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Consolidation of Arbitration under "Entire Agreement" Clauses

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Introduction

In many commercial transactions, there will be multiple agreements among various parties, and those agreements often contain "entire agreement" clauses to ensure that the parties are bound only by the terms of the agreement(s) they sign. However, such a clause may be invoked and interpreted in a way surprising to the parties, especially in terms of dispute resolution.

While an entire agreement clause typically reads as "this Agreement contains the entire agreement and understanding between the parties hereto and supersedes all prior negotiations, representations, undertakings and agreements on any subject matter of this Agreement", its variation in a complex transaction with multiple instruments may provide that the agreement containing the clause *and another agreement* constitute the entire agreement between the parties and so on. When the former has an arbitration clause and latter does not, a party to the former may rely on the entire agreement clause, to file an arbitration consolidating claims under both contracts; to make the case more challenging, the latter may have its own disputes resolution clause providing for a different mechanism, or the claim may be pursued against a party not bound by the latter, in accordance with terms thereof.

One West vs. Greata Ranch

The issue has been emerging in M&A disputes, according to a presentation by Tunde Ogunseitan, counsel at the ICC International Court of Arbitration, and in energy disputes according to David R Haigh QC and Paul Beke of Burnet, Duckworth & Palmer LLP, often involving different dispute resolution clauses in different instruments.

So far few cases have come into public knowledge, except *One West Holdings Ltd. v. Greata Ranch Holdings Corp.*, 2014 BCCA 67, an interesting case before the courts of British Columbia.

The case involves three agreements, a Limited Partnership Agreement (LPA) with an arbitration clause, and a Project Management Agreement (PMA) and a Purchase Agreement (PA) both without such. One West is a party to the PMA but not a party to the LPA; Greata Ranch is a party to the LPA but not to the PMA.

The "entire agreement" clause in the PMA reads as:

> "This Agreement, [the LPA] and [the PA] and any documents expressly contemplated by this Agreement, constitute the entire agreement between the parties and/or affiliates of the parties and supersede all previous communications, representations and agreements, whether oral or written, between the parties with respect to the subject matter hereof."

The arbitration clause in the LPA reads as:

> "All disputes arising out of or in connection with this Agreement, or in respect of any legal relationship associated therewith or derived therefrom, shall be referred to and finally resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre pursuant to its Rules. The place of arbitration shall be Vancouver, British Columbia, Canada."

Disputes arose and Greata Ranch initiated an arbitration against other parties to the LPA and One West, relying on the arbitration clause in the LPA. One West asserted that it should not be joined to the arbitration because it did not sign the LPA and is not a party to any arbitration agreement with Greata Ranch. The arbitrator determined the issue in favor of Greata Ranch, concluding as follows:

> "The intention of the parties is explicit that the LPA and PMA are to be part of one comprehensive agreement and the only reasonable interpretation of the [Arbitration Clause] is that all disputes connected with that agreement 'shall be referred to and finally resolved by arbitration…'"

One West sought judicial review. The Supreme Court agreed to One West, holding that the entire agreement clause in the PMA does not incorporate terms of the LPA and the PA by reference, and set aside the award.

On appeal, the Court of Appeal reversed, opining that:

> "[The entire agreement clause] does two things: it defines the agreement of the parties and it limits the scope of inquiry. The [Supreme Court]'s approach appears to eliminate the first part of the provision merely because it is called an 'entire agreement' clause."

Comments

As one commenter said, the *One West* decision gave to entire agreement clauses "greater implications than expected".

There is no dispute to the function of "limiting the scope of inquiry" of entire agreement clauses. Black's Law Dictionary defines "entire agreement clause" (also called "integration clause", "entire contract clause", "merger clause" and "whole agreement clause") as "[a] contractual provision stating that the contract represents the parties' complete and final agreement and supersedes all

informal understandings and oral agreements relating to the subject matter of the contract." It points to "parol evidence rule", which is described as "[t]he common law principle that a writing intended by the parties to be a final embodiment of their agreement cannot be modified by evidence earlier or contemporaneous agreements that might add to, vary, or contradict the writing." The Court of Appeal also agreed that entire agreement clauses "set out the document or documents to which the court may refer" and "attempt to limit the scope of contractual relevance to the four corners of the specified document or documents".

The key inquiry is whether, and how, do they *"define the agreement of the parties"*. In my view, the reasoning of the arbitrator and the court is doubtful in three aspects.

Firstly, the arbitrator might be wrong in concluding that *"the intention of the parties is explicit that the LPA and PMA are to be part of **one** comprehensive agreement and the only reasonable interpretation of the ss. 13.13 is that all disputes connected with **that** agreement 'shall be referred to and finally resolved by arbitration…'"* (emphasis added). There is no language to create **one comprehensive agreement** (with the word "agreement" used as a countable noun) – the parties agreed that the three instruments should constitute **the entire agreement** (with "agreement" probably used as a non-countable noun), and nothing beyond. If the parties intended to make "one comprehensive agreement" explicitly, the parties would have used languages to that effect, such as "a comprehensive agreement" or "a single agreement", but they did not. And from a linguistic perspective, it makes little sense to have "entire" describe "agreement" as a countable noun in the context, and neither the arbitrator nor the appellate judges used the counterintuitive *"an entire agreement"*.

