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Prior to 2013, Mr. Heintzman practiced with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, insurance, broadcasting and telecommunications, construction and environmental law. He has acted in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia, Nova Scotia and New Brunswick and has made numerous appearances before the Supreme Court of Canada. He was an elected bencher of the Law Society of Canada for 8 years and is an elected Fellow of the American College of Trial Lawyers and of the International Academy of Trial Lawyers.

Thomas Heintzman is the author of ***Heintzman & Goldsmith on Canadian Building Contracts,*** 5th Edition which provides an analysis of the law of contracts as it applies to building contracts in Canada.

This article contains Mr. Heintzman's personal views and does not constitute legal advice. For legal advice, legal counsel should be consulted.

New *International Commercial Arbitration Act* Enacted In Ontario

On March 22, 2017, a new ***International Commercial Arbitration Act****, 2017* came into force in Ontario (the 2017 ICAA). The 2017 ICAA is contained in Schedule 5 to the ***Burden Reduction Act,*** *2017*, SO 2017, c. 2.. The 2017 ICCA replaces the existing Ontario ***International Commercial Arbitration Act***, RSO 1990, c I.9 (the Old ICAA).

The 2017 ICAA introduces into Ontario law the **UNCITRAL Model Law** updated as of July 7, 2006 (Updated Model Law). The Updated Model Law is attached as Schedule 2 to the 2017 ICAA. The 2017 ICAA also makes other amendments to the existing Ontario ***International Commercial Arbitration Act*** (Old ICAA).

In addition, a number of other statutes are annexed to ***Burden Reduction Act****, 2017* which affect international dispute resolution, including the ***International Choice of Court Agreement Convention Act****, 2017.*

Practitioners involved in arbitration in Ontario should be aware of the changes that are introduced by the 2017 ICAA. Here are some of the more notable changes.

1. Limitation period

Section 10 of the 2017 ICAA introduces a new ten year limitation period for the recognition and enforcement of international commercial arbitration awards, starting in January 2019. Section 10 states as follows:

"10**.** No application under the Convention or the Model Law for recognition or enforcement (or both) of an arbitral award shall be made after the later of December 31, 2018 and the tenth anniversary of:

(a) the date on which the award was made; or

(b) if proceedings at the place of arbitration to set aside the award were commenced, the date on which the proceedings concluded."

A similar ten-year limitation period for domestic arbitrations is introduced by section 13 of the 2017 ICAA. Under that section, subsection 52 (3) of the ***Arbitration Act,*** *1991* is repealed and the same 10 year limitation period is introduced, commencing in 2019. The commencement of the limitation period is expressed slightly differently, as being:

(a) the day the award was <u>received</u>; or

(b) if an application to set aside the award was commenced, the date on which the application was finally <u>determined.</u> (underlining added)

The Old ICAA and the Model Law attached to it do not contain a limitation period. The limitation period for the enforcement of international commercial arbitration awards was settled in Canada in ***Yugraneft Corp. v. Rexx Management Corp***., [2010] 1 S.C.R. 649. In that decision, the Supreme Court of Canada held that the general two-year limitation period in Alberta's limitation statute applied to such an enforcement in Alberta.

The March 2014 report of the Uniform Law Conference of Canada (ULCC) expressed the view that a two-year limitation period for the enforcement of an arbitral award is too short and not

consistent with the limitation periods in other countries. The ULCC report recommended a 10-year period, which has been adopted by the Ontario legislature.

2. Appeals re Preliminary Decision Declining Jurisdiction

Section 11 of the 2017 ICAA provides for an appeal to the Superior Court in the following words:

> (1) If, pursuant to article 16 (2) of the Model Law, an arbitral tribunal rules on a plea that it does not have jurisdiction, any party may apply to the Superior Court of Justice to decide the matter.
>
> (2) The court's decision under subsection (1) is not subject to appeal.
>
> (3) If the arbitral tribunal rules on the plea as a preliminary question and an application is brought under this section, the proceedings of the arbitral tribunal are not stayed with respect to any other matters to which the arbitration relates and are within its jurisdiction. (underlining added)

Article 16(3) of the Model Law says that if the arbitral tribunal "rules as a preliminary question that it has jurisdiction," there is an appeal to the court, and that there is no appeal from the court's decision. The Model Law does not expressly provide for an appeal in the event that the arbitral tribunal decides that it does not have jurisdiction. Section 11 if the 2017 ICAA now provides for an appeal in that situation, but (reflecting the Model Law on this point) there is no appeal from the Superior Court's decision.

