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Thomas Heintzman specializes in alternative dispute resolution. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Does the CCDC Dispute Resolution Clause Require Arbitration?

Most building contracts contain dispute resolution clauses which refer to arbitration. A dispute resolution clause can be mandatory – it can require arbitration – or it can be permissive – it can permit arbitration if all parties agree to arbitration when the dispute arises. One would think that the most important thing to make clear in a dispute resolution clause is whether arbitration is mandatory or not.

Yet, there has been some doubt whether the dispute resolution clause in the CCDC standard form construction contract makes arbitration mandatory or permissive. That is because the key wording in that clause contains the word "may", which is typically a word that designates a permissive procedure, while the word "shall" designates a mandatory procedure.

The Ontario Superior Court of Justice recently addressed this issue in ***Bondfield Construction Co. v. London Police Services***. The court held that the CCDC dispute resolution clause creates a mandatory obligation to arbitrate. The court accordingly stayed an action which had been bought in relation to the CCDC contract.

The Facts

In November 2007, Bondfield as general contractor entered into a contract with the London Police Services Board as owner for the renovation and expansion of the Board's headquarters. The contract was in the standard form CCDC-2 Stipulated Price Contract. Paragraph 8.2.6 of that contract reads as follows:

> "By giving a notice in writing to the other party not later than 10 working days after the date of termination of the mediated negotiations under para. 8.2.5, either party may refer the dispute to be finally resolved by arbitration under the latest edition of the *Rules of* Arbitration of CCDC 2 Construction Disputes. The arbitration shall be conducted in the jurisdiction of the *Place of the Work."* (underlining added)

The work began in November 2007. Bondfield alleged that conduct of the Board delayed the completion of the project by 17 weeks. In May, 2008, Bondfield gave notice to the architectural consultant of its claim for delay. In January, 2009, the consultant recommended that the dispute be resolved pursuant to the contracts' dispute resolution process.

In June, 2010, Bondfield invited the Board to enter into a dispute resolution process involving an "independent third party" to avoid lengthy litigation. In July, 2010, the Board replied that it wanted to follow the contract's dispute resolution clause and asked the consultant to deal with the Board's deficiency claims, which the consultant did in October 2010. In November 2010 Bondfield wrote a "dispute" to the consultant's report and suggested that a project mediator be appointed, and the Board then suggested a person to be the mediator.

In June 2011, Bondfield delivered a claims brief to the Board which referred the brief to the consultant for a report. In July, 2011 the Board's lawyers said that they hoped for an answer on the claim from the Board by the middle of that summer. On July 29, 2011, this action was commenced. The Board delivered its defence in November 2011 and in that pleading alleged that the action was commenced outside the Ontario 2-year limitation period. Bondfield then brought a motion to stay its own action on the ground that arbitration was mandatory under the dispute resolution clause in the CCDC contract. The Board resisted the motion on the

ground that the action commenced by Bondfield was the preferable procedure to resolve the dispute.

The Decision

The Ontario Superior Court held that arbitration was mandatory under the CCDC-2 contract and stayed the action by Bondfield. The court referred to prior decision in ***Brock University v. Stucor Construction Ltd.*** (2002), 33 CLR (3d) 182 (Ont. S.C.J.) as being on point on the same clause. In that case, the owner sought a stay of a mechanics' lien action brought by the contractor on the basis of the dispute resolution clause in the CCDC-2 contract between the parties, and the court granted the stay. The court also referred to the decisions in ***Automatic Systems Inc. v. E.S. Fox Limited*** *[1995]* O.J. No. 461 [Gen. Div.]; ***Merit Sinclair Developments v. O.R. Haemet Sephardic School***, [1998] O.J. No. 5225[Gen. Div.] and ***Atyscope Richmond Corp. v. Vanbots Construction Corp.,*** [2001] O.J. No. 638 (S.C.J.) as evidencing the same approach.

The court held that the arbitrator should deal with all the objections raised by the Board, with respect to whether the dispute fell within Article 8.2 of the CCDC contract, the alleged dilatory pursuit of its remedies by Bondfield and the limitation period, and otherwise.

The court also concluded that, in bringing the application to stay its own action, Bondfield was entitled to rely upon Article 8.2 of the contract and section 106 of the ***Courts of Justice Act*** . The normal route to a stay an action brought in the face of an arbitration clause is Section 7 of the *Arbitration Act,* but that section was unavailable to Bondfield since it only allowed "another party", not the party bringing the action, to seek a stay of the action. However, section 106 of the ***Courts of Justice Act*** permitted the court to stay the action and it was available to Bondfield since it was available to "any person, whether or not a party" to the action. The court also noted that the alleged dilatory pursuit of its remedies by Bondfield might be answered by Article 1.3.2 of the CCDC contract which states that " No action or failure to act by the *Owner, Consultant*, or *Contractor* shall constitute a waiver of any right or duty afforded any of them under the *Contract*, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach there under, except as may be specifically agreed in writing."

