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Court's CCAA supervision trumps forum selection clause

An ongoing insolvency proceeding under the *Companies' Creditors Arrangement Act* can now be added to the short list of circumstances in which a court will decline to follow a forum selection clause in a commercial contract.

In *Re Nortel Networks Corporation et al*, 2015 ONSC 1354, Justice Newbould refused to lift the stay of proceedings in the Nortel insolvency in order to allow a creditor, SNMP Research, Inc. (SNMPRI), to sue Nortel in the U.S. District Court for Delaware, holding that "a *CCAA* court should not lightly lose control of the process whereby claims against the debtor are to be determined".

SNMPRI had brought pre-filing claims and post-filing claims against both the Canadian and U.S. Nortel debtors, alleging that Nortel made unauthorized use of the software that it develops and distributes. While the pre-filing claims had to be heard in a *CCAA* court, SNMPRI intended to sue the Canadian debtors for post-filing claims alongside the U.S. debtors in a jury trial in Delaware.

In deciding the motion, Newbould J. followed the "single control" model of insolvency proceedings, adopted by the Supreme Court of Canada in *Sam Lévy & Associés v. Azco Mining Inc.*, 2001 SCC 92, which held that it was preferable that all litigation relating to an insolvent debtor be dealt with in one jurisdiction, in order to prevent a "free for all" between creditors.

Newbould J. also considered the Court of Appeal's decision in *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, which set out the factors to consider in deciding when to depart from a forum selection clause in a commercial contract. He identified two factors as applicable: when circumstances arise that are outside the contemplation of the parties, and when a forum selection clause would frustrate a clear public policy.

In this case, the forum selection clause was part of the 1999 licensing agreement between SNMPRI and Nortel. It was impossible for the parties to contemplate that Nortel would seek insolvency protection 10 years later.

Justice Newbould recognized that a *CCAA* court exercises a public policy role on behalf of all creditors, which takes priority over the private commercial interests reflected in the forum

selection clause. He noted that an American proceeding could undermine the policy objectives of the *CCAA*:

> The prospect of the Nortel Debtors being dragged around in different U.S. courts is not an appealing one. For them to become entangled in a drawn-out, foreign litigation process that will likely have no regard for the practical concerns of this insolvency, including the importance of resolving all remaining unresolved claims against the Canadian Debtors in a timely and efficient manner so that these proceedings, already pending for six years, can be brought to their conclusion, is a situation that should be avoided.

This decision provides greater peace of mind for insolvent companies and individuals, who can know that once they have obtained protection under either the *CCAA* or the *BIA*, the court will not allow forum selection provisions in commercial agreements to interfere with its supervisory jurisdiction.

- Research contributed by David Shore, 2014/2015 Articling Student.