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Maryland Court of Appeals Limits Right to Appeal Denial of Petition to Compel Arbitration [Ober|Kaler]

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Private construction contracts routinely include arbitration clauses to ensure that disputes that arise from a project are resolved by a technically skilled arbitrator. Questions may arise, however, about whether an arbitration clause is enforceable, or about whether a particular dispute falls within the scope of an arbitration clause. These questions may need to be decided by a court.

Traditionally, this inquiry has favored arbitration over litigation. One of the mechanisms favoring arbitration under the various state arbitration statutes has been the right immediately to appeal a court order denying a motion to compel arbitration, without having first to litigate the case to a final judgment. This right to appeal is generally set forth under Sections 19 and 28 of 1956 and 2000 Uniform Arbitration Acts, respectively. Accordingly, a party whose motion to compel arbitration is denied could obtain appellate review of that denial without first having to go through the time and expense of a trial.

Through a 6-to-1 decision filed on December 30, 2013, however, the Maryland Court of Appeals limited this right of immediate appeal under the Maryland Uniform Arbitration Act. In *American Bank Holdings, Inc. v. Kavanagh*, two former employees of a mortgage lender sued their former employer. The mortgage lender responded with a petition to compel arbitration, which the circuit court denied, apparently finding that the specific dispute was not within the scope of the arbitration clause. The mortgage lender immediately filed a notice of appeal to the Maryland Court of Special Appeals. In an unreported opinion, the Court of Special Appeals dismissed the appeal, finding that the circuit court's denial of the petition to compel arbitration was not an appealable final judgment.

On certiorari, the Maryland Court of Appeals affirmed the Court of Special Appeals' dismissal of the appeal. The Court of Appeals held that a party's right to appeal an order denying a motion to compel arbitration may only be immediately appealed where that order constitutes a “final judgment” that has the effect of putting the parties out of court. Because the former employees in *Kavanagh* had, in essence, sued first, the mortgage lender's petition to compel arbitration became what is sometimes referred to as an “embedded proceeding.” Because it was an “embedded proceeding,” the circuit court's denial of the mortgage lender's motion to arbitrate did not put the parties out of court. Instead, it had the effect of letting the former employees' lawsuit go forward. In contrast, if the mortgage lender had instead first filed its own action to compel arbitration (which is sometimes referred to as an “independent proceeding”), then the circuit court's denial of the motion to compel arbitration would have been an appealable final judgment, because there would have been nothing left for the circuit court to decide.

Consider the impact of this on claims among parties to a private construction contract with an arbitration clause subject to the Maryland Uniform Arbitration Act, where a dispute has arisen between a general contractor and a subcontractor. If the general contractor desires arbitration, but has doubts as to whether a circuit court will find that the dispute is within the scope of the arbitration clause, then the general contractor will want to file an “independent proceeding” as soon as practicable in order to preserve its right to a quick appeal should the court deny the motion to compel arbitration. The *Kavanagh* opinion may have therefore set up the classic “race to the courthouse.”

What other steps may a party to a construction contract take to preserve its rights to an immediate appeal of an order denying arbitration? One idea may be to build into the contract a pre-suit notification provision, which is sometimes found in other commercial contracts. If a party opposing arbitration, for example, has to provide 30-days notice before bringing suit, that notice could give the party favoring arbitration a 30-day head start in the race to the courthouse. Another idea may be to use forum-selection and choice-of-law clauses so that any action is brought in another state and is subject to another state's Arbitration Act. As Judge Robert McDonald observed in his dissent in *Kavanagh*, “[v]irtually every other state that has adopted the Uniform Arbitration Act provides for an immediate appeal of orders denying motions to compel arbitration, either as a final judgment or as a permissible interlocutory appeal.”

Regardless, parties to private construction contracts containing arbitration clauses should take note of the *Kavanagh* decision. Under this holding, a party may find itself having to go through the expense of a full trial before it has the right to appellate review of the trial court's denial of the party's motion to compel arbitration.