Why purchase orders alone are not enough: Keep consistent or lose the benefit of the arbitration clause

May 03, 2023

Electek Power Services Inc v. Greenfield Energy Centre Limited Partnership, 2022 ONSC 894 (EPS) serves as a stark reminder to monitor and review purchase orders even during the course of long-standing commercial relationships. In EPS, the Court determined that an executed purchase order, with terms and conditions containing an arbitration agreement, does not necessarily apply to future services if not expressly referenced in or annexed to subsequent purchase orders. Absent such steps, subsequent terms and conditions may override and negate any prior arbitration clause.

Takeaway

EPS confirms the long-standing proposition that an arbitration agreement is a contract in its own right, separate from the underlying contract, and reflecting the parties' intent, or lack of intent, to proceed with a particular dispute resolution forum.

From a practical perspective, EPS is a clear signal that, unless specific steps are taken to create an arbitration agreement, courts are unwilling to infer an arbitration clause from separate or stale contractual arrangements. As such, where sequential purchase orders are used to award work, parties should consider using a Master Services Agreement to set out the terms and conditions applicable to all purchase orders, ensuring that the Master Services Agreement includes an arbitration clause, if arbitration is the preferred method of dispute resolution for all purchase orders.

Background

Electek Power Services Inc. (Electek) applied to set aside an Arbitral Tribunal's decision on the dispute between Electek and Greenfield Energy Centre Limited Partnership (Greenfield). Greenfield was the operator of an electricity power plant in Ontario and Electek was the operator of high-voltage equipment. In 2009, Greenfield and Electek executed a document entitled "Purchase Order General Terms and Conditions" (POGTC), which included a binding arbitration agreement provision.

In 2011, Electek submitted a bid in response to Greenfield's invitation to submit a proposal to do work. The bid indicated that work was to be performed in accordance with Electek's standard terms and conditions. The bid was accepted and Electek provided the agreed-upon services. Greenfield issued its first purchase order to Electek in 2011, which was followed by numerous other purchase orders, usually issued after the work was completed.

Greenfield did not annex the POGTC to any of these subsequent purchase orders, nor did it incorporate the POGTC by reference. In addition, and importantly, it signed Electek's timesheets with its own terms and conditions, which did not contain an arbitration agreement.

Details of the dispute

In 2018, Greenfield hired Electek to perform emergency services on a transformer at Greenfield's power plant. Electek performed the services and Greenfield issued a purchase order. However, similar to their previous transactions, the purchase order did not annex the POGTC. Subsequently, Greenfield alleged that Electek's services gave rise to $10 million in damages to the power plant. In 2020, Greenfield sought compensation from Electek and initiated arbitration proceedings.

Electek disputed Greenfield's submission to arbitration. During the arbitration proceedings, the Tribunal unanimously held that it had jurisdiction to decide the dispute. Electek then brought an application before the Ontario Superior Court of Justice to set aside the Tribunal's decision pursuant to s. 17(8) of the *Arbitration Act*. The Court determined that there was in fact no valid arbitration agreement between the parties, therefore, the Tribunal lacked the jurisdiction to render a decision.

Application to the Court

The Court reiterated the established principle that an arbitration agreement is a matter of contract law, and that the jurisdiction of arbitrators is grounded in the formation of the contract, its interpretation, and the parties' performance and enforcement of the contract.

The Court found that the parties had not settled the fundamental terms of their bargain. While the parties executed the POGTC, further steps were required to settle the terms of the agreement to either annex the POGTC to the purchase order or to incorporate it expressly by reference. Given that neither occurred, the Court found that the POGTC was not a settled contract between the parties.

The Court also found that the work related to the dispute was completed before Greenfield issued its purchase order. When Greenfield agreed to engage Electek for the work, it signed Electek's timesheets and expressly agreed to Electek's terms and conditions (which had no arbitration agreement provision). Having made this finding, the Court held that these were the only terms that governed the relationship around the services preceding the dispute.

Ultimately, the Court set aside the Tribunal's decision, finding that no arbitration agreement has been agreed to by Greenfield and Electek for the purchase order or the work.

Conclusion

In order for there to be an arbitration agreement, as is the case with any contract, the parties must consent to it. Consent to arbitration can be established by annexing such provisions to purchase orders or expressly incorporating general terms and conditions, which can include an arbitration clause into purchase orders. EPS is a cautionary tale for those who fail to properly incorporate negotiated terms and conditions into their contracts.

Contact us

For more information on proper drafting of contractual documents and implementation of strategic procedures involving future and ongoing services, please reach out to any of the authors and contacts below, or any lawyer from BLG's Construction Group.

By

Stela Hima Bailey, Patricia L. Morrison, Marin Leci

Expertise

Construction, Contract Disputes, Commercial Arbitration

BLG | Canada's Law Firm

As the largest, truly full-service Canadian law firm, Borden Ladner Gervais LLP (BLG) delivers practical legal advice for domestic and international clients across more practices and industries than any Canadian firm. With over 800 lawyers, intellectual property agents and other professionals, BLG serves the legal needs of businesses and institutions across Canada and beyond – from M&A and capital markets, to disputes, financing, and trademark & patent registration.

blg.com

BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

The information contained herein is of a general nature and is not intended to constitute legal advice, a complete statement of the law, or an opinion on any subject. No one should act upon it or refrain from acting without a thorough examination of the law after the facts of a specific situation are considered. You are urged to consult your legal adviser in cases of specific questions or concerns. BLG does not warrant or guarantee the accuracy, currency or completeness of this publication. No part of this publication may be reproduced without prior written permission of Borden Ladner Gervais LLP. If this publication was sent to you by BLG and you do not wish to receive further publications from BLG, you may ask to remove your contact information from our mailing lists by emailing unsubscribe@blg.com or manage your subscription preferences at blg.com/MyPreferences. If you feel you have received this message in error please contact communications@blg.com. BLG's privacy policy for publications may be found at blg.com/en/privacy.

© 2026 Borden Ladner Gervais LLP. Borden Ladner Gervais LLP is an Ontario Limited Liability Partnership.