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— Franks & Zalev - This Week in Family Law

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THE ARBITRATION EDITION

Mediation and Arbitration: Don't Take it for Granted; Use it or Lose it; And Don't Just Say it - Do Something!

Provincial arbitration acts generally serve to entrench the primacy of arbitration proceedings over judicial proceedings by directing courts to not intervene, and establishing a presumptive stay of court proceedings where parties have agreed to arbitrate. See, for example: *Ontario Hydro v. Denison Mines Ltd.*, 1992 CarswellOnt 3497 (Gen. Div.); *Grosman v. Cookson* (2012), 25 R.F.L. (7th) 284 (Ont. C.A.); *Hopkins v. Ventura Custom Homes Ltd.*, 2013 CarswellMan 355 (C.A.); and *Haas v. Gunasekaram*, 2016 CarswellOnt 16116 (C.A.).

However, the right to arbitrate is not unfettered. A submission to arbitration is a contractual relationship, and the parties are entitled to rely on the conditions and timelines in the agreement to arbitrate. Arbitration (and mediation for that matter) cannot be used as a procedural weapon. Three recent cases - two from Ontario and one from Nunavut - make these points.

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***Comren Contracting Inc. v. Bouygues Building Canada Inc.*, 2020 NUCJ 2 (C.J.) - Bychok J.**

In *Comren Contracting Inc. v. Bouygues Building Canada Inc.*, the Nunavut Court of Justice considered whether a party must strictly meet timelines set out in an arbitration agreement in order to be able to compel the arbitration to proceed. Although not a family law case, the result is nevertheless instructive.

One of the corporate parties, Comren, tried to invoke the portion of a contract that dealt with the mediation and arbitration of disputes, and to force the other commercial party, Bouygues, to submit to mediation and arbitration. However, Bouygues argued that Comren had not complied with the timelines set out in the contract's dispute resolution provisions. The Court agreed, and dismissed the application.

The underlying contract provided that, in the event of a dispute, Comren could send a written notice of dispute to Bouygues that was to include particulars relevant to the dispute, and references to relevant provisions of the contract. The relevant parts of the contract stated as follows:

> 8.2.4 If the dispute has not been resolved within 10 Working Days after the Project Manager was requested . . . the Project Manager shall terminate the mediated negotiations by giving Notice in writing to both parties.

> 8.2.5 By giving Notice in Writing to the other party, not later than 10 Working Days after the termination of the mediated negotiations under paragraph 8.2.4, either party may refer the dispute to be finally resolved by arbitration under the Rules of Arbitration of Construction Disputes . . .
>
> 8.2.6 On expiration of the 10 Working Days, *the arbitration agreement under paragraph 8.2.5 is not binding on the parties* and, if a Notice in Writing is not given under paragraph 8.2.5 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use. [emphasis added]

During the course of the business relationship, Comren sent 23 notices to Bouygues, and the last notice was sent on November 26, 2016. Bouygues did not respond to any of the notices.

Ignoring the requirement to proceed to mediation, on December 21, 2016, Comren advised Bouygues that it intended to proceed to arbitration. Bouygues took the position that the notices had not complied with the agreement.

The parties did, eventually, attend for an unsuccessful mediation, but it was done independently of their obligations under the agreement.

As an aside, a party should not be allowed to just "skip" a contractual obligation to mediate. Although it may seem counter-productive to "force" an unwilling party to participate in mediation - a consensual process - one never knows what might happen in mediation, and a skilled mediator may be able to settle even a seemingly intractable case. Several cases also suggest that parties must comply with an agreement to mediate, and that an agreement to mediate is, in fact, enforceable. See, for example: *Pulkinen v. Munden*, 2013 CarswellAlta 2128 (Q.B.); *Albergaria v. Albergaria*, 2015 CarswellOnt 8098 (S.C.J.); *Fraizinger v. Mensher*, 2012 CarswellOnt 16860 (S.C.J.); *Henderson v. Henderson*, 2016 CarswellAlta 1684 (C.A.); *Shah v. Shah*, 2018 CarswellOnt 5377 (S.C.J.); and *Veneris v. Veneris* (2015), 58 R.F.L. (7th) 211 (Ont. C.J.).

