[Redacted extract from a decision in which the Landlords in a dispute relating to a commercial lease brought a court action to declare the Lease Agreements (from time to time herein, collectively referred to as the "Lease") null and void on various grounds. The Tenant, after taking certain preliminary actions in the court proceeding sought to enforce the arbitration clause in the Lease. The arbitration clause permitted the arbitrator appointed by the party initiating the arbitration to serve as the sole arbitrator "as if appointed by both parties" if the responding party failed to appoint an arbitrator. The Landlords did not appoint an arbitrator and therefore a three person tribunal could not be formed. The Landlords brought a motion before the sole arbitrator to stay the arbitration pending determination of the court proceeding.]

Motion to Sole Arbitrator to Stay Arbitration

There are two principal grounds for the motion which may be paraphrased as follows:

(1) The language of section 15.07 of the Lease Agreements only requires arbitration of "an unresolved dispute between the Landlords and the Tenant involving any terms of this Lease" and this language does not require arbitration of any dispute relating to the validity or enforceability of the Lease as a whole. If the Lease is found to be null and void for the reasons advanced by the Landlords, there is no dispute between the Landlords and the Tenant involving "any terms of the Lease" since there would be no Lease.

(2) Even if some or all of the disputes between the Landlords and the Tenant are subject to arbitration, the Tenant "attorned" to the jurisdiction of the court or "waived" its right to arbitration by bringing its Application and by seeking an indulgence with respect to the delivery of its Statement of Defence in the Landlords' Action.

Jurisdiction Issue

As stated in the grounds for the Notice of Motion: the position of the Landlords is that:

a) the Arbitrator lacks jurisdiction until the issues in the Landlords' Action are resolved in the Tenant's favour; and
b) [t]o the extent that some of the issues in the Notice of Arbitration might or would be arbitrable if the alleged Lease Agreements or either of them are ultimately determined to be enforceable as written or rectified, then the arbitration thereof until such ultimate determination would be wasteful and therefore premature and *nihil ad rem*.

In essence, the Landlords seek to draw a distinction between disputes relating to specific terms of the Lease Agreements and disputes relating to the Lease Agreements as a whole, in particular a dispute as to whether the Lease Agreements are null and void. It is argued that the former are arbitrable whereas the latter are not. It is argued on behalf of the Landlords that "it would do violence" to the language of section 15.07 of the Lease Agreements to interpret a provision that calls for arbitration of disputes "involving any of the terms of the Lease" as providing for or requiring arbitration of disputes as to the validity or enforceability of the Lease Agreements themselves. There is also a strong implication, if not assertion, in this argument that if the Lease Agreements as a whole are null and void and unenforceable then the agreement to arbitrate also is unenforceable.

In my view, these arguments of the Landlords fail when viewed from each of the following three perspectives:

(1) language and logic;
(2) commercial reasonableness and efficacy; and
(3) statutory and judicial authority.

Language and Logic

From the perspective of language and logic, an acceptance of the Landlords' argument would involve making a sharp distinction between disputes relating to the whole of an agreement as opposed to disputes relating to parts of an agreement. Certainly, it is possible for the parties to clearly delineate those matters which they wish to submit to arbitration and those which they do not. The suggestion that the parties intended a reference to disputes involving "any of the terms of this Lease" to be dealt with in a different way than disputes relating to the Lease as a whole is, however, neither a necessary nor a reasonable meaning to attribute to the words the parties have used.

One can characterize the position of each of the parties to the dispute as follows: the Landlords assert that none of the terms of the Lease are enforceable whereas the Tenant asserts that all of the

terms of the Lease are enforceable. The dispute can then accurately be described as a dispute as to whether any of the terms of the Lease are enforceable, in which case the dispute as framed by the Landlords clearly falls within the actual words of section 15.07 as a dispute involving "any of the terms of the Lease".

