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Same Court, Different Results: When Does The Limitation Period Start For An Arbitration Claim?

When does the limitation period start for an arbitration claim? Can the very making of the demand start the period running? Yes, the Ontario Court of Appeal recently said in ***Federation Insurance Co. of Canada v. Markel Insurance Co of Canada***. In so deciding, the Court of Appeal seems to have reached a conclusion which is contrary to another of its decisions in 2011.

While this decision was rendered in the context of automobile insurance, it may have wide implications for commercial arbitrations, especially under bonds or indemnity contracts. The

decision may mean that, in a wide variety of settings, the very demand by a claimant may start the limitation period running under an arbitration clause. That is because, under the particular language of the contract in which the arbitration clause is found, the claim may be "discovered' before or at the very time when the claim is made. If that is so, then the claimant should start counting the very day it makes its claim.

The Background

Between April and May 2006, Federation paid statutory accident benefits ("SABS") to its insured under an automobile policy arising from an accident which the insured had with another motorist. Under Ontario Insurance law, Federation was entitled to recover the SABS from the other motorist's insurer and made a request for payment from the other insurer. More than two years later and having not been paid by Markel, Federation instituted an arbitration claim against the other insurer for payment.

The other insurer took the position that Federation's claim was barred by Ontario's two year limitation period. The arbitrator agreed and dismissed Federation's claim. The arbitration award was upheld by the Ontario Superior Court and Court of Appeal.

The Court of Appeal held that Federation suffered a loss and had discovered that loss at the very time that it made a demand for payment from the other insurer. It said:

> [T]he first party insurer suffers a loss from the moment the second party insurer can be said to have failed to satisfy its legal obligation to satisfy the loss transfer claim… the first party insurer suffers a loss caused by the second party insurer's omission in failing to satisfy the claim the day after the Request for Indemnification is made.
>
> I cannot agree with the proposition that no loss is suffered until the second party insurer unequivocally denies the claim. That argument ignores the fact that once a valid request is made, the first party insurer is legally entitled to be indemnified and therefore suffers a loss each day it is out of pocket for the SABS paid to its insured. I note here that this conclusion is supported by the passage I have quoted at para. 9 from the FSCO bulletin for loss-transfer claims stating that loss-transfer claims are to be paid "promptly" upon receipt of a Request for Indemnification and that the relevant arbitral jurisprudence holds that where a first party insurer is successful in establishing a loss transfer claim, interest is payable from the date the claim was asserted."

The Court of Appeal then considered the language in section 275(4) of the Ontario Insurance Act. That sub-section stated that "If the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the Arbitration Act." (emphasis added)

The Court said that this sub-section did not require, as a precondition to the cause of action arising and the limitation period beginning to run, that the parties actually engage in

discussions and actually be unable to agree. The Court stated its decision on this point as follows:

> "In my view, s. 275(4) does nothing more that stipulate that any disputes that cannot be otherwise resolved by the parties are to be resolved by arbitration rather than by litigation. Section 275(4) says: if you cannot agree, your claim is to be resolved by arbitration. It does not say: you must be able to demonstrate a failure to agree or a clear denial of your claim by the other insurer in order to commence arbitration.
>
> I accept that the loss-transfer regime assumes that virtually all claims can and should be resolved by agreement. I accept as well that as a practical matter, insurers should be encouraged to discuss and negotiate claims. Moreover, as a practical matter, no insurer would proceed with arbitration unless it was apparent that an acceptable agreement could not be reached by negotiation. But <u>that does not mean that as a matter of law, an insurer must be able to demonstrate a failure to agree or clear denial of the claim</u> by the other insurer as a condition precedent to commencing a proceeding to enforce a claim for indemnification." (emphasis added)

Federation submitted that this approach to the arbitration clause was contrary to public policy on the ground that it would discourage negotiation and real efforts at settlement. The Court of Appeal disagreed:

> "I fully accept that parties should be discouraged from rushing to litigation or arbitration and encouraged to discuss and negotiate claims. In my view, when s. 5(1) (a) (iv) [of the **Limitations Act, 2002]** states that a claim is "discovered" only when "having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it", the word "appropriate" must mean legally appropriate. To give "appropriate" an evaluative gloss, allowing a party to delay the commencement of proceedings for some tactical or other reason beyond two years from the date the claim is fully ripened and requiring the court to assess to tone and tenor of communications in search of a clear denial would, in my opinion, inject an unacceptable element of uncertainty into the law of limitation of actions."

In this decision, the Court of Appeal arrived at a result which is contrary to the result in its 2011 decision in ***L-3 Communication Spar Aerospace Limited v. CAE Inc*** (which decision was not referred to in the ***Federation v. Markel*** decision, although one of the judges sat on both cases).

I dealt with the ***L-3 Communication*** decision in my article of July 17, 2011. In that case, the contract provided for the dates for the delivery of data relating to a hardware and software aviation system. The contract said that: "The price and other adjustments that are <u>not agreed between the parties</u> may be referred to arbitration". Based on that language and other language in the contract, the Court of Appeal held that the limitation period did <u>not</u> commence until the parties had undertaken negotiations and there had been a definite inability to agree on the price and other adjustments. The Court said:

> The commercially reasonable interpretation is that a dispute over failure by SPAR to deliver information as required together with the cost consequences caused thereby is one that the parties were obliged to attempt to resolve between themselves. Failing agreement either party is entitled to take the dispute to arbitration

How can these two decisions be reconciled?

In ***L-3 Communications***, the words "not agreed between the parties" were held to mean that the limitation period did not commence before a negotiation and absence of agreement occurred. In *Federation v. Markel*, the words "unable to agree" were held not to require the parties to negotiate and be unable to reach an agreement, and not to delay the commencement of the limitation period.

It seems that the only way to reconcile the two cases is to examine the process leading up to the demand in each case. In *L-3 Communications*, the parties were involved in a tender process and were in direct dealings and negotiations with each other over price and other adjustments. The language of the tender documents contemplated real efforts to agree on price and adjustments. So the Court of Appeal was able to conclude that the words "not agree" meant that the parties were obliged to engage in an actual process of negotiation leading to non-agreement, and until that process was concluded the claim did not arise in law and the limitation period did not begin.

In **Federation v. Markel**, there were no ongoing dealings between the parties, apart from one insurer's demand that the other insurer indemnify it. There was no prior contract, tender or other relationship between the parties. The parties were simply insurers whose insureds had been involved in a motor vehicle accident. In this circumstance, the Court of Appeal held that the words "unable to agree" did not signify that the parties had to go through an attempt to agree as a pre-condition to the existence of a legal entitlement to payment and the commencement of the limitation period.

These decisions demonstrate the danger lurking in limitation periods relating to contract claims in general, and to claims under arbitration clauses in particular. While the general law of limitations will apply to those arbitral claims, the terms of the contract and the terms of the arbitration clause may fundamentally affect the question of when a legal right under the contract or arbitration clause comes into existence.

All the ingredients of the cause of action may have arisen when the party with the claim makes its demand. The party with the claim may have discovered all those ingredients when it makes its claim. If these ingredients are in place then, unless the arbitration clause very clearly suspends the limitation period during settlement or negotiation, it may be unwise to rely on a suspension of the limitation period during that period. Prudence may demand that the claim be issued and the negotiations come later.

See ***Heintzman and Goldsmith on Canadian Building Contracts*** (4th ed.), Chapter 6

Federation Insurance Co. of Canada v. Markel Insurance Co of Canada, 2012 CarswellOnt 4051, 2012 ONCA 218

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