There are several interesting questions about Section 11 and Article 16. First, why did drafters of the Model Law not provide for an appeal if the tribunal declines jurisdiction? According to the March 2014 report of the ULCC, the drafters of the Model Law felt that it was "inappropriate to compel a tribunal to decide matters that it concluded it lacked jurisdiction to decide" and accordingly gave the court no power to reverse the tribunal's decision and require it to decide the dispute. The drafters of the Model Law may also have been of the view that a decision by the arbitral tribunal declining jurisdiction is a final award and subject to an application for judicial review of the award under Article 34 of the Model Law. The view that a negative jurisdictional decision is a final award and subject to appeal under Article 34 is apparently shared by Gary Born as expressed in ***International Commercial Arbitration*** (2nd ed., 2014, Vol. 1, p. 1104).

If there is a right to review an arbitral award declining jurisdiction, then the normal rights of appeal would presumably apply to that application. The drafters of the Model Law may have decided to provide for an appeal from a decision of an arbitral tribunal accepting jurisdiction because such a decision is an interlocutory, not a final award, and there is no other recourse against such an award.

The Ontario legislature has accepted the recommendation of the ULCC that there should be an appeal if the arbitral tribunal declines jurisdiction. The reasons for the ULCC's recommendation were that:

- the international consensus favours allowing appeals from negative rulings;

- it is unfair and inconsistent to allow appeals from positive rulings without also allowing appeals from negative rulings;

- denying the opportunity to correct erroneous negative rulings can lead to injustice and frustrate the parties' intention of avoiding litigation in national courts; and

- parties may prefer to seat their arbitrations in states that allow appeals from negative rulings.

Section 11(1) of the 2017 ICAA is drafted in a rather ambiguous way. One is left to wonder whether the words "that it does not have jurisdiction" modify the word "plea" or the word "rules". If the former, then an appeal may be taken whichever way the tribunal rules. If the latter, then an appeal may not be taken if the ruling is that the tribunal does have jurisdiction. Since Article 16 provides for an appeal if the tribunal decides that it has jurisdiction this ambiguity may not be important since on either reading, Section 11(1) provides for an appeal if the tribunal holds that it does not have jurisdiction. It is likely that the 2017 ICAA was drafted to allow for an appeal when the tribunal held that it did not, to fill this loophole in the Model law.

What is the impact of section 11 of the 2017 ICAA? Is an appeal under section 11 the exclusive remedy if the arbitral tribunal declines jurisdiction, in which case there is no appeal from the order of the Superior Court? Or is there a right, under Article 34, to bring an application to the Superior Court to review an arbitral decision declining jurisdiction on the basis that the decision is a final award? If there is a right of review under Article 34, is there a right of appeal from that review notwithstanding section 11(2) of the 2017 ICAA?

The second issue relates to ***res judicata*** and issue estoppel. If the arbitral tribunal decides to accept jurisdiction and continue with the hearing, and there is no appeal from that decision, presumably there is no issue ***res judicata*** at that point, and the final arbitral award is subject to review on all grounds, including jurisdiction. But if, under Article 16(3) of the Model Law, a party appeals to the court the decision of the arbitral tribunal accepting jurisdiction, is the court's decision ***res judicata***? If so, then that factor has a big impact on the decision to appeal to the Superior Court.

Similarly, if the arbitral tribunal declines jurisdiction, an appeal is taken, and the court reverses the arbitral tribunal and sends the matter back to the tribunal, is that decision of the court ***res judicata*****?** Or is the party objecting to the tribunal's jurisdiction entitled to raise that objection in a later application to review the final award, or in defence in an application to enforce the final

award? Articles 34 and 35 of the Model Law expressly state that lack of jurisdiction is a ground to review, and to refuse the recognition and enforcement of, an arbitral award. In effect, can the jurisdiction of an arbitral tribunal always be raised?

3. Interim relief

The Updated Model Law contains a much broader power for an arbitral tribunal to grant interim relief. As summarized in the ULCC report:

- Article 17 of the Updated Model Law re-states the authority of arbitrators to award interim measures and then adds a description of the categories of permissible interim measures.

- Article 17A sets out the tests that applicants for interim measures must meet. The tests are:

  (a) Irreparable Harm that substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

  (b) A reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility is not to affect the discretion of the arbitral tribunal in making any subsequent determination.

- Article 17B empowers the arbitral tribunal to make preliminary orders and the conditions for granting such orders. These orders may be granted ***ex parte*** if the tribunal decides that the disclosure of the request for an interim measure will frustrate the purpose of the interim measure.

