WeirFoulds LLP

Limitation Periods on Arbitration: If not Clarity, then Context

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Arbitration can be a great alternative to litigation. It allows disputes to be resolved sooner, it can be less costly, and it may help the parties to a dispute keep issues and their final resolution private. Arbitration agreements provide parties with some latitude to decide on the procedures and timelines that will govern the dispute resolution process. Nevertheless, with that freedom comes a price. In those agreements, parties should be clear about timelines applicable to the dispute resolution process to avoid any uncertainty regarding the application of limitation periods. Otherwise, the parties may very well end up in court, as in the case of the parties in *Maisonneuve v. Clark*, 2022 ONCA 113.

Background

This case involved a dispute between two cousins, Jean Maisonneuve and Christopher Clark, who were in business together as shareholders of various companies. Over the years, their relationship deteriorated and Clark made a series of legal claims against Maisonneuve.

On September 26 and 27, 2016, the parties reached a settlement and signed Minutes of Settlement and a mutual release, among other documents. At that point, the parties had still not resolved one issue: the payment of expenses associated with one of the companies. Accordingly, the release provided, among other things, that if the parties were unable to resolve the issue, then the issue would be fully and finally referred to an arbitration for resolution as follows:

The undersigned agree and understand that there is one issue that is not covered by the Mutual Release and it is as set out in this paragraph (the "Excluded Issue") ….If the parties are unable to resolve the Excluded Issue as between them, then the Excluded Issue shall be fully and finally referred to the Arbitrator for resolution. The Arbitrator's decision shall not be subject to any appeal, either of law, fact or mixed law and fact. [Emphasis added.] (the "**Arbitration Clause**")

In July 2017, Clark began an action to enforce the Minutes of Settlement. In his defence, Maisonneuve asserted that the parties had contemplated that any arbitration pursuant to the Arbitration Clause would take place within 90 days.

In January 2018, Maisonneuve's lawyer sent Clark's lawyer a settlement proposal, including a mechanism to resolve the expenses issue. Clark's lawyer advised that he had no intention of engaging in any negotiations outside the 2017 action.

In June 2019, Maisonneuve retained new counsel and resiled from his position that the parties intended that an arbitration take place within 90 days. He then requested arbitration. Clark refused the request on the basis that the arbitration was time-barred and that it should have been completed 90 days from the date of the settlement agreement, or alternatively, within two years of that date under the two-year limitation period in the *Limitations Act,* 2002, SO 2002, c 24, Sched B (the "***Limitations Act***").

Maisonneuve then brought an application to the Superior Court to appoint an arbitrator. He took the position that the Arbitration

Clause required the parties to make some attempt to resolve the issue regarding expenses before initiating arbitration. Until such an attempt was made, the applicable two-year limitation period in the *Limitations Act* did not start running. Maisonneuve argued that since Clark did not clearly communicate his refusal to negotiate a resolution of the issue until January 2018, at the earliest, the request to arbitrate was not time-barred.

The Superior Court Decision: 2021 ONSC 1960

The application judge found that there was no agreement that the parties would conduct the arbitration within 90 days of the agreement. Further, the application judge held that the arbitration was not barred by the two-year limitation period in the *Limitations Act*. She referred to section 5 of the Act, which provides that:

A claim is discovered on the earliest day that the person with the claim knew, or reasonably ought to have known that:

1. the injury, loss or damage had occurred,
2. the injury, loss or damage was caused by or contributed to by an act or omission,
3. the act or omission was that of the person against whom the claim is made, and
4. having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it.

The application judge found that it was not evident that arbitration was "appropriate" until it was clear that the dispute could not be resolved through negotiations. The application judge noted the wording of the Arbitration Clause and the context of the negotiations leading up to the September 2016 settlement. Ultimately, she found that Maisonneuve should have known by January 31, 2018 that a negotiated settlement of the expenses was not possible based on the communications between the parties' counsel. On that basis, she found that Maisonneuve commenced the application within the two-year limitation period.

The Ontario Court of Appeal: 2022 ONCA 113

Before the Court of Appeal, Clark argued (among other things) that the application judge's decision would lead to uncertainty about the application of limitation periods to arbitration clauses because it is difficult to ascertain when negotiations are at an end. The Court of Appeal rejected this argument, finding that the decision was based on the specific wording of the Arbitration Clause and the circumstances in which it was negotiated. The Court held:

"Parties are free to agree to arbitration clauses that make no reference to the possibility of an informal agreement or that are more specific about the steps and timing leading to arbitration. In this case, as stated by the application judge, it was open to the appellants [Clark] to let the respondents [Maisonneuve] know at any time that no further negotiations would take place. Indeed, this is what occurred in January 2018, which the application judge found triggered the start of the limitation period."

Key Takeaways

Arbitration provides parties with a certain freedom to resolve a dispute on their own terms. However, arbitration agreements should be clear and set out timelines for resolving issues. When applying limitation periods to an arbitration clause, a court will likely not only look at the wording of the clause, but also the context in which it was negotiated, including any correspondence between the parties and their counsel.

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