Kluwer Mediation Blog

Nortel Saga Continues

Rick Weiler (Weiler ADR Inc.) · Saturday, June 22nd, 2013

Faithful readers will recall my posts here and here mentioning the failed mediation relating to the international effort to reach an agreement on the distribution of some $9 Billion in assets remaining from the Nortel insolvency.

The Ontario Courts are now struggling with the fallout from that failed mediation. This week saw the release of a decision by the Ontario Court of Appeal refusing to overturn the earlier decision of Justice Morawetz of the Ontario Superior Court basically approving an "Allocation Protocol" setting out a proposed procedure for coming to a binding decision on how the $9 Billion is to be allocated.

Central to that proposed protocol is a ***joint hearing*** between the Canadian and U.S. Courts ***followed by each Court issuing its own respective decision***.

Unsurprisingly, some of the players in the saga objected to the proposed protocol and wanted to have the whole distribution issue decided by international arbitration. While acknowledging that this would be a preferable procedure the Court observed it had no jurisdiction to compel the parties to arbitration in the absence of an agreement among them in that regard and, further, found there was no such agreement in this case.

Regarding the objectors' concern that the proposed protocol could conceivably result in ***two inconsistent decision neither of which would be enforceable,*** Justice Morawetz had this to say,

> "***I acknowledge the procedural difficulties identified by the Joint Administrators in their supplemental submissions, and I do not underestimate the challenges that lie ahead.*** However, all parties embraced joint or parallel hearings of the U.S. Court and the Canadian Court to bring forth a number of matters, most notably applications for approval of sales process and for approval of sales. Further, despite the different procedures in the U.S. Court and the Canadian Court, both courts have worked effectively with the result that billions of dollars are now available for distribution to the stakeholders. I maintain confidence that the U.S. Court and the Canadian Court will ensure that matters going forward are similarly dealt with in a fair and equitable manner." (emphasis added)

As a mediator I admire Justice Morawetz's optimism and high expectations. But really, what a mess! With professional fees and other process costs now reputedly $861 Million, and growing, a scandalously high percentage of the funds available for distribution most certainly will be eaten up

by costs.

This ongoing case highlights at least these two things in my mind:

1. **The incredible difficulty of achieving agreement in mediation in high-stakes, multi-party, multi-jurisdictional disputes and the crying need to develop and utilize new tools to assist mediators in such cases**. For example, it would have been interesting if each of the parties in this dispute had been required to come to mediation prepared to share and discuss their own decision-tree analysis used by them in arriving at their reservation points in the negotiation. (I'm of course giving all parties the benefit of the doubt that such decision tree analyses were even prepared. My own experience in large multi-party disputes is that most often no effort has been expended by the parties on this invariably helpful tool). Such decision trees would have taken into account the various possible outcomes of the litigation in the U.S. and Canada, assign probabilities to each of those outcomes and assign total net costs or benefits associated with each outcome. At the very least such an approach would have made clear what precisely was preventing the parties from coming to a bridgeable gap. If the gap resulted from differing legal opinions about the probability of the various outcomes then evaluative judicial mediators could have weighed in with their own (of course, non-binding) views and thereby provided some momentum to narrow the gap. For all I know Justice Winkler applied just such an approach in this mediation but, of course, the confidential nature of the process will prevent us from ever knowing.

2. **The glaring lack of an international judicial forum to bring certainty, finality and efficiency to the resolution of such cross-jurisdictional disputes**. Stakeholders of the 40 international entities claiming entitlement to the Nortel residue will continue to pay a heavy price because of the lack of that forum and perhaps may put pressure on trading nations to work harder in the development of such a Court notwithstanding the inevitable ceding of a measure of sovereignty it would entail.

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