THE SPECIFIER

THE OFFICIAL NEWSLETTER OF CSC SASKATOON CHAPTER

MARCH 2022

PLEASE JOIN US FOR OUR NEXT VIRTUAL PRESENTATION OF 2022, PRESENTED BY BRYCE GIVEN OF GUARDIAN INDUSTRIES. ALL NON-MEMBERS AND STUDENTS WELCOME.

THURSDAY, MARCH 10, 2022, 12:00-1:00PM, TEAMS VIRTUAL MEETING

AIA/CES Program Presentation

"Making Glass Come to Life: The Principles of Glass Selection"

I would sincerely welcome the opportunity to conduct this accredited course at your office or via a MicroSoft® Teams meeting. Those in attendance would acquire one learning unit towards maintaining their AIA Membership. This course qualifies for **Health, Safety and Welfare** and **Sustainable Design** credit. The program number is GRD 12, provider # J535.

Presentation Overview:

The presentation reviews the foundations of glass selection and explores options for meeting both aesthetic and performance goals. Covering the glass manufacturing process and the basics of performance measurement, it also provides a comprehensive overview of float and coated glass choices—and related fabrication decisions—that can affect the final appearance of the glass façade.

Discussion points include:

- How all the parts of a glass façade work together to meet project vision and goals.
- Glass composition and low-E coatings affect aesthetics and performance.
- Identify important design considerations for glass substrates and low-E coatings.
- Recognize the ways fabricated glass can affect building aesthetics and performance.

In addition, there is a special focus on understanding the variety of performance coatings and customized glass fabrication options.

To schedule a presentation, call 1.866.482.7374.

Guardian Glass is a global manufacturer of float glass, including the following value-added glass products: SunGuard® Advanced Architectural Glass, CrystalGray® and CrystalBlue® tinted float glass, Guardian UltraClear® low-iron float glass, SatinDeco® acid-etched glass and ShowerGuard® protective coating for shower doors. Guardian also makes heat-strengthened and fully tempered glass, laminated safety glass, patterned glass, and mirrors.

INTERNATIONAL ARBITRATION: WHEN IS AN AGREEMENT NOT AN AGREEMENT?

BY WILL HAMPTON, ROBERTSON STROMBERG LLP

With ever increasing frequency, parties involved at all levels in construction projects enter into agreements with internationally-based partners. At times, a point of friction between these parties can be the dispute resolution mechanism provided for in the agreement. What happens to your rights to resolve a construction dispute if your business accepts the standard form of a firm based in Texas, Brussels, or Hong Kong? Might you be forced to attend an arbitration hearing in another country, or can you seek relief at home?

As is often the case, the answer is situationally dependent. However, a dispute that arose from the expansion of a potato processing plant near Portage la Prairie, Manitoba may help you to answer the question.

In the case of Razar Contracting Services Ltd. v Evoqua Water, 2021 MBQB 69 [Razar], the general contractor on the expansion project, Evoqua Water Technologies Canada Ltd. (“Evoqua”) sought to rely on an arbitration clause present in its standard terms listed on its website, after a subcontractor, Razar Contracting Services Ltd. (“Razar”) registered a lien against the project in relation to unpaid amounts and delay costs. The arbitration clause mandated that arbitration was to take place before a panel in Pittsburgh, Pennsylvania.

Here comes the legalese. Evoqua brought a motion before the Manitoba Queen’s Bench to stay Razar’s lien action on the basis that an arbitration agreement had been reached. Basically, in Evoqua’s view, even the question of whether the dispute should go to arbitration or not was within the purview of the American panel. Under most circumstances, The Arbitration Act (Manitoba) would apply, but since the provision named a foreign city as the arbitration’s location, The International Commercial Arbitration Act (Manitoba) [ICAA] applied instead. In turn, the ICAA incorporated by reference the United Nations’ “Model Law On International Commercial Arbitration” (the “Model Law”).

