Interoffice Memorandum of Law
Law Review

TO: Mr. Dudley Knox; Advanced Legal Research and Writing LGLA-2331-53500
FROM: Mr. Chris Rainbolt
DATE: April 3, 2015
IN RE: *Argo Data Resource Corp. v. Shagrithaya*, 380 S.W.3d 249 (Tex.App.—Dallas 2012).
Jill Yaziji, *The Texas Supreme Court Revises The Definition and Remedies of Shareholder Oppression*, 52-OCT Hous. Law. 42 (2014).
Peter Meijes Tiersma, Note, *The Language of Offer and Acceptance: Speech Acts and the Question of Intent*, 74 Cal. L. Rev. 189 (1986).

Assignment: To find articles relating to the two main issues from *Argo v. Shagrithaya* in Law Review Publications.

I. Minority Shareholder Oppression

A. Headnote #5 - Corporations and Business Organizations 1526(5)

"Depending on the facts of the case, conduct found by the jury in an action for minority shareholder oppression could be oppressive under either or both definitions of oppression, which occurs when majority shareholder conduct substantially defeats minority's expectations that were both reasonable under the circumstances and central to minority shareholder's decision to join venture and when conduct is burdensome, harsh, or wrongful. V.T.C.A., Business Organizations Code § 11.404." *Argo v. Shagrithaya*, 380 S.W.3d 249 (Tex.App.—Dallas 2012).

B. The Texas Supreme Court Revises the Definition and Remedies of Shareholder Oppression

"On June 20, 2014 the Texas Supreme Court issued a landmark decision in Ri[t]chie v. Rupe, No. 11-0447, a shareholder oppression case arising out of a Texas family dispute. The dispute arose when Plaintiff Rupe, wife and heir of one of the owners of this family-held business, wanted to sell her shares to an outside investor. Rupe alleged being treated as an outsider and with hostility by the majority shareholders. While the majority shareholders had previously offered to appoint Rupe on the board of directors, she declined. Instead, Rupe sought to sell her shares of the corporation. The board declined purchasing Rupe's stocks, citing a 'financial crisis' with one of the subsidiaries, and Rupe began marketing her shares to potential outside buyers. But when the majority shareholders, again citing business reasons, refused to meet with the prospective buyers of Rupe's shares, the sale was stymied because the would-be purchasers wanted to 'talk to executives as part of their due diligence' before investing their money.

A Dallas jury indeed found the majority shareholders' conduct was oppressive, and the trial court entered a judgment ordering them to buy out Rupe's interest for a 'fair market value' of $7.3 million. The Dallas Court of Appeals affirmed the trial court's decision, but remanded the case for further consideration of the value of Rupe's shares.

In this much-anticipated decision, six members of the Texas Supreme Court reversed the Dallas Court of Appeals' decision, rejecting its definition of 'shareholder oppression' and changing the remedies available in shareholder disputes in Texas.

The Court's majority opinion defined, or redefined, shareholder oppression by construing the meaning of 'oppression' in then-Article 7.05 of the Texas Business Corporations Act, (now-Section 11.404 of the Texas Business Organization Code or Receivership Statute,) and by focusing on the harm to the business entity, not just to the individual shareholder. Since the Receivership Statute does not define the word 'oppression,' the Court's majority had to examine not 'only the language of the oppression provision but also the language and context of the entire receivership statute …"

'To qualify as the type of "oppressive" actions that justify a rehabilitative receivership,' the majority wrote, the 'complained-of actions must create exigent circumstances for the corporation.' The Court's majority found instructive that the word 'oppressive' in the Statute was grouped with actions that are 'illegal' and 'fraudulent.' Hence, the majority defined shareholder oppression as taking place 'when [officers or directors] abuse their authority over the corporation with the intent to harm the interests of one or more of the shareholders, in a manner that does not comport with the honest exercise of their business judgment, and by doing so they create a serious risk of harm to the corporation.'

