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This article contains Mr. Heintzman's personal views and does not constitute legal advice. For legal advice, legal counsel should be consulted.

Is The Commencement Of An Arbitration Claim Also The Commencement Of An Arbitration Counterclaim?

In a recent English decision, the court held that the commencement of an arbitration by the claimant could also amounted to the commencement of the arbitration of any counterclaim. In ***Glencore International AG v (1) PT Tera Logistic Indonesia (2) PT Arpeni Pra,*** the English court

held that if the notice given by the claimant, and the appointment of an arbitrator by the respondent, refer to "claims" and "all disputes" then the notice and appointment are sufficient, under the English ***Arbitration Act**, 1990,* to amount to the commencement of any counterclaim arising from the same facts and which effectively asserts a claim which can be brought into the balance of accounts between the parties.

This decision is obviously of considerable importance for many reasons, and especially limitation purposes. If this decision applies, then the respondent in the arbitration does not have to serve its own notice of arbitration in respect of its counterclaim and may, in effect, shelter under the claimant's notice, if the counterclaim can be brought into account in respect of the claim being made by the arbitral claimant.

Would the same decision be made by a Canadian court?

The English Decision

The claims arose under a shipping contract. Two arbitrations were commenced. In the first arbitration, the Owners gave notice in writing that they commenced "arbitration proceedings against you in respect of their claims under this Contract", appointed an arbitrator and required Glencore to appoint an arbitrator. Glencore responded by appointing a second arbitrator "in relation to all disputes arising under the [contract]". (underlining added)

In the second arbitration, the Owners gave notice in writing that they commenced "arbitration proceedings against you in respect of claims under this Contract", appointed an arbitrator, and required Glencore to appoint an arbitrator. Glencore responded by appointing a second arbitrator "in relation to all disputes arising under the [contract]". In due course in each arbitration, the two appointees then appointed a third arbitrator. (underlining added)

By the time Glencore served its defence and counterclaim submissions in the arbitrations, the limitation period for claims under the contracts had expired. Two members of the arbitral tribunal found that the counterclaims were time-barred. The third member of the tribunal dissented, holding that the notices of commencement of arbitration and the appointments of arbitrators included both claims and counterclaims.

The English decision was based upon section 14(3)-(5) of the English ***Arbitration Act**, 1990* which states as follows:

> (3) Where the arbitrator is named or designated in the arbitration agreement, arbitral proceedings are commenced in respect of a matter when one party serves on the other party or parties a notice in writing requiring him or them to submit that matter to the person so named or designated.
>
> (4) Where the arbitrator or arbitrators are to be appointed by the parties, arbitral proceedings are commenced in respect of a matter when one party serves on the other

party or parties notice in writing requiring him or them to appoint an arbitrator or to agree to the appointment of an arbitrator in respect of that matter.

(5) Where the arbitrator or arbitrators are to be appointed by a person other than a party to the proceedings, arbitral proceedings are commenced in respect of a matter when one party gives notice in writing to that person requesting him to make the appointment in respect of that matter. (underlining added)

Relying on the underlined words, the English court held that the claimant's notice of arbitration and the respondent's appointment of arbitrator, referring to "***claims***" and to "***all disputes arising under the contract,***" stopped the running of time in respect of the counterclaim for the purposes of s 14(4) of the English Act if the claim and counterclaim arise from a single set of facts which effectively create a 'balance of accounts' between the parties. The judge did not deal with the circumstances which would arise in respect of other counterclaims and whether, and in what circumstances, the respondent must issue its own notice of arbitration. The judge held as follows:

> ``In my judgment the reference in the notices to "claims" and to "all disputes arising under the contract" had the effect of referring counterclaims for MV Demurrage, and not just claims for FC Detention, to the arbitrations. The context is one of a contract under which delay was capable of giving rise to money obligations on either side of an account, with a net sum falling for payment. The party commencing the arbitration is in effect asking for an account and asserting that the balance is in its favour. It is further commercially unlikely that the parties would contemplate that MV Demurrage and FC Detention Claims would be separate for the purposes of reference to arbitration, so that only one and not the other would be within a reference unless the parties were more explicit that both were within the reference. The attendant possibility that there could otherwise be separate tribunals reinforces the unlikelihood.``

The specific order that the judge made was as follows:

> ``In circumstances where a claim and a counterclaim arise from a single set of facts giving rise to a balance of accounts or netting-off under a contract, a reference to "claims" and to "all disputes arising under the contract" in notices of appointment of an arbitrator will ordinarily suffice to interrupt the running of time in respect of the counterclaim for the purposes of s. 14(4) Arbitration Act 1996, and does so in this case." (underlining added)

The judge specifically declined to decide whether the word `claims` alone would have had the same effect.

