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Thomas Heintzman specializes in the field of alternative dispute resolution. He has acted as counsel in trials, appeals and arbitrations in Ontario, Newfoundland, Manitoba, British Columbia and New Brunswick and has made numerous appearances before the Supreme Court of Canada.

Mr. Heintzman practised with McCarthy Tétrault LLP for over 40 years with an emphasis in commercial disputes relating to securities law and shareholders' rights, government contracts, broadcasting and telecommunications, construction and environmental law.

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

Who Decides If There Is An Appeal From A Court Order Requiring Arbitration: The Parties Or The Court?

One of the first issues that can arise in a dispute is whether arbitration or court proceedings must be pursued. The issue will often arise from a motion by a defendant in the action. The defendant will bring a motion to stay or dismiss the action on the basis that the dispute must be arbitrated.

What happens when one party wants to appeal the decision which grants the motion to stay or dismiss? Can the parties to the arbitration agreement agree beforehand that there shall, or

shall not be, a right of appeal? That was the issue that Federal Court of Appeal recently considered in ***Murphy v. Amway Canada Corporation.***

Interestingly, the Federal Court of Appeal held that, while the applicable arbitration legislation can preclude an appeal from that decision, the parties cannot, and that the court's own statutory powers relating to appeals apply despite what the parties have agreed to. This decision could have wider ramifications relating to the parties' ability to limit or expand the powers of courts relating to arbitration proceedings. According to this decision, the parties may have no right to do so.

Background

Amway is in the business of distributing home, personal care, beauty and health products. It does so through individual distributors who sell the products in their homes or through other persons they recruit. Mr Murphy was an Amway representative in British Columbia.

The agreement between Amway and Mr Murphy was called the Registration Agreement. The Registration Agreement contained a clause requiring any dispute between the parties to be arbitrated. The arbitration clause contained conflicting provisions relating to the arbitration. On the one hand it said that the Ontario *Arbitration Act, 1991* was to govern the "interpretation, enforcement, and any proceedings in any federal or provincial court in Canada." On the other hand, it said that Michigan law applied to the arbitration and that the "United States Arbitration Act shall govern the interpretation and enforcement of the arbitration rules and the arbitration proceedings." The Rules of Conduct incorporated into the arbitration clause stated that the arbitration would be conducted under the procedures of JAMS (an American-based dispute resolution service) or the American Arbitration Association.

The Murphy v Amway decision:

The *Murphy v. Amway* decision is most famous for the ruling that a party to an arbitration agreement who asserts a claim under the ***Competition Act*** must bring the claim by way of arbitration, and cannot bring the claim in court. Accordingly, Mr. Murphy was precluded from bringing a class action asserting remedies under the *Competition Act* against Amway.

A judge of the Federal Court stayed Mr. Murphy's action based upon the arbitration agreement contained in the agreement between Mr Murphy and Amway. Mr. Murphy appealed. A preliminary issue in the Federal Court of Appeal was whether Mr. Murphy had any right to appeal.

Amway argued that Mr. Murphy had no right of appeal from the decision of the Federal Court because, by virtue of the parties' agreement, the Ontario ***Arbitration Act, 1991*** applied. Section

7 of that Act provides for a party to an action bringing a motion to stay an action based upon an arbitration agreement. Sub-section 7(6) states that "there is no appeal from the court's decision." Accordingly, Amway argued that the parties had incorporated sub-section 7(6) into their agreement and that subsection precluded Mr. Murphy from appealing.

The Federal Court of Appeal rejected Amway's submission and held that Mr. Murphy was entitled to appeal. It held that the Ontario *Arbitration Act, 1991* did not apply to the Registration Agreement as a matter of statute law. It said: "Simply put, we are not bound by the term of that statute." It so held presumably because the Registration Agreement related to an Amway representative located in British Columbia and a distribution agreement to be performed in British Columbia, and not agreements made in Ontario. The Federal Court of Appeal accordingly held that the Ontario *Arbitration Act, 1991* only applied by way of agreement, that is, by being incorporated into the Registration Agreement.

The Federal Court of Appeal further held that, simply as an agreement, the arbitration clause in Registration Agreement could not over-ride the *Federal Courts Act*. That Act provides for an appeal to the Federal Court of Appeal from decisions of the Federal Court. In that situation, the Federal Court of Appeal held that the *Federal Courts Act* applied and was not ousted by the parties.

The Federal Court of Appeal distinguished the present situation from that found in a number of provincial trial and appellate courts decisions in which the court had applied sub-section 7(6), or the comparable section in other provinces. In those cases, sub-section 7(6) applied directly to the proceedings because the arbitration was governed by that provincial law. Here, the Ontario *Arbitration Act, 1991* apparently had no application *qua* statute.