Given this definition, the Court emphasized the 'business judgment' test as capturing the legislative effect of shareholder oppression under the Statute. Hence, neither the 'fair dealing' test, nor the 'reasonable expectation' test alone, previously relied upon to analyze shareholder oppression, will suffice in determining when an action by corporate officers and directors against a shareholder is oppressive.

The Court further rejected the holding in *Davis v. Sheerin*, 339 S.W.2d 375 (Houston App.—[1st Dist.] 1988), the determinative Texas opinion on shareholder oppression remedies, that a Texas court could, under its general equity power, order a buyout of a shareholder's stock as a remedy for shareholder oppression. The Court specified that the buyout remedy was not authorized under the Receivership Statute. However, it left open the door for such recovery 'under a common-law cause of action for which equitable remedies are otherwise available.'

Yet, 'Texas law should ensure that remedies exist to appropriately address such harm' when officers and directors of a corporation engage in 'squeeze-out' tacks such as denying minority shareholders 'access to corporate books and records,' 'withholding payment' to them, 'termination of … [their] employment,' or 'misapplication of corporate funds' for personal gain. And these remedies are available through common-law causes of action, such as breach of contract, breach of fiduciary duty, fraud, misappropriation, unjust enrichment, and so forth.

In the wake of *Ri[t]chie v. Rupe,* it becomes even more crucial to draft shareholder agreements that expressly specify the rights and expectation of shareholders and the remedies available, such as the right to buyouts, should disputes arise." (Yaziji 42).

II. Sufficiency of Evidence of Existence of Implied Contract

A. Headnote #43 – Corporations and Business Organizations 1530, 1578

"There was legally insufficient evidence of a legally enforceable agreement that majority shareholder and minority shareholder would receive same annual compensation while they remained active in corporation to support jury's verdict in favor of minority shareholder in minority shareholder's action for breach of implied contract; that shareholders had received same annual compensation in the past did not demonstrate agreement to continue same compensation scheme in the future, there was no indication that shareholders had any meeting of the minds over any other terms of minority shareholder's employment, such as his specific job obligations or duration of employment, and agreement to 'remain active' was not sufficiently clear and definite." *Argo v. Shagrithaya*, 380 S.W.3d 249 (Tex.App.—Dallas 2012).

B. The Language of Offer and Acceptance: Speech Acts and the Question of Intent

"The philosophy of language provides a useful approach for analyzing the language and actions used to communicate offer and acceptance. The analysis presented here suggests that offer and acceptance are speech acts that must have a particular force—the force of committing the speaker to the proposal. There are several rules that regulate how that commitment ought to be made, among them rules relating to good faith bargaining and sincerity. But what is essential is that there be an utterance or act that counts as committing the speaker to a proposal. This crucial element is most explicitly satisfied by the performative formulas "I hereby offer you" and "I hereby accept."

Often action, inaction, or less explicit utterances will potentially indicate the force of offer or acceptance. Then it becomes necessary to determine whether the words or inaction are the equivalent of, or expressible as, the explicit performative phrases. In addition, the words or deeds must be accompanied by a particular mental state. Certain types of mental state, such as mental assent or an intent to carry out the terms, are not necessary to create a bargain. What is crucial is that the speaker must intend to create in the hearer the illocutionary effect of offer or acceptance by causing the hearer to recognize the speaker's intent to create that effect. In other words, the speaker must intend to create in the hearer the perception that the speaker wishes to commit herself.

While insincere and joking offers are often offers nonetheless, an obviously insincere or joking offer cannot be intended to create the requisite illocutionary effect, and it thus does not operate as an act of commitment. It is mainly in cases of ambiguity and mistake that subjective illocutionary intent and the hearer's interpretation of the speaker's intent are likely to diverge. Therefore, the subjective element is most important in these areas. Though the speaker has not committed himself in such cases, he might be held responsible for the consequences of careless communication. But since the hearer plays a role in determining meaning as well, she may also bear responsibility for mistake or ambiguity." (Tiersma 231-2).