Costs have also been awarded in cases where a party commences litigation in the face of an agreement that calls for mediation first: *Benson v. Crawford*, 2012 CarswellOnt 13373 (S.C.J.); *Marshall v. Collins*, 2015 CarswellOnt 6499 (S.C.J.). And in the United Kingdom, refusing to mediate may be grounds for denying costs: *Halsey v. Milton Keynes General NHS Trust* (2004), [2004] 4 All E.R. 920 (Eng. & Wales C.A. (Civil)).

Anyway . . . back to *Comren* . . .

In late January 2017, Comren reiterated that it intended to proceed to arbitration (perhaps thinking that Bouygues did not understand the first time), and on July 27, 2019, it filed an application to compel Bouygues to arbitrate the disputes in accordance with the agreement. Bouygues argued that Comren had failed to comply with the clear timelines in paragraph 8.2 of the contract; Bouygues never waived the timelines; and the Court did not have jurisdiction to force the matter to arbitration.

The Court determined that Comren's application turned on three questions:

> 1. Did Comren comply with the timeline requirements of paragraph 8.2.5 such that Bouygues was contractually bound to engage in arbitration?
>
> 2. If not, was Bouygues estopped from refusing arbitration given its previous actions and stated willingness to engage in arbitration?
>
> 3. If the answer to number 2 was yes, did the Court have jurisdiction to appoint an arbitrator?

On the first question, the Court noted two arbitration "triggers" that Comren claimed supported its claim to force an arbitration. Comren was required to give notice within 10 working days of December 21, 2016 as per paragraph 8.2.5, but did not do so. And, while Bouygues had agreed to participate in mediation and arbitration, its agreement was subject to objections that it had not waived. Therefore, Bouygues was not contractually bound to arbitrate. The Court noted that "on the expiration of 10

working days following the unsuccessful mediation in June 2017, with no arbitration notice from Comren to Bouygues, the arbitration provisions of the contract no longer bound the parties."

On the second question, Comren relied on *Lorneville Mechanical Contractors Ltd. v. Clyde Bergemann Canada Ltd.*, 2017 CarswellNS 361 (S.C.) for the proposition that "even where specific requirements have not been complied with, there is still an understood primacy and preference for arbitration over litigation". However, the Court noted that in *Lorneville*, the parties had expressly waived the applicable timelines. That was not the case here. Bouygues had not waived anything.

While the courts will unquestionably force parties to submit to arbitration when they have agreed to arbitrate, counsel must remember that arbitration is a contractual relationship. Counsel must not fall into the trap of simply assuming that an agreement to arbitrate will always be enforced. If there are timelines or conditions precedent, they must be met.

Lesson #1: Meet procedural and substantive requirements and timelines.

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***Paulpillai Estate v. Yusuf*, 2020 CarswellOnt 15032 (C.A.) - Doherty, Hoy, and Jamal JJ.A.**

In a similar vein, not only must a party looking to enforce an agreement to arbitration comply with the terms, conditions, and timelines set out in the agreement, they must also ask that the arbitration actually take place. And, again, while *Paulpillai Estate* is not a family case, it is instructive.

The late Richmond Gabriel Paulpillai and Joshua Akanni Yusuf were partners in a successful business venture. The venture operated under a partnership agreement governed by Ontario law that provided for arbitration of disputes between the partners.

While the case dealt with far more than just arbitration (in fact, it offers a concise summary of the mind-numbing difference in Ontario between "final" and "interlocutory" orders for the purposes of appeal), it is primarily about the obligation to arbitrate that we are presently interested in.

The appellants wanted the matter sent to arbitration pursuant to the Partnership Agreement. However, despite the provision for arbitration in the Partnership Agreement, the judge below did not stay the court proceeding and order the matter to proceed to arbitration. There was a very good reason for this: no one actually asked the judge to do so. If a party wants a proceeding stayed and referred to arbitration, they must actually ask for it. Here, no motion had actually been brought to refer the dispute to arbitration.

The motion judge accepted that the Partnership Agreement "clearly states that any disputes should be resolved through an arbitration." However, she further observed that, despite the appellants maintaining in their affidavit material on the motion that the matter should have proceeded to arbitration, "at no time did they bring a motion seeking to stay these proceedings or to compel the [respondents] to proceed by way of arbitration".

