Leave it to the pros:

Enforcement of exclusion clauses in professional service contracts post-*Tercon*

November 30, 2016

Presented by:
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Outline

1. General principles
2. Exclusion of negligence pre-*Tercon*
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4. Exclusion of negligence post-*Tercon*
5. Tips for professionals
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    2. Executing engagement letter
6. Sample clauses

General principles:
Interpreting exclusionary clauses

General principles

- When interpreting exclusionary clauses, Courts will generally:
  - Give words their true and natural meaning
  - Read in light of contract as a whole
  - Consider commercial context
  - Give effect to parties' intentions
  - Construe clause strictly

Pre-*Tercon*:
Exclusion of negligence

Bloor Italian Gifts Ltd. v. Dixon, 2000 CarswellOnt 1781 (C.A.)

Facts:

- Accountant engaged to review client's financial statements
- Failed to notice discrepancy in unremitted sales tax
- Client underpaid tax in excess of $1.1 million
- Accountant relied on exclusion clause in engagement letter:
  - "Although we will prepare or assist in preparing your financial statements, the statements will be your representations and **you must accept responsibility** for the fairness of such representations…We wish to emphasize that **control over and responsibility** for the prevention and detection of defalcations and other irregularities, errors and omissions **must rest with you**."

Bloor Italian Gifts Ltd. v. Dixon, 2000 CarswellOnt 1781 (C.A.)

Decision:

- Accountant could not rely on clause because he had not met standard of care
- Court read clause in context of accountant's comments, which also appeared in engagement letter:
  - "We have prepared the accompanying balance sheet as at (date) and the statements of income for the (period) then ended from the records of Bloor Italian Gifts Limited and from other information supplied to us by the company. In order to prepare these financial statements **we made a review consisting primarily of enquiry, comparison and discussion of such information**…"
- Accountant could not escape responsibility to make reasonable enquiries and comparisons, and engage in discussion of information provided

The *Tercon* analysis

Tercon Contractors v. British Columbia (Minister of Transportation & Highways), 2010 SCC 4

Facts:

- Case dealt with public procurement process
- Tercon submitted bid for construction of highway
- B.C. instead accepted bid from ineligible tenderer
- Tercon sued and B.C. defended on basis of exclusion clause:
  - "…no Proponent shall have **any claim for compensation of any kind whatsoever, as a result of participating in this RFP**…by submitting a Proposal each Proponent shall be deemed to have agreed that it has no claim"

Decision:

- Majority determined that clause, when properly interpreted, did not apply

Tercon Contractors v. British Columbia (Minister of Transportation & Highways), 2010 SCC 4

- Justice Binnie in dissent (Majority adopts this test)
- Three-part test for determining whether exclusion clause applies:
  1. As a matter of interpretation, does the clause apply to the circumstances?
  2. If yes, was it unconscionable at the time the contract was made?
  3. If applicable and valid, is there a public policy concern (ie. serious criminality or egregious fraud)?

Post-*Tercon*:
Exclusion of negligence

Felty v. Ernst & Young LLP, 2015 BCCA 445

Facts:

- Plaintiff was U.S. citizen in midst of divorce from Canadian husband
- EY (U.S. accountant) hired to advise of any U.S. tax consequences of proposed share transfer in divorce settlement
- EY negligently advised plaintiff that tax liability would be nil, when in fact was more than $500,000
- EY relied on exclusion clause in standard form engagement letter

Felty v. Ernst & Young LLP, 2015 BCCA 445

Exclusion Clause:

- "EY's **total liability for any claim** arising out of the performance of the Services, regardless of the form of the Claim**, shall in no event exceed an amount equal to the total fees paid to EY for the services**. This clause shall not limit EY's liability for death, personal injury or property damage caused by the negligent acts or omissions of EY and its partners and staff, or for loss or damage caused by their fraud or willful misconduct."

