of one of the parties), the aggrieved party must still act within the limitation period. The failure to commence either arbitration or a court action (where arbitration is not mandatory or has not been chosen to finally resolve the dispute) within the limitation period will bar the claim from proceeding.

Alberta Court of Appeal

M. S. Paperny, P. W. L. Martin JJ.A., and R. P. Belzil J. (ad hoc)
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GUEST ARTICLE

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MULTI-TIER DISPUTE RESOLUTION CLAUSES: A VIEW FROM ONTARIO

Alternative dispute resolution ("ADR") clauses are increasingly common in construction contracts, because parties have lost their taste for litigation. Few companies can afford the time, expense, and business interruption that accompany a lawsuit. In addition, and often as a precondition, to litigation or arbitration, construction contracts may provide for mandatory multi-tier dispute resolution. Multi-tiered dispute resolution clauses generally include progressively more involved steps prior to arbitration. These might include a step of meetings between project managers, followed by meetings between executives, followed by a Dispute Resolution Board ("DRB") in an attempt to resolve issues in a more timely and cost-effective manner. The intent, of course, is to reduce time and costs of disputes.

Commencing arbitration prior to completing mandatory pre-arbitration proceedings as stipulated in multi-tier dispute resolution clauses

It is not clear under the law whether pre-arbitration requirements such as negotiations and mediation constitute a true condition precedent to arbitration. In the case of arbitration, tribunals have the right to make determinations as to jurisdiction, and thus they may have different views.

In *Boeing Satellite Systems International Inc. v. Telesat Canada*, Boeing argued that Telesat failed to avail itself of the pre-arbitration conciliation provisions in the contract, which provided for an escalating degree of consultation between various official levels at Boeing and Telesat with a view to settling difficulties under the contract. Boeing's argument was predicated on the claim that the pre-arbitration conciliation provisions constituted a true condition precedent. The Ontario Superior Court held that even if pre-arbitration conditions are not followed, and a party chooses to proceed straight to arbitration, the courts will allow the arbitration to proceed. Similarly, in *Conrad McIntyre Garage v. Savoie* [*Conrad*], the defendant failed to engage in pre-arbitration procedures specified in the Canadian Inter-Company Arbitration Agreement. The court in *Conrad* noted that "the Court is reluctant to deal with issues which may go to the jurisdiction of the arbitrator" and that "an arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement". Thus, the impact of eschewing mandatory steps is entirely in the tribunal's hands.

Tribunals in international arbitrations have taken an unpredictable approach to addressing jurisdictional challenges based on a party's failure to comply with mandatory conciliation steps. Where tribunals have found that preliminary steps are indeed mandatory, they must decide whether to address the issue as a matter of procedure or substantive law. As a substantive matter, a failure to engage mandatory pre-arbitral procedures could

be viewed as a breach of contract, the remedy for which would be damages (difficult, if not impossible, to quantify) or a withdrawal from the contract and dismissal of the claim with prejudice. In view of the purpose of dispute resolution clauses, this appears to be too harsh a result.

More typically, tribunals will treat jurisdictional challenges of this nature as procedural matters. In the face of a failure to comply with a mandatory step, tribunals have taken different approaches to getting to the same place. In some cases, they have ruled that a request for arbitration is valid but inadmissible at the time (without prejudice). In other instances, tribunals have found that they have jurisdiction but stayed proceedings until mandatory steps are satisfied. Finally, it is also within a tribunal's power to simply defer ruling on the issue until its final award on the merits or to factor a party's failure to comply with preliminary steps in its cost award.

Consideration of limitation periods when engaging in multi-tiered alternative dispute resolution processes

Certain common dispute resolution steps may be much more involved and may require much more time than executive negotiations or mediation. For example, referring matters to a DRB or to the Project Engineer for determination is becoming increasingly common such that these procedures may require substantial time for both claim preparation and deliberation, depending on complexity.

Parties often forget that for disputes being resolved by DRBs or Engineer Determinations, the limitation period may continue to run. This can be particularly problematic where matters in dispute are delayed in reaching these stages, because limitations ostensibly begin to run from the time of discoverability of a claim. Often, it may not be feasible to complete all the stipulated dispute resolution steps before the expiration of the limitation period.

That the limitations period in Ontario begins to run at the time of discoverability may be considered trite law, but in the context of multi-tiered dispute resolution provisions and arbitration, matters are not so clear. The argument against the running of limitations from discoverability takes two common forms: 1) section 11 of the *Limitations Act, 2002* acts to suspend the running of limitations until after the third-party deciders have issued their determinations; and 2) limitations do not begin to run until the *right to arbitrate* arises, which may not be until after preliminary dispute resolution steps are exhausted.

