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Thomas Heintzman specializes in arbitration and mediation relating to corporate disputes, shareholder's rights, construction law, 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 numerous appearances in the Supreme Court of Canada.

Thomas Heintzman is the author of Goldsmith & Heintzman on Canadian Building Contracts, 4th 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:

An International Commercial Arbitral Award Is Enforced Even Though It Provided No Reasons

In Canada, the obligation of a tribunal to give reasons has become one of the hallmarks of justice. But do arbitrators have an obligation to give reasons? Not if the parties agree that no such reasons need be given and the arbitration is an international commercial arbitration conducted pursuant to the UNCITRAL Model Law. That is what the Ontario Superior court recently decided in ***Activ Financial Systems, Inc. v. Orbixa Management Services Inc.***

In its 2002 decision in ***Sheppard*** and its 2003 decision in ***Dunsmuir***, the Supreme Court of Canada has placed the obligation to give reasons at the very heart of a fair decision-making

process. As I said in my blog of January 23, 2012, the Supreme Court has effectively held that a court's decision should be set aside for legal error if the reasons are totally inadequate. Without adequate reasons, the person who loses does not know why.

But in the field of arbitration, some principles are not immutable. Subject to the governing law, the parties can agree to waive the protections that the law provides. In the field of international commercial arbitration, they can waive the obligation of the arbitral tribunal to deliver reasons.

Background Information:

The dispute in the present case arose under a software license agreement. Activ claimed payment for software license fees during a period in which Orbixa said the agreement had been terminated. The question was whether the agreement had been so terminated or had continued by virtue of automatic renewal, and whether a liquidated damages clause applied.

Article 31(2) of the UNCITRAL Model Law as appended to the **Ontario *International Commercial Arbitration Act*** (ICAA) provides that "the award shall state… the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30." The license agreement was governed by New York law and it provided for arbitration in New York under the Commercial Arbitration Rules of the American Arbitration Association. Those Rules state that the "arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate."

Prior to the arbitration, the parties agreed that no reasons need be given by the tribunal. The tribunal rendered a decision in Activ's favour without reasons. Activ obtained a judgment of the New York court enforcing the award. Activ then came to Ontario to enforce the award. Orbixa opposed that enforcement on three grounds, among others.

First, Orbitza said the award was unenforceable since it contained no reasons. Based on Article 31(2) of the Model Law appended to the ICAA, Perell J held that the award should be enforced in Ontario despite the absence of reasons. He held, however, that before doing so the Court must "fairly determine…that the arbitration award did not deal with a dispute beyond the terms of the submission and that the award was not contrary to the public policy of Ontario." Justice Perell concluded that these conditions were satisfied in the present case.

Second, Orbitza said that the award could no longer be enforced as such since it had been rendered into a judgment of the New York Courts. Justice Perell dismissed this objection, holding that the award still remained enforceable under the ICAA in Ontario even If the award was also enforced in New York.

Justice Perell did agree with a third submission made by Orbitza. Activ sought to enforce the judgment under the common law, and not pursuant to the ICAA. Indeed, Activ first commenced its application without relying on that Act. Justice Perell allowed Activ to amend its application to also

rely on the ICAA and, as noted, enforced the award under that Act. But he accepted Orbitza's position that, once the ICAA was enacted, international commercial arbitration awards may only be enforced under that Act and not at common law. In his view, "it would be a source of unnecessary confusion and unnecessary expense to have two enforcement mechanisms."

Justice Perell concluded "as a matter of statutory interpretation that it was the intention of the Legislature to introduce a complete code about the enforcement of foreign arbitration awards under the ***International Commercial Arbitration Act***."

The first basis for the decision raises an interesting contrast with domestic arbitral awards. Under section 38 of the **Ontario *Arbitration Act****, 1991*, the award "shall state the reasons on which it is based" unless it is a consent award. Section 3 of that Act does not list Section 38 as one of the sections which the parties cannot vary or exclude. Accordingly, one would think that the parties can contract out of Section 38.

The Contrast Between The Model Law and ICAA

On the other hand, Sections 3 and 38 do not expressly provide that the parties can agree that no reasons need be delivered by the tribunal. In this respect, there could not be a starker contrast between the **Model Law** and the **ICAA.** With this contrast in two statutes dealing with arbitration, a party opposing the enforcement of a domestic award given without reasons could argue that, in contrast to international commercial arbitral awards, the legislature made a clear choice that domestic arbitral awards must be delivered with reasons.

Moreover, Section 38 expressly states that consent awards are an exception to the obligation to give reasons. That exception suggests that the legislature thought about the issue and provided for that exception and did not provide for an exception for "no reasons" decisions.

In support of those arguments is Section 3 of the ***Arbitration Act****, 1991*. Section 3 says that the parties cannot exclude Section 19. Section 19 states that "in an arbitration, the parties shall be treated equally and fairly." ***Dunsmuir*** and ***Sheppard*** stand for the principle that reasons for decision are an essential ingredient in the fairness of a decision-making process.

Does that mean that the parties to a domestic arbitration cannot waive the provisions of Section 38? That argument will face the fact that Section 3 does not refer to Section 38 as an obligation which the parties cannot exclude. And if the parties agree that no reasons need be given, then it seems difficult to argue that the absence of reasons is unfair.

See ***Heintzman and Goldsmith* on *Canadian Building Contracts*** (4th ed.), Chapter 10, part 3.

Arbitration - Absence of Reasons - Enforcement

***Activ Financial Systems, Inc. v. Orbixa Management Services Inc.*, 2011 ONSC 7286**

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