Felty v. Ernst & Young LLP, 2015 BCCA 445

Decision: Exclusion clause enforced

- EY's liability for negligence was successfully limited by clause
- Plaintiff entitled to $15,000, amount paid for fees
- Regarding public policy, provision of negligent tax advice not "so reprehensible"
- Issue of unconscionability did not arise because plaintiff obtained legal advice and preferred EY to other accountants
- Although clause made no express exclusion of negligence, language was sufficiently broad

Swift v. Eleven Eleven Architecture Inc., 2014 ABCA 49

Facts:

- Architecture firm hired to design plaintiff's home
- Contract included clause limiting plaintiff's recovery to $500,000 for claims arising solely and directly out of defendant's duties
- Defendant then sub-contracted structural designs to engineering firm
- Serious deficiencies later discovered in engineer's design

Swift v. Eleven Eleven Architecture Inc., 2014 ABCA 49

Exclusion clause:

- **"**With respect to the provision of services by the Designer to the Client under this Agreement, the Client agrees that **any and all claims** which the Client has or hereafter may have against the Designer **which arise solely and directly out of the Designer's duties and responsibilities pursuant to this Agreement** (hereinafter referred to in this Article 3 as "claims'), whether such claims sound in contract or in tort, shall be limited to the amount of $500,000."

Swift v. Eleven Eleven Architecture Inc., 2014 ABCA 49

Decision: Exclusion clause not enforced

- Engineer negligently misrepresented that he had complied with obligations under contract
- Negligent misrepresentation not explicitly covered by exclusion clause
- Also, misrepresentation that engineer complied with building code raised public policy concerns
- Plaintiffs entitled to recovery in excess of $500,000

Tips for professionals

Form of the engagement letter

- Use explicit language
- Specify:
  - Types of liability excluded or limited
  - Types of damages excluded or limited
  - Extent of the exclusion
  - Whether liability is several or joint and several
- Ensure terms are broad enough to cover all professional services you may be asked to provide
- Consider **Bolding** or CAPITALIZING exclusionary language

Executing the engagement letter

- Send in advance of commencing engagement
- Give client time to review and ask questions
- Bring clause to client's attention
- If sending by e-mail, clearly set out steps to be taken
- Recommend independent legal advice to unsophisticated parties
- Never begin substantive work until engagement letter is signed
- Establish formal execution protocols
- Write memo to file

Sample clauses

Sample clause #1

The liability of [professional] to [client] for a claim related to professional services provided pursuant to this agreement in either contract or tort is limited to the extent that such liability is covered by errors and omissions insurance in effect from time to time including the deductible therein, which is available to indemnify [professional] at the time the claim is made.

In any action, claim, loss or damage arising out of the engagement, [professional]'s liability will be several, and not joint and several, and [client] may only claim payment from [professional]'s share of the total liability based on degree of fault.

Sample clause #2

[Professional]'s total liability for any claim arising out of the performance of the Services, regardless of the form of the Claim, shall in no event exceed an amount equal to the total fees paid to [professional] for the Services. This clause shall not limit [professional]'s liability for death, personal injury or property damage caused by the negligent acts or omissions of [professional] and its partners and staff, or for loss or damage caused by their fraud or willful misconduct.

Final thoughts and questions?

Thank you

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Why your ADR clause may be costing you money

Arbitration agreement best practices

30 November 2016

Questions to consider

- ✓ Domestic or international?
- ✓ Nature of the dispute?
- ✓ *Ad hoc* or institutional?
- ✓ Applicable law?
- ✓ "Seat" and language?
- ✓ Institutional rules or draft your own?
- ✓ How many arbitrators?
- ✓ Appointing authority?
- ✓ Right of appeal?
- ✓ Confidential?
- ✓ Costs?

