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Commercial Litigation Insights: A Framework for Arbitrators to Determine Jurisdiction

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Jurisdiction is one of the first issues that is raised in an arbitration. It is complicated by the fact that it can be raised in the course of the arbitration itself, or through applications and motions to the courts for various reliefs such as stay of proceedings, declarations and injunctions under s. 48 of the *Arbitration Act*, *1991* and even applications pursuant to Rule 14.05(3)(d) of the Rules of Civil Procedure.

It is used to raise *bona fide* concerns over the applicability of an arbitration agreement. It is also sometimes used as a tactic by respondents to delay and increase costs of adjudication of disputes.

Generally, unless a decision on jurisdiction has already been made by the arbitrator and the courts are being asked to make a *de novo* finding, courts will maintain the competence-competence principle, enshrined in section 17(1) of the *Arbitration Act, 1991*[1], and decline to determine the jurisdiction of the arbitrator.

The competence-competence principle protects the arbitration process from intervention by the courts by holding that arbitrators should be allowed to exercise their power to rule first on their own jurisdiction.[2] This, and the fact that most arbitral awards are confidential and nonbinding, makes it difficult to establish a framework for how an arbitrator ought to determine its jurisdiction, however there is helpful guidance from our courts.

In *Haas v. Gunasekaram*[3], the Ontario court of appeal considered a stay under s. 7 of the *Arbitration Act, 1991*. In its decision, the Court set out an analytical framework that captures the questions to be asked to determine jurisdiction of an arbitrator:

1. Is there a valid arbitration agreement?
2. What is the subject matter of the dispute?
3. What is the scope of the arbitration agreement?
4. Does the dispute fall within the scope of the arbitration agreement?

In this article, we consider how each of these questions have been approached by the Courts to help develop a framework for how arbitrators could determine their jurisdiction.

1. Is there a valid arbitration agreement?

Arbitration is a creature that owes its existence to the will of the parties alone[4]. The parties that are purported to be subject to arbitration must have agreed to arbitrate. This is an issue of contract formation. There must be offer and acceptance, consideration and a meeting of the minds on the essential terms of the bargain[5]. Doctrines of mistake, misrepresentation, frustration *non est*

factum, illegality and unconscionability apply.[6]

Arbitration clauses are independent from other terms of the contract and can continue to apply if the contract itself is terminated or found to be invalid.[7]

2. What is the subject matter of the dispute?

Once the validity of the arbitration agreement is established, the arbitrator should define the subject matter of the dispute, which has been characterized as the "pith and substance" of the dispute[8].

This requires a consideration of the allegations that are made to substantiate the wrongdoings claimed, followed by an assessment of whether those allegations depend on the existence of the agreement subject to the arbitration clause.[9] That is, in determining whether the dispute is one that relates to the interpretation or execution of an agreement, it is relevant to consider whether the existence of the contractual obligation is a necessary element to create the claim or to defeat it.[10]

Importantly, the Supreme Court of Canada has stated that an arbitrator's mandate includes everything that is closely connected with the agreement to which the arbitration clause or agreement applies, or, in other words, questions that have "a connection with the question to be disposed of by the arbitrators with the dispute submitted to them."[11]

3. What is the scope of the arbitration agreement?

Once the "pith and substance" of a dispute has been ascertained, the scope of the arbitration clause must be determined. This is a matter of contract interpretation. Certain language and phrases may suggest a broader scope of an arbitration clause as compared to others. For example, words such as "relating to" or "in connection with" as compared to words such as "under the contract" or "upon the contract".[12]

Broader language could suggest that arbitration applies to even extra-contractual disputes, such as fraudulent misrepresentation. In *Haas*, the Ontario Court of Appeal considered that the language "… any dispute… respecting this agreement or anything herein contained…" gave the arbitration clause a broad enough scope to apply to a claim of fraudulent misrepresentation where the claimant would be required to rely on contractual documents to make out this cause of action.[13]

4. Does the dispute fall within the scope of the arbitration agreement?

The approach to this question will depend on if the arbitrator has determined the scope of the arbitration clause (or agreement) is wide or narrow.

Where the arbitration clause is found to apply broadly, the Ontario Court of Appeal has considered that a dispute can be caught by the clause so long as either the claimant or respondent relies on the existence of a contractual obligation as a necessary element to create the claim or to defeat it.[14]

Parties to an arbitration should be alive to the issue of jurisdiction and prepared to navigate the complexity of the factors set out above. Equally important, and a topic for a subsequent article, is the many ways the issue of jurisdiction can be brought before the courts. Parties should know what these options are, and their nuanced differences, at the outset of any arbitration.

[1] S.O. 1991, c. 17. [“*Arbitration Act, 1991*”]

[2] *Blind Spot Holdings Ltd. v. Decast Holdings Inc.*, 2014 ONSC 1760

[3] 2016 ONCA 744, para. 17 [“*Haas*”]. See also *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894, para. 114 [“*Electek*”].

[4] *Laurentienne-vie, cie d’assurance inc. C. Empire, cie d’assurance-vie*, [2000] R.J.Q. 1708 (C.A. Que.), paras. 13 & 16; as cited by the Supreme Court of Canada in *Union des consommateurs c. Dell Computer Corp.*, 2007 SCC 34, para. 51.

[5] *Elektek*, para. 96

[6] *Elektek*, para. 107.

[7] *Arbitration Act, 1991*, section 17(2). See also *Elektek*, paras. 147-151.

[8] *Haas*, para. 27.

[9] *Haas*, para. 22.

[10] *Dalimpex Ltd. v. Janicki*, [2003] 172 O.A.C. 312, para. 41; citing *Kaverit Steele & Crane Ltd. v. Kone Corp.* (1992), 87, D.L.R. (4th) 129 (Alta. C.A.).

[11] *Desputeaux c. Éditions Chouette (1987) inc.*, 2003 SCC 17, para. 35.

[12] *Matrix Integrated Solutions Inc. v. Naccarato*, 2009 ONCA 593, para. 15. [“*Matrix*”].

[13] *Haas*, para 35.

[14] *Matrix*, para. 16.

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