

Jurisdictional challenges to arbitral awards: raise them before they're gone



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Introduction

Justice Spies, for the Ontario Superior Court of Justice, recently provided a comprehensive judicial review of a jurisdictional challenge to an arbitral award in *Canada Inc v Reid-Lamontagne* (2019 ONSC 364). This case is a reminder that without raising a timely objection to non-compliance before the arbitrator, as required by the Arbitration Act, the arbitral award may not be subject to review. In particular, this case concerned raising an objection to jurisdiction.

Spies concluded that the applicant could not bring a challenge to jurisdiction if it were not brought before the arbitrator at the beginning of the hearing. Arbitrators are afforded significant deference. **(1)** Spies goes further in her analysis and concludes that even if she were to review the arbitrator's decision, it would be appropriate under both a standard of correctness and reasonableness.

Facts

Christine Reid-Lamontagne (the purchaser) commenced an arbitration under the Canadian Motor Vehicle Arbitration Plan (CAMVAP) against FCA Canada Inc (the manufacturer) regarding a number of ongoing problems with the vehicle she had purchased from Ontario Chrysler Jeep Dodge (the authorised dealer). **(2)**

In the arbitration agreement the parties consented to the use of CAMVAP, an alternative dispute resolution programme intended to resolve small disputes between car manufacturers and customers. **(3)** To be eligible for CAMVAP, the dispute must be about a "Current Defect in vehicle Assembly or Materials". **(4)**

The manufacturer was given multiple opportunities to inspect the vehicle and even "agree[d] that the Vehicle was 'now eligible for the CAMVAP process'". **(5)** From these inspections the manufacturer concluded that the vehicle had had an aftermarket starter installed. **(6)** A further inspection, conducted by a technician, confirmed that the starter had been installed by a third party. The technician's report recommended removing the starter to facilitate further testing. **(7)**

The purchaser argued that because the starter had come with the vehicle and had been included in the purchase price, the manufacturer should bear the cost of bringing the vehicle back to its "original equipment specifications". **(8)** The manufacturer disagreed, claiming that it had not authorised the installation of the starter and therefore should not have to pay to remove it.

The arbitrator's final award concluded that because the cost of installing the starter had not been specified in the purchase price, the manufacturer should remove it.**(9)**

It was not until the final award had been rendered that the manufacturer brought forward a jurisdictional challenge. It "complain[ed] that the Arbitrator failed to address the jurisdictional basis for rendering his Final Award".**(10)** But, as the court makes clear, it is the parties' responsibility – not the arbitrator's – to challenge jurisdiction.

Court's analysis

The court stated that "(i) In failing to raise a timely objection to the Arbitrator's jurisdiction the Manufacturer is barred from raising this issue for the first time after the fact".

The manufacturer claimed that it was not responsible for the vehicle's problems because the starter had been an "after market part". The court concluded that this was "a defence on the merits, not a preliminary issue of the jurisdiction of the Arbitrator".**(11)** Further, In the final award, the arbitrator stated that the manufacturer had conceded that the vehicle had been eligible for the CAMVAP process, implying that the arbitrator had jurisdiction.

The act provides that if a party to an arbitration fails to object to non-compliance with the act within the prescribed time, it "shall be deemed to have waived the right to object".**(12)** Section 17(3) of the act "provides that a party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration

shall make the objection no later than the beginning of the hearing".(13) (Emphasis in original.) The very purpose of this provision is to encourage parties to raise objections to jurisdiction promptly.**(14)**

The manufacturer and purchaser did not dispute the eligibility of the CAMVAP process at any point during the arbitration.**(15)** The court stated that "Having lost on the merits, the Applicant cannot now re-cast the issue as one of jurisdiction".**(16)**

In addition, because the manufacturer was represented by a manager with several years of experience in CAMVAP arbitrations, it was presumed to be aware of the correct procedure.**(17)** As a result, in failing to object to the arbitrator's jurisdiction when it was statutorily obliged to, the manufacturer waived its right to contest the arbitrator's jurisdiction.

The court went on to state that "(ii) Based on the standard of correctness, the Arbitrator's inquiry of whether there was a Current Defect was not beyond the scope of the Arbitration Agreement".

Following *United Mexican States v Cargill Inc*, the standard of review for true questions of jurisdiction is correctness.**(18)** Although the court concluded that neither the arbitrator's interpretation of the arbitration agreement nor his findings of fact regarding a current defect and authorisation were true questions of jurisdiction, Spies further affirmed that even if the standard of correctness had been engaged, the arbitrator had been correct in assuming jurisdiction.**(19)**

The merits of the arbitrator's decision are not reviewable irrespective of the standard of review.**(20)** In *Cargill* the court explicitly stated that "In assessing whether the tribunal exceeded the scope of the terms of jurisdiction, the court is to avoid a review of the merits".**(21)**

Further, the court stated that "(iii) The finding in the Final Award that there was a Current Defect was reasonable".

