Alberta Court of Appeal curtails enforcement of arbitration clauses on third-party beneficiaries

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In the recent decision of *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc.*, 2024 ABCA 369, the Court of Appeal of Alberta cautioned against the enforcement of arbitration provisions on third-party beneficiaries to contracts. The Court declined to pronounce whether such enforcement was possible at all, but held that, at minimum, the requirement to arbitrate would need to be manifest and expressed in clear and explicit language.

Background

Husky Oil Operations Limited (Husky) undertook a steam-assisted gravity drainage oil sand project in northern Alberta. Husky hired Saipem Canada Inc. (Saipem) as its general contractor for the project. Saipem then entered into a subcontract with Technip Stone & Webster Process Technology, Inc. and Technip USA, Inc. (Technip) for the design, fabrication, and delivery of steam generators for use in the project.

The parties to the subcontract were Saipem and Technip. There was no evidence to suggest that Husky was involved in the negotiations leading to the formation of the subcontract.

Nonetheless, the subcontract extended a *benefit* to Husky by expressly stating the warranties given were for the benefit of Husky and that Husky could enforce the warranties, as stated in clause PC 9:

> All warranties given by [Technip] shall be given for the benefit of both the [Saipem] and [Husky] and the warranties may be enforced by either the [Saipem] or [Husky] through the [Technip].

Husky commenced an action in the Alberta Court of King's Bench to enforce alleged breaches of those warranties.

In response, Technip argued that Husky was bound by the arbitration provision in the subcontract and applied to dismiss or stay the action pursuant to the *Arbitration Act*, RSA 2000, c A-43. The subcontract's arbitration clause, PC13, stated that:

> In the event of a dispute between the PARTIES as to the performance of the SUPPLY or the interpretation, application or administration of the PURCHASE ORDER DOCUMENTS, [Technip] shall perform the SUPPLY as directed by [Saipem]. All disputes between the PARTIES not resolved by the initial decision of [Saipem]'s Representative, and all disputes arising out of this PURCHASE ORDER and its performance shall be settled in accordance with this PC 13.
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> …
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> PC 13.8: All disputes arising out of or in connection with the present PURCHASE ORDER shall be finally settled under the Rules or Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

In the first instance, the Applications Judge found that the arbitration clause only applied to the parties to the contract, namely Saipem and Technip. A Justice of the Court of King's Bench overturned that result, finding that Husky's right to enforce warranties was "qualified" by the arbitration requirement, and thus Husky was required to resolve any warranty disputes by way of arbitration.

Decision

A unanimous Court of Appeal reversed the King's Bench decision and concluded that, as a third-party, Husky was not bound by the arbitration provision in the absence of clear and explicit language in the subcontract.

The Court of Appeal framed its analysis by reference to arbitration as a contractual arrangement pursuant to which parties agree to forgo litigation in the courts and submit to arbitration. Arbitration is enforced because parties should be held to their contractual agreements

Privity of contract holds that contracts cannot confer rights or impose obligations on anyone other than the parties to the contract. The Court of Appeal recognized an exception to privity that can extend contractual *benefits* to third parties. As such, Husky was a proper third-party beneficiary and entitled to enforce its warranty rights, subject to doing so in the proper forum.

Still, the Court of Appeal recognized a meaningful distinction between a grant of rights or benefits on a third-party, and the imposition of *obligations*, such as the "procedural burden" of arbitration. Whereas the contracting parties' intent can be sufficient to establish that a benefit is conferred, their intent is of little use in determining what obligations a third-party may owe. Outside of tort, parties have few obligations that do not arise by virtue of their express agreement.

The Court of Appeal cautioned that framing the obligation of arbitration as a qualification on the benefit of the warranty was a "nuanced distinction that calls for significant caution." While not deciding whether such a conditional grant was possible at all, the Court of Appeal held that, at minimum, the requirement to arbitrate must be manifest, expressed in clear and explicit language, and supported beyond reliance on ordinary principles of contractual interpretation whose application is limited by a focus on the

parties' intent. As reasonable competing interpretations of the arbitration provision were available on the facts, those requirements were not made out.

As a result, the decision of the Court of King's Bench was overturned and Husky was permitted to proceed with litigating its warranty claims.

Key Takeaways

Mandatory arbitration clauses are commonplace and can provide parties with heightened control and efficiency in resolving contractual disputes. However, an attempt by a party to enforce an arbitration clause on a third-party *beneficiary* is unlikely to be successful unless the requirement to arbitrate is manifest and expressed in clear and explicit language.

Parties should consider options for overcoming the concerns expressed by the Court of Appeal. These include the use of clear and express language that the arbitration clause applies to both the "parties" to the contract and the third-party beneficiaries, providing notice to the third-party beneficiary of this obligation, and, ideally, a supplementary arbitration agreement between the parties and the third-party beneficiaries.

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