Is Your Arbitration Clause Enforceable?

Is your agreement to arbitrate disputes ironclad? You may be wrong. A recent Hawaii Court of Appeals decision proposes a modification to the theory to which many have subscribed: ambiguous text renders the arbitration agreement as hollow. In this case, determining whether the arbitration agreement was enforceable hinged on indirect evidence of the parties’ intent to be bound by the agreement to arbitrate, not merely the provisions in the contract.

The Arbitration Agreement and Supplemental Conditions

In *Safeway, Inc. v. Nordic PCL Constr., Inc.*, 312 P.3d 1224 (Haw. Ct. App. 2013) the owner, a supermarket chain, sued the general contractor for damages associated with a water leak in the store. In moving to compel arbitration, the general contractor relied on language in the AIA A101 Standard Form of Agreement Between Owner and Contractor (the “Contract”), which required disputes to be arbitrated.

The owner responded with a two tiered attack. First, the owner argued that a specific clause in the Supplemental Conditions voided the agreement to arbitrate. Second, the owner reasoned that the present dispute over the text of the contract as a whole demonstrates the arbitration agreement’s ambiguity and thus, it must be voided.

Determining the contract was “confusing as heck to me,” the trial court judge adopted the owner’s argument as to the ambiguity of the text: “because there’s more than one reasonable interpretation of the arbitration agreement, the agreement itself is ambiguous.” The contractor appealed that ruling.

What Makes an Arbitration Agreement Enforceable?

In an effort to resolve the issue, the appellate court outlined a two-step approach to determine the enforceability of the arbitration agreement. First, the appellate court examined whether the agreement complied with the laws that require an arbitration agreement be: (1) in writing, (2) with unambiguous text that demonstrates the parties’ intent to submit disputes to arbitration; and (3) supported by bilateral consideration.

Second, the court must determine if the arbitration agreement fails for lack of assent. Specifically, the court must determine if the parties, in fact, intended to arbitrate disputes. Even if a dispute as to the issue of assent exits, this would not necessarily defeat the agreement. Instead, it requires the court to examine the facts related to assent.

Uncertain Status of Supplemental Conditions

The appellate court held that while both parties were aware that Supplemental Conditions existed, it was unclear whether those terms were incorporated into the contract as the references to the Supplemental Conditions were neither clear nor specific. For instance, the phrase “and are as follows” was placed at the end of
two sections relating to what was to be incorporated; thus, the language implied that further specifications would be incorporated. They were not.

Despite the contract being executed by both parties, the appellate court could not determine if the Supplemental Conditions were specifically incorporated in a manner to allow the general contractor to understand their application. Therefore, the question of assent was to be resolved by examining the facts surrounding the contract’s execution.

To resolve such facts, the general contractor asserted that the owner’s choice to modify the arbitration clause in the contract, to include that the prevailing party would be rewarded attorney’s fees, suggested that the owner was consenting to the arbitration provision as it did not delete the language agreeing to arbitrate disputes when given this initial editorial opportunity. Concluding that the written record (affidavits, pleadings, and discovery documents) was not sufficient to resolve the question of the status of the Supplemental Conditions, the appellate court ultimately ordered an evidentiary hearing to resolve that issue.

Look Before You Leap

The requirement for an additional evidentiary hearing clearly increases the cost of the parties’ dispute and delays resolution of the underlying issues. Thus, this case demonstrates the old adage that an ounce of prevention is worth a pound of cure. To best prepare for unexpected claims that may arise, it is paramount to know the applicable platform for dispute resolution: litigation, mediation or arbitration. This question may often be answered by familiarizing yourself with the entirety of the contract documents before bidding or proposing on the contract. Seems obvious, but is not always done.

Once you have completed a thorough review of the proposed contract documents, create a checklist that references the clauses for dispute resolution. This can be done at the proposal stage to determine if your preferred policy is incorporated. If questions remain, seek written clarification from the owner or contractor.

After the award, identify all significant contract terms, whether they be arbitration or other issues of paramount concern: site conditions, changes, and/or payment provisions. Reference the applicable clauses and any unique issues such as an optional arbitration election by either party. Orient the project staff on these terms and conditions.

To decrease any risk of confusion, draft language that not only stipulates which contract clauses would be affected by the corresponding supplemental condition(s), but also specifies the other parties’ acknowledgement and assent of such supplemental conditions and the related impact on the contract terms.

While arbitration is favored by some, it is not by others. To ensure your goals for arbitration, either existence or elimination, the best investment is taking the time to understand the contract terms and how such affect your goals for dispute resolution.