Thomas G. Heintzman, O.C., Q.C., FCIArb

Heintzman ADR

Arbitration Place

Toronto, Ontario

www.arbitrationplace.com

416-848-0203

tgh@heintzmanadr.com

www.constructionlawcanada.com

www.heintzmanadr.com

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.

Can An Entire Agreements Clause Make A Party To An Agreement Also A Party To Another Agreement?

In construction projects, there will often be several agreements between the various participants. Those agreements may contain "entire agreement" clauses to ensure that the parties are bound only by the terms of the agreement they sign. But could the entire agreement clause have the opposite effect if it refers to one of the other agreements?

In ***One West Holdings Ltd. v. Greata Ranch Holdings Corp.*** the British Columbia Court of Appeal recently answered Yes to this question. As a result, the entire agreement clause became an

incorporation by reference clause, incorporating an arbitration clause from one agreement into another.

Background

Several parties joined together to buy the Greata Ranch in British Columbia and to subdivide and develop the land for resale. There were three agreements:

the limited partnership agreement between the participants (LPA);

the project management agreement between the limited partnership and the management company One West (PMA); and

the agreement to purchase the ranch (PA). One West was not a party to the LPA or PA although it was affiliated to a company that was.

The PMA and PA each had an entire agreements clause that said that the PMA, LPA and the PA "and any documents expressly contemplated by this Agreement, constitute the entire agreement between the parties and/or affiliates of the parties and/or affiliates and supersede all previous communications, representations and agreements, whether oral or written, between the parties with respect to the subject matter hereof….".

The LPA had an entire agreements clause that said that "This Agreement constitutes the entire agreement between the parties hereto with respect to all of the matters herein and its execution has not been induced by, nor do any of the parties hereto rely upon or regard as material, any representations or writings whatsoever not incorporated herein and made a part hereof."

The LPA had an arbitration clause requiring the arbitration of "all disputes arising out of or in connection with this Agreement, or in respect of any legal relationship associated therewith or derived therefrom…." The PMA and PA had no arbitration clauses.

When disputes arose, arbitration proceedings were commenced, and One West was joined as a respondent. One West said that it could not be joined as a party to the arbitration as it was not a party to the LPA and therefore was not a party to the arbitration agreement.

The Decisions

The arbitrator held that, because of the entire agreements clause in the PMA, One West was a party to another agreement, the LPA, and therefore a party to the arbitration agreement in the LPA. On appeal, a judge of the B.C. Supreme Court disagreed, holding that the entire agreements clause in the PMA did not make One West a party to another agreement, the LPA, and to the arbitration agreement in the LPA. The B.C. Court of Appeal disagreed with that decision and agreed with the arbitrator.

The Court of Appeal's conclusion about the entire agreement clause in the PMA was as follows:

> "Article 17.1 does two things: it defines the agreement of the parties and it limits the scope of inquiry. The judge's approach appears to eliminate the first part of the provision merely because it is called an "entire agreement" clause. It is necessary, as was done by the arbitrator, to look at the opening words of the provision: "This Agreement, the Partnership Agreement and the Purchase Agreement and any documents expressly contemplated by this Agreement, constitute the entire agreement between the parties and/or affiliates of the parties".
> There is nothing ambiguous or unclear about this language. It defines the agreement of the parties. The balance of the provision limits the sources on which the parties can rely and to which the court can look. It reflects the traditional purpose of an "entire agreement" provision, but it does not supplant the agreement of One West that the LPA is part of the agreement between the parties. That agreement contains an arbitration commitment that is binding on One West."

In effect, the court held that, by reason of the wording of the entire agreements clause in the PMA, One West had agreed that it was a party to the LPA and the arbitration clause in that agreement.

The Court of Appeal gave a second reason for its decision:

> "The scope of the arbitration commitment extends to legal relationships associated with or derived from the LPA. The "entire agreement" clause in the PMA extends to the parties and their affiliates."

In this passage, the Court of Appeal is saying that the arbitration clause itself was sufficient to sweep One West into the arbitration as an affiliate of the party which signed the LPA, quite apart from the argument that the LPA and its arbitration clause were incorporated into the PMA through the entire agreements clause.

Comments

This decision arrives at startling conclusions about both the entire agreement and the arbitration clause. As to the former, entire agreement clauses are not usually thought of as creating new rights but as ensuring that there are no rights other than those contained in the written contract. If this is the purpose of the clause, then when the clause appears in one contract of a number of related contracts to which a number of entities are parties, the clause can be taken to mean that there are no rights in the contract other than those in the respective contract or contracts, not that new rights are created in one contract that are not otherwise there. But that is the very argument that the court appears to have rejected.

As to the affiliate issue, the PMA and PA said that they constituted the entire agreement between the parties and/or affiliates of the parties. So far as the reasons of the court disclose, the PMA or PA did not apparently state that they were being executed by one party on behalf

of its affiliates who were thereby made a party to and bound by it. So, again, it seems arguable that the statement about affiliates was that there were no other agreements between all these parties, not that the affiliates were parties to every agreement. But again, that seems to be the argument rejected by the court.

So far as the arbitration clause is concerned, the court's decision is that an entire agreements clause in one agreement (the PMA in this case) effectively operates as an "incorporation by reference" clause and brings the arbitration agreement from another agreement (the LPA in this case) into the first agreement. This is a very significant issue for construction law.

There are many cases holding that an arbitration clause is not incorporated from one agreement into another without there being a specific incorporation of that clause. Thus, it has been held in many cases that an arbitration clause in the main contract between an owner and contractor will not be incorporated into the subcontract between the contractor and subcontractor merely because the subcontract states that the terms of the main contract are incorporated into the subcontract: it takes something much more specific to incorporate the arbitration clause from one agreement into the other.

Yet in this case, the court has held that an entire agreements clause –which on its face doesn't appear to be an incorporation by reference clause at all– is not only an incorporation by reference clause, but it incorporates an arbitration clause from one agreement into another.

With this decision in mind, those involved in preparing building contracts will have to carefully scrutinize their entire agreement and arbitration clauses to ensure that they have the intended ambit and effect.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 4th ed., chapter 7, part 1.

***One West Holdings Ltd. v. Greata Ranch Holdings Corp.,* 2014 Carswell BC 414, 2014 BCCA 67**

Building contracts – incorporation by reference - arbitration clauses-third parties –

T.G. Heintzman O.C., Q.C., FCIArb **April 6, 2014**

www.heintzmanadr.com
www.constructionlawcanada.com