notice to the Landlord of the exercise of this option at least nine (9) months prior to the expiry of the original Term or previous Extension Term, as the case may be.

Each Extension Term shall be on the terms and conditions set out in this Lease, save and except that:

> (i) there shall be no further or other right of extension or renewal after the third Extension Term;
>
> (ii) the Leased Premises shall be taken on an "as is" basis and there shall be no rent free or fixturing periods, and no allowances or inducements and no obligation of the Landlord to perform or complete any work, construction or renovations;
>
> (iii) the Minimum Rent shall be in such amount as the Landlord and the Tenant may agree, based on the fair market value rent payable for the Leased Premises at the commencement of the relevant Extension Term, for comparable premises with similar buildings with similar industrial uses in the vicinity of the Leased Premises but in any event not less than that payable in the preceding Term or Extension Term, as the case may be; and
>
> (iv) the Tenant shall enter into an agreement prepared by the Landlord at the Tenant's expense to give effect to the terms of this extension.

In the event that the Landlord and the Tenant are unable to agree upon the Minimum Rent to be paid by the Tenant during an Extension Term by a date which is three (3) months prior to the expiry of the original Term hereof or the first or second Extension Term, as the case may be, then the Minimum Rent shall be determined by mediation between the parties, and failing resolution by mediation within one (1) month thereafter, in accordance with Section 18.2 hereof. In the event the Tenant fails to give the notice as aforesaid, then the exercise of the within option to extend shall be null and void and of no further force or effect, and the Tenant shall surrender the Leased Premises to the Landlord upon the expiry of the original Term of this Lease or the relevant Extension Term, as the case may be.

18.2 Arbitration

Provided the Tenant has given to the Landlord proper written notice of extending this Lease as required above and provided the Landlord and Tenant do not agree in writing on the Minimum Rent for the relevant Extension Term on or before the date three (3) months prior to the date of completion of the original Term or the first or second Extension Term, as the case may be, then the Minimum Rent for the Extension Term shall be determined in accordance with the following additional terms and conditions:

(a) The Minimum Rent shall be determined by a single arbitrator. The Tenant shall by written notice to the Landlord given within ten (10) Business Days of the failure to agree by mediation propose the name of the person that it wishes to be the single arbitrator. Within five (5) Business Days thereafter, the Landlord shall give notice to the Tenant advising whether the Landlord accepts the arbitrator proposed by the Tenant. If such notice is not given within such five (5) Business Day period, the Landlord shall be deemed to have accepted the arbitrator proposed by the Tenant. If the parties cannot agree on a single arbitrator, then, upon the application of either party, a justice of the superior court of the province in which the Leased Premises are situate shall forthwith appoint an arbitrator whose sole determination shall be final. The arbitrator shall be a disinterested person of recognized competence in the real estate business in the city in which the Leased Premises are situated.

(b) The Minimum Rent for the Extension Term shall be based on the basis referred to in subsection (iii) of Section 18.1 above.

(c) The decision of the single arbitrator shall be final and binding upon the Landlord and the Tenant only with respect to Minimum Rent.

(d) All documents and proceedings with respect to the arbitration are to be kept confidential.

(e) The expense of the arbitration shall be borne equally between the parties hereto and the Tenant's share of such expense shall be due and payable immediately upon receipt and may be applied as Additional Rent or deducted from any deposit, letter of credit or other security as the Landlord so requires.

The arbitration shall be conducted in accordance with the provisions of the relevant arbitration legislation in the Province of Ontario in force at the time of the arbitration.