Appeal Court Puts a New Spin on Costs for Arbitration

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As published in the February 12, 2010 issue of THE LAWYERS WEEKLY

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The ability of commercial arbitrators to order security for costs has taken a new twist.

The Ontario Court of Appeal defended arbitral autonomy, and questioned the extent to which security for costs is not just procedural, in Inforica Inc. v. CGI Information Systems, [2009] O.J. No. 3747. The court allowed an appeal from Justice Sandra Chapnik's 2008 determination that, in ordering security for costs, an arbitrator had exceeded his jurisdiction.

The lessons from the Ontario Court of Appeal's analysis are complicated by the fact that its focus was on whether the Superior Court itself had had jurisdiction to review the arbitrator's order. Reminding practitioners of the limits on judicial intervention in arbitration, the Court of Appeal held it had not.

"…whether arbitral jurisdiction may derive from statutes which do not expressly provide for security for costs has been of longstanding interest to parties and arbitrators." - *Ludmila Herbst*

The Court of Appeal emphasized that judicial intervention in the arbitral process should be strictly limited to those situations contemplated by Ontario's Arbitration Act, 1991. This limitation was "in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the court."

Against this backdrop, the appeal court found that while s. 17(8) of the Act permits the Superior Court to review arbitral rulings on certain jurisdictional objections, it did not apply here. Section 17 concerns arbitral jurisdiction to entertain the subject matter of the dispute, not "to make interlocutory or procedural orders that do not determine the merits of the dispute and that are made along the way to final resolution of the issues." Even if an order for security for costs were not strictly procedural in nature (an issue returned to below), s. 17(8) would not have applied.

And while s. 46(1) of the Act permits the Superior Court to set aside arbitral "awards" on certain grounds, an arbitral order for security for costs does not qualify as such: an award "connote[s] the judgment or order of an arbitral tribunal

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that 'disposes of part or all of the dispute between the parties.'" The Court of Appeal also noted that a "significant feature of the modern approach limiting access to the courts to review decisions of arbitrators" is that there are no appeals from procedural or interlocutory orders.

The Court of Appeal did not expressly question Justice Chapnik's premise that the arbitrator's jurisdiction to order security for costs had to derive from either the parties' agreement or statute. However, the Court of Appeal noted that the Superior Court should not have overturned the arbitrator's finding - either one of fact or close to that end of the mixed fact and law spectrum - that the ADR Chambers Rules (which provide for security for costs) applied by agreement.

Holding that an order for security for costs was not strictly procedural in nature, Justice Chapnik had also determined that the arbitrator lacked jurisdiction to order security for costs under s. 20 of the Act, which permits the arbitral tribunal to determine the procedure to be followed in the arbitration.

While not considering whether s. 20 conferred such jurisdiction, for other purposes the Court of Appeal noted that "even if it can be said that orders for security for costs do fall into a special category, that category is much closer to procedure than to substance," with such orders being made to "protect the integrity of the dispute resolution process by preventing parties from structuring their affairs in a manner that immunizes them from the discipline of costs. They do not decide rights, but rather serve to ensure that parties are governed by the rules of the game."

The Court of Appeal stated that while "failure to satisfy an order for security for costs may lead to a dismissal of the claim" (an important consideration for Justice Chapnik), this was in common with many procedural or interlocutory orders, and "the sanction for non-compliance with an order cannot alter the nature of the order itself." Its reasoning suggests it might at least have been more open than Justice Chapnik to finding jurisdiction under s. 20 had it addressed the issue.

The question of whether arbitral jurisdiction may derive from statutes which do not expressly provide for security for costs has been of longstanding interest to parties and arbitrators. In the abiding irony of arbitration, by limiting or foreclosing review of such orders, the Court of Appeal has made less likely the further development of Canadian jurisprudence on the merits of the issue.

At the same time, as commercial arbitration awards are private, how arbitrators treat security for costs under the applicable legislative regimes may remain largely unknown. Parties who wish to provide for security for costs should consider addressing this issue in their arbitration agreements or verifying that the rules they adopt as part of that agreement do so.

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