

# Contracts with Arbitration and Jurisdictional Clauses: Are They in Conflict?

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Contracts often contain both mandatory arbitration clauses and jurisdictional clauses that specify which courts have jurisdiction. These clauses need to be drafted carefully so that there is no conflict and no ambiguity created as to whether arbitration is the only dispute resolution procedure.

Two cases in Ontario in the past year, one in the Superior Court of Justice and one in the Court of Appeal of Ontario, have considered contracts that contain both clauses and the proper interpretation to be given to them.

In *Graves v. Correactology Healthcare Group Inc.*<sup>[1]</sup>, the plaintiffs entered into three agreements when they enrolled in a program at the Canadian Institute of Correactology: an Enrolment Agreement, a Licence Agreement and a Confidentiality Agreement. A dispute arose and the plaintiffs sued, alleging, among other things, causes of action for fraudulent misrepresentation, conspiracy, restraint of trade and breach of contract. The plaintiffs alleged that the defendants' program was a sham and a fraudulent and illegal scheme. In addition to the corporate defendants who were parties to the three agreements, the plaintiffs also sued directors of the corporations.

The defendants brought a motion to stay the action based on the arbitration clauses contained in the Enrolment Agreement and the Licence Agreement. The Confidentiality Agreement did not contain an arbitration clause.

The arbitration clause in the Enrolment agreement provided that "[i]f the parties are unable to reach a solution within a period of thirty (30) days, then upon written notice by any other party to the other, the dispute, claim, question or difference shall be resolved by arbitration." The arbitration clause contained other provisions regarding the appointment of the arbitrator by a judge of the Superior Court of Justice if the parties could not agree. The decision of the arbitrator was final and binding and there was no right of appeal. The Licence Agreement contained a similar arbitration clause.

The Enrolment Agreement also contained the following clause:

This Agreement shall be governed by and construed in accordance with the laws of Ontario, Canada and each party hereby submits to the exclusive jurisdiction of the courts of Ontario.

The Licence Agreement also contained a clause governing choice of law and jurisdiction, although broader. It provided as follows:

Any party bringing an action or proceeding against any other party arising out of or relating to this Agreement, subject to Subsection 12.13<sup>[ii]</sup>, shall bring the action or proceeding before a justice of the Ontario Superior Court of Justice sitting in Sudbury, Ontario. ...

The motions Judge dealt with several issues in determining the motion to stay the action, including whether the action should be stayed in view of the fact that several of the named defendants were not parties to the arbitration agreement, whether the

agreements were invalid and, given the arbitration clause and the jurisdiction of the courts clause, whether the intent of the parties was to make arbitration mandatory.

The motions Judge dismissed the defendants' motion and permitted the action to continue on several grounds against all of the defendants, including the parties to the Enrolment Agreement and the Licence Agreement. This article will consider the judge's finding that the clauses providing that the Ontario courts have jurisdiction rendered the arbitration clause ambiguous. The judge held that "the arbitration clauses in the Enrolment Agreement and the License Agreement are ambiguous and do not indicate a clear intent to refer all disputes arising under those agreements to arbitration." In effect, the plaintiffs had a choice to arbitrate or bring an action in the Superior Court of Justice.

While the judge acknowledged that Ontario courts strongly favour the enforcement of arbitration agreements and recognized the competence competence principle, he rejected the argument that the exclusive jurisdictional clause is simply a "jurisdictional" forum selection clause. He held that such an interpretation would require the court to disregard the clause rendering the clause "superfluous", something that should be avoided based on the principles of contractual interpretation. He found the arbitration and jurisdictional clauses to be inconsistent, making it difficult to interpret the two agreements in a manner that gives meaning to both the arbitration clauses and the jurisdictional clauses at the same time. Consequently, the judge found that there was no clear intent to refer all disputes to arbitration.

The Court of Appeal for Ontario in *Trade Finance Solutions Inc. v. Equinox Global Limited and Lloyd's Underwriters*<sup>[iii]</sup> also had to consider whether to stay an action where an insurance policy contained an arbitration clause and an endorsement to the policy contained an Action Against Insurer clause. The motion judge determined that reading the contract as a whole provided two alternative methods of dispute resolution: the international arbitration pursuant to the base policy and the domestic proceedings pursuant to the Action Against Insurer clause.

The base policy contained a provision that the policy is governed by the laws of England and Wales and that any dispute arising in connection with the contract shall be referred to and finally resolved by arbitration. An Action Against Insurer provision in the endorsement stated:

In any action to enforce the obligations of the Underwriters they can be designated or named as "Lloyd's Underwriters" . . . . Service of such proceeding may validly be made upon the Attorney in Fact in Canada for Lloyd's Underwriters, whose address for such service is . . . .

The Court of Appeal allowed the appeal and stayed the action holding that the motion judge erred in widening the meaning of the Action Against Insurer endorsement and turning it into an alternative dispute resolution provision. The Court of Appeal found that the Action Against Insurer provision in the endorsement did not conflict with mandatory arbitration provisions. There were still several actions available to which that clause would apply, such as actions to determine jurisdiction or compel arbitration, actions to enforce arbitral awards and appeals of arbitral awards. The Court of Appeal held, unlike in the *Graves* case, that it is possible to give meaningful effect to both a mandatory arbitration provision and the Action Against Insurer clause.

This is what the judge in the *Graves* case missed. The jurisdictional clause in the *Graves* case still had meaning in the face of the mandatory arbitration provision. It would apply in at least two circumstances in addition to the ones mentioned by the Court of Appeal in *Trade Finances Solutions Inc.* The first is right in the arbitration provision itself which gives the Ontario Superior Court of Justice jurisdiction to appoint the arbitrator if the parties cannot agree. The second circumstance is section 46 of the *Arbitration Act, 1991*<sup>[iv]</sup> of Ontario which permits a court to set aside an arbitration award in the circumstances set out in that section, including misconduct on the part of the arbitrator.

While the judge in *Graves* based his decision to refuse to stay the action on several grounds, his views on the jurisdictional clause

causing ambiguity is a warning to the drafters of contracts to ensure that an arbitration clause and a choice of forum clause are not inconsistent and do not create an ambiguity.

[ii] 2018 ONSC 4263.

[iii] There was no Subsection 12.13 in the agreement. The defendants submitted that the reference should be to Subsection 11.12, the arbitration clause. The judge seems to have proceeded on that basis.

[iv] 2018 ONCA 12.

[v] S.O. 1991, c. 17.

***The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.***

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