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Top 4 Considerations When Appealing Commercial Arbitration Awards

By Marco P. Falco

Commercial arbitration has two primary goals: efficiency and finality.

Parties who enter into private domestic arbitration do so in part to avoid the lengthy delays associated with civil litigation. The purpose is to ensure that a matter is brought to a final resolution, without the need for lengthy Court proceedings.

This is why Ontario's *Arbitration Act, 1991*, S.O. 1991, c.17 (the "*Act*") limits the circumstances in which the Courts will allow an appeal from a commercial arbitral award.

Appellate rights are deliberately circumscribed under the *Act*, to ensure that parties are largely bound by the outcome of the arbitral process to which they agreed.

A recent decision of the Ontario Superior Court, *D Lands Inc. v. KS Victoria and King Inc.,* 2022 ONSC 1029, serves as a helpful reminder of the main considerations a party wishing to appeal a commercial arbitral award ought to take into account.

Disputed Valuations

D Lands arose out of a dispute between a commercial landlord and tenant regarding their 99-year lease of land in Toronto (the "Lease").

The landlord owned the lands and the tenant owned the building on the land. Both landlord and tenant were successors to the parties who entered into the Lease in 1968.

Under the Lease, if the parties were unable to agree to rent payable for a particular term, the rent would be determined by a panel of commercial arbitrators, whose task was to calculate the "appraised value of the Demised Premises".

After the parties could not agree to the rent payable for the following 25-year term of the lease, arbitration ensued. The Majority of the arbitral panel concluded that the value of the "Demised Premises" at the relevant date was $63 million. The minority held it to be $95 million.

The landlord then sought leave to appeal the Majority's award to the Ontario Superior Court pursuant to subsection 45(1) of the *Act*, which provides a right of appeal on questions of law where the arbitration agreement does not set out an express right of appeal, provided the test for "leave" to appeal the decision is met:

45(1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,

(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and

(b) determination of the question of law at issue will significantly affect the rights of the parties.

Alternatively, the landlord sought an order under section 46 of the *Act* to set aside the Majority's award as an "unreasonable and erroneous exercise of the arbitral tribunal's mandate and jurisdiction".

Ultimately, the Court granted leave to appeal the Majority's award to the landlord, but dismissed the appeal. The Court held that the landlord did not show that the Majority made an error of law in interpreting the Lease, nor did it show that the Majority exceeded its jurisdiction in making its ruling.

In reaching these conclusions, the Court set out a number of key factors any party considering an appeal from an arbitral award should take into account. These include:

1. If a prior version of the Act applies, did the parties intend to exclude a right of appeal?

At the time the Lease in *D Lands* was executed in 1968, the 1960 *Arbitrations Act* applied (the "*1960 Act*"). The *1960 Act* established an "opt in" regime for an appeal, meaning the parties arguably had to expressly provide for a right of appeal to the Courts from an arbitration award.

The Lease did not provide for any such statutory right of appeal, nor did it specifically exclude one.

The Lease did refer to the *International Center for Dispute Resolution Rules* (the "ICDR Rules"), which did not provide for a right of appeal.

Citing and distinguishing the leading decision on the matter, being the Court of Appeal's decision in *Labourers' International Union of North America, Local 183 v. Carpenters and Allied Workers Local 27* (1997), 34 O.R. (3d) 472, the Court in *D Lands* noted that in assessing whether the parties intended to exclude the right to appeal the Majority's arbitral award, the Court had to consider:

i. The parties' intention; and

ii. The language of the agreement and surrounding circumstances.

In *D Lands*, the parties did not clearly and unequivocally waive their right to appeal the arbitral award in the Lease. The Court concluded that the parties did not intend to, expressly or impliedly, exclude the possibility of a right of appeal.

2. Should the Court grant leave to appeal?

Under subsection 45(1) of the current *Act*, if the arbitration agreement does not deal with appeals on questions of law, a statutory right of appeal on questions of law nonetheless is available, with leave of the Court, if the circumstances set out under subsection 45(1) of the *Act* above are met.

Normally, questions of contractual interpretation, such as the interpretation of a lease, are considered questions of mixed fact and law, because the lease has to be interpreted in light of its factual matrix: *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 at para. 50.

The Court in *D Lands* granted leave to appeal on the basis of the landlord's argument that the Majority's award failed to interpret the Lease according to basic principles of contractual interpretation and failed to apply binding authority regarding the interpretation of rent renewal clauses, raising questions of law.

The Court was further satisfied that the other preconditions of subsection 45(1) of the *Act* were met: the matter was of importance to the parties and the determination of the legal question would significantly affect the parties.

3. What is the standard of review applicable to arbitral awards on appeal?

The law on this issue is somewhat unsettled and requires appellate Court intervention.

Based on a 2014 decision of the Supreme Court of Canada (the "SCC"), *Sattva, supra*, the Court applied two standards of review to arbitral awards: reasonableness and correctness, which are the same standards applicable to administrative tribunal hearings.

However, in 2019, the SCC issued its decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, which held that where a statute provides for a right of appeal, the standards of review applicable by the Court are the ordinary standards for civil appeals: being "correctness" or "palpable and overriding error".

This principle was further implied, though not formally resolved, in a 2021 SCC decision, *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 at para. 120.

Without clear guidance from an appellate Court on the issue, the Court in *D Lands* ultimately held that the *Vavilov* principle governed. The ordinary standards of appellate review apply to appeals from commercial arbitration awards, being "correctness" or "palpable and overriding error".

In *D Lands*, the standard of review on the legal questions raised by the landlord was the less deferential standard of "correctness".

4. Can the arbitral decision be set aside under section 46(1) of the Act?

Separate and apart from the right to appeal an arbitral award under subsection 45 of the *Act*, section 46 of the *Act* allows a party to seek to set aside an arbitral award on a number of grounds, including that the award "deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement".

In *D Lands*, the Court rejected the landlord's argument that a question of the Lease's interpretation raised a true question about the arbitral panel's jurisdiction, so as to trigger relief under subsection 46.

The Court further noted that subsection 46 is not concerned with the substance of the parties dispute and cannot be employed as an "alternate appeal route": citing *Alectra Utilities Corporation v. Solar Power Network Inc.,* 2019 ONCA 54.

A Long Road to Appeal

The *D Lands* decision illustrates that parties seeking to appeal a commercial arbitration award in Ontario under the *Act* will face a number of hurdles.

The Courts' reluctance to grant leave to appeal the arbitral award and its general approach of deference toward the arbitrator's decision protects the fundamental policy underlying the *Act*: to have the parties resolve their dispute without Court interference.

All things being equal, the parties' choice to have their claim adjudicated by an arbitrator will be respected by the Courts.

For more information on appealing commercial arbitration awards in Ontario, or civil appeals generally,

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