Section 7 of the *Arbitration Act, 1991*, S.O. 1991, c. 17 is clear that an action can only be stayed by way of motion, and even then, the court has the discretion to refuse to grant the stay if the motion is not made in a timely manner. Therefore, agreed the Court of Appeal, even if the appellants had a right to have the issues determined by an arbitrator, *they waived that right when they took steps in the court proceeding*. That is, the lack of a motion to stay the proceeding coupled with taking steps in the proceeding resulted in a waiver of the right to arbitrate. The Court of Appeal agreed with the motion judge when she stated in her decision that:

> [58] [G]iven that there is no motion before the Court to stay the action, and given that the [appellants] have taken significant steps to respond to this application, including filing numerous affidavits, producing *viva voce* evidence in the application, conducting cross-examinations and even bringing an oral motion . . . I find that the [appellants] have waived their right to seek to have these issues determined by way of arbitration.

The Court of Appeal also noted that even if the motion judge was viewed as having exercised discretion to refuse to stay the court proceeding and refer the dispute to arbitration because of undue delay under s. 7(2)4 of the *Arbitration Act* - despite the silence of the order on this point - the Court of Appeal would still lack appellate jurisdiction over this aspect of the order because s. 7(6) of the *Arbitration Act* provides there is no appeal from the court's decision.

Lesson #2: If you don't ask for it, you can't get it.

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***George v. Wang*, 2020 CarswellOnt 14605 (S.C.J.) - Diamond J.**

In *George*, the applicant ("George") brought a motion for:

> (a) An order releasing 50% of the net proceeds of sale of a specific property to him, without prejudice to his position that he was entitled to the total sum of $850,000.00 as per a Mediation Agreement dated March 26, 2019;
>
> (b) An order that from George's 50% share of the net sale proceeds, he would direct the real estate lawyer to pay the respondent $19,200 for child support arrears that had accrued between June 2019 - October 2020;
>
> (c) An order that the balance of the net sale proceeds would remain in trust until further court order or agreement between the parties;
>
> (d) Costs.

The respondent ("Wang") opposed the relief on two primary grounds:

> (a) The Court lacked jurisdiction to hear the motion because the subject matter of the relief sought by George was properly within the jurisdiction of the parties' mediator/arbitrator; and
>
> (b) Wang's claims for damages arising from George's alleged misconduct with respect to the listing and sale of the parties' jointly owned property should be set off against the amounts claimed by the George.

Wang's first primary ground is the one that interests us.

On March 26, 2019, the parties attended a mediation with a respected mediator. The mediation dealt with the financial issues arising from the breakdown of their common law relationship, but did not deal with support or parenting. The main issue was what to do with the parties' jointly owned property.

With the mediator's assistance, the parties entered into an Agreement whereby Wang would arrange a mortgage to buy out George's 50% interest in the property for $850,000.

Clause 7.1 of the Agreement provided (as is fairly typical in a mediated resolution):

> The parties agree that any issues arising out of this agreement shall be mediated and if no agreement arbitrated by Paul McInnis. Mr. McInnis' arbitration agreement is attached as Schedule "A".

The draft arbitration agreement attached as Schedule "A", in turn, required the parties to arbitrate any issues arising out of the implementation and enforcement of the Agreement, and to waive any right to further litigate those issues in court.

However, Wang did not ultimately purchase George's interest in the property, and argued that George had interfered with her ability to secure financing. George disagreed, and alleged that Wang had been wholly uncooperative and had interfered with the listing and sale process.

After efforts to salvage the agreement failed, George commenced a proceeding on November 20, 2019, for a wide scope of relief, including both financial and parenting issues. While Wang had yet to serve an Answer, there was no dispute that she took active steps in the proceeding.

On December 5, 2019 (a few weeks after George started the proceeding), the parties entered into a consent order ("the Consent Order"). Paragraphs 8 through 12 of the Consent Order permitted Wang to reside in the property with the children on a temporary, without prejudice basis. The parties further agreed to list the property for sale by no later than January 20, 2020, and to work co-operatively with a view to listing and selling the property.