Secondly, going further from the analysis, that these instruments constitute "the entire agreement between the parties" does not necessarily lead to the conclusion that all the parties are bound by each instrument within the entire agreement. It could reasonably be read as that each party is bound by the instrument(s) it signed, and nothing beyond, as a reasonable business person (and their legal advisor) would expect in entering into such agreements in a complex transaction. The use of **"and/or"** rather than "and" before "affiliates of the Parties", is simply indicative that not all of them are bound by each instrument, otherwise the "or" is simply redundant. On the other end, it would cause absurdity to drag a party into a contractual relationship when the language of the instrument defines no right or duty of that party, and provides bad incentives for an opportunistic disputant.

Thirdly, the court perhaps understated the fact that in a transaction with multiple contracts many terms cannot be incorporated into each other and some terms conflict with each other. A common rationale for the parties to sign multiple contracts, instead of "one comprehensive agreement", is to define different aspects of their relationships with different conditions and among different persons; the asserted "consolidation" of agreements would find great difficulty in reconciling these agreements in a "battle of forms". The commercial reality is that entire agreement clause is indeed a term of legal art, and it should be interpreted as common lawyers intend it.

That said, incorporation clauses, including "integral part" clauses, which incorporate the terms of a contract into another, should be distinguished from entire agreement clauses, as in the case of *Karah Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* (2004), 364 F 3d (5th Cir), where the Tribunal correctly consolidated disputes under two contracts.

Conclusion

"If there is such an ambiguity in the words used, the court should interpret them in a manner that accords with commercial reality and that avoids a commercial absurdity." Cross-referencing other agreements in an entire agreement clause is usually not intended to incorporate other agreements or terms thereof into the agreement between the parties; the latter stays as it is. The consolidation of agreements and consequent consolidation of disputes, through entire agreement clauses, probably will go against the genuine intention of the parties and bring consequential chaos. Though it can never go wrong to ask parties to be more careful in contract drafting, the misinterpretation of "entire agreement" clauses for consolidation purpose should be, and can be, ceased.

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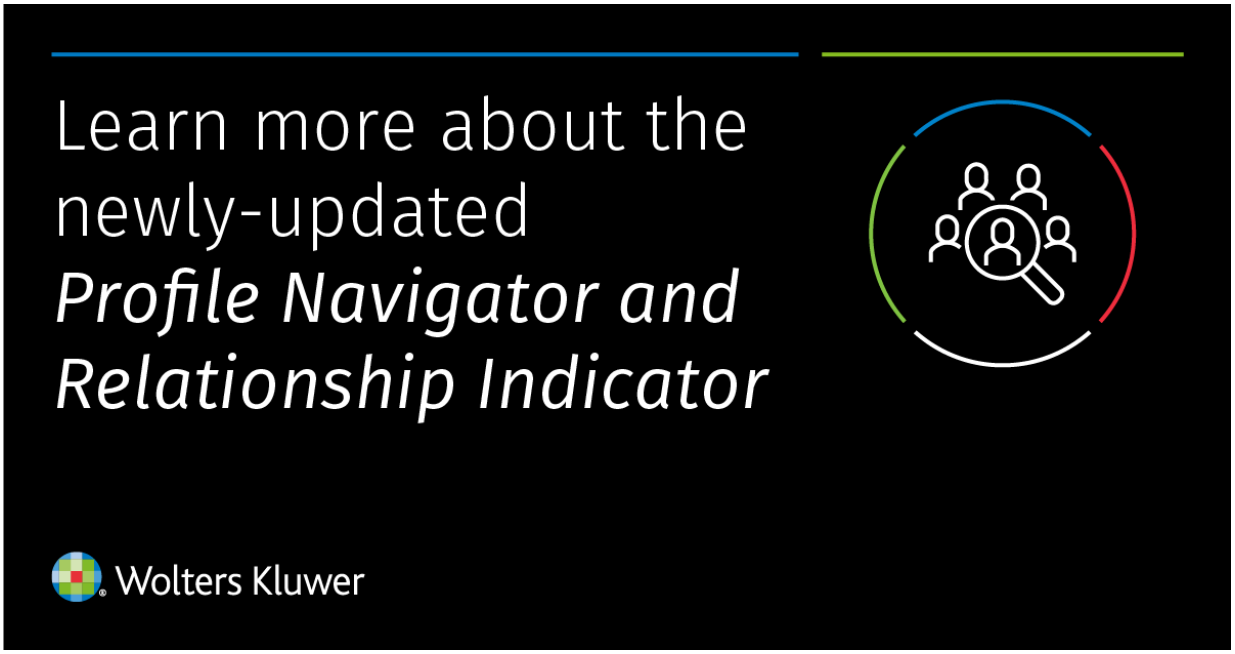

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