ARBITRATION

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Arbitration Clauses: Be Specific and Don’t Delay

The precision of language and the timing of assertion of right can affect the protection afforded by an arbitration clause.

Clauses in corporate agreements governing termination, dispute resolution, and the like, are often drafted in a hurry or borrowed from precedent. And these clauses are the ones to undergo the greatest scrutiny when the agreement is litigated. The question often asked is, How broadly or narrowly can the terms be construed? How much protection do they offer?

This issue came before the Ontario Superior Court of Justice in Bouchan v. Slipacoff,¹ a dispute regarding the scope of an arbitration clause. In that case, the Court found the plaintiffs’ oppression remedy claim under Ontario’s Business Corporations Act² to be beyond the scope of protection afforded by an arbitration clause. The Court also found that, in any event, the defendants had waived their right to arbitration by delaying bringing a motion to stay the action under Ontario’s Arbitration Act.³
This case is of note to all practitioners involved in drafting or litigating corporate agreements because it suggests that courts will require specific language in an arbitration clause to deprive a party of statutory remedies, such as those available under the OBCA. It also suggests that any delay in asserting a right to arbitration can be fatal.

Background

The facts of the case between the two Sarnia (Ontario) dentists Bouchan and Slipacoff are uncomplicated. In 2006, Bouchan and his numbered company entered into an agreement to purchase a 25 per cent interest in Slipacoff’s professional corporation and a 25 per cent interest in a dental hygiene practice. To finance the purchase, Bouchan secured two bank loans of approximately $600,000, guaranteed by the professional corporation.

Bouchan and Slipacoff entered into two shareholder agreements. The agreements set out, among other things, Bouchan’s compensation, which was a mix of billings, bonuses and/or dividends from the professional corporation and salary. The agreements also included a provision that required that matters “concerning the interpretation of [the] agreement or any part thereof [emphasis added]” be resolved by way of arbitration, and they imposed a share valuation process in the event of default.

In 2008, Bouchan was diagnosed with a major depressive disorder and was advised by his doctor to stop practising. Bouchan alleged that when he told Slipacoff of his ailment, Slipacoff advised him to leave the practice and offered to buy back the shares in the professional corporation and hygiene practice for $200,000. Bouchan refused Slipacoff’s offer and left the practice. Bouchan’s bank loans went into default. Slipacoff ceased all payments to Bouchan.

Bouchan brought an action for damages (outstanding bonus and dividend payments and salary), punitive damages and an order that Slipacoff purchase his shares pursuant to the oppression remedy provision of the OBCA.

After delivering a statement of defence and counterclaim, responding to Bouchan’s demand for particulars and delivering a request to admit, Slipacoff proposed that the parties submit their dispute to arbitration, according to the shareholder agreements. Bouchan refused. Slipacoff brought a motion to stay Bouchan’s action under the Arbitration Act.

The Decision

Bouchan argued that the arbitration clause applied only to the interpretation of the agreement and not to his claim for relief from oppression. Slipacoff, on the other hand, argued that courts have broadly interpreted arbitration agreements containing language such as “in connection with” or “related to” and that the word “concerning” in the relevant arbitration clause should allow for a broad interpretation.

Justice O’Marra acknowledged the judicial trend toward upholding arbitration where an arbitration clause is capable of bearing two interpretations. However, he found that Bouchan’s claim for relief under the oppression remedy clearly fell outside the ambit of the arbitration clause. The Court agreed with Bouchan that that element of the dispute could not be resolved by way of an interpretation of the agreement. While Justice O’Marra found that Bouchan’s claim for damages fell within the arbitration clause, he held that it would not be reasonable to stay those claims and not others because doing so would subject the parties to a multiplicity of proceedings and would be inefficient.

The Court also held that Slipacoff, by failing to bring his motion to stay at the earliest opportunity, had unduly delayed in bringing his motion. The Court observed that “if the defendants did have a right to have the issues in this action determined by an arbitrator, they abandoned such right when they took steps within this action.”

Analysis

Courts are clearly reluctant to deprive parties of statutory remedies, including those under the OBCA, absent express language in an arbitration agreement indicating that the parties intended to resolve these types of claims through arbitration. This case illustrates the court’s willingness to read broad language narrowly to avoid what was clearly viewed to be an unintended result. The result in this case drives the litigator’s caution that parties entering into an agreement would be well-advised to spend more time in the boardroom focusing on technical terms and scrutinizing boilerplate language to avoid time in the courtroom later on.
Parties are also cautioned not to delay asserting their claim to arbitration. Justice O'Marra's obiter comment about a waiver of rights through delay appears to have breathed life into the notion that any steps taken by a defendant to “atorn” to litigation before bringing a motion to stay the action can preclude a request for arbitration. This was precisely the (successful) argument of the plaintiff in the case of Sala v. Jack Aaron & Co. Referring to Bouchan, Justice Ray found that the defendant waived its rights to arbitration as a result of a five-month delay in bringing its motion to stay. The Court found that, alternatively, the defendant’s decision to assert its rights by counterclaim rather than by relying on the relevant arbitration clause and bringing a motion to stay amounted to “an estoppel by conduct”.

The lesson from these two cases is that a party seeking to invoke an arbitration clause should do so at its earliest opportunity.

4. Section 7(2) of the Arbitration Act permits a court to deny a stay of proceedings on a limited number of grounds, including undue delay. Supra note 1 at para. 32.
6. Ibid. at para. 13.