- Article 17 C sets forth the specific regime for preliminary orders. While a preliminary order expires twenty days after its issuance, its terms may be adopted or modified in an interim measure. A preliminary order is binding on the parties but not subject to enforcement by a court, and does not constitute an award.

- Article 17D authorizes arbitrators to modify, suspend or terminate interim measures.

- Article 17E authorizes arbitrators to require applicants for interim measures to provide security.

- Article 17F requires prompt disclosure of all material circumstances and of any changes in circumstances that might have a bearing on the interim measure.

- Article 17G creates a cause of action for damages and costs against parties who obtain interim measure that the tribunal later concludes should not have been granted.

- Article 17H makes orders or awards for interim measures enforceable in a similar manner to other awards.

- Article 17I sets out the grounds on which a court may refuse recognition and enforcement of interim measures.

- Article 17J gives the court the same powers regarding interim measures in relation to arbitration proceedings as the court has in relation to court proceedings.

With the 2017 ICAA now in force, Ontario practitioners in the field of international commercial arbitration will have to become familiar with the broader interim relief regime contained in the Updated Model Law.

4. Written Agreement

Article 7 of the Updated Model Law provides two alternative forms of arbitration agreement that qualify as an "arbitration agreement" under that Law. Option 1 is a written agreement which is of the same nature as the arbitration agreement as defined in the present Model law. Option 2 is a less formal agreement, simply "an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." Section 5(2) of the 2017 ICAA adopts Option 1, so there is no change in the Ontario law in this respect.

5. Enforcement of an award

Article 35(2) of the Updated Model Law states that the party relying on an award or seeking to enforce it "shall supply the original award or a copy thereof." Article 35(2) of the prior Model Law required that party to provide a "duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement….or a duly certified copy thereof." So, under the Updated Model Law, the party seeking to rely upon the award or enforce it need not, at least in the first instance, provide the arbitration agreement or a copy of it.

Other Statutes annexed to the Burden *Reduction Act, 2017*

In addition to the 2017 ICAA, there are many other statutes attached to the ***Burden Reduction Act, 2017***, including the ***International Choice of Court Agreement Convention Act, 2017***, the ***International Electronic Communications Convention Act, 2017,* the *International Recognition of Trusts Act, 2017*** and the ***International Sale of Goods Act Amendments***.

For practitioners involved in international disputes, the ***International Choice of Court Agreement Convention Act, 2017*** is particularly important. That Act adopts the International Choice of Court Agreement Convention. The Convention seeks to put court litigation in a similar position to arbitration, so far as reciprocal enforcement is concerned. Clearly, reciprocal enforcement is one of the great advantages of international arbitration. Those engaged in court litigation have long since wanted court judgments to enjoy the same reciprocity of enforcement.

Reciprocity of enforcement for court judgments is achieved in the Convention by permitting parties to enter into a written "exclusive choice of court agreement" for the purpose of choosing a court to decide disputes "which have arisen or may arise in connection with a particular legal relationship." If they do, then the selected court may not decline to exercise jurisdiction on the ground that some other court should decide the dispute and, except in limited circumstances, any other court shall decline to decide the dispute. The judgment of the chosen court shall be enforced by the courts in all other signatory countries, and those latter courts shall not review the merits of the dispute or the facts found by the chosen court. A judgment shall be recognised only if it has effect in the State of origin, and shall be enforced only if it is enforceable in the State of origin.

The Convention is subject to a broad exclusion of subject matters, including amongst others: consumer claims; employment contracts including collective agreements; status and legal capacity of natural persons; maintenance and family law matters; wills and succession; insolvency and composition; carriage of passengers and goods; marine pollution, limitation of liability for marine claims, anti- trust; person injury for natural persons; tort claims for damage to tangible person property not arising from contracts; and certain claims relating to intellectual property. By these exclusions, the Convention appears to focus on the court resolution of commercial disputes.

Ontario's adoption of the International Choice of Court Agreement Convention may well encourage Ontario parties to insert choice of court agreements into their dealings with foreign parties and to rely on that Convention to enforce their rights, and not international arbitration. The difficulty, of course, is in coming to an agreement on a court to settle all claims between the parties. Each party may not want the courts of the other party's country to decide the disputes between them. So arbitration may still be their preferred option.

See *Heintzman and Goldsmith on Canadian Building Contracts*, 5th Ed. Chapter 11

Arbitration – International Commercial Arbitration – pnew legislation

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