The s. 11 argument has been addressed in *Suncor Energy Products Inc. v. Howe-Baker Engineers Ltd.* [*Suncor*], where the contract provided that all disputes were to be resolved through "a three-step mechanism: negotiation, followed by mediation, followed by arbitration". In an attempt to preserve the right to arbitration, it was argued that s. 11 of the Ontario *Limitations Act*, *2002* applied.

> 11(1) If a person with a claim and a person against whom the claim is made have agreed to have an independent third party resolve the claim or assist them in resolving it, the limitation periods established by sections 4 and 15 do not run from the date the agreement is made until
>
> (a) the date the claim is resolved;
>
> (b) the date the attempted resolution process is terminated; or
>
> (c) the date a party terminates or withdraws from an agreement.

In *Suncor,* the court found that s. 11 could not be applied to mean that simply having contracted multi-tier dispute resolution steps is sufficient to suspend the limitation period. This section of the Act was held to apply only "to agreements which have been made after a claim has arisen and the parties, in an attempt to resolve it, have referred it to a third party resolution", and not to pre-arbitration proceedings prescribed by "the original contract reached between the parties, which has a dispute resolution process as part of the overall agreement" after limitation periods have expired.

Likewise, *Sandro Steel Fabrication Ltd. v. Chiesa* [*Sandro*] appears to establish that just because parties are engaged in mandatory multi-tier dispute

resolution, the two-year limitation period set out in the *Limitations Act, 2002* will not be suspended.

In *Sandro*, the court found that the limitation period was suspended because the parties chose to engage in mediation with a third party after the dispute had arisen. Section 11 applies only where a third party is brought in to facilitate resolution and does not operate to suspend limitations periods in the context of executive negotiations and similar steps.

Complicating matters is the 2011 decision of the Ontario Superior Court of Justice affirmed by the Ontario Court of Appeal in *L-3 Communication SPAR Aerospace v. CAE Inc.* [*SPAR*]. The matter dealt with a dispute between parties over a price adjustment. Spar argued CAE was time barred from commencing arbitration, because limitations had expired—it was more than two years from when CAE knew that SPAR would not provide further required data; however, based on the contract, the parties were required to negotiate a price adjustment before commencing arbitration. The court held the limitations clock did not begin to run until after negotiations took place:

> This is because CAE's right to arbitrate did not arise at that time. The two year limitation period could not have begun to run until CAE's right to arbitrate under the Subcontract arose. I agree with CAE that its right to relieve itself of its obligations under the Subcontract did not arise until the parties could not agree on a proper price adjustment. […] Indeed a Request to Arbitrate issued directly after SPAR's alleged failure to provide the data would have been premature if attempts to negotiate a price adjustment had not yet taken place.

We do not believe that *SPAR* fundamentally changes the matter of discoverability as the starting point for limitations; nor is it necessarily at odds with the decisions in *Suncor* or *Sandro*. The critical difference in *SPAR* is that the breakdown of negotiations *was* the event or the dispute giving rise to arbitration rather than an attempt at resolving a separate dispute, which would be the subject of the arbitration. That is to say, in *SPAR*, the breakdown in negotiations was the subject of arbitration, not the prerequisite. Thus, the two seemingly disparate positions may be reconciled.

Lending further credence to this analysis is that, as discussed earlier, mandatory pre-arbitral steps may not, in fact, be mandatory at all. If that is the case, the right to arbitrate, as contemplated in *SPAR*, must arise from the time of discoverability and not after contractual dispute resolution steps have been exhausted. Thus, in Canada, parties may not rely on multi-tiered dispute resolution clauses to protect them from expiring limitations periods. Absent a tolling agreement or a third-party agreement as contemplated by s. 11 of the *Limitations Act, 2002*, parties must engage in contractual dispute resolution steps with one eye on the clock.

CASE SUMMARY

W. Donald Goodfellow, QC, C. Arb.

RECENT ONTARIO CASE ON TTC SUBWAY MAY IMPACT ALBERTA CONSTRUCTION PROJECTS

Advanced Construction Techniques Ltd. v. OHL Construction Canada

A recent decision of an Ontario Master regarding the extension of the Toronto Transit Commission subway may impact future construction projects in Alberta. In *Advanced Construction Techniques Ltd. v. OHL Construction Canada*, Master Donald E. Short of the Ontario Superior Court of Justice, in an interesting (and lengthy) decision, made some comments that may, if adopted by the Alberta courts, have an impact on future construction projects in Alberta.

In this case, once the subcontractor Advanced Construction Techniques Ltd. registered its