Arbitration - Canada

Stay for oppression proceedings pending arbitration of contract claims

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January 05 2012

A potential jurisdictional tug-of-war between courts and arbitration tribunals concerning their respective roles in shareholder disputes, involving both statutory and contractual claims, has been averted. Following in the footsteps of an earlier British Columbia court decision in *142560 Ontario Inc v 636381 BC Ltd*,(1) the Supreme Court of British Columbia ruled that a claim for statutory oppression relief should be stayed until the underlying issue of the proper interpretation of a unanimous shareholder agreement be determined by arbitration.

Background

The parties were engaged in a dispute over the operations of a business owned and operated by a company incorporated under the British Columbia Business Corporations Act. The parties were shareholders in the company and had entered into a shareholders' agreement that contained a mandatory arbitration clause to resolve disputes "relating to the interpretation or implementation of any of the provisions of" the shareholders' agreement.

One party commenced court proceedings in the Supreme Court of British Columbia, invoking the statutory oppression remedy and seeking the winding-up of the company under the act. Citing the arbitration clause, the other party applied to the court for a stay of proceedings under the act.

Decision

The court found that the central dispute concerned the interpretation of the shareholders' agreement, an issue that fell squarely within the scope of the arbitration agreement. However, the court followed an earlier British Columbia Court of Appeal decision, *ABOP LLC v Qtrade Canada Inc*,(2) in which it had determined that the granting of relief under the oppression sections of the Business Corporations Act fell within the exclusive jurisdiction of the courts, but that court proceedings should be stayed until an arbitrator determined underlying issues of fact, including the interpretation of the shareholders' agreement. The court granted the stay of proceedings, but left it open for any remaining issues under the act to proceed after the arbitration is concluded.

Comment

This case reflects what appears to have become standard practice in British Columbia: to manage interactions between the courts and arbitration tribunals in the context of shareholder disputes involving both contractual and statutory claims.

There have been a series of international arbitrations under unanimous shareholders' agreements between Canadian and foreign investors, intended to be precursors to statute-based oppression court proceedings. In each case, the tribunal has:

- made declarations as to the proper interpretation of the shareholders' agreement;
- made declarations of breach; and
- awarded contractually based remedies.

In each case, the claimants' intention is that the arbitrators' determinations be determinative of those issues, and binding in the context of the oppression proceedings. The court will be asked to grant statutory remedies based on those findings. Despite the fact that this protocol results in multiple proceedings between the same parties arising out of the same underlying facts, the risk of re-litigating issues and inconsistent findings are minimised.

In some instances parties to disputes arising out of the affairs of closely held corporations may not find the existing protocol acceptable and may wish to have their disputes resolved in a single proceeding. One way to accomplish this is to agree that, despite the agreement to arbitrate, the entirety of any disputes involving requests for statutory relief will be determined by the applicable court. In at least one instance, the parties made a supplemental agreement expressly confirming their intention that the arbitrator have jurisdiction to award statutory relief, waiving any defence to enforcement based on want of jurisdiction to grant statutory relief and also agreeing – if necessary – to consent to a court judgment on whatever terms the arbitrator finds appropriate. The efficacy of such an agreement has not been tested before a court.

The British Columbia courts' approach in *ABOP* is not necessarily followed in other jurisdictions within Canada, and may not be appropriate under other Canadian corporate statutes.

For further information on this topic please contact Gerald W Ghikas at Borden Ladner Gervais LLP by telephone (+1 604 687 5744), fax (+1 604 687 1415) or email (gghikas@blgcanada.com).

Endnotes

(1) [2011] BCJ no 1268.

(2) 2007 BCCA 290 (for further details please see "Court of appeal confirms commitment to arbitrate").

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