International or domestic arbitration

International arbitration

- Arbitration applied to disputes between parties with places of business in different states.
- Each province and territory, with the exception of Quebec, has adopted legislation governing international arbitration (e.g. *International Commercial Arbitration Act*, RSO 1990, c I.9 (Ontario)).
- *Commercial Arbitration Act*: Federal legislation that implements the *Commercial Arbitration Code*, based on the UNCITRAL Model Law.
  - Applies only where one party is the Crown, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters.
  - "commercial arbitration" under the *Code* includes claims under certain sections of NAFTA, Canada-Chile FTA, Canada-Peru FTA, Canada-Colombia FTA and certain other claims listed in the *Act*.

http://laws-lois.justice.gc.ca/eng/acts/C-34.6/page-1.html#h-3

International or domestic arbitration

Domestic arbitration

- Arbitration applied to disputes between parties with places of business in Canada.
- Each province and territory, with the exception of Quebec, has adopted legislation governing domestic arbitration (e.g. the *Arbitration Act*, *1991*(Ontario)).
- Legislation governing international arbitration and domestic arbitration may apply simultaneously depending on the nature of the dispute and the parties.

What kind of dispute resolution clause do you need?

- **Pre-dispute clause**: A dispute resolution agreement that does not envisage a specific dispute.
- **Post-dispute clause**: A dispute resolution agreement that defines, in detail, a specific dispute.
- **Multi-step clause**: A dispute resolution clause that specifies particular steps the parties must follow when a dispute arises, which usually includes both mediation and arbitration clauses.
  - Pursuant to Canadian law, if the parties do not follow all of the steps in a multi-step clause, a panel and/or single arbitrator will not have jurisdiction to hear the matter.

Ask yourself…

Questions	Options/Cautions
What kind of disputes do you want to arbitrate?	(i) Arbitrate disputes relating to the entire business relationship; or (ii) Arbitrate disputes arising under a specific contract.
Under what law is the arbitration to be conducted?	It is recommended that the arbitration be conducted under the law of the jurisdiction of the place ("seat") of the arbitration, as selected by the parties.
What are the seat and language of the arbitration?	It is important that the "seat" of the arbitration be in a jurisdiction with modern arbitration law and an arbitration-friendly court system. The legal culture of the jurisdiction may influence the way the arbitration is conducted, available enforcement measures, and eligibility of appeals. Hearings do not need to take place in the seat of the arbitration.

Ask yourself…

Questions	Options/Cautions
How many arbitrators will there be and how will they be selected?	(i) A single arbitrator: A single arbitrator is appointed by the parties or an institution; or (ii) A panel of 3 arbitrators: Each party appoints an arbitrator and the two appointed arbitrators appoint a Chair.
Do you want to specify an appointing authority?	An appointing authority does not administer the arbitration and may increase efficiency where one or more parties are being uncooperative.
Do you want to specify additional qualifications for the panel?	Having too many, or too restrictive, qualifications for arbitrators may result in difficulty locating appropriately qualified individuals, and may give rise to additional disputes regarding eligibility.

Ask yourself…

Questions	Options/Cautions
Do you want an institution to administer the arbitration?	Institutional arbitrations are not necessarily required to be conducted pursuant to the institution's arbitration rules. Ad hoc arbitrations can be conducted pursuant to institutional rules and/or rules created by the parties, and are otherwise governed by the applicable Arbitration Act.
Do you want to specify any specific procedures to be followed in the arbitration?	(i) The arbitral panel may determine the procedure if the parties do not. (ii) The parties may wish to specify institutional rules or their own rules relating to certain areas of procedure (e.g. IBA Rules on the Taking of Evidence in International Arbitration).
Confidentiality?	Arbitrations conducted under the *Arbitration Act, 1991* (Ontario) are private however, they are only confidential as between the parties. Confidentiality must be implemented by the rules selected or the wording in the agreement.

Some additional considerations

What do the parties want to include in the agreement or leave until the pre-hearing conference?

- Does the arbitration clause apply to all agreements between the parties?
  - This is particularly relevant when implementing an ADR Policy.
    - Is the arbitration clause in the Master Agreement between the parties?
    - Does the same clause appear in all agreements between the parties?
- Do the parties want a reasoned award or agree to dispense with reasons?
- How are the costs to be divided between the parties?
- Does the arbitrator have the jurisdiction to award interest?
- Do the parties want to include or exclude a right of appeal?
- Do the parties want to conduct a document-only arbitration?
- Do the parties want the ability to bring *ex parte* applications for interim relief?

