Canadian litigants battle over scope of arbitration clauses seeking juridical advantages

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In Canadian courts, arbitration agreements are broadly interpreted and if a dispute could arguably fall within the scope of an arbitration clause, the court should refer the parties to arbitration. At the very least, the court should permit the arbitrator to determine whether the claim falls within the scope of the arbitration clause.

Further, Article 8 of the UNCITRAL Model Law in the Ontario *International Commercial Arbitrations Act ("ICAA")* requires the court to refer a matter to arbitration where an action is brought in a matter which is the subject of an arbitration agreement. In local arbitrations, s.7(1) of the *Arbitration Act* requires a court to stay the action of a party to an arbitration agreement except in the limited circumstances in s. 7(2).

In spite of this apparent judicial and legislative clarity, there is a plethora of litigation over the scope of arbitration clauses because arbitration clauses tend to be drafted either to maximize the drafter's juridical advantage or as a hard-fought compromise between parties of equal bargaining power. The cases reviewed here are just the tip of the iceberg.

In *Greenfield Ethanol Inc. v. Suncor Energy Products Inc.*, 2007 CanLII 33118, Justice James Spence applied the oft-cited Ontario Court of Appeal decision in *Dalimpex Ltd. v. Janicki* 2003 CanLII 34234 to conclude that an arbitration clause was intended to include all disputes between the parties. In *Dalimpex*, the appeal court held that even oppression claims could be the subject of arbitration unless the language of the arbitration clause clearly excluded them. To the same effect is the Court of Appeal's decision in *Woolcock v. Bushert* 2004 CanLII 35081.

In *Dancap Productions Inc., v. Key Brand Entertainment, Inc.*, 2009 ONCA 135, the Ontario Court of Appeal again applied the deferential approach to arbitration. The case involved Key Brand's acquisition of the Toronto Canon and Panasonic Theatres and their management by Dancap. A "Term Sheet Agreement" was silent on arbitration. However, a shareholders' agreement provided for mandatory arbitration and exclusive jurisdiction of courts in California. Dancap sought to restrain alleged violation of the Term Sheet. Key Brand sought a stay of the action on the basis of the arbitration clause in the shareholders agreement.

Justice Robert Sharpe held that "[w]hile the issue of whether the dispute between the parties is covered by the [agreement] is by no means free from doubt . . . it is at least arguable that the arbitration clause governs the core issue raised in the action." Accordingly, the Court of Appeal directed that the arbitrator should determine the scope of the arbitration and the Ontario action was stayed.

When the claims in the action clearly fall outside the scope of the arbitration clause, the Court will not grant the stay. In *Patel v. Kanbay International Inc.*, 2008 ONCA 867, the Ontario Court of Appeal refused to stay a wrongful dismissal and negligent misrepresentation action under Art. 8 of the *ICAA* on the basis that the wrongful dismissal claims are not covered by the *ICAA* and the arbitration clause in the shareholders' agreement was only intended to resolve disputes over "transactions". As the action did not deal with transactions, it was clearly outside the scope of the arbitration clause.

In *Norton v. Peel Financial Holdings Limited*, 2007 CanLII 59454, the parties were involved in arbitration for years and reached an interim settlement which included an arbitration clause as to implementation of the settlement. Justice Colin Campbell considered whether the action should be stayed under section. 7 of the Ontario *Arbitration Act*. As it was not clear whether the plaintiff's claims fell within the arbitration clause, Justice Campbell adjourned the stay motion pending the arbitrator's decision as to whether the new issues fell within his jurisdiction.

In *Pandora Select Partners LP v. Strategy Real Estate Investments Ltd.* [2007] O.J. No. 993, the plaintiff sought relief from oppression under the *Ontario Business Corporations Act.* ("OBCA") and the defendant sought a stay under Article 8 of the *ICAA*. Justice Joan Lax refused the stay on the basis that "the arbitration clause would need to have much more explicit language" to encompass the determination of the statutory obligations and remedies under the *OBCA*. Similar conclusions were reached in *Bouchan v. Slipacoff*, 2009 CanLII 728 and in *Lansens v. Onbelay Automotive Coatings Corp.*, 2006 CanLII 51177, both involving shareholder disputes in which *OBCA* remedies were sought. In both cases, the defendant's delay in seeking a stay was a relevant consideration.

In *Smith Estate v National Money Mart* [2008] OJ No 4327, the Ontario Court of Appeal declined to stay a class action which claimed improper day loan charges in favour of a mandatory arbitration clause in the loan agreement, upholding a decision of Justice Paul Perell. The decision was the culmination of a three-year litigation saga. Sections 7 and 8 of the *Consumer Protection Act, 2002*, which permit consumers to participate in a class action even if the contract contains an arbitration clause, were applicable.

Litigants understandably look for every available juridical advantage. The forum where the dispute is determined may significantly impact its outcome. Therefore, parties to arbitration clauses, particularly those seeking equitable or statutory remedies, will continue to institute court actions if there is a potential advantage. Conversely, defendants

continue to bring motions to stay in favour of mandatory arbitration.

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