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• WHY THE WORDS IN YOUR BUSINESS CONTRACT'S ARBITRATION CLAUSE MATTER •

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One of the most overlooked provisions in a commercial contract is an arbitration clause.

These clauses typically set out the resolution mechanism the parties devise to resolve any dispute under the contract.

The effect of an arbitration provision is to divorce the commercial proceeding from the Courts and shift the duty of adjudication to an arbitrator - this protects the privacy of the litigation and typically guarantees a timely result.

Ontario's *Arbitration Act, 1991*, S.O. 1991, c.17 (the "Act") seeks to protect the benefits of arbitration by limiting recourse to the Courts once an arbitral award has been made.

For example, if parties choose not to provide any appeal rights to the Courts from an arbitration decision, the *Act* significantly limits their ability to appeal the decision.

A recent decision of the Ontario Court of Appeal, *Baffinlands Iron Mines LP v. Tower EBC G.P./ S.E.N.C.*, 2023 O.N.C.A. 245, clarifies how judges will approach commercial arbitration provisions that do not provide for a right of appeal under the Act.

Baffinlands establishes that where an arbitration provision precludes appeals by specifying that the arbitration decision is "final and binding", there is no appeal to the Ontario Superior Court.

"FINALLY SETTLED" MEANS "FINAL AND BINDING"

Baffinlands involved two agreements in which the respondent, TEBC, agreed to provide earthworks for the construction of a railway at the appellant BIM's ore mine in Nunavut. The agreements were standard-form construction contracts.

The dispute resolution clauses in the contracts provided that if a dispute could not be settled amicably and there was no final and binding decision to settle the dispute by a dispute adjudication board ("DAB"), the dispute "shall be finally settled by international arbitration" and "finally settled by the Rules of Arbitration of the International Chamber of Commerce [the "ICC Rules"]". The ICC Rules provided that every award was "binding on the parties" and the parties waived any form of further recourse.

In 2018, BIM terminated the contract as a result of construction delays. When the matter could not be resolved amicably and there was no final and binding decision of the DAB, TEBC commenced an arbitration against BIM before a tribunal of three arbitrators. TEBC alleged that BIM had improperly terminated the agreement and sought damages for breach of contract.

The majority of the arbitration panel awarded TEBC more than $100 million in damages. However, the dissenting member would have reduced the award by $54 million (the "Award").

Under section 45(1) of the Act, if the arbitration agreement does not deal with appeals on questions of law, a party can only appeal an award to the Court on a question of law with leave,

i.e., with the permission of the Court, provided certain preconditions are met.

BIM sought leave to appeal the Award to the Ontario Superior Court.

The application judge of the Ontario Superior Court dismissed BIM's request for leave, holding that the arbitration agreement dealt with appeals by precluding them, i.e., the contract said that the Award would be "finally settled" by arbitration and incorporated the ICC Rules, which state that the parties would carry out any award and waive any form of further recourse.

On further appeal, the Ontario Court of Appeal upheld the application judge's ruling.

The Court clarified a number of principles governing the availability of an appeal from an arbitration award, depending on the words chosen by the parties in the arbitration clause itself:

Three Appeal Scenarios under the Act

Baffinland recognizes three possibilities in which an arbitration award may (or may not) be appealed to the Courts:

- The arbitration agreement expressly *provides for* an appeal – in this case, there is an appeal as of right to the Courts because the parties agreed to such an appeal. The Court will protect the parties' wishes;
- The arbitration agreement *is silent on* appeals, in which case an appeal is only allowable on questions of law under s.45(1), with leave (or permission) of the Court; and
- The arbitration agreement *precludes* an appeal from the arbitral award, such that there is no appeal or right to seek leave from the Court to appeal at all.

The limited appellate rights under the Act reflect the non-interventionist posture of the Courts towards commercial arbitration, which is meant to be final and binding on the parties. Further recourse to an appeal would defeat the purpose of arbitration, which is to provide a private and efficient means of resolving the dispute outside the scope of ordinary litigation.

