THE SPECIFIER

THE OFFICIAL NEWSLETTER OF CSC SASKATOON CHAPTER

DECEMBER 2022

CSC SASKATOON CHAPTER IS PLEASED TO OFFER

PRINCIPLES OF CONSTRUCTION DOCUMENTATION

The course is designed for individuals involved in the construction industry, who at any point in their career are required to produce, read, supply products for, or rely on, the project manual/specification. In other words, it is designed for anyone in construction, whether they work as a designer, consultant, contractor, or supplier.

The PCD course is an introductory course that will enable the student to have a better understanding of construction documentation (specifications, drawings and schedules), products, bidding procedures and contracts. It is also precursor to all the other CSC educationcourses.

The PCD course is a prerequisite for the Certified Technical Representative (CTR), Certified Specification Practitioner (CSP) and the Certified Construction Contract Administrator (CCCA) designations from CSC.

Course Begins:	January 26th, 2023 (12 Weekly Sessions)
Cost:	CSC Member Total Cost $875
	Non-member Total Cost $975
Location:	To be Determined
Registration Deadline:	January 5th, 2023
To Register Contact:	Jenny Dergousoff, A.Sc.T.
	(306) 667-2409 or jenny.dergousoff@stantec.com

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CSC MEMBERSHIP RENEWAL REMINDER

Continuing in 2023 your CSC Membership Renewal Notice is electronic and available through "CSC Central" giving you the member access to your CSC profile. Please look for the renewal notice being sent by email. We ask that you renew as soon as possible so that you may continue to benefit from your participation in CSC.

When might a court not uphold an arbitration agreement?

by Will Hampton, Lawyer, Robertson Stromberg

As we know, arbitration clauses are a very common feature to encounter in construction contracts. These provisions typically mandate that the parties must undergo an arbitration process before relief can be sought in the courts. They will often articulate how disputes are referred to arbitration, how the arbitrator is selected, where the arbitration will take place, and who will bear the arbitrator's expenses. It is no secret that arbitration is often preferred over the courts due to its relative simplicity, and the fact that courts will tend to uphold arbitration agreements as a matter of public policy.

However, sometimes arbitration agreements, that is, arbitration clauses in broader contracts, will not be enforced by the courts. On the other hand, courts will sometimes uphold arbitration agreements in what might be surprising circumstances. The question as to whether a court will or will not uphold an arbitration agreement can be especially thorny when insolvency proceedings are involved.

Provincial arbitration legislation provides that, if a lawsuit is filed in circumstances where arbitration agreements are supposed to govern disputes, a party can apply to the court to stay the proceedings. If the court finds an arbitration agreement between the parties, it has to grant the stay unless certain exceptions apply.

Recently, the Supreme Court of Canada ("SCC") had the opportunity to discuss the sorts of circumstances where arbitration agreements may or may not be upheld. The case of Peace River Hydro Partners v Petrowest Corp., 2022 SCC 41, involved a dispute surrounding the construction of a hydroelectric dam in northern British Columbia. The subcontract between Peace River Hydro Partners and Petrowest Corp. included an arbitration agreement. Later, Petrowest encountered financial difficulties, and the Alberta Court of Queen's Bench appointed Ernst & Young Inc. as receiver.

The receiver then attempted to bring a civil lawsuit against Peace River in the B.C. courts, despite the arbitration agreement. Peace River then applied through B.C.'s Arbitration Act to stay the new lawsuit. The receiver opposed this application, and the dispute eventually made its way to the Supreme Court of Canada.

The SCC ultimately sided with the receiver, which had the effect of dismissing the stay application and allowing the matter to proceed in the B.C. courts. However, the interesting aspect of the decision is not so much the conclusion that was reached but rather the underlying analysis.

The SCC looked to B.C.'s Arbitration Act, which provides that a court will not stay the court proceedings if it finds that the arbitration agreement is "void, inoperative or incapable of being performed".

In Saskatchewan, our Arbitration Act lists a different set of exceptions than B.C.'s. Here, the court may refuse to stay the proceedings in cases where a party didn't have capacity to do so; where the arbitration agreement is invalid or outside the scope of arbitration under Saskatchewan law; where the stay application is brought with undue delay; or where the matter is proper for default or summary judgment.

The Saskatchewan legislation considerably expands the scope of circumstances where courts may refuse to grant the stay when compared to B.C.'s. However, the basic analysis the SCC provides in Peace River v Petrowest still provides a good reference point (and is square on, if doing work governed by B.C. law).

With that caveat in mind, we can look at the reasons given by the SCC as to when an arbitration agreement may be "void, inoperative or incapable of being performed".

In interpreting this phrase, the SCC basically stated that if an arbitration agreement is invalid under the normal rules of contract law (for instance, fraud, misrepresentation, frustration, or waiver), then a court should refuse to grant the stay and allow the lawsuit to continue.

The SCC also made clear that Ernst & Young, as court-appointed receiver, was standing in the shoes of Petrowest, and as such, was a party to the arbitration agreement in the subcontract.

However, where the question becomes more difficult is cases where one of the parties is involved in bankruptcy or insolvency proceedings. Federal bankruptcy law can still step in and render an arbitration agreement inoperative, despite being otherwise enforceable under provincial law. This can happen in cases where the arbitration would compromise the orderly and efficient resolution of insolvency proceedings, including a court-ordered receivership order. The SCC listed a number of factors to help determine whether this may be the case:

- Effect of arbitration on the integrity of the insolvency proceedings. A court may find the arbitration agreement inoperative if it would lead to an arbitration process that would compromise the orderly and expeditious administration of the insolvent party's property.

- ·Prejudice to the parties. A court should override the parties' agreement to arbitrate their dispute only where the benefit of doing so outweighs the prejudice to them.

- Urgency. The court should generally prefer the more expeditious procedure. For instance, an arbitration agreement may be inoperative if staying the court action would hinder the resolution of the insolvency proceedings.

·In this case, the SCC found that due to the complexity of the issues and number of parties, granting the stay and allowing the arbitration to proceed would have the effect of compromising the broader insolvency proceedings. In other words, the SCC found that allowing the dispute to proceed under the umbrella of insolvency proceedings was a more efficient dispute resolution process than multiple concurrent arbitrations.

Because of this, the SCC essentially decided to not uphold the arbitration agreement on the basis that it was inoperative. As such, the B.C. lawsuit brought by the receiver was allowed to proceed.

While this case arose in B.C., its analysis on this point is likely to apply in Saskatchewan. That said, it hasn't been tested in Saskatchewan courts as of the time of writing.

The takeaway for parties seeking to arbitrate a dispute (or to avoid doing so) in Saskatchewan is this: if the arbitration agreement is invalid as a matter of law, the courts will allow a court action to proceed notwithstanding the arbitration agreement.

That said, if one of the parties is in the midst of bankruptcy or insolvency proceedings, then the question becomes one of whether the arbitration proceedings would undermine the integrity of the bankruptcy or insolvency proceedings. If the issues and parties are simple enough, then a court may uphold the arbitration agreement and grant the stay. But as the issues and parties become more complex, the likelihood of a court denying the stay and allowing a court action to proceed increases.

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APR

"DON'T BE RELIABLE ONLY WHEN IT'S CONVENIENT."
UNKNOWN AUTHOR