It’s not you, it’s me: Termination for Convenience Clauses

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Breaking up a contractual relationship can be hard to do. Unless your contract includes express terms that provide otherwise, the only way to terminate is by agreement. A "termination for convenience" clause, which allows a party to terminate the contract without cause, can be a useful mechanism to end a contract and avoid costly disputes. This type of clause has become more common in the construction industry in recent years. However, it is crucial that the termination for convenience clause include clear and unambiguous language that sets out both how the clause is to be applied and what damages are to be paid to the other party when it is invoked.

Given the number of cases which involve disputes over termination for convenience clauses, these clauses are not always clearly written or understood. In contract disputes, courts seek to enforce and give effect to the bargain made between the parties. Generally, this does not include implying additional terms, interpreting ambiguous language in favour of the party seeking to rely on it, or expanding rights beyond what the contract states. Therefore, the express language included in a termination for convenience clause is critical to how a court will determine its operation. When the language is not clear, a complicated dispute requiring a trial to determine the outcome may be necessary. This defeats the intention and utility of an easy exit clause.

Clear language detailing when a termination for convenience clause may be invoked is key. For example, the 2016 version of the CCDC-3 Cost Plus standard form construction contract includes a termination for convenience clause that entitles an owner to terminate "if conditions arise which make it necessary". This language may invite the court to assess whether the termination was actually "necessary", as opposed to just being convenient for the party invoking it. By comparison, it may be preferable to include a clause which clearly sets out that a party may terminate the contract for its own convenience, at any time, for any reason, and without reliance on a default by the other party.

It is equally important to include clear language regarding the damages that are payable to the non-terminating party upon a termination for convenience. Given that a termination for convenience clause does not require a default, it is only logical and fair that the non-terminating party be compensated. Termination for convenience clauses should contemplate paying the non-terminating party for the work performed up to the

date of the termination, for reasonable demobilization costs, and for other reasonable costs which arise from the termination such as related severance costs.

Whether the non-terminating party is entitled to its lost profits for the work it would have performed but for the termination is a more contentious issue and is one the parties should discuss and agree on when the contract is formed. In the event that the costs payable at the time of termination are not clearly set out in the contract, the court may be asked to decide. This can lead to prolonged litigation and legal costs, which the termination for convenience clause may have been intended to avoid.

A useful example of the interpretation of these clauses presents itself in the recent Ontario Court of Appeal decision *Atos IT Solutions and Services GMBH v. Sapient Canada Inc.,* 2018 ONCA 374 (CanLII). Though disagreeing on other issues, the Court of Appeal agreed with the trial judge's interpretation of the termination for convenience clause for the calculation of damages. In particular, the court held that the plain language of the termination for convenience clause required the general contractor, Sapient, to pay the subcontractor, Atos, for the last milestone prior to the termination even though that milestone payment had already been paid. The court noted that the termination for convenience clause did not expressly state that payment for the last milestone was only due if it had not already been paid. Accordingly, the court treated the referenced milestone payment as being agreed upon damages in the event of a termination for convenience.

Terminating a contract without proving the other party is in default of its obligations can be a significant benefit. To operate as intended, a termination for convenience clause must be drafted clearly. The circumstances under which it may be invoked, and the measure of compensation to which the non-terminating party will be entitled, must be appropriately articulated. Failing to draft a termination for convenience clause properly can result in costly litigation and counteract any benefit that was intended when it was included in the contract.

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