The judge in this case was clearly influenced by commercial common sense under a shipping contract. How far this decision applies outside of those circumstances is unclear. But the decision is clearly an important one which will be cited in the future.

Would the same result arise under Canadian arbitration statutes?

In addition to questions about the scope and effect of this English decision, would the logic of this decision apply in Canada?

Arbitration Statutes

Many Canadian provinces have, in whole or in part, adopted the ***Uniform Arbitration Act*** (UAA") promulgated by the Uniform Law Conference of Canada ("ULCC"). The UAA addressed the limitation period applicable to counterclaims in two ways.

1. Section 23 of that UAA states the various ways in which an arbitration can be commenced. One of the ways that the arbitration may be commenced is set forth in Section 23(1)(a):

> A party to an arbitration agreement serves on the other parties notice to appoint or to participate in the appointment of an arbitrator under the agreement. (underlining added)

Then, section 24 states as follows:

> A notice that commences an arbitration without identifying the dispute is deemed to refer to arbitration all disputes that the arbitration agreement entitles the party giving the notice to refer. (underlining added)

The Commentary to this section says that, **"**The purpose of this is self-explanatory."

2. Section 52(1) of the UAA says that the law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration were a cause of action. So presumably, the limitations statute of a province adopting this sub-section applies to a counterclaim in an arbitration.

These sections are adopted in some, but not all, of the provincial arbitration statutes.

Thus, the arbitration statues in Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia appear to adopt these provisions from the UAA. The limitation statutes in the other common law provinces do not appear to address these issues.

Article 2892 of the Quebec Civil Code says that cross demands and notices to submit a dispute to arbitration constitute judicial applications, and Article 2882 says that any ground of defence may be asserted after prescription even if it could be asserted as direct action.

There are clear differences between section 23 of the UAA, and in the various provincial limitations statutes which adopt that section, and section 14 of the English statute.

<u>First</u>, the Canadian section refers to the disputes that the "party giving the notice" may refer to arbitration. This wording would appear to exclude claims that the respondent might refer to arbitration.

<u>Second</u>, the Canadian section says the effect of that section is "deemed" to be so. The English statute refers to ``a matter`` and ``in respect of that matter``.

Limitations Statutes

The provincial limitations statutes are quite different across Canada. To the author's understanding there are basically three different regimes applicable to limitation periods and counterclaims:

1. In four provinces, the limitations statutes extend the limitation period for counterclaims if an action is commenced, in certain circumstances relating to the connection of the counterclaim to the main action: British Columbia, Alberta, Manitoba, and Newfoundland and Labrador. This provision reflects section 13(1) of the Uniform Limitations Act ("ULA") of the ULCC.
2. The limitations statutes of six provinces and territories do not seem to contain any such extension of the time to commence a counterclaim, and state that the same limitation period which is applicable to actions also applies to counterclaims and set-offs: Nova Scotia, P.E.I., Saskatchewan, Yukon, Northwest Territories and Nunavut. Quebec law appears to adopt the same approach. In Book 8, Prescription, Article 2892 of the Quebec Civil Code says that cross demands (and, as noted above, notices to submit a dispute to arbitration) constitute judicial applications. Article 2882 says that any ground of defence may be asserted after prescription even if it could be asserted as direct action.
3. In Ontario, the limitation statute does not appear to expressly address this issue so far as counterclaims are concerned. One could infer that, therefore, the limitation period for counterclaims is not extended by the original action**.**
4. Presumably, however, the judge-made rule with respect to equitable set-offs (namely that they can be relied upon in the defence and therefore are not caught by the limitations period) would apply in all these cases.

