

## Arbitration

# Why appealing commercial arbitration awards is an uphill struggle

By Marco Falco



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(March 26, 2018, 9:11 AM EDT) -- The purpose of commercial arbitration is to bring certainty and finality to a dispute without the need for court intervention. Parties choose arbitration for a range of reasons, including the privacy inherent in an arbitral hearing and the expertise of the arbitrator. Nowhere is the policy underlying commercial arbitration more important than where an appellate court subjects an arbitral award to judicial scrutiny. Canadian appeal courts are increasingly showing deference to commercial arbitration decisions in order to honour what was intended to be a final resolution of the parties' dispute.

The Supreme Court of Canada's 2014 decision, *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53, laid the foundation for judicial deference to arbitral awards where the appeal court has determined it has jurisdiction to intervene.

*Sattva* made two key contributions to the standard of review.

It established that the standards of review applicable to administrative tribunals, namely reasonableness and correctness, equally apply to commercial arbitration. This is based on the court's view that tribunals and arbitrators, as non-judicial decision-makers, have similar characteristics, including presumed expertise.

The court in *Sattva* further held that because commercial arbitration "takes place under a tightly defined regime" chosen by the parties, the applicable standard of review is "almost always" reasonableness. The less deferential standard of correctness applies in rare cases where the appeal raises constitutional issues or questions of law of central importance to the legal system as a whole and outside the arbitrator's expertise.

Following *Sattva*, Canadian appeal courts have echoed the deferential approach to commercial arbitration.

In *Ottawa (City) v. Coliseum Inc.* 2016 ONCA 363, the Ontario Court of Appeal reversed a ruling by a Superior Court application judge, who had overturned an arbitrator's interpretation of a settlement agreement. The Court of Appeal applied the reasonableness standard of review to the arbitrator's ruling, relying on *Sattva* for the proposition that even where appeals are limited to questions of law, reasonableness review applies because commercial parties engage in arbitration "by mutual choice" and select the "number and identity of the arbitrators."

What is notable about the *Ottawa (City)* decision is the effect of reasonableness review on the Court of Appeal's assessment of the case's merits. The court noted that while the arbitrator's interpretation of the settlement agreement did not necessarily flow from the express language or four corners of the contract itself, the arbitrator's decision was nonetheless reasonable. It was entitled to deference. The application judge's interpretation of the agreement, which differed from the arbitrator's, was equally reasonable. However, the Court of Appeal concluded that by

substituting the arbitrator's interpretation of the agreement with her own, the application judge erred. In a contest between an arbitrator's and application judge's reasonable interpretation of a contract, the arbitrator's is entitled to deference.

The reasoning in *Ottawa (City)* was guided largely by a 2016 decision of the Ontario Court of Appeal, *Popack v. Lipszyc*, 2016 ONCA 135. Although *Popack* concerned an appeal from an international, as opposed to a domestic, commercial arbitral award, the court held that the nature of the question before the court warranted deference. The court was reviewing a private arbitration award before a panel that was chosen by the parties. The "parties' selection of their forum implie[d] both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum."

In 2017, the Supreme Court revisited the standard of review applicable to commercial arbitration awards in *Teal Cedar Products Ltd. v. British Columbia* 2017 SCC 32.

The court affirmed its previous ruling in *Sattva* that the standard of review in the commercial arbitration context is "almost always" reasonableness, subject to the exceptions listed above.

*Teal*, however, heightens the level of deference owed to commercial arbitrators by establishing that the nature of the question under review on appeal (i.e. factual, legal or mixed factual and legal) does not determine the standard of review. Unlike in appeals from civil proceedings, where the type of question on appeal before the court establishes the standard of review, appeals from arbitral awards are not necessarily dependent on the kind of question the appeal court has to decide.

While *Teal* did not go so far as establishing a presumption of reasonableness in appeals from arbitral awards, the court held that legal questions, which in the civil context would attract correctness review, may still be subject to a reasonableness standard.

The deference shown by Canadian appellate courts to arbitral decisions is a function of the values informing arbitration itself. Judicial deference is based on respect for the parties' choice to resolve their dispute in an alternative forum and to have that dispute resolved finally by an expert arbitrator.

From *Sattva* onward, the case law confirms that appellants who seek to appeal an arbitral decision face an uphill battle. Courts necessarily approach arbitral awards with the utmost reluctance and caution.

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