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

Mr. Heintzman practised with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, broadcasting and telecommunications, construction and environmental law.

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 An Agreement To Mediate Enforceable?

A recurring issue in arbitration and construction law is whether an agreement to mediate is enforceable. That is because an arbitration or building contract may contain a clause imposing an obligation to mediate before arbitrating. If the agreement to mediate is enforceable, that likely has certain consequences. The limitation period is likely not running and the arbitration cannot be commenced until the mediation is finished. The reverse is true if the mediation agreement is not enforceable. And if it is uncertain which is the correct position, then the parties may be in a real quandary about whether they may or must commence the arbitration and ignore negotiation.

The English High Court recently considered this issue in ***Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors***. The court upheld an arbitral decision that a clause requiring mediation was not enforceable. Therefore, the arbitration was not premature.

What is interesting about the decision is that the court did not hold that mediation clauses are *per se* unenforceable. Rather the court held that such a clause must have one of two qualities to be enforceable.

Either the mediation clause must provide reasonable certainty as to the beginning, the ingredients and the end of the mediation process;

Or the subject matter of the mediation must be determinable by fairness or reasonableness so that the court can infer the necessary procedural ingredients.

Finding that the mediation clause in the *Grant Thornton* case satisfied neither criteria, the court upheld the arbitrator's decision that the mediation clause was ineffective.

In the alternative, the court found that the period for the mediation had expired by the time that the arbitration started. Therefore, the arbitration was validly commenced.

Background

The claimants were two partners in a Hong Kong partnership, JBPB. That partnership was a member of the international Grant Thornton organization. JBPB was removed as a member of the international Grant Thornton organization. The claimants sought to invoke the mediation provisions of the international Grant Thornton agreement before going to arbitration. The partnership agreement contained a two stage mediation procedure involving the Chief Executive Officer and Executive committee. The English High Court summarized those procedures as follows:

> **Section 14.3(a)** requires that the dispute or difference should be referred to the Chief Executive with a view to him attempting amicably to resolve that dispute or difference by amicable conciliation of an informal nature;
>
> **Section 14.3(b)** prescribes that the Chief Executive shall attempt to resolve the dispute or difference in an amicable fashion within one month after receipt of a request that he should do so;
>
> **Section 14.3(c)** prescribes that if the dispute or difference is not by then resolved it should be referred to a three-person Panel selected by the Board (none of whom is associated with or in any other way related to the member Firm(s) who are parties to the dispute), it being provided that the Panel is to have up to one further month to resolve the dispute or difference.

The international agreement stated that, until the Panel determined that it could not resolve the dispute or one month passed after the reference of the dispute to that Panel, "no party may commence any arbitration procedures in accordance with this Agreement."

It is interesting to note that the CEO recused himself from the mediation process on the ground that he had been involved in the decision to remove JBPB. In addition, nobody volunteered to be members of the three member board. These facts did not expressly figure in the decisions of the arbitral tribunal or court. The Grant Thornton international organization and the other partners of JBPB did not object to the arbitral tribunal proceeding with the arbitration without the mediation procedures in the partnership agreement being utilized.

Arbitral and Court Decisions

The claimants took the position before the arbitral tribunal and the court that participating in the mediation process was a condition precedent to arbitration and that, since there had been no mediation, the arbitration was premature and the arbitral tribunal had no jurisdiction to proceed with it. The arbitral tribunal held that the mediation clause did not preclude the tribunal from proceeding with the arbitration. That decision was upheld by the court.

The court held that an agreement to negotiate in good faith, without more, is unenforceable, even if that agreement is contained within an agreement that is otherwise enforceable. But this is the beginning, not the end of the debate. The court will "strain to give effect" to a mediation agreement.

The court outlines two ways in which a mediation agreement may be effective.

First, the subject matter of the mediation may be one that can be objectively determined, and if it is, then the mediation agreement may be enforceable:

> "For that purpose it may imply criteria or supply machinery sufficient to enable the Court to determine both what process is to be followed and when and how, without the necessity for further agreement, the process is to be treated as successful, exhausted or properly terminated. The Court will especially readily imply criteria or machinery in the context of a stipulation for agreement of a fair and reasonable price."