Discussion

The Canadian arbitral and limitation statutes appear to raise a Rubik's cube of possible results. In the absence of a definitive Canadian decision to discuss, now is not the time to answer questions but to raise them. Here are just a few of them:

1. Do the words "in respect of a matter" in the English statute, and the words "the party giving the notice to refer" in section 23 of the UAA (and provincial statutes which adopt it) mean that, in Canada under the provincial limitations statues which adopt section 23

of the UAA, the commencement of arbitration is limited to those claims which the claimant can submit to arbitration, and not those which can be raised by counterclaim?

2. Can the claimant forestall the application of section 23 of the UAA by stating, expressly or by implication, that the arbitral claim does not raise any issue by, or related to, an arbitral counterclaim?

3. If the claims raised by counterclaim are ones that can be "brought into account" within ***Glencore*** decision, why do they not fall within the apparent right of the arbitral respondent to assert an equitable set-off without commencing a counterclaim?

4. What is the basis or effect of the ***Glencoe*** decision?

   Does it mean that the respondent's notice appointing an arbitrator is itself the commencement of a counterclaim if it refers to "all disputes" or words to that effect? If so, that would mean that the words "notice to appoint….an arbitrator" in section 23(1)(a) mean and include the appointment of an arbitrator by the respondent in response to the claimant's demand for the appointment of an arbitrator.

   Does it mean that the provisions of the applicable arbitration statute over-ride the limitations statute, and that, because of the nature of arbitration proceedings, once an arbitration is commenced and arbitrators appointed then the arbitration is commenced for all applicable purposes including counterclaims (as delimited in the ***Glencoe*** decision) notwithstanding the limitations statute?

   How does that approach conform to, say, those sections of Canadian limitation statutes (such as section 19(2) of the Ontario ***Limitations Act**, 2002*) that provide that the limitation period prescribed in the Act applies notwithstanding any other statute?

   Or is that approach consistent with a section such as section 52(1) of the UAA, and the provincial sections that follow it, which state that the provisions of the limitations statute that apply to actions also apply to arbitrations?

   In other words, is the decision in ***Glencoe*** consistent with relationship between arbitral and limitations law established under the UAA?

   If the arbitration statute prevails over the limitation statute (in the sense that the commencement of the arbitration and appointment of arbitrators amount to the commencement of all potential proceedings in the arbitration, at least to the extent of "money obligations on either side of an account, with a net sum falling for payment", to use the words from ***Glencoe*)**, then at least some of the discussion about the effect of the limitation statues on counterclaims in arbitrations may be irrelevant. To the extent that is not the case, however, then:

5. In those provinces and territories whose limitation statutes state that the limitation period applies to set-off, does that mean that the reasoning in the ***Glencoe*** decision does not apply?

6. In four provinces, the limitation statutes expressly provide for the extension of the limitation period if the counterclaim is related to the claim in the original action. However, the arbitration legislation in only two of these Provinces (Alberta and Manitoba) provides, as does section 52(1) of the UAA, that the limitation period for arbitrations is the same as those in actions. Does that mean that in the other two provinces (British Columbia, and Newfoundland and Labrador) that the extension of time to commence a counterclaim does not apply to arbitrations?

One can imagine many other permutations or combinations of these statutory provisions. In addition, in those provinces which have not expressly dealt with some of these issues, arriving at a reasoned conclusion may be even more difficult.

What can be said is that parties to arbitrations should be aware of the pitfalls relating to the limitation period. A party wishing to assert a counterclaim in an arbitration notwithstanding a prescription or limitation period, or a party wishing to preclude the assertion of a counterclaim in an arbitration by reason of prescription and limitation period, must be familiar with the provisions of both the arbitral statute and the limitations or prescription statute, and should consider the inter-relation, if any, between the two.

Glencore International AG v (1) PT Tera Logistic Indonesia (2) PT Arpeni Pra* [*2016] EWHC 82 (Comm)

Arbitration – counterclaim – limitation and prescription periods

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This article contains Mr. Heintzman's personal views and does not constitute legal advice. For legal advice, legal counsel should be consulted.