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Article

Litigation

July 2022

Top four factors to consider when appealing commercial arbitration awards

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There are two main goals to commercial arbitration: efficiency and finality. The purpose is to ensure that a matter is brought to final resolution, without the need for lengthy court proceedings and appeals.

Accordingly, Ontario's *Arbitration Act,* 1991, S.O. 1991, c.17 (the Act) deliberately circumscribes the situations in which a party may appeal an arbitral award. In this way, the underlying policy of the Act is enforced –parties are 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 considerations that factor into the calculus of whether an arbitration order should be appealed.

The value of property

D Lands involved a dispute between a commercial landlord and tenant regarding their multi-year lease of land in Toronto (the lease).

The landlord owned the lands and the tenant owned the building on the land. Both the landlord and tenant were successors to the parties who originally 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, who were required to calculate the "appraised value of the Demised Premises."

When 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 was $95 million.

The landlord sought leave to appeal the majority's award to the Ontario Superior Court pursuant to

ss. 45(1) of the Act, which provides a right of appeal on questions of law, subject to certain conditions, where the arbitration agreement does not set out an express right of appeal.

Alternatively, the landlord sought an order under s. 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."

The court granted leave to appeal the majority's award to the landlord, but ultimately dismissed the appeal.

In making this ruling, the court set out a number of key factors that should be taken into consideration when pursuing an appeal:

1. If a prior version of the Act governs, did the original 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 had to expressly provide for a right of appeal to the courts from an arbitration award in their contract.

The lease did not provide for any such right, nor did it exclude one. The lease did expressly refer to the *International Center for Dispute Resolution Rules* (the ICDR Rules). However, the ICDR Rules did not provide for a right of appeal.

Citing and distinguishing the leading decision of the Ontario Court of Appeal 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* held that in assessing whether the parties intended to exclude the right to appeal the majority's arbitral award, the court had to consider:

- The parties' intention; and
- 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 therefore concluded that the parties did not intend to, expressly or impliedly, exclude the possibility of a right of appeal.

2. Should leave to appeal be granted?

Under ss. 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 specific circumstances set out under ss. 45(1) of the Act 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 based on the landlord's position 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. In the landlord's view, these issues raised pure questions of law requiring resolution by an appellate court.

The court was further satisfied that the other preconditions of ss. 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?

The law on this issue is unsettled in Ontario and requires appellate intervention.

Based on a 2014 decision of the Supreme Court of Canada, *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 Supreme Court of Canada 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 Supreme Court of Canada decision, *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District* 2021 SCC 7 at para. 120.

Without clear guidance from an appellate court, the court in *D Lands* 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 ss. 46(1)?

Separate and apart from the right to appeal under sss. 45, s. 46 of the Act allows a party to seek to set aside an arbitral award on a number of jurisdictional 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 ss. 46.

The court further noted that ss. 46 is not concerned with the substance of the parties dispute and

cannot be employed as an "alternate appeal route" to subsection 45, citing *Alectra Utilities Corporation v. Solar Power Network Inc.* 2019 ONCA 254.

Why is it so difficult to appeal a commercial arbitration award?

D Lands illustrates that parties seeking to appeal a commercial arbitration award in Ontario will face a number of hurdles.

The courts' reticence to grant leave to appeal the arbitral award and its general approach of deference protects the normative basis of the Act itself: to have parties of equal bargaining strength resolve their dispute without court interference.

Broad appellate rights undermine the spirit of the Act. If the parties do not expressly provide for appeal rights in their arbitration agreement, they can expect that Ontario courts will only intervene in very narrow circumstances.

This article was published in *The Lawyers' Daily.*

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