What if…

the agreement does not specify an appointment procedure, rules or an institution?

- **The provincial legislation applies**:
  - How many arbitrators will conduct the arbitration?
    - There shall be a single arbitrator.
      - s. 9, *Arbitration Act, 1991* (Ontario)
  - What if the parties can't agree on the arbitrator(s)?
    - On any party's application, the Court may appoint the arbitrator(s).
      - s. 10, *Arbitration Act, 1991* (Ontario)
- Some challenges:
  - **Confidentiality/Privacy**: Without an appointment procedure, a party valuing confidentiality and/or privacy may be forced to compromise on an arbitrator in order to keep the matter out of the public record, even prior to the matter being heard.
  - **Expertise**: Arbitrators, unlike judges, can be selected for their familiarity with the material at issue. If a single arbitrator is appointed under the *Arbitration Act, 1991* (Ontario) or the Court appoints the arbitrator, the parties may not reap this benefit.

Model domestic dispute resolution clauses

- ADRIC Basic Institutional Dispute Resolution Clause

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, will be finally resolved by arbitration under the Arbitration Rules of the ADR Institute of Canada, Inc. [or the Simplified Arbitration Rules of the ADR Institute of Canada, Inc.] The Seat of Arbitration will be [specify]. The language of the arbitration will be [specify].

http://adric.ca/arbrules/

Model domestic dispute resolution clauses

- ADR Chambers Sample Institutional Arbitration Clause

Any dispute, controversy or claim arising out of or relating to this contract including any question regarding its existence, interpretation, validity, breach or termination or the business relationship created by it shall be referred to and finally resolved by arbitration under the ADR Chambers Arbitration Rules. The place of the arbitration shall be [specify].

The Parties may wish to consider adding one or all of the following options:

1. There shall be [1 or 3] arbitrators. [If 3, state whether each party may nominate an arbitrator and how the third arbitrator is to be selected.]
2. The language of the arbitration shall be [specify].
3. [In "baseball style" arbitration only] The Arbitral Tribunal must select its award from one of the final offers made by each of the Parties, in its entirety and without modification. The Arbitral Tribunal need not provide detailed reasons for its award.
4. An oral hearing need not be held.
5. There will be no appeal from the decision of the Arbitral Tribunal on questions of fact, law, or mixed fact and law.

http://adrchambers.com/ca/arbitration/regular-arbitration/model-clause/

Model domestic dispute resolution clauses

- *Ad Hoc* using Institutional Rules and Appointing Authority

All disputes arising out of or in connection with this agreement, or in respect of any legal relationship associated with or derived from this agreement, will be finally resolved by arbitration under the Arbitration Rules of the ADR Institute of Canada Inc. [or the Simplified Arbitration Rules of the ADR Institute of Canada Inc.] ("Rules"). Pursuant to section 1.5 of the Rules, the parties agree that the arbitration shall not be administered by the ADR Institute of Canada Inc. except that all matters related to the formation of the arbitral tribunal, including substitutions, challenges, or the appointment of an interim arbitrator, if required, shall be governed by Article 3 of the Rules. The Seat of Arbitration will be [specify]. The language of the arbitration will be [specify].

Model domestic dispute resolution clauses

- *Ad Hoc* using Institution only as Appointing Authority

The Parties agree that any and all disputes, disagreements or differences between them relating to this agreement, to any or all of its terms, or to the business relationship to which this agreement relates, including any dispute, disagreement or difference relating to the validity, enforceability or applicability of this agreement or any of its terms, shall be submitted to arbitration. The seat of the arbitration shall be Toronto, Ontario. The arbitration shall be conducted in accordance with the arbitration laws of Ontario and the *Arbitration Act, 1991*, S.O. 1991, c. 17. The arbitration shall be final and binding with no right of appeal.