"Final" Means "Final"

BIM argued that in certain parts of the contract, the term "final and binding" was used as applied to decisions of the DAB; by contrast, the contract employed the term "finally settled" to describe the arbitration.

According to BIM, the fact that a different term was applied to arbitration, i.e., "finally settled" (not "final and binding"), meant that the application judge erred in concluding that the parties had contracted out all rights of appeal.

The Court of Appeal rejected BIM's position. It held that "finally settled" and "final and binding" were "mutually reinforcing phrases" that were understood to have an identical meaning:

The ordinary and grammatical meaning of 'finally settled' by arbitration, when situated in the contracts' dispute resolution provisions, clearly means no further recourse by way of appeal, in the same way 'final and binding' would.

…

[citing J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 3rd ed. (Huntington, NY: JurisNet, 2017) at p.483:]

> By using the word 'final' the implication is that the parties intended to oust all rights of appeal. It is difficult to understand what those words could otherwise mean in the arbitration context. It is also difficult to understand how parties could have consciously chosen those words, yet at the same time intended there to be appeal rights [to the Courts] …

The "presumption of consistent expression", a contractual interpretation principle, meant that the repeated word "final" in the contract had to be given a consistent meaning.

The parties intended that the Award would be final and, therefore, there was no right to seek leave to appeal the Award to the Courts. An appeal had been precluded by the parties to the contract.

Limited Rights to Seek Leave to Appeal the Superior Court Decision

Under the Act, the first Court to which parties would seek leave to appeal or an appeal as of right from the arbitration award is the Ontario Superior Court.

Typically, if the Superior Court denies leave to appeal the arbitration award (in the scenarios in which leave to appeal is required), that would be the end of the matter and the parties would have no further avenue to challenge the Superior Court's decision.

This is based on both the principle that there is no further right to appeal a decision denying leave to appeal and on the fact that the Act itself provides no further appeal rights once leave to appeal the arbitral award has been denied by the Superior Court.

In this case, TEBC argued that there was no right to appeal the Superior Court's denial of leave to appeal the arbitration award to the Court of Appeal. It sought to have BIM's appeal to the Court of Appeal quashed on a preliminary basis.

The Court of Appeal disagreed, however.

The Court held that there are limited circumstances in which a lower Court decision denying leave to appeal could be subsequently appealed to a higher Court. That exception occurs where "the appeal from the refusal granting leave to appeal is premised on a submission that the judge refusing leave to appeal mistakenly declined jurisdiction to consider whether leave to appeal was warranted": citing *Denison Mines Ltd. v. Ontario Hydro* (2001), 56 O.R. (3d) 181 (C.A.).

In this case, the application judge of the Ontario Superior Court held that the arbitration agreement precluded appeals period, rendering BIM's right to seek leave to appeal a nullity. He, therefore, declined to exercise any jurisdiction to consider whether leave to appeal should be granted, meeting the limited exception under *Denison Mines*.

Thus, an appeal from whether the application judge mistakenly declined jurisdiction was still available to the Court of Appeal.

BEWARE THE CARELESSLY DRAFTED ARBITRATION CLAUSE

While *Baffinland* initially appears to have little effect beyond the lawyers tasked with arguing arbitration appeals, its ruling has broad implications for commercial contracts generally.

Parties to a business agreement must be cognizant of the language they employ when crafting a dispute resolution mechanism in the contract.

Sloppy language can have unintended consequences, such as creating a further right of appeal to the Courts following a lengthy arbitration, where no such was right was intended. This danger is heightened where parties use a standard-form contract, relying on language already devised for the parties that they may not wish to adopt.

The corollary is also true – if parties want their arbitral award to be subject to Court scrutiny, they must ensure they have not inadvertently excluded a right to appeal or a right to seek leave to appeal under the Act.

Commercial parties should be vigilant in the language they choose to craft an arbitration clause and any rights of appeal that flow therefrom. A failure to do so will have serious repercussions.

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