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Thomas Heintzman is counsel at McCarthy Tétrault in Toronto. His practice specializes in litigation, arbitration and mediation relating to corporate disputes, shareholder's rights, securities law, broadcasting/telecommunications and class actions.

He has been counsel in many important actions, arbitrations, and appeals before all levels of courts in many Canadian provinces as well as the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Canadian Building Contracts, 4<sup>th</sup> Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on Canadian Building Contracts has been cited in over 183 judicial decisions including the two leading Supreme Court of Canada decisions on the law of tendering:

*M.J.B. Enterprises Ltd. v. Defence Construction (1951)*, [1999] 1 S.C.R. 619 and  
*Double N Earthmovers Ltd. v. Edmonton (City)*, [2007] 1 S.C.R. 116

## **When Is An Arbitration Award An Enforceable Judgment?**

When you enter into an arbitration agreement, do you think about whether the arbitration process results in an enforceable judgment? You should.

The award that you receive at the end of the arbitration process isn't a judgment and can't be immediately enforced as a judgment. That is what the U.K. Court of Appeal recently held in ***Mobile Telesystems Finance SA v Nomihold Securities Inc.***

Nomihold obtained an arbitration award in London, U.K. which Mobile Telesystems (MTSF) did not appeal or otherwise challenge. Without notifying MTF, Nomihold then applied to the English court to enforce the award, and was granted an order enforcing the award, subject to MTF's right to bring a motion to set aside that order (the "initial order"). In effect, Nomihold was granted a provisional judgment, but subject to it being set aside. MTF in fact brought such a motion, seeking to set aside the initial order.

### **The Freezing Order: A *Mareva* Injunction**

The initial order also contained an order freezing MTF's assets pending the disposition of MTF's motion to set aside the order. Consistent with the normal practice, the freezing order stated that it did not apply to transactions carried on by MTF in the ordinary course of business. The freezing order that the court granted Nomihold was in the nature of what the English courts call a *Mareva* injunction.

A *Mareva* injunction may be issued by a court before judgment to restrain a defendant from dissipating its assets. However, a *Mareva* injunction is an extraordinary remedy and only granted when there is some real fear that the defendant is about to purposefully denude itself of assets to avoid paying any judgment which the plaintiff might obtain.

Previously, MTF had issued \$400 million in Notes which required it to make half yearly interest payments to the noteholders. If the "ordinary course" exception was removed, then MTF could not make those interest payments and would be in default to the noteholders.

After the initial order, a further order was granted removing the "ordinary course" exception. MTF appealed the order removing the "ordinary course" exception. In deciding whether the "ordinary course" exception was properly removed, the Court of Appeal was obliged to consider the effect of the arbitration award, and in particular whether it was a "judgment."

### **Was The Arbitral Award A Judgment Or Not?**

If the arbitral award was not a judgment, and if a judgment would only come into being after the motion to set aside the initial order was determined, then that initial order was in the nature of a pre-judgment order which, according to the usual practice, should not interfere with the defendant carrying on its normal business.

If, however, the arbitration award was effectively a judgment, then the initial order was more like an order enforcing a judgment, in which case the plaintiff was entitled to use the court's enforcement process to execute upon the judgment, and the defendant was no longer entitled to delay payment of the claim of Nomihold.

### **The Arbitral Award Was Not A Judgment**

The Court of Appeal held that the arbitration award was not a judgment and that therefore the lower court judge was wrong to treat that award or the initial order as a judgment and remove the "ordinary course" exception on that basis. The Court of Appeal said:

“The circumstance that Nomihold has in its favour an unchallenged award does not in my view mean that MTSF should for all purposes be treated as a judgment debtor. If there is a judgment of the court...it is not presently enforceable.....[F]or present purposes the touchstone is enforcement or perhaps the availability of enforcement....[W]hilst the freezing order can be said to be granted in aid of execution it cannot currently be said to be a remedy designed to effect execution, since execution is unavailable. In any event that is not the nature of a freezing order. It remains a freezing order designed to prevent the dissipation of assets with the object or effect of denying Nomihold satisfaction of its contractual claim.”

The Court of Appeal also stated that, whether or not an arbitration award should be treated as a judgment for other purposes, it should not permit the party holding that award to use that award to prevent other creditors of the respondent from being paid in the ordinary course, until the award was fully converted into a judgment of the court:

“Thus both as a matter of principle and on authority it seems to me that a freezing order granted in aid of enforcement of an arbitration award ought ordinarily to contain an ordinary course of business exception. There is no basis upon which one contractual claimant should be able to prevent the satisfaction of the claims of others in a similar position. I am not satisfied that the circumstance that Nomihold is also in the sense described a judgment creditor should lead to any different conclusion.”

**This decision demonstrates** the difference between a judgment in a court action and an arbitral award. The award is only enforceable as a judgment once it has been rendered into a judgment of the court. Until then, the judgment execution process of the court is not available to the claimant. While the court may still grant extra-ordinary injunctive relief to protect the claimant from the respondent hiding or dissipating its assets, the court will likely look at the issue in the context of a pre-judgment proceeding, not the execution of a judgment.

In most cases, obtaining a court order to enforce the arbitral award may be a simple matter. Indeed, the modern domestic and international commercial arbitration statutes severely limit the grounds to resist the conversion of an arbitral award into a court judgment. But in some cases, there may be costs and timing issues in obtaining the court judgment which may be crucial.

**The present case reminds us** that an arbitral award is not a court judgment and we should consider this distinction when deciding whether to enter into an arbitration agreement.

**Arbitration – Enforcing the Award - Freezing Orders - *Mareva* Injunction**

*Mobile Telesystems Finance SA v Nomihold Securities Inc* [2011] EWCA Civ 1040 (01 September 2011)

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