Omitting the fine print: Manitoba Court of Queen's Bench refuses to enforce arbitration clause

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A recent decision of the Manitoba Court of Queen's Bench in *Razar Contracting Services Ltd v. Evoqua Water, 2021 MBQB 69 (Razar Contracting)* may have implications for businesses utilizing their website to host general terms and conditions that are not expressly incorporated into their contracts. An arbitration clause that is not expressly incorporated into a contract may not be enforceable.

Case overview and background facts

- Evoqua Water Technologies Canada Ltd. (Evoqua) retained Razar Contracting Services Ltd. (Razar) as a subcontractor for a construction project involving the expansion of a potato processing plant.
- After accepting Razar's bid, Evoqua issued several purchase orders to Razar. The purchase orders included a statement purporting to incorporate general terms and conditions that were hosted at a link on Evoqua's website. Those terms and conditions included an arbitration clause directing the parties to resolve any disputes by arbitration, which was to be seated in Pittsburgh, Pennsylvania.
- The president of Razar attempted to access the terms and conditions through Evoqua's website, but was unsuccessful. There was also no evidence of Evoqua specifically drawing Razar's attention to the arbitration clause in the terms and conditions.
- A dispute arose between Evoqua and Razar regarding unpaid invoices and delay costs. On September 2, 2020, Evoqua filed a demand for arbitration against Razar. On September 18, 2020, Razar filed its own claim against Evoqua in the Manitoba Court of Queen's Bench. Evoqua subsequently brought a motion before the court to stay the action commenced by Razar in favour of arbitration, in accordance with the arbitration clause contained in the terms and conditions on its website.
- The primary issue before the court was whether there was a valid and binding agreement to arbitrate disputes. If there was a valid arbitration agreement, then the action commenced by Razar would be stayed in favour of the arbitration commenced by Evoqua.

Decision summary

What you need to know:

Justice David Kroft of the Manitoba Court of Queen's Bench found there was no valid and binding arbitration agreement between the parties. As a result, Evoqua's motion to stay the action commenced by Razar was dismissed. In reaching his decision, Justice Kroft emphasized the importance of both parties consenting to submit their disputes to arbitration and found that mutual consent to arbitrate was lacking for several reasons, including:

- The language in the purchase orders that directed Razar to the terms and conditions on Evoqua's website was not sufficient. Article 7 of the governing legislation, the UNCITRAL Model Law on International Commercial Arbitration (1985) (the Model Law) (as incorporated as Schedule B to *The International Commercial Arbitration Act*, CCSM c C151) requires an arbitration agreement to be signed by both parties or be contained in an "exchange" of documents where both parties indicate their agreement to resolve disputes through arbitration. Justice Kroft found that merely directing Razar to the terms and conditions set out on Evoqua's website, without more, did not constitute an "exchange" for the purposes of the Model Law.
- The terms and conditions on Evoqua's website were difficult to comprehend, including containing multiple categories with no direction as to which terms were important or applicable in the context. As such, Justice Kroft found that the terms and conditions were not sufficiently clear to satisfy the requirements of the Model Law.
- The parties did not reach a meeting of the minds on the arbitration clause, which is required to form a valid and binding contract at common law. Razar did not see the terms and conditions contained on Evoqua's website during the formation of the contract, nor was there any evidence before the court that Evoqua brought them to the attention of Razar. As such, it was not possible for the parties to have agreed to the arbitration clause.

Takeaways

Razar Contracting essentially refused to enforce an arbitration clause because it was buried in online terms and conditions that were only incorporated into a contract by reference.

In light of *Razar Contracting*, it may be prudent for any party drafting a contract that includes an arbitration clause to expressly incorporate that clause into the contract itself or, if the clause is incorporated by reference, to clearly draw the other party's attention to the arbitration clause. Failing to do so may risk the arbitration clause being unenforceable.

If you're interested in learning more about arbitration clauses and how to protect your business, contact our Commercial Arbitration team or any of the contacts listed below.

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