Either Party may commence the arbitration by delivering to the other Party a Notice of Request to Arbitrate (or similarly titled document), which shall:

a) identify and briefly describe the dispute to be submitted to arbitration,

b) set out the position of the party delivering the document with respect to the dispute;

c) set out the relief claimed in the arbitration by the party delivering the document.

The Notice of Request to Arbitrate shall be accompanied by a list of one or more proposed arbitrators. If, after 14 days from the delivery of the Notice of Request to Arbitrate, the Parties have failed to agree on an arbitrator or arbitration tribunal the arbitration shall be conducted by a single arbitrator appointed by ADR Institute of Canada Inc. ("ADRIC") within 14 days of the application of either party to ADRIC requesting that an appointment be made. Subject to the foregoing, ADRIC shall serve as the appointing authority for the arbitration and Rule 3 of the ADRIC Arbitration Rules shall apply with respect to the replacement or substitution of arbitrators, challenges to arbitrators and requests for the appointment of an interim arbitrator.

Model domestic dispute resolution clauses

- ADR Chambers Multi-Step Dispute Resolution Clause

If any dispute occurs between the parties relating to the application, interpretation, implementation or validity of this Agreement, the Parties agree to seek to resolve the dispute or controversy through mediation with ADR Chambers before pursuing any other proceedings. Nothing herein shall preclude any Party from seeking injunctive relief in the event that the Party perceives that without such injunctive relief, serious harm may be done to the party. Any Party to the dispute may serve notice on the others of its desire to resolve a particular dispute by mediation. The mediator shall be appointed by agreement between the Parties or, if the Parties cannot agree within five days after receipt of the notice of intention to mediate, the mediator will be appointed by ADR Chambers. The mediation will be held at [city]. The Parties agree to attempt to resolve their dispute at mediation. The costs of the mediator shall be shared equally by the Parties. If the dispute has not been resolved within thirty days of the notice of desire to mediate, any Party may terminate the mediation and proceed to arbitration as set out below.

Subject to the mediation provisions set out above, if any dispute or controversy occurs between the Parties relating to the interpretation or implementation of any of the provisions of this Agreement, the dispute will be resolved by arbitration at ADR Chambers pursuant to the general ADR Chambers Rules for Arbitration. Any Party may serve notice of its desire to refer a dispute to arbitration. [The arbitration shall be conducted by a single arbitrator.] The arbitration shall be held in [city]. The arbitration shall proceed in accordance with the provisions of the Arbitration Act (province). The decision arrived at by the arbitrator(s) shall be final and binding and no appeal shall lie therefrom. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction. The costs of the arbitrator shall be divided equally between the parties.

http://adrchambers.com/ca/arbitration/regular-arbitration/model-clause/

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Keeping secrets secret:

Protecting confidential information during litigation

November 30, 2016

Presented by:
Chloe Snider

Outline

1. **Problem**
   - The production and filing of documents containing confidential business information during litigation

2. **Solutions**
   I. The Deemed Undertaking Rule
   II. Protective Orders
   III. Sealing Orders
   IV. Confidentiality Agreements

The problem

- Exposure of confidential information to competitors and the public

- **Discovery:** parties must disclose "every document relevant to any matter at issue"
  - Includes commercially sensitive information
  - Confidential information may be used by competitor or become publicly available

- **Open court principle:** documents filed with the court are publicly accessible
  - The public is entitled to see any documents filed in civil court (s. 137(1) *Courts of Justice Act*)

I. The deemed undertaking rule

- All parties are deemed to undertake not to use evidence or information obtained through discovery for any purpose other than the proceeding in which the evidence was obtained (Rule 30.1.01(3))
- Breach of undertaking can lead to contempt of court, striking out pleadings

The deemed undertaking rule

- Limitations to the Deemed Undertaking Rule
  - Does not apply to information filed in the court file or referred to in open court
  - Other party still *knows* the information
    - Can misuse information; difficult to "unlearn"
    - Does not prevent the use of the information by a competitor so long as it does not use the information to commence a new lawsuit

