Judicial Review in Commercial Arbitration Awards North of The 49th Parallel - Sattva

by

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"Disputes, unlike wine, do not improve by aging.
Willard Z. Estey (a former Justice of the Supreme Court of Canada)

Unlike the United States, *all* Canadian provinces *and* the federal government have adopted legislation implementing the UNCITRAL *Model Law* with respect to international arbitrations conducted in Canada and the enforcement of international arbitration awards. Thus principles (first enunciated in the *New York Convention* of 1958 and amplified in the *Model Law*) that limit judicial intervention and preclude any review of the merits either on matters of fact or law, are applicable and very consistently enforced throughout Canada with respect to international arbitrations. British Columbia was the first jurisdiction to adopt the Model Law anywhere in the world.

Different principles apply to non-international commercial arbitration. While federal arbitration legislation (which only applies to disputes with the federal government and certain specialized areas of the law under federal jurisdiction) and the Quebec Civil Code apply the same principles regarding judicial non-intervention to both international and non-international commercial arbitration, most of the provinces allow for appeals to the courts on "questions of law". Usually, such appeals can only be brought if the losing party obtains "leave", i.e. permission, to appeal on certain criteria that are set out in the arbitration statutes. In most provinces, the parties may exclude any right of appeal by agreement, or in some cases they may expand rights of appeal to include appeals on questions of fact and questions of mixed fact and law. In two provinces (British Columbia and Alberta) it is not possible for the parties to contract out of the possibility of an appeal to the court, with leave, on a question of law.

Although the distinction between international and non-international arbitration is clear in theory, it can become somewhat blurred in practice. It must be remembered that many arbitrations that would otherwise be considered international become non-international when the foreign party (very typically American) is involved in the arbitration through a Canadian subsidiary. It may also be of interest that is it is not unheard of, in Canada, for parties to an international arbitration to choose to make the arbitration subject to a domestic arbitration statute rather than to the international statute which should be applicable. No doubt this choice is made by mistake in many cases; however, one of the authors is aware of at least one instance in which the choice was made deliberately because the parties wished to have judicial review of the arbitral tribunal"s award on questions of law. The validity of the choice to turn an international arbitration into a domestic arbitration for purposes of judicial review is very much open to debate and disagreement, but is beyond the scope of this article.

For those who deal with domestic commercial arbitration North of the 49th Parallel, the recent decision of the Supreme Court of Canada in *Sattva Capital Corporation v. Creston Moly Corporation*, 2014 SCC 53 ("Sattva") marks an important inflection point in the development of judicial attitudes towards the review of arbitration awards on the merits.

The facts of the Sattva case are themselves very illustrative. Sattva Capital earned an introduction fee which was payable either in cash or in shares. Sattva elected to take the finder"s fee in shares. The agreement provided that the amount of the shares would be calculated as of the day prior to the day on which the transaction giving rise to the introduction fee would be made public. However, the agreement also contained a "maximum fee" provision which stated that the fee would not exceed $1.5 million. Creston Moly took the position that if the number of shares as calculated on the day before the announcement would exceed $1.5

million in value on the day on which they were delivered, the number of shares would have to be reduced accordingly.

The dispute was submitted to arbitration in February 2008. The case was heard in late September, early October. The arbitration award was released in December 2008 by Leon Getz QC, a seasoned commercial arbitrator and retired professor of corporate law at the University of British Columbia. The arbitrator rejected the position taken by Creston Moly.

The story of the leave to appeal proceedings that followed the rendering of the arbitration award is a sad commentary on the leave to appeal process. The entire arbitration was conducted and concluded within approximately 10 months of the dispute arising. The final resolution, which came with the rendering of the Supreme Court of Canada decision, took another 5 1/2 years. The first judge who was asked for leave to appeal declined. Creston Moly sought and obtained leave to appeal that decision to the Court of Appeal. The Court of Appeal granted leave to appeal both the decision of the applications judge and the award. The judge who then heard the appeal from the award rejected the appeal. That decision was the subject of a further appeal, this time as of right, to the Court of Appeal. The Court of Appeal chastised the judge hearing the appeal for not having granted the appeal given that the Court of Appeal had granted leave to appeal, stating that the judge hearing the appeal was bound by the Court of Appeals observations in its decision to grant leave to appeal. In the course of granting the appeal, the Court of Appeal commented that the arbitration award was absurd. The Supreme Court of Canada granted leave to appeal the decision of the Court of Appeal and, on the appeal, reversed the decision of the Court of Appeal and commented critically on virtually every aspect of its decision.

Sattva is a seminal decision in commercial arbitration for several reasons. Rothstein J. writing for the court dealt with issues affecting not only the process of appealing an arbitration award but also affecting the ability to appeal an interpretation of a commercial contract. The latter is the most frequent ground on which appeals from arbitration awards are sought.

Briefly, the important principles established in the reasons include:

1. A statutory right to seek leave to appeal on a question of law does not confer a right to seek leave to appeal on a question of mixed fact and law.

2. A question of law must be "extricable" from issues of fact and raise a question of principle that could affect other cases.

3. Interpretation of a written contract is not a question of law but is a question of mixed fact and law. The old approach treating interpretation of a written contract as an issue of law is now "abandoned".