In addition, if one were to accept the Landlords' characterization of the dispute as one relating to whether the Lease Agreements are null and void as a whole, it does not follow that the dispute does not include a dispute about numerous specific terms of the Lease Agreements, in particular, the specific provisions which create the obligations which the Landlords seek to avoid by challenging the validity of the entire Lease (for example 1.01 Grant, 2.02 General Rights of Tenant and 6.09 Interference with the Project) as well as specific terms that relate to the scope and enforceability of the Lease itself (for example 15.10 Entire Agreement and 15.11 Independent Legal Advice). Any adjudication of the enforceability of the Lease Agreements as a whole necessarily "involves" adjudication of the enforceability of those individual terms which the Tenant seeks to enforce and the Landlords seek to resist.

Solely on a review of the pleadings and proceedings in the two actions and the contents of the Notice of Arbitration, and without reaching any conclusions as to the merits of the allegations or legal positions taken by either side, it is evident that the dispute arises because the Tenant seeks to enforce the terms of the Lease and the Landlords seek to resist performance. The fact that the Landlords seek to defend the claims for performance on a basis which would, if proven and accepted, eliminate any obligation on their part to perform any of the specific terms of the agreement, does not change the nature of the dispute as one relating to the performance of the obligations set out in the "terms of the Lease".

In other words, it is artificial to draw a distinction between disputes that relate to the whole of the Lease Agreements and disputes that relate to individual terms of the Lease Agreements given that the whole is nothing more than the sum of its parts.

Commercial Reasonableness

Given that the parties expressly selected arbitration as the method for resolving any disputes "involving any of the terms of the Lease Agreements", is there any reason to assume (without specific language to the contrary) that they intended to reserve litigation as the method for resolving disputes in which performance of the terms of the Lease was disputed on the grounds that the Lease as a whole is unenforceable or invalid? One has only to consider the proposals advanced by the Landlords as to the procedural implications of their interpretation of the Lease to see that there is good reason to doubt the commercial reasonableness or efficacy of their interpretation. If the interpretation advanced by the Landlords is correct, one alternative would be for the dispute regarding the enforceability of the Lease as a whole to be litigated, including full discoveries, trial and rights of appeal following the disposition of which proceedings, the arbitrable matters regarding specific terms of the Lease Agreements could begin to be addressed if the Landlords lose the action, perhaps two or more years from now. On another scenario, the arbitration of the specific issues could proceed simultaneously with the action but, as proposed by the Landlords, entirely at the cost of the Tenant pending determination of the enforceability issues in the court action. A third option would be for the issues which the Landlords concede to be governed by section 15.07 (and therefore arbitrable by agreement) to be dealt with in the court proceedings. Given any of the reasons for which the parties may have chosen to arbitrate issues relating to the terms of the Lease Agreements, it is hard to conceive that any of the proposed procedural scenarios for dealing separately in a court action with the enforceability issues would be consistent with the objectives which could have led the parties to include an arbitration provision in the first place.

This perspective on the issue is very well articulated by Lord Hoffmann in *Premium NAFTA Products Ltd. v. FILI Company Ltd.*, [2007] UKHL 40 at paragraphs 12 and 13 in which he commented on various English cases that had previously drawn distinctions of the type propounded by the Landlords in the present arbitration in the following words:

> 12 I do not propose to analyse these and other such cases any further because in my opinion the distinctions which they make reflect no credit upon English commercial law. It may be a great disappointment to the judges who explained so

> carefully the effects to the various linguistic nuances if they could learn that the draftsman of so widely used a standard form as Shelltime 4 obviously regarded the expressions "arising under this charter" in clause 41(b) and "arisen out of this charter" in clause 41 (c) (I) (a) (i) as mutually interchangeable. So I applaud the opinion expressed by Longmore LJ in the Court of Appeal [2007] Bus LR 687, para 17, that the time has come to draw a line under the authorities to date and make a fresh start. I think that a fresh start is justified by the developments which have occurred in this branch of the law in recent years and in particular by the adoption of the principle of separability by Parliament in section 7 of the 1996 Act. That section was obviously intended to enable the courts to give effect to the reasonable commercial expectations of the parties about the questions which they intended to be decided by arbitration. But section 7 will not achieve its purpose if the courts adopt an approach to construction which is likely in many cases to defeat those expectations. The approach to construction therefore needs to be re-examined.
>
> 13 In my opinion the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal. The clause should be construed in accordance with this presumption unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction. As Longmore LJ remarked, at para 17: "if any businessman did want to exclude disputes about the validity of a contract, it would be comparatively easy to say so."

