INTERPRETING A CONTRACTUAL DISPUTE RESOLUTION CLAUSE? STEP IN THE ARBITRATOR'S DIRECTION

Posted on October 24, 2022

Categories: Insights, Publications

Dispute resolution provisions are a common feature of commercial contracts and are often framed as a series of escalating steps/tiers leading towards arbitration ("**step clause**"). The principle reason to include a step clause in a contract is to obtain certainty on the resolution process in the event of a dispute. Certainty is achieved by ensuring that each stage specified within a step clause has the mechanics clearly laid out.

However, it is common for step clauses to be ambiguous, or lacking in procedural detail. This leads to unwanted surprises for parties when it comes time to enforce the clause, or requires parties to seek a determination of the meaning of the clause itself in the midst of a dispute, which is unhelpful, and also, reintroduces uncertainty.

This uncertainty can extend not only to the mechanics of the step clause itself, but in some instances, to whom the parties should look to interpret the clause.

Where a step clause leading to arbitration is unclear about whether each step along the way is mandatory, parties should consider simply appointing an arbitrator to make such a determination and not incur the time and expense of bringing the issue before the courts. This is because a court may decline to interpret a step clause where the dispute arguably falls within the arbitrator's jurisdiction, and especially where the dispute is heavily fact-laden.

Justice Myers recently dealt with this situation in *Cruikshank Construction Ltd. v Kingston*.[1]

In *Cruikshank*, a dispute arose further to an agreement between the parties for Cruikshank to provide construction services to the City of Kingston. The parties' agreement included an arbitration clause. Cruikshank applied to the Court to appoint an arbitrator. The City of Kingston cross-applied requesting that the Court decide if an arbitrator had jurisdiction to proceed and whether Kingston's proposed defences to the arbitration were valid.[2]

Ultimately, Justice Myers found that an arbitrator should be appointed, and further to the competence-competence principle, the arbitrator would decide whether they had jurisdiction to hear the matter.[3] This

included the determination of a limitations defence and whether the arbitration process was properly invoked (i.e. whether there were procedural preconditions to arbitration that Cruikshank failed to follow).[4]

Justice Myers cautioned that parties are not free to ignore arbitration agreements to ask the court to decide their case in advance. Where parties agreed to submit their disputes to arbitration, the court will enforce arbitration agreements and will respect the competence-competence principle, which recognizes the power of an arbitrator to determine his or her own jurisdiction under an arbitration agreement.[5]

The decision in *Cruickshank* may seem surprising, given that the Court recently heard and decided similar issues in *Maisonneuve v Clark,*[6] rather than referring the matter to an arbitrator. In *Cruickshank,* Justice Myers noted that parties should not expect a repeat performance of *Maisonneuve:*

> *While that reasoning works in the first case that mistakenly comes to court, to allow subsequent cases to continue to come to court when they should be before the arbitrator undermines the "should" and drives a truck through a loophole in the competence-competence principle.*[7]

Conclusion

Parties want certainty about whether a dispute resolution provision or step clause is enforceable. This can be achieved by careful drafting to ensure that such clauses are interpreted in accordance with the parties' expectations.

Parties are not free to ignore arbitration agreements, and attempts to litigate around an arbitration agreement are likely to be scrutinized closely by the courts. Where a dispute arguably falls within the arbitrator's jurisdiction and is heavily fact-laden, the parties should look to the arbitrator for the necessary determinations and not the court.

[1] *Cruikshank Construction Ltd. v Kingston*, 2022 ONSC 5704.
[2] *Ibid* at para 5.
[3] *Ibid* at para 50.
[4] *Ibid* at paras 13 and 41
[5] *Ibid* at paras 24-26.
[6] 2021 ONSC 1960.
[7] 2022 ONSC 5704 at para 16.

by Gemma Healy-Murphy, Connor Campbell and Srinidhi Akkur (Articling Student)

A Cautionary Note