4. Questions of law raised by an arbitration award are not reviewable on the standard of correctness, but on a standard of reasonableness. Unless the question of law raises a constitutional issue or an issue fundamental to our system of justice, the award will not be reversed unless the result is unreasonable.

5. Assuming that a question of law meeting these criteria is made out, the test for granting leave to appeal is "arguable merit".

6. The Court provides a practical common-sense approach on interpretation of contracts which is not to be dominated by technical rules of construction (par. 47) and a clearer statement of how one should deal with the parol evidence rule (par.60).

As noted above, the Supreme Court of Canada has shifted away from the historical approach which dictated that interpretation of a written contract was a question of law. This shift is based on Canadian law

relating to the interpretation of contracts which requires the decision maker to have regard for their surrounding circumstances of the contract " sometimes referred to as the "factual matrix". As this approach has become increasingly entrenched, it has become more difficult to characterize the interpretation of written contracts purely as a question of law based on the language of the contract itself. The court also found that treating the interpretation of written contracts as a pure question of law is a historical anachronism based on the fact that, when the principle originally developed, questions of interpretation were better treated as matters of law to be decided by the judge rather than as questions of fact or mixed fact and law to be dealt with by juries that might not have been entirely literate. Indeed, this is a double anachronism as Canadian juries nowadays are neither illiterate nor are they used in Canadian civil cases in which contracts are interpreted.

The court at paragraph 47 deals with the evolution towards the practical common sense approach, not the technical rules of construction - all of which promotes commercial efficacy which the business community embraces.

Given the ultimate outcome in the *Sattva* case (award confirmed after five trips to the Court over a six year period following a one year arbitration process) it is legitimate to ask how much the parties were benefited by having access to an appeal process at all. Some argue that an appeal process ensures a "correct" result. But assume the SCC was right when they reversed the Court of Appeal and restored the Award (which by definition they are), consider what the situation would have been if they had not granted leave or do not grant leave in the next similar case if the losing party in the Court of Appeal ran out of time or money to pursue a further appeal. The parties would have ended up with an "incorrect" result because of an appeal process which is mandated by the *BC Arbitration Act*. Of course, this could be said in any case in which an appeal is successfully pursued to the next level; but the point is dramatically illustrated in Sattva in which an award found to be "absurd" by the Court of Appeal of a major Canadian province, was found not to be unreasonable by the Supreme Court of Canada.

In any event, the SCC has substantially undermined the argument that appeals from arbitration awards are necessary to ensure adherence to correct legal principles. Adherence to correct legal principles is no longer the test. The final test, after any question of law has been considered, is reasonableness (or unreasonableness) of the result.

The *Sattva* decision, if applied in the spirit in which it was rendered, should render an appeal from an arbitration award pointless in virtually all cases - which seems to be the point the SCC is trying to make. The question remains whether the enlightened principles in *Sattva* will have the salutary effect intended if parties cannot escape from an appeal regime, in BC and Alberta, or if they choose to adopt an appeal process as they may do elsewhere in Canada. For example, how difficult would it have been for the BC Court of Appeal (which found the award in Sattva to be "absurd") to have reached exactly the same result (now known to be wrong) by navigating through the new principles set out in Sattva?

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In 1810, Jeremy Bentham, in the *The Rationale of Evidence*, described arbitration as a process by which the parties consent to the judgment of a third person *without recourse to the courts*. There are clear benefits to this form of dispute resolution when chosen by the parties. All of those benefits are compromised by an appeal process which leads them into the very court system they sought to avoid.

Consider only one of those benefits: the timeliness of the arbitration proceedings when contrasted with the glacial pace of the court process. In the end, what the arbitrator accomplished in a year in Sattva provided the parties with more value than what the court system labored mightily to deliver in almost six.

It will now be appropriate for provincial legislatures to consider amendments to the arbitration statutes which govern arbitration appeals. The subject of legislative changes is a topic for the Unified Law Conference of Canada (ULCC) in its current review of domestic arbitration legislation.

[1]. In *Ottawa (City) v. Coliseum Inc.* 2014 Carswell Ont. 12211, 2014 ONSC 3838 a decision released a few weeks after *Sattva* a judge of the Ontario Superior Court had no difficulty identifying "extricable errors of law" in an arbitration award and held that an award can not be "reasonable" unless it is correct. That decision is now under appeal.

In *Martenfeld v. Collins Barrow* 2014 ONCA 625, the Ontario Court of Appeal affirmed the principles of contractual interpretation and standard of review in contractual disputes citing Sattva

On August 28, 2014, in *942125 Ontario Limited v. Metro Ontario Real Estate Limited*, the Ontario Superior Court citing *Sattva*, particularly paragraphs 41-64 and 72 concluded that applicable criteria for leave had not been satisfied and leave was not granted.

The authors, both members of the ULLC, are independent arbitrators and mediators of Canadian and International Arbitration. Kenneth Glasner QC, is based in Vancouver and has practiced as a neutral since 1967. He is one of the Canadian neutrals listed with CPR as well as being a past contributor to Alternatives. He is also a past trustee of the British Columbia International Commercial Arbitration Centre. William G. Horton is based in Toronto. He is a listed CPR's distinguished panel of neutrals and numerous other international panels of arbitrators.

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