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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*, 4th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

Goldsmith & Heintzman on 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

Have you chosen the Right Forum for a Construction Arbitration?

Construction Law –Arbitration – Appeal

My article on May 24, 2011, on **Arbitration Appeal Rights: Think About Them Before Signing A Contract**, dealt with the rights of appeal from arbitration awards. That article made reference to the appeal rights from arbitration awards in most Canadian provinces, but did not deal with the province of Quebec. This article will address the appeal rights in Quebec.

In Quebec, the rights arising from an arbitration award are found in Book VII of the Code of Civil Procedure. The Code provides for arbitration awards to be registered (“homologated”) in the Superior Court by way of a motion to the court. The court can only refuse to homologate the award upon certain specific grounds, including invalidity of the arbitration agreement,

procedural irregularity, jurisdictional grounds, the dispute is not subject to arbitration under Quebec law or the award is contrary to public order. Article 946.2 states that a court examining a motion for homologation cannot inquire into the merits of the award.

Article 947 states that the only possible recourse against an arbitral award is by way of an application for annulment. The grounds for annulling an arbitral award effectively reflect the same grounds upon which the court may refuse to homologate an award.

So, in these ways, the Code states that an arbitration award cannot be appealed nor the merits of the award questioned. Article 940 states that these provisions of the Code, among others, are peremptory and not subject to agreement otherwise by the parties.

Similarly, a court considering an application for recognition and enforcement to homologate a foreign arbitration award cannot enquire into the merits of the dispute.

Foreign, international and domestic arbitrations are all dealt with under the same regime in Book VII of the Code. In essence, all arbitration awards are not subject to appeal, are all subject to similar homologation procedures and all may be attacked on the grounds reflecting the grounds for homologation.

This review of Quebec Arbitral law leads nicely to a comparison of the appeal rights from international arbitral awards in the United Kingdom. There, as in Quebec, domestic and international arbitrations are dealt with under one statutory regime, the U.K. Arbitrations Act, 1996. But the effect has been the opposite, so far as appeal rights are concerned. The U.K. Act permits the court to grant leave to appeal. That appeal right is derived from statutory provisions which originally related to domestic arbitrations. However, in *Shell Egypt West Manala et al v. Dana Gas Egypt Ltd*, [2009] EWHC 2097, [2010] EWHC 465, the English court granted leave to appeal from an international arbitral award conducted under the UNCITRAL rules. Those rules provide that arbitral awards are “final and binding”. The English court held that those words were insufficient to preclude the appeal rights under the U.K. Arbitration Act, 1996.

Returning to the Canadian landscape, there are in essence four appeal regimes relating to arbitral awards. The most common regime relating to domestic arbitral awards is found in Alberta, Saskatchewan, Manitoba, Ontario, New Brunswick and Nova Scotia. That regime generally provides (with some variations) for an appeal to the provincial superior court with leave of that court, or if the parties have so agreed, on matters of fact, law and mixed fact and law. In those jurisdictions, a further appeal to the provincial appeal court, or an appeal of a decision relating to an application to set aside the award or declare it invalid, is only permitted with leave.

The second regime provides for no appeal rights from arbitral awards, but imposes no specific limit on appeals from other decisions of the superior court relating to arbitral awards (such as setting aside, or declaring invalid, arbitral awards, or relating to homologation in Quebec). That

regime applies to all provincial regimes relating to international commercial arbitrations, and to domestic awards in Quebec and Newfoundland and Labrador.

The third regime is found in Prince Edward Island where, if the parties consent to an appeal in their arbitration agreement, the appeal is directly to the Appeal Division.

The fourth regime is found in British Columbia, where the parties may provide for, or the court may permit by way of leave, an appeal on a question of law.

This review of appeal rights in Canada underscores the point which was made in my article of May 24, 2011. The parties to a construction contract which contains an arbitration clause should carefully consider the rights of appeal before they sign the contract. If the arbitration involves a serious issue of law, or if there are other good reasons to do so, consider whether to include a right of appeal. As importantly, insert into the contract an arbitral law that allows for an appeal. The law of neighbouring provinces – for instance, Ontario and Quebec – are completely different so far as appeals are concerned. So choosing the appropriate arbitral regime is crucial.

Construction Law- Arbitration – Appeal

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