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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.

Is A "May Arbitrate" Clause Mandatory Or Permissive?

What is the meaning of an arbitration clause which states that a dispute "may be determined by arbitration"? Does the clause mean that the arbitration process is permitted but not mandatory? Or does the word "may" mean that the parties do not have to have a dispute, but if they do, the arbitration clause applies?

In ***Durham (Regional Municipality) v. Oshawa (City),*** the court held that the word "may" in an arbitration clause makes the arbitration permissive and not enforceable. This conclusion is significant for building contracts which often use very similar wording.

Background

In December 2004, the Regional Municipality of Durham (the Region) passed a resolution relating to the jurisdiction over public transportation in the Region. The resolution transferred the jurisdiction over those facilities to the Region from City of Oshawa and certain lower-tiered municipalities which had previously had jurisdiction over them. The bylaw provided that the amount and future payment of exiting and unfunded liabilities was to be determined by negotiations between the region and the lower-tiered municipalities. It stated that "any matter not agreed to within three (3) months of the Effective Date [of the bylaw] may, at the request of the Region or a lower-level municipality, be determined by arbitration under the provisions of the **Ontario Arbitration Act**."

There were some complicated issues to be resolved between the Region and the lower-tiered municipalities: the identity of the facilities to be transferred, the nature of the legal arrangements (sale or lease), and amount and nature of the unfunded liabilities relating to former transit employees. Up until late 2009, it was not known exactly which assets would be transferred.

In early April 2009, the Region settled the issue of the transferred costs and liabilities with all the other lower-tiered municipalities except Oshawa. On April 1, 2009 the Region requested arbitration. Oshawa asserted that, from the very beginning, it refused to accept responsibility for the unfunded liabilities. On April 21, 2009, Oshawa passed a resolution denying responsibility for the unfunded liabilities and refusing to proceed to arbitration. On March 22, 2011, the Region commenced an action against Oshawa for payment of those liabilities.

The Regions took the position that the two year limitation period commenced on April 21, 2009 when Ottawa passed its resolution denying responsibility for the unfunded liabilities. The Region said that it was on that date that it "discovered" that there was a dispute with Oshawa, and that its action on March 22, 2011 was commenced within the two year limitation period from that date.

Oshawa asserted that the limitation period commenced in March 2005 when the three month negotiation period expired after the Region's bylaw and that the Region's action was barred by the limitation period. In the alternative, Oshawa said that its refusal to accept responsibility for the unfunded liabilities was well known to the Region long before Oshawa's resolution of April 21, 2009 and that the Region knew or should have known, long before Oshawa's resolution, that Oshawa denied responsibility for those liabilities and that the limitation period was running.

The Decision

The court held that the Region's bylaw did not create a mandatory obligation to arbitrate. The words "may…be determined by arbitration" only established a permissive arbitral regime in which either party could opt not to arbitrate. The court said:

> "There is no decision that a permissive clause, in which parties "may" proceed to arbitration, triggers a limitation period. Had the limitation clause instead *required* the parties to attend arbitration after three months by using the word "shall", it would have changed the complexion of Oshawa's arguments."

The court also held that the limitation period commenced when Oshawa passed a resolution denying liability for the unfunded obligations, not when the three month period expired after the Region's bylaw was enacted. The parties had negotiated in good faith right up to April 2009, all apparently in good faith. The relevant financial statements, upon which a resolution of the issues between the municipalities could be resolved, were not available until April 2006. So the limitation period could not sensibly run from the expiry of the three month period after the Region's bylaw was enacted . Since a municipality can only officially act by resolution, it was not until Oshawa's resolution of April 21, 2009 that the Region could reasonably know, and therefore discover, that there was a dispute.

Comments

Whether an arbitration clause requires, or merely permits, arbitration is of crucial importance in any contract and, to no less an extent, in a building contract. How does this decision help us understand and apply arbitration clauses?

The Region's bylaw used the word "shall" at least 15 times. It would seem that the arrangements instituted by the bylaw were mandatory, that the assets and liabilities were being transferred, with no going back. In those circumstances, what meaning should be given to "may", at the request of the Region or a lower-tier municipality, be determined by arbitration"? Could the word "may" simply mean that the parties are not required to have a dispute? Did all the "shall"s in the bylaw mean that the regime itself was mandatory, but that disputes were not mandatory? Did it make sense that the municipalities would have two dispute resolution regimes (arbitration and an action) to resolve their disputes? Or does it make sense for an arbitration clause to be interpreted as permissive when that would mean that the Region had inserted an unenforceable clause into its bylaw?

This issue is of interest to construction law because wording of the same kind is found in building contracts . For example, GC 8.2 of the CCDC 2 **Stipulated Price Contract** is the dispute resolution clause in that contract. GC 8.2 has the word "shall" in it at least six times. But when it refers to arbitration, it says in GC 8.2.6 "either party may refer the dispute to be finally resolved by arbitration." Other parts of GC 8.2 may make it clear that arbitration is mandatory if

one party wants arbitration. But the use of the word "may" in the pivotal clause, 8.2.6 may confuse the issue if the decision in ***Durham v. Oshawa*** is strictly applied.

The decision in ***Durham v Oshawa*** may be more readily understood by considering whether the Region's bylaw was an enforceable document as between the Region and Oshawa. If it was not, then the word "may" makes sense because a mandatory obligation could not be imposed on Oshawa. If this is the case, then this decision has no application to a contractual arbitration clause.

It is interesting that the Region did not press the point that the arbitration provision was mandatory. It had passed a resolution on April 1, 2009 that the dispute should proceed to arbitration. But when Oshawa passed a resolution on April 21, 2009 refusing to arbitrate, the Region did not try to force Oshawa to proceed with arbitration. Perhaps it did not do so because it was concerned that, on April 1, 2009, the two year limitation period had already passed since its 2004 bylaw and the three month period for negotiation. But having passed that resolution on April 1, 2009, it seems odd that it could later assert that the limitation period hadn't even started to run.

There are some other interesting issues arising from this decision. But enough has been said to emphasize the point that limitation periods and arbitration clauses are a troublesome mixture.

Durham (Regional Municipality) v. Oshawa (City) **(2012), 113 O.R. (3d) 54 (Ont. S.C.J.)**

Construction Law - Arbitration - Limitation Periods

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