The problems with the listing and sale ended up before the Court several times, resulting in several endorsements that ultimately supported George's narrative, and ultimately resulted in an order dispensing with Wang's consent to sell the property for $2,300,000.

The sale closed on September 30, 2020, and $1,209,863.07 - the net proceeds of sale - remained in trust.

By the time of the motion before Justice Diamond, the parties had attended three case conferences and five motions in the proceeding, and Wang had never previously suggested that the Court did not have jurisdiction or seek a stay.

When George brought a motion for an order dispensing with Wang's consent to the sale, Wang not only opposed that relief, but brought her own cross-motion for:

> (a) An order allowing her to purchase George's 50% interest in the property; or in the alternative
>
> (b) An order permitting her to purchase George's 50% interest in the property for $1.00 more than the current highest valid offer - that is, granting her a right of first refusal. (As the Ontario Court of Appeal recently reminded us in *Barry v. Barry*, 2020 CarswellOnt 7283 (C.A.), this is not allowed.)

Wang also sought an order requiring George to pay half of the mortgage and line of credit.

In dealing with the prior motions and cross-motions, it was clear on the record that Wang, not George, had been the problem. She had been obstructive, uncooperative, and had not followed through on the agreement reached at mediation.

Despite these prior attendances, it was not until the September 16, 2020 Case Conference (nearly a year after the proceeding was started) that Wang raised the issue of whether the Court had jurisdiction to deal with the relief that was being sought on the motion. And, at the same time, no cross-motion seeking a stay of this proceeding had been brought by Wang (see *Paulpillai Estate*, above).

So, did the Court lack jurisdiction to hear George's motion?

Wang argued that she had never officially "attorned" to the Court process (or took any steps akin to attornment), and that the subject matter of the motion was "an issue arising from the implementation and enforcement of" the Agreement that triggered the mediation/arbitration clause and placed the matter before Mr. McInnis.

The problem with Wang's position, however, was that it was simply wrong. The Court's jurisdiction to hear and decide the issues in the proceeding was "bestowed" when George issued the Application. Until a motion was successfully brought to stay the proceeding, the Court had jurisdiction.

Furthermore, to use Justice Diamond's words, Wang's argument was "the definition of piecemeal." After participating in three case conferences and five motions (including seeking relief on two separate cross-motions), Wang could not reasonably suggest that the Court lacked jurisdiction to hear the matter. Again, as noted by Justice Diamond - "jurisdiction is not an elastic concept . . . this Court either has jurisdiction, or it does not."

Wang had participated in the previous motions and claimed relief because it suited her at the time as the forum to deal with her arguments and interests.

This is not the first time the Court has had to deal with this issue. As held by Justice Curtis in *Tameanko v. Goldman*, 2014 CarswellOnt 15536 (Ont. C.J.), where a party does not raise the existence or effect of an arbitration clause and its possible impact upon a legal proceeding, that party acquiesces to a waiver of the arbitration clause. Parties can, by course of conduct, agree to waive or abandon the right to mediate and/or arbitrate: *Vojan v. Lauzon*, 2015 CarswellOnt 1918 (S.C.J.).

[See also: *Ontario Provincial Police Commissioner v. Silverman*, 1999 CarswellOnt 5853 (Div. Ct.); *Dalimpex Ltd. v. Janicki*, 2003 CarswellOnt 1998 (C.A.); *125516 Canada Ltd. v. William Day Construction Ltd.*, 2007 CarswellOnt 5146 (S.C.J.); *Johnston v. Johnston*, 2006 CarswellOnt 5060 (S.C.J.); *E. (E.) v. F. (F.)* (2007), 45 R.F.L. (6th) 448 (Ont. C.J.); and *Boutsakis & Kakavelakis, A Partnership v. Boutsakis*, 2008 CarswellBC 45 (C.A.).]

Such a result is even more obvious when the protesting party not only failed to object to proceeding in Court, but took active steps to claim affirmative relief.

Having never previously tried to enforce the mediation/arbitration clause of the Agreement, Wang was out of luck. A party cannot ignore their rights and then try to assert them to the prejudice of the other side.

Lesson #3: Use it or Lose it

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