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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 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:

M.J.B. Enterprises Ltd. v. Defence Construction (1951), [1999] 1 S.C.R. 619 and
Double N Earthmovers Ltd. v. Edmonton (City), [2007] 1 S.C.R. 116

Ontario's Highest Court Upholds NAFTA Arbitration Award Against Mexico

The Ontario Court of Appeal has just released an important decision upholding an arbitration award under NAFTA against Mexico. This decision shows that Canadian courts will be reluctant to interfere on jurisdictional grounds with the remedial decisions of international commercial arbitrations.

In ***The United Mexican States v. Cargill, Incorporated,*** Mexico opposed the recognition in Ontario of an award by an international commercial arbitration tribunal relating to Mexico's

protection of its refined sugar industry. Cargill had established a business in which its wholly-owned Mexican subsidiary distributed HFCS, a low-cost substitute for caned sugar. Cargill's Mexican subsidiary imported HFCS from Cargill's U.S.'s plants, and sold it to Mexican customers. Mexico enacted a number of prohibitions which were found by the arbitration tribunal to constitute breaches of NAFTA. As a result of those prohibitions, Cargill shut down a number of its HFCS plants and distribution centres in the U.S.A.

Cargill claimed damages for both the "downstream losses" that its Mexican subsidiary suffered, and also the "upstream losses" which it suffered by reason of the closing down of its U.S. production and distribution facilities. The arbitral tribunal awarded damages on both accounts. In particular, in relation to the damages suffered by reason of the impact on Cargill's U.S. plants and distribution centres, the arbitral tribunal found that those damages were caused by the prohibitions implemented by Mexico.

Since the seat of the arbitration was in Toronto, Ontario, Mexico challenged the damage award in the Ontario Superior Court. Its position was that the arbitral tribunal had no jurisdiction to award the "upstream" damages, and its position was supported by the governments of the U.S.A. and Canada as intervenors.

Mexico argued that under Chapter 11 of NAFTA, Cargill could only recover losses as an "investor" in relation to its "investment" in Mexico. Accordingly, Mexico argued that Cargill had no right to recover, and the arbitral tribunal had no jurisdiction to award, damages to Cargill as a U.S. producer and exporter of its product to Mexico. The tribunal held that Cargill was an "investor", that it had made an "investment", that Mexico had adopted a prohibited measure and that everything else related to the measure of damages. The tribunal found that there were no express or necessarily implied limitations on the scope and nature of the damages that could be awarded by it.

Mexico's submissions were rejected by both the Superior Court judge who heard the initial application and the Court of Appeal. The Court of Appeal went through a lengthy consideration of the standard of review to be applied, and basically held that if the issue was one of jurisdiction, the standard of review was "correctness". Having said that, the Court stated that this standard only applied in the rare case of a true jurisdictional dispute, and that a very narrow view should be taken of what amounted to a jurisdictional dispute in the case of international commercial arbitrations.

The Court of Appeal's conclusion:

The Court of Appeal held that the arbitral tribunal had not exceeded its jurisdiction. It arrived at that conclusion through a number of concessions by Mexico and other conclusions, such as: Mexico's concession that damage suffered by an investor is not limited to damage suffered in the country where the investment is located; and no territorial limitation for damages or the occurrence of damages is contained in NAFTA.

The Court concluded: “It is up to the tribunal to make findings of fact, apply the facts to the definitions, and determine whether, in any particular case, the claimed damages fall within the defined criteria.”

In particular, the Court held as follows;

> “The only issue is whether the tribunal was correct in its determination that it had jurisdiction to decide the scope of damages suffered by Cargill by applying the criteria set out in the relevant articles of Chapter 11, and that there is no language in Chapter 11, or as agreed by the NAFTA Parties, that imposes a territorial limitation on those damages. Once the court concludes that the tribunal made no error in its assumption of jurisdiction, the court does not go on to review the entire analysis to decide if the result was reasonable.”

Clearly, this decision is of great importance to arbitrations under NAFTA. It is also of general importance under the UNCITRAL Model Law. The Model Law was incorporated into Ontario law in the *International Commercial Arbitration Act* .

Everything is, of course, in the eyes of the beholder and depends upon the perspective from which one looks at the matter. To the governments of Mexico, U.S.A. and Canada, the award of damages for activity in another country could not be the basis of a claim as an “investor” in the offending country. From their perspective, damage <u>was</u> a jurisdictional issue.

But NAFTA does not quite say that loss in another country is a forbidden element of recovery. And from the perspective of the injured party, damage in the country of origin may well be a source of damage arising from an investment in the offending country. In the absence of specific language in NAFTA removing such damage from the loss which the complainant may recover, the Court of Appeal was not able to say that the arbitral tribunal had made a jurisdictional error in awarding those damages.

There are at least three lessons to be learned from this decision:

First, Canadian courts will be very reluctant to interfere with the decisions of international commercial arbitrations. This reluctance is due to the evident respect for those tribunals which legislatures have accorded to them.

Second, absent specific language excluding the jurisdiction of the arbitral tribunal, a Canadian court is unlikely to infer a limitation.

Third, it is very unlikely that a Canadian court will find that arbitral decisions relating to damages or other remedies contain jurisdictional error. Once the arbitral tribunal has jurisdiction to deal with the merits of the dispute, it will require specific limitations on the tribunal’s jurisdiction for the remedial powers of the tribunal to be circumscribed.

Arbitration - International Arbitration - Enforcement-Remedies - Damages

***The United Mexican States v. Cargill, Incorporated* 2011 ONCA 622**

Thomas G. Heintzman O.C., Q.C. **October 14, 2011**

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