The court found that the decision in ***Petromec Inc and others v Petroleo Brasileiro SA Petrobras and others,*** [2005] EWCA Civ 891 could be explained on that basis. There, the English Court of Appeal stated that a provision requiring negotiation in good faith with respect to the cost of equipment was enforceable. In *Grant Thornton,* the court said that a mediation agreement dealing with that sort of matter may be enforceable, but that was not the nature of the mediation agreement and dispute in the present case.

The **second** approach is to determine whether the mediation process is sufficiently clear to give rise to an enforceable agreement. But the court said that the issue is not just the clarity of the procedures, but the clarity of the end of those procedures:

> The Court has been in the past, and will be, astute to consider each case on its own terms. The test is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect.

The Court set forth a three step process for making this determination:

> "the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach."

The court concluded that the Grant Thornton partnership agreement did not satisfy these criteria:

> "I have reached the clear conclusion that Section 14.3 is too equivocal in terms of the process required and too nebulous in terms of the content of the parties' respective obligations to be given legal effect as an enforceable condition precedent to arbitration. In particular, I accept that the omission to give any guidance as to the quality or nature of the attempts to be made to resolve a dispute or difference renders the Court unable to determine or direct compliance with the provisions of Section 14.3(a), (b) and (c)."

The Court also rejected the suggestion that the mediation process could indefinitely postpone arbitration if the two steps in that process never occurred. The court said that it was not "realistic to suppose the parties to have intended that the Board or panel members could indefinitely postpone the right to arbitration." Accordingly, the court held that, in the alternative, the mediation clause did not prevent a party to the partnership agreement from commencing any arbitration procedures after the time limits set for the in the mediation agreement. The arbitration in question started well after that time frame.

Discussion

The *Grant Thornton* decision holds that a mediation agreement is enforceable, if properly drafted. This decision is useful because it advances the debate on this issue to a further level. For the clause to be enforceable, *Grant Thornton* says that the clause must be one of two kinds.

Either the mediation agreement must set out a process that has a reasonably certain commencement, procedural ingredients and ending. Or the mediation agreement must deal with a dispute over some matter of fairness or reasonableness which allows the court to infer reasonable procedural elements. Furthermore, in order to ensure that the mediation clause does not hold up dispute resolution in court or arbitration, the mediation clause should have a reasonably prompt "drop dead date."

The court's remarks about second alternative, namely a mediation to determine a matter on the basis of fair and reasonableness, raise difficult issues. Must the mediation agreement itself state that it deals with the fairness of something, such as price? Or if the specific mediation is in fact about some matter of fairness or reasonableness, is that sufficient to infer the necessary procedural ingredients to validate the mediation agreement, or its application in the particular case? If it is the latter, then the validity of the mediation agreement will be determined on a case by case basis. A mediation clause which may or may not be valid, depending on the issue being mediated, may be an unsatisfactory sort of mediation agreement.

In prior articles I have dealt with Ontario decisions dealing with the enforceability of the duty to mediate. In an article on July 17, 2011, I reviewed the decision in ***L-3 Communication Spar Aerospace Limited v. CAE Inc.**, 2010 ONSC 7133* in which the Ontario Court of Appeal held that, in that case, there was a legally enforceable duty to mediate. In an article on May 5, 2012, I reviewed the same court's decision in ***Federation Insurance Co. of Canada v. Markel Insurance Co of Canada***, 2012 ONCA 218 in which it was held that the mediation clause in that case was not enforceable and that in the meantime the limitation period had expired. Clearly, the law relating to the enforcement of mediation clauses remains a matter of considerable importance.

See **Heintzman and Goldsmith on *Canadian Building Contracts*** (4th ed.), Chapter10, part 6

***Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors* [2012] EWHC 3198**

Mediation - Validity of Mediation Agreement – Uncertainty - Duty to Mediate - Commencement of Arbitration