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Family

Strict compliance to form essential in family arbitration agreements

By **Alexander Gay**

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(April 6, 2018, 9:03 AM EDT) -- Family arbitration in Ontario under the *Arbitration Act* requires that counsel respect certain formalities when concluding an arbitration agreement, failing which the agreement and the award are of no force or effect. This is an exception to the general rule in commercial arbitration where the mere intention of entering into an arbitration agreement is sufficient to bind the parties. A recent case from the Ontario courts illustrates the importance of adhering to the formalities that are prescribed by the *Family Statute Law Amendment Act* and Ontario *Regulations 134/07* when concluding family arbitration agreements.

A "family arbitration" under the *Arbitration Act* means an arbitration dealing with matters that could be dealt with in a marriage contract, separation agreement, cohabitation agreement or paternity agreement under Part IV of the *Family Law Act* and is conducted exclusively in accordance with the law of Ontario or of another Canadian jurisdiction.

An arbitrator in Ontario cannot grant a divorce or an annulment, but they can decide custody, support, access and how to divide property. Family arbitration has been available since about 2007 and is growing in popularity for a number of good reasons, including the protection of privacy of the parties.

The content of the arbitration agreement is prescribed by the *Family Statute Law Amendment Act* and Ontario *Regulations 134/07*. This is unlike commercial arbitration agreements where the content of the agreements is not prescribed by the *Arbitration Act*. A "family arbitration agreement" is only binding if it meets certain formalities, namely: (a) the agreement is in writing; (b) the agreement is made after the dispute has arisen; (c) the agreement spells out how the award may be appealed; d) the arbitration is conducted exclusively under the law of Ontario or another Canadian jurisdiction; (e) both sides certify they have received independent legal advice; (f) the arbitrator certifies that both sides have been screened for domestic violence or power imbalances and that the arbitrator has considered a report of the screening; and (g) the arbitrator must also be able to say that he or she has had appropriate training approved by the Attorney General.

These formalities, which must be strictly adhered to, are intended to protect the parties from situations where there may be a power imbalance. If these formalities are not met, the arbitration agreement is invalid and the arbitrator's award is also not enforceable.

The importance of respecting the requirements of the *Family Statute Law Amendment Act* and Ontario *Regulations 134/07* was recently seen in *Horowitz v. Nightingale* 2017 ONSC 2168, where the parties entered into Minutes of Settlement in which they agreed to submit certain unresolved issues to family arbitration on specified dates before a named arbitrator. However, the judge held that the Minutes of Settlement did not constitute a valid arbitration agreement as it did not respect all of the requirements of the *Family Statute Law Amendment Act* and Ontario *Regulations 134/07.*

The judge held that all family law arbitration agreements must contain *all* of the provisions, such as the applicable law, the parties' appeal rights and the name of the arbitrator, failing which there is not a valid arbitration agreement. The judge refused to apply the reasoning found in a number of

commercial arbitration cases where the threshold for finding a binding arbitration agreement is low. The judge held that these commercial arbitration cases do not apply in circumstances where the legislature has chosen to make certain formal requirements necessary in order to have a legal and binding arbitration.

The *Horowitz* case should serve as a warning bell to counsel that the form requirements imposed on arbitration agreements under the *Family Statute Law Amendment Act* and Ontario *Regulations 134/07* must be respected and, within the context of family arbitration, little to no reliance can be placed on commercial arbitration where the threshold for finding a binding arbitration agreement is low.

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