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be careful what you wish for: arbitration clauses can come back to haunt you

Commercial parties frequently include arbitration clauses in their business agreements to provide for the resolution of disputes. Contrary to popular belief, however, arbitration clauses are not mere boilerplates. Thought must be applied when drafting, and when subsequently invoking, such clauses.

The Ontario Court of Appeal's recent decision in *Bell Canada v. The Plan Group et al.* ("*Bell*") highlights the disastrous consequences that can result when this advice is ignored. Reading this article may help you prevent an arbitration clause from coming back to haunt you.

the facts of the *Bell* case

In 2004, a dispute involving millions of dollars arose between the parties relating to work that The Plan Group had performed under a written agreement for Bell. The agreement, which the parties signed back in 1999, contained a relatively common multi-step dispute resolution clause. The clause first required the parties to attempt to resolve disputes through negotiation. If negotiation failed, the clause mandated that disputes be arbitrated.

The parties were unable to negotiate a resolution of their dispute. Accordingly, The Plan Group commenced an arbitration in December of 2005 to recover the amounts allegedly owing from Bell. This is where things began to go horribly wrong for The Plan Group.

As explained below, The Plan Group did not follow the procedure required by the arbitration clause for commencing the arbitration. As a result, it forever lost its ability to recover in an arbitration the amounts allegedly owed by Bell.

More specifically, the arbitration clause contained two provisions that came back to bite The Plan Group. First, the clause provided that all arbitrations will be governed by "…the *then-current rules* of the Arbitration and Mediation Institute of Ontario ("the Institute")". Second, the clause provided that any "…Failure to *file* a notice of arbitration…" within one year of the occurrence giving rise to the claim "… constitutes an *irrevocable waiver of that claim*". Ultimately, the case turned on the meaning of these provisions.

By 2005, the Institute's rules (the "2005 Rules") differed from those in effect when the agreement was drafted in 1999 (the "1999 Rules"). The 2005 Rules provided that an arbitration is commenced when a notice is "…*filed* with the Institute and the initial filing fee has been paid". When the Plan Group purported to commence its arbitration in 2005, however, it did so by delivering a notice of arbitration to Bell. The Plan Group never *filed* a notice of arbitration with the Institute. The Plan Group also did not pay any filing fee to the Institute, thinking that it could simply administer the arbitration on its own.

Bell immediately took the position that The Plan Group had failed to commence the arbitration in accordance with the language of the arbitration clause. The Plan Group brought an application to have the issued determined by the court. The Plan Group essentially argued that the Ontario *Arbitration Act, 1991*, not the rules of the Institute (regardless of version), provides the mechanism for commencing arbitrations.

At first instance, the court agreed with The Plan Group. The application judge applied the Institute's rules that were in effect when the agreement was negotiated (the 1999 Rules) and found that The Plan Group did not need to file a notice of arbitration with the Institute. Bell appealed.

the Court of Appeal's decision

The majority of the Court of Appeal overturned the lower court's decision and found in favour of Bell.

The Court of Appeal began by holding that the reference in the arbitration clause to the "*then-current* rules" could only be interpreted to mean the rules of the Institute *in effect when the dispute arose* (being the 2005 Rules). The Court concluded that the parties had agreed to have their disputes governed by whatever set of rules were operative at the time the arbitration in question took place. Unlike the 1999 Rules, the 2005 Rules clearly stated that an arbitration is not commenced until a notice is "…*filed* with the Institute and the initial filing fee has been paid".

The Court of Appeal went on to conclude that the concept of "filing" requires that the notice of arbitration be deposited with or delivered to the Institute – not simply *served* on the other side. While The Plan Group had *served* the notice of arbitration on Bell in December, 2005, it never *filed* the notice with the Institute. The Court of Appeal accordingly found that, since The Plan Group did not *file* a notice within the time required (12 months), it had irrevocably waived its claim.

The Plan Group did not appeal the Court of Appeal's decision. Accordingly, its complaints (which amounted to over $17 million) are now time-barred. Ouch.

implications of the decision

The Bell case illustrates that the courts will defer to the language of contractual agreements made by sophisticated commercial entities, even where doing so may seem unfair. Through its own inadvertence (by failing to *file* its notice of arbitration with the Institute on time), The

Plan Group deprived itself of the right to have an arbitrator determine whether Bell owed the over $17 million claimed.

Two of the most important implications of this decision are as follows:

1. *Care should be exercised when drafting, and when seeking to enforce, an arbitration clause.* Had The Plan Group thought more carefully about what it needed to do to initiate the arbitration process (and had it reviewed the 2005 Rules when the dispute with Bell arose), it could have avoided shooting itself in the foot. Instead of incurring large legal bills arguing about the meaning of the arbitration clause, The Plan Group could have focused its efforts on the merits of the dispute. More importantly, had it paid more attention to the requirements of its own arbitration clause, by now The Plan Group might have received an arbitral award in its favour instead of an adverse Court of Appeal decision.
2. *Parties to an arbitration agreement can effectively truncate limitation periods.* Ontario's general limitations statute provides for a basic 2-year limitation period that begins running the day a claim is discovered (or reasonably could have been discovered). The statute goes on to say that this applies despite any agreement by the parties "to vary or exclude" the limitation period. So, can parties to an arbitration clause shorten the general two year limitation period by agreement? The answer illustrated by the *Bell* case is that they effectively may do so.

The parties in the *Bell* case agreed that the only way to resolve disputes arising under their contract was by arbitration. The parties further agreed that the failure to commence an arbitration within twelve months from the date a claim is discovered constitutes a complete waiver of the right to arbitrate. Although not expressly discussed in the case, *Bell* recognizes the distinction between time limits that extinguish the *cause of action*, and those which extinguish the *remedy*. Even though the *cause of action* in Bell continued to be governed by the general limitation period of two years, the *remedy* of arbitration was only available for one year.

The *Bell* case contains important lessons about exercising care when using an arbitration clause. Being mindful of the above might just keep an arbitration clause from coming back to haunt you.

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