As noted below, the principle of "separability" referred to by Lord Hoffman was also introduced (at an earlier date) into Ontario Law in section 17(2) of the *Ontario Arbitration Act, 1991* (the "Act"). The foregoing decision of the House of Lords (as it then was) is not binding on me or on the courts of Ontario, however it is a very clear articulation of the principle of commercial reasonableness in relation to the approach to interpretation proposed by the Landlords in the present case.

Ontario Law

Given that none of the parties to the Lease Agreements or this arbitration are foreign, the Act applies to this arbitration. Section 17(1) and (2) of the Act provides as follows:

> Arbitral tribunal may rule on own jurisdiction
> 17. (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement.

> Independent agreement
> (2) If the arbitration agreement forms part of another agreement, it shall, for the purposes of a ruling on jurisdiction, be treated as an independent agreement that may survive even if the main agreement is found to be invalid.

Although these provisions do not relate to the scope of the matters which are referred to arbitration under any particular agreement, I note in passing that the Landlords have raised no separate issue as to the validity or enforceability of section 15.07 of the Lease Agreements and have made no allegations that there are any grounds regarding validity or enforceability that relate specifically to that section of the Lease Agreements. I also note that, while section 17(1) of the Act provides that an arbitral tribunal may rule on its own jurisdiction, any such ruling as it relates to whether or not the matters in dispute fall within the arbitration clause are subject to an appeal to the court: see section 17(8) if the arbitral tribunal rules on an objection to jurisdiction as a preliminary question and section 46(1) (3) if the decision is rendered as part of a final award.

In my view, the jurisprudence in Ontario overwhelmingly supports the following propositions relating to the interpretation of agreements to arbitrate:

(1) the approach of the courts in Ontario has been to give arbitration provisions a large, liberal and remedial interpretation to give effect to the intention of the parties that disputes will be resolved ultimately by binding arbitration: *Brock University v. Stucor Construction Ltd.*, [2002] O. J. No. 2300, paras 20-21;

(2) where a contract calls for dispute resolution through arbitration, there is a clear and growing tendency on the part of the courts to insist that arbitration and not litigation be pursued: *Nazarinia Holdings Inc. v. 2049080 Ontario Inc.*, [2010] O.J. No. 1196 (Ont. S.C.J.) at para. 13 and 14;

(3) where the language of an arbitration clause is capable of bearing two interpretations, and one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option: *Onex Corp. v. Ball Corp.* [1994 CarswellOnt 228 (Ont. Gen. Div.) at para. 24;

(4) to give effect to an argument that a party cannot rely on the arbitration clause in an agreement because the party resisting arbitration is alleging that the agreement is null and void would render an agreement to arbitrate illusory since most disputes involve allegations which, if proved, make the agreement terminable or voidable by the aggrieved party: *Fairfield v. Low* (1990), 71 O.R. (2d) 599; and

(5) an arbitration clause which includes disputes arising out of or in connection with a contract includes more than rights and duties created by the contract and is triggered if either Claimant or Defendant relies on the existence of the contractual obligation as a necessary element to create the claim, or defeat it: *Kaverit Steel & Crane Ltd. V. Kone Corp.*, (1992) D.L.R. (4th) 129 (Alta. C. of A.); *D.G. Jewelry Inc. v Cyberdiam Canada Ltd.*, [2002] 21 C.P.C. (5th) 174.