Discussion

Reading this decision, one would conclude that the mandatory effect of the dispute resolution provision, Article 8, in the CCDC-2 contract has been definitively determined. Perhaps it has, but not yet by an appellate court. While the principle in this decision may well be upheld by an appellate court, there are several issues which are lurking under the surface which have not yet been addressed by the courts.

The first has to do with the words "may" and "shall" in Article 8. As noted above, the pivotal clause in Article 8 is clause 8.2.6. That clause says that "either party <u>may</u> refer the dispute to be

finally resolved by arbitration…." Normally the word "may" means that arbitration is permissive, and there are many cases holding that "may" in an arbitration clause means that arbitration is not required.

Moreover, the word "may" in Article 8.2.6 stands in stark contrast to the word "shall" in virtually all the prior clauses within Article 8.2. Thus, Article 8 8.2.1 says that "the parties shall appoint a project mediator…". Article 8.2.2 says that a "party shall be conclusively deemed to have accepted a finding of the Consultant…" unless certain steps are taken. Article 8.2.3 says that the "parties shall make all reasonable efforts to resolve their dispute…" Article 8.2.4 says that "the parties shall request the Project Mediator to assist the parties to reach agreement…." Article 8.2.5 says that if the dispute is not resolved within 10 working says, then the "Project Mediator shall terminate the mediated negotiations…." And then Article 8.2.6 uses the word "may".

Normally one would think that by using a different word in Article 8.2.6, the parties intended a different meaning, and the normal difference between "shall" and "may" is that the latter is permissive. One would think that some analysis or reasoning of the use of those words would be necessary to arrive at the conclusion that arbitration is mandatory.

It is true that Article 8.1.1 starts with mandatory wording: " Differences between the parties to the Contract as to the interpretation, application or administration of the Contract….shall be settled in accordance with the requirements of Part 8…" So there is a mandatory requirement to use the procedures in Article 8.2. But that leaves open the questions: What are those procedures? And do they include mandatory or permissive mediation?

The second issue left open for discussion is the actual workings of Article 8.2.6. It seems fairly clear that, even if Article 8.2.6 does permit one party to refer the dispute to arbitration, that party can only do so "within 10 days after the termination of mediated negotiations…" If neither party does so, then Article 8.2.7 says that "the arbitration agreement under paragraph 8.2.6 is not binding on the parties… and the parties may refer the unresolved dispute to the courts…"

So Articles 8.2.6 and 8.2.7 appear to create an opt-in regime in which one party may force the other party to arbitrate, but must do so within 10 days of the termination of the mediated negotiations. Exactly why the CCDC contract created an opt-in arbitration regime is unclear, but that is the regime that is apparently intended. And the concept of an opt-in arbitration regime gives sense to the word "may" in Article 8.2.6, since it means that either party may, but need not, refer the matter to arbitration; if either party does then the arbitration agreement is binding; but if either party does not, then the arbitration agreement is not binding.

But if that is the meaning of the arbitration regime in Article 8.2 of CCDC-2, then how does it apply to the facts in this case? The mediation procedures referred to in Article 8.2.1 to 8.2.5 have tight timeframes, none of which were observed in this instance. Unless the consultant was the "project mediator" which does not seem to have been the case, the mediation procedures never occurred. The "termination of the mediated negotiation" referred to in Article 8.2.6 never happened, so the 10 Working Days in which either party could refer the matter to arbitration never occurred.

What does all of this mean? At least two results seem possible. The first could be that the procedures under Article 8.2 are mandatory and a precondition to any substantive rights to litigate arising. If this is so, then the limitation period never started running and the parties have to "go back to GO" and start all over again, right back at mediation under Article 8.2.1. Article 8.2.1 says that if the parties neglect to appoint a project mediator within 20 days of signing the contract, then the mediator shall be appointed within 10 days of one of the parties making that request. Are the parties back at that point in the process? And does the court have the power to appoint a mediator if the parties do not agree on one? Or is Article 8.2 an agreement "to have an independent third party resolve the claim…" within section 11(1) of the **Ontario *Limitations Act*,** *2002* so that the limitation period does not start running until the attempted resolution process is terminated or one party terminates or withdraws from the agreement? Or does that section only apply to agreements made after the dispute arises?

The other result could be that, since the mediation procedures weren't used, then the normal procedural and limitation rules are applicable. In this case, it would seem that the opt-in arbitration regime has not been used and therefore recourse to the courts is permissible. Does this mean that the limitation period is running in the meantime? That result may have serious repercussions in terms of the limitation period and the lengthy time that had transpired since Bondfield first gave notice of its delay claim in 2008. This case highlights, once again, the limitation dangers inherent in mediation and arbitration clauses.

These questions may not be debated publicly in this proceeding since the court has ordered that the action be stayed and the dispute dealt with by arbitration. But in some future case, an appellate court may have to address exactly what Article 8.2 of CCDC-2 means and what are the consequences of not following the regime set forth in that article.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 4th ed., chapter 10, parts 1, 4 and 6

***Bondfield Construction Co. v. London Police Services,* 2013 ONSC 4719**

Arbitration – mediation – building contracts – obligation to arbitrate - limitations

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