The Federal Court of Appeal also distinguished the decision in ***Halterm Ltd v. Canada***, [1984] F.C.J. No 541. In that case the parties had effectively appointed the Federal Court trial division as the arbitrator of their dispute. In that situation, they were permitted to make a binding and effective agreement that there would be no appeal.

In the result, the Federal Court of Appeal held that the parties had not and could not agree there was no appeal from the judge's order granting the stay. The Court proceeded to hear the appeal, but dismissed the appeal on the ground that the Federal Court had properly held that the dispute must be determined by arbitration.

Discussion

This decision raises the very interesting public policy issue of where the limits of agreement are in respect of court procedures generally and specifically in relation to arbitration proceedings.

There are a number of sections in the Ontario *Arbitration Act, 1991* that state that there is "no appeal" or limited rights of appeal:

section 7(6) – no appeals with respect to a court decision to stay the action in favour of arbitration;
section 10(2) – no appeals with respect to the court's appointment of the arbitral tribunal;
section 15(6) – right of appeal only by a removed arbitrator or party with respect to a court decision to remove an arbitrator;
section 16(4) – no appeal from court order appointing a replacement arbitrator; section 17(9) – no appeal from a court order dealing with a jurisdictional objection.

None of these prohibitions on appeals (and particularly the one found in sub-section 7(6) of the Ontario Act) are found in the British Columbia *Commercial Arbitration Act.* This may be the reason why Amway relied upon the Ontario Act.

These prohibitions on appeal exist alongside the provisions in the ***Courts of Justice Act*** and the ***Rules of Civil Procedure*** contemplating appeals from the same judges to courts of appeal. Nevertheless, the latter provisions have been found to be inoperative in the face of the specific prohibition on appeals found in the *Arbitration Act, 1991*.

Section 3 of the Ontario *Arbitration Act, 1991* says that "the parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except" certain specific sections. None of those non-waivable sections include any of the sections precluding appeals. In that situation may the parties agree that there is an appeal? Presumably the argument would be that the parties cannot create by an agreement an appeal to the courts; and that only the legislature can do that.

If that is so, and if the parties cannot contract <u>in</u> to an appeal, then should the parties be able to contract <u>out</u> of an appeal? Should they be able to contract out of the right in section 45 to seek leave to appeal? Section 45 is not one of the sections that the parties are precluded from waiving and the case law appears to support the entitlement of the parties to contract out of this statutory right to seek leave to appeal. But if a party can do so, should it also be entitled to contract out of the prohibition against appeals in the other sections?

These sections are, of course, one step closer to the arbitration than the situation in ***Murphy v. Amway***. There, the appeal concerned an appeal from one Federal Court judge to the Court of Appeal, that is, an appeal within the court system itself. So the argument that the parties should not be able to contract out of the appeal rights found in the court statutes may have greater weight. Nevertheless, without citing any authority, the Federal Court of Appeal held that no such agreement can be made, <u>even if</u> the prohibition on appeal is exactly what is found

in provincial arbitration statutes. Since the prohibition on appeals is found in provincial statutes, it is hard to say that such a prohibition is contrary to general public policy. The argument must be made entirely on the basis that the parties cannot, in advance, contract into or out of the provisions of the court system. For example, just as they cannot contract about what are the grounds for appeal to the Federal Court of Appeal (or the Supreme Court of Canada) will be between them, they cannot contract that there will be no such appeal.

The **Ontario *International Commercial Arbitration Act* (ICAA)** and the **Model Law** attached to that statute do not contain any prohibitions on appeals or any right to contract out of the statute. It is interesting to speculate why this is so, in light of the contrasting provisions in the domestic statute. So far as appeals are concerned, one might conclude that, being an international law intended to be adopted in many countries, the Model Law does not deal with rights of appeal, leaving each country to sort that matter out. In the case of Ontario, however, the effect is to leave wide open rights of appeal in many cases in which there would be no appeal under the domestic statute. So far as contracting out, ICAA and the Model Law are written in a fashion that makes it appear that they are public policy and that the parties cannot contract out of them.

All of the above, and the decision in *Murphy v. Amway,* may make us re-think the legal principles underlying the waiver or creation of rights relating to appeals and arbitration proceedings. Is the right to waive or create such rights based on contract law, administrative law, public policy or what, and why?

See *Heintzman and Goldsmith on Canadian Building Contracts,* 4th ed., chapter 10

***Murphy v. Amway Canada Corporation,* 2013 FCA 38**

Arbitration – Stay of court proceedings – appeals -

Thomas G. Heintzman O.C., Q.C., FCIArb **March 10, 2013**

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