The current state of the law in Ontario regarding the interpretation and enforcement of agreements to arbitrate disputes is compendiously set out in *Alpina Holdings Inc. v. Data & Audio-Visual Enterprises Wireless Inc.*, [2013] 229 A.C.W.S. (3d) 19 where it was said by Moore J.:

> 21 The parties agree that in situations where a contract calls for dispute resolution through arbitration, there is a clear and growing tendency of the part of our courts to insist that arbitration and not litigation be pursued. As Strathy J., as he then was, put the proposition in *Nazarinia Holdings*,
>
> > The *Arbitration Act* reflects a modern philosophy in favour of alternative dispute resolution and the principle that where parties have agreed to resolve their disputes by arbitration, the court should require them to do so...
> >
> > As Blair J., as he then was, noted in *Onex Corp. v. Ball Corp.* (1994), 12 B.L.R. (2d) 151, [1994] O.J. No. 98 at para. 17 (Gen. Div.), the provisions of the statute reflect a "clear shift in policy towards encouraging parties to submit their differences to consensual dispute resolution mechanisms outside the regular court stream".

22 In its consideration of the provisions of the *Arbitration Act* that exempt disputes from the strict ambit of section 7(1), the Court of Appeal said this of the purpose of section 7(2):

> It provides a list of five circumstances where a court is not required to stay an action in the face of an arbitration clause in an agreement. They are all cases where it would be either unfair or impractical to refer the matter to arbitration; unfair because there was no legal agreement to arbitrate or because a party effectively waived the agreement by undue delay in objecting to the court action, or impractical because the party was not disputing the claim or it was a claim that was clear and could be resolved by summary judgment without a referral to arbitration.
>
> The purpose of s. 7(2) of the *Arbitration Act* is to provide a limited exception to the mandatory requirement that the courts enforce arbitration clauses and not take jurisdiction where the parties have legitimately agreed to arbitrate their disputes. One of those exceptions arises when one party defaults and there is therefore no need to enlist an arbitrator to make any findings. Another is where the case is properly one for summary judgment, i.e., there are no genuine issues for trial, and therefore, as with a default situation, there are no issues that require the assistance of an arbitrator.

23 In my view the parties clearly turned their minds to the arbitration option in reaching the agreement at issue in this matter. They agreed to arbitrate certain disputes and reserved others for determination through litigation. In *Onex Corp. v. Ball Corp.* [1994] CarswellOnt 228 (Ont. Gen. Div.)], Blair J. also held that "[a]t the very least, where the language of an arbitration clause is capable of bearing two interpretations, and one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option, given the recent developments in the law in this regard to which I have earlier referred".

In this case, the interpretation advanced by the Landlords as to the scope of the arbitration agreement runs afoul of all of these principles of Ontario law.

The language of section 15.07 of the Lease Agreements is broad enough on its own to encompass disputes in which it is a necessary element of the claim or the defence to assert or deny the existence of the agreement under the terms of which the disputed obligations to perform arise.

One way to characterize the position taken by the Landlords with respect to the interpretation of section 15.07 is that agreements to arbitrate should be strictly construed such that parties are only bound to arbitrate those matters which fall squarely within the words the parties have used in the arbitration agreement or submission. An explicit rationale for this approach as it was developed in oral submissions on the motion is that litigation in the courts provides the parties with "full procedural safeguards" whereas arbitration does not. Neither the principle nor the rationale given for it by the Landlords is correct. On the contrary, as I have already outlined above, the approach of the courts in Ontario has been to give arbitration provisions "a large, liberal and remedial interpretation to give effect to the intention of the parties" and to "lean towards" honouring the option of arbitration "where the language of an arbitration clause is capable of bearing two interpretations, and one of those interpretations fairly provides for arbitration".

Furthermore, it is not correct to state that procedural safeguards available in litigation are unavailable in arbitration. On the contrary, all procedures that are available in litigation are also available in arbitration. The crucial difference is that whereas the procedures are available in litigation, *prima facie*, as a matter of right and are therefore subject to overuse, abuse and uses which are inappropriate to the business realities surrounding the dispute, in arbitration procedures are only available to the extent that they have been agreed upon by the parties or have been found by the tribunal to be necessary or appropriate for the resolution of the particular dispute that has arisen. Arbitration has a particular concern with ensuring that the substantive rights of the parties are not nullified by procedural prerogatives. That is one of the key differences that leads parties to commercial agreements to agree that their disputes will be submitted to arbitration rather than litigation. It is one of the benefits which the courts have sought to preserve by resisting arguments that could defeat the reasonable expectation of parties that their disputes will be arbitrated.