II. Protective orders

- Can be used where the deemed undertaking rule does not provide enough protection
- Protects confidentiality of documents and information exchanged during discovery process
- Court must balance the right to disclosure against the right of a party to protect sensitive and confidential information
- The party seeking the order must show:
  - (i) The information is confidential and commercially sensitive and a competitor could obtain an unfair advantage or improve its competitive position
  - (ii) The party would risk serious financial harm if information is made available to a competitor
  - (iii) The risk of harm is real and substantial, not speculative
- Will not be granted if the responding party would be unduly prejudiced

  Eisses v CPL Systems Canada Inc., 2008 CarswellOnt 301

Protective orders: "Counsel's Eyes Only"

- "Highly unusual" order that keeps information private during discovery
- Typically, confidential information can only be reviewed by opposing counsel and experts – **not** the parties
- Has the potential to interfere with the lawyer-client relationship

Example: "Counsel's eyes only" order

- Parties designate commercially sensitive material as "Confidential -Counsel's eyes only"
- Such information may only be reviewed by counsel and independent third parties who sign a confidentiality undertaking
- Counsel may bring a motion if they disagree with the characterization of information as confidential, or believes disclosure to client is essential for conduct of the action

BASF Canada Inc. v Max Auto Supply (1986) Inc., 1999 CarswellOnt 505

III. Sealing orders

- Sealing orders protect confidentiality of documents filed with the court
- Seal information from public view, including the media
- S. 137(2) of the *Courts of Justice Act*: a court may order any document filed in civil proceedings be treated as sealed and not form part of the public record
- Balancing open court principle vs. confidentiality
- Difficult threshold to meet

Sealing orders - The test

I. **Sealing order is necessary in order to protect a serious risk to an important commercial interest**

This requires demonstrating:

a) There is a real and substantial risk that poses a serious threat to the commercial interest in question
   - Risk cannot be speculative (*Fairview Donut v TDL Group Corp.,* 2010 ONSC 789)

b) The "important commercial interest" goes beyond the party seeking the order – there must be a **public** interest in confidentiality; and
   - Private interest in confidentiality not enough (although there is a "general commercial interest of preserving confidential information)

c) There are no reasonable alternatives available

Sierra Club of Canada v Minister of Finance, 2002 SCC 41

Sealing orders - The test

II. **The benefits of the confidentiality order outweigh its deleterious effects**

- Balances the salutary effects on the rights of a litigant to a fair trial vs. the deleterious impact on the public interest in open and accessible court proceedings
- Open court principle is a basic tenet of our legal system

Sierra Club of Canada v Minister of Finance, 2002 SCC 41

Sealing order - Application

- Can be used to protect the confidential information of third parties
  - *Andersen v St Jude Medical Inc.,* 2010 ONSC 5191
- May protect details of manufacturing process or the supplier's process
  - *Eli Lilly & Co. v Apotex Inc.,* 2008 FC 892
- Certain contexts (i.e class actions, municipal RFPs) warrant more emphasis on the open court principle
  - *Fairview Donut v TDL Group Corp.,* 2010 ONSC 789; *Inzola Group Ltd. v Brampton (City),* 2014 ONSC 1301

IV. Confidentiality agreements

- A practical alternative
- Parties can agree what information will be accessible and to whom

Confidentiality agreements – Example

- Any Party may designate any document served in this action, including transcripts and exhibits to examinations for discovery, as “Confidential Information”
- Confidential Information shall only be disclosed to and used by listed Authorized Persons
- Confidential information shall not be disclosed during the course of the Action or any time after its resolution
- Confidential information can only be filed with the Court in a sealed envelope and is subject to a motion for a sealing order
- Confidential information must be returned or destroyed within 90 days of conclusion of action

Practical tips

1. Determine whether litigation could expose confidential information
2. Consider protection strategies at the outset
3. High threshold for Protective Order and Sealing Order – still a factor in determining pros and cons of litigating

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