Under Section 46(1)(3) of the act, the standard of reasonableness applies if the arbitrator asks the correct questions.**(22)** Spies rightfully notes that in determining reasonableness, the reviewing court is not to determine whether it would have come to the same conclusion, nor does the potential for alternative interpretations make a decision unreasonable.**(23)**

Spies concluded that the final award was reasonable and that the manufacturer cannot re-cast the facts on this application.**(24)** An application for review does not mean that there is an opportunity to bring fresh arguments (eg, the manufacturer's argument that the final award fails to recognise the separate legal identity of the authorised dealer and the manufacturer when neither had provided evidence to support this submission before the arbitrator).**(25)**

The purchaser was awarded C\$20,000 in costs.(26) Spies concluded that the arbitrator's final award had been "justifiable, transparent and intelligible", particularly when considering that the manufacturer could seek a remedy from the authorised dealer through its dealership agreement but the purchaser had no contractual relationship with the third-party company that had installed the starter.(27) Although the purchaser could reasonably commence an action against the authorised dealer, this would be inconsistent with CAMVAP's aim.(28)

Significance

This decision will be of interest not only to car manufacturers, but also to most parties subject to an arbitration agreement.

For car manufacturers, this case demonstrates that regardless of whether there is a direct contractual relationship between the end purchaser and manufacturer, CAMVAP bridges this divide. In order to prevent being held responsible for add-ons provided by dealers, aftermarket parts should be distinguished and disclosed in the purchase agreement, rather than being built into the vehicle's purchase price.

The broader takeaway from this case is that non-compliance with the Arbitration Act is not a ground for review. Rather, in failing to "object to the non-compliance within the time limit provided or... within a reasonable time, [the party] shall be deemed to have waived the right to object".(29) Therefore, a jurisdictional challenge must be brought at the beginning of the hearing.

This decision is not limited to CAMVAP, but applies to arbitral awards more broadly, and may also include international arbitrations under the International Commercial Arbitration Act. The Model Law referenced in Schedule 2 Article 16(2) of the International Commercial Arbitration Act specifies that a challenge to arbitral jurisdiction must be "raised not later than the submission of the statement of defence".

Parties subject to an arbitration agreement, whether international or domestic, should be aware that a jurisdictional challenge will not stand unless it is contended before the arbitrator. Even then, given that an arbitral award is subject to significant deference, review of arbitral decisions is limited in scope.

For further information on this topic please contact Marina E Sampson or Susan Fridlyand at Dentons Canada LLP by telephone (+1 416 863 4511) or email (marina.sampson@dentons.com or susan.fridlyand@dentons.com). The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) *Canada Inc v Reid-Lamontagne* (2019 ONSC 364), Paragraph 32.

(2) *Ibid*, Paragraphs 1 and 4.

(3) *Ibid*, Paragraph 5.

(4) *Ibid*, Paragraph 6. The arbitration agreement defines a 'current defect' as a "defect in your Vehicle that you allege: (i) is currently causing symptoms in Your Vehicle; and (ii) has not been repaired properly".

(5) *Canada Inc v Reid-Lamontagne* (2019 ONSC 364), Paragraphs 8 to 10.

(6) *Ibid*, Paragraph 10.

(7) *Ibid*, Paragraphs 15 to 17.

(8) *Ibid*, Paragraphs 11, 12 and 19.

(9) *Ibid*, Paragraph 31.

(10) *Ibid*, Paragraph 37.

(11) *Ibid*, Paragraph 30.

(12) *Ibid*, Paragraph 35.

(13) *Ibid*.

(14) *Ibid*, Paragraph 40.

(15) *Ibid*, Paragraph 36.

(16) *Ibid*, Paragraph 38.

(17) *Ibid*, Paragraphs 7 and 41.

(18) *Ibid*, Paragraph 45.

(19) *Ibid*, Paragraphs 51 and 52.

(20) *Ibid*, Paragraph 55.

(21) *Ibid*, Paragraph 47.

(22) *Ibid*, Paragraph 57.

(23) *Ibid*, Paragraph 59.

(24) *Ibid*, Paragraph 62.

(25) *Ibid*, Paragraph 65.

(26) *Ibid*, Paragraph 73.

(27) *Ibid*, Paragraph 70 to 72.

(28) *Ibid*, Paragraph 70.

(29) *Ibid*, Paragraph 30.

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