While these facts arose out of Manitoba, Saskatchewan has its own ICAA, which incorporates the same Model Law as Manitoba.

With that out of the way, the question for the court to answer was simple enough: could the Manitoba lien action proceed, or did the Parties have to attend arbitration in Pennsylvania instead?

To answer that question, the court asked another: did the arbitration provision on Evoqua’s website constitute a binding “written arbitration agreement”? If so, it was off to Pittsburgh for the subcontractor.

Thankfully (at least for Razar), the court found that, on the facts, the Parties had not reached an arbitration agreement. The reasons for this are simple enough, but may be instructive for those who find themselves in similar circumstances.

First, Razar did not even know about the arbitration clause. While it can be tough to plead ignorance, in this case it worked. The only link to the standard terms that Evoqua claimed formed part of its agreement with Razar was a URL printed on the bottom of the purchase orders it issued. Razar’s president, Nicholson, went to the trouble of manually typing out the long address, but he could not get the link to work.

Even if he had found the webpage, the court essentially held that the website was poorly organized and would not have helped Nicholson to determine what a “written arbitration agreement” was under the Model Law.

So, what is a “written arbitration agreement” under the Model Law? The definition is found at Article 7:

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

The court placed weight on the word “exchange”, finding that for an arbitration agreement to be binding under the Model Law, there must be “‘an exchange’ of documents where both parties signify their agreement to refer matters to arbitration.” Since Nicholson never found the standard terms, and since the court doubted the website’s ability to properly convey those terms anyway, the court surmised that an “exchange” could hardly be found to have occurred.

With that said, the court might not have let Nicholson off the hook so easily, since the website was ultimately accessible, but there was another problem with Evoqua’s position. The expansion project had been procured by way of tender, and the bid documents that Razar relied on as a proponent referred to an altogether different set of standard terms than those found on the website.

That explained any lack of diligence on the part of Nicholson. He had a perfectly reasonable basis to think that he already knew the standard conditions – they were what he reviewed when preparing Razar’s bid! As such, the court held that there was no “meeting of the minds” with respect to the standard terms as found on the website, and therefore no agreement regarding them could have been reached.

With that, Razar was able to cancel any tickets to Pittsburgh, and the lien action could continue on the Winnipeg docket.

With that all laid out, what are the takeaways?

First, despite the enormous differences between the two provinces, the Model Law is as valid in Saskatchewan as it is in Manitoba, and the Razar decision is likely good law west of Flin Flon (though it has not been considered by Saskatchewan courts as of the time of writing).

Second, if an arbitration clause says you have to arbitrate in another country, then the ICAA will apply (along with the Model Law), instead of The Arbitration Act.

Third, make sure you know what you are agreeing to. Razar got lucky in a sense: had it not been for any one of Evoqua’s mistakes, there is a chance that Razar may have been forced to stop the local lien action and spend valuable time and money arbitrating in Pennsylvania instead.

Fourth, in a more general sense, don’t assume that just because you print a reference to other terms on a purchase order or invoice, that a court is going to uphold them. While sometimes this strategy might work, Razar goes to show that there are plenty of circumstances in which standard terms incorporated by (rather loose) reference will not be enforced. As with any agreement, there needs to be a meeting of the minds – all parties need to know what they are agreeing to before they can be bound by the agreement.

Different people might read Razar as a tale of hard-won victory for the home team, as a parable about sleepwalking around contractual obligations, or as an excruciating illustration of commercial oversight. But no matter what your thoughts are about the facts, the decision should serve as a reminder of simple things to keep aware of, and to avoid, when considering arbitration provisions with international counterparties.

As time goes on, and international owners and contractors become increasingly regular industry participants, these considerations will only become more relevant. At the same time, legal instruments like the Model Law will become more a part of everyday commercial dealings, and the lessons learned by both parties in Razar will be ever the more valuable to keep in your back pocket, no matter where you sit on the construction pyramid.

EVENTS

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