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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 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 SCC3, [2007] 1 S.C.R. 116-2007-01-25 Supreme Court of Canada

## **Can A Party Enforce An Arbitration Award In One Court And Litigate The Issue In Another Court?**

### **Arbitration - Enforcement - Anti-Suit Injunction**

The Ontario courts have recently considered two questions with respect to the enforcement of an arbitration award:

Should the court refuse to enforce an award because the party which seeks to enforce it is taking proceedings in another jurisdiction which contradict the award?

And should an anti-suit injunction be issued against that party to stop those other proceedings?

In *Accentuate Ltd v. Asigra Inc*, the Ontario courts answered No. While this result occurred in the context of an international arbitration, the result would seem to be as applicable to arbitrations under domestic construction contracts.

Accentuate is a United Kingdom company and Asigra is an Ontario company. They entered into a contract whereby Accentuate would act as a reseller of Asigra's products in the UK. The contract provided that the law of Ontario governed the contract and that all disputes would be resolved by arbitration in Toronto under the UNCITRAL Arbitration Rules.

In 2006, Asigra terminated the contract, first with six months notice and then peremptorily for cause. Accentuate gave notice that it claimed damages for wrongful termination. While it acknowledged that its claim was to be dealt with under the arbitration provisions of the contract, it also took the position that it was entitled to certain rights under the Commercial Agents Regulations of the UK and that those rights could not be excluded by the contract.

The arbitration occurred in Toronto. The tribunal held that it had jurisdiction to deal with the claim under the UK Commercial Agents Regulations and to determine whether those Regulations applied. It held that those Regulations did not apply as the parties had chosen the law of Ontario to apply to their arrangements.

The arbitration tribunal awarded \$14,112.32 and interest to Accentuate. Unhappy with the amount of this award, Accentuate commenced proceedings in the UK courts based on the Regulations. The UK court held that Accentuate was entitled to bring its claim in the UK courts, but at the time of the enforcement proceedings in Ontario the UK court had not adjudicated upon the substantive issue.

At the same time Accentuate applied to the Ontario court to enforce the award. Asigra submitted that the Ontario court should not enforce the award at the instance of Accentuate when Accentuate was pursuing a remedy, and effectively impugning the award, in the UK courts. Asigra argued that Accentuate's position amounted to an abuse of process. Asigra also asked the Ontario court to issue an anti-suit injunction against Accentuate to prohibit Accentuate from continuing with its UK action.

The Ontario Superior Court of Justice disagreed. It held that the arbitral award was final and would not be altered by the outcome of the English proceedings. It decided that the conduct of Accentuate did not amount to a public policy consideration that precluded Accentuate from enforcing the award.

The Ontario court also refused to issue an anti-suit injunction. It held that this case was not one in which one tribunal had been given jurisdiction by the parties under their contract and one of the parties, Accentuate, had gone off to another jurisdiction which had improperly accepted jurisdiction. Here, the parties had gone through the very arbitration proceedings which they both agreed should apply. Accentuate now asserted that it had additional rights not determinable under that arbitration proceeding. The Ontario court held that it should not preclude the arbitration decision from being enforced by Accentuate in Ontario merely because Accentuate was maintaining that other claim in the United Kingdom.

The Ontario Court of Appeal dismissed the appeal. It agreed with the Superior Court that Accentuate's "re-litigation" in the UK of issues between the parties did not warrant a refusal by the Ontario courts to enforce the arbitral award. The arbitration award was a final award, and Accentuate's conduct did not amount to a policy reason for not enforcing the award.

This decision is a clear reminder of the power and effect of an arbitral award, and the direction in Article 36 of the UNCITRAL Model Law. Unless there are strong public policy reasons for not doing so, arbitral awards must be enforced by the courts. If they are not, then the efficacy of the whole arbitration process is undermined.

Ironically and unusually, in the present case the party which was enforcing the award was the one which was discontented with it. That party was apparently acting contrary to the award (or at least continuing the dispute in another court) while at the same time seeking to enforce it. But that did not change the principle. And the principle required the court to enforce the award, whatever the result of the UK proceedings might be.

The same principle applies under domestic arbitration law. Section 50 of the *Ontario Arbitration Act, 1991* provides that, on the application of a party to a non-family arbitration, the Superior Court "shall give judgment enforcing an award" unless the award is under appeal or subject to an application to set it aside or has been set aside. In view of this mandatory statutory direction, arbitration awards will be enforced without regard to other considerations, unless the award has been or is being impugned by appeal or judicial review.

#### **Arbitration – Enforcement - Anti-Suit Injunction**

*Accentuate Ltd v. Asigra Inc*, 2010 ONSC 3364; 2011 ONCA 99 (CanLII)

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