Finality in commercial arbitration further affirmed by the Supreme Court of Canada

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Confirming its 2014 decision in *Sattva Capital Corp. v. Creston Moly Corp.*[1] *(Sattva)*, the Supreme Court of Canada (SCC), in another appeal from the Province of British Columbia, has held that there is limited jurisdiction for appellate review of arbitration awards when statutorily limited to questions of law. Further, where such questions of law do arise, the deferential standard of "reasonableness" almost always applies. Where "mixed questions" of fact and law arise, which are questions "applying a legal standard to a set of facts", appellate review of the arbitral award will be permissible only if the underlying legal test was altered, which constitutes an extricable question of law. As noted by Gascon J., writing for the majority, these principles advance the goals of efficiency and finality in commercial arbitration.

Factual background

The underlying dispute in *Teal Cedar Products Inc. v. Her Majesty the Queen in Right of the Province of British Columbia*[2] *(Teal Cedar)*, concerned the quantum of compensation that the Province owed to Teal Cedar, a forestry company, when the latter's access to certain improvements on Crown land was reduced. Specifically, in 2003, the Province enacted the Forestry Revitalization Act[3] (Revitalization Act) which "changed forestry companies' rights under their licenses by deleting areas from their land base and reducing the volume of their allowable harvest."[4] The Revitalization Act set out a scheme for compensation to affected forestry companies, however the parties were unable to settle the value of the so-called "Improvements Compensation." Specifically at issue was s. 6(4) of the Revitalization Act, which provides forestry companies with "compensation from the government in an amount equal to the value of improvements made to Crown land."[5] While the Revitalization Act permits regulations "prescribing methods of evaluation for use in determining" that value, at no material time were there any such regulations.[6] In accordance with s. 6(6) of the Revitalization Act, the dispute concerning the amount of compensation owed to Teal Cedar was referred to arbitration under British Columbia's Arbitration Act.[7]

Issues on appeal

Three questions arising from the arbitrator's award were the subject of the appeal to the SCC:

1. A question of statutory interpretation: Did the arbitrator err in selecting a valuation method that was allegedly inconsistent with s. 6(4) of the Revitalization Act (Valuation Issue)?[8]
2. A question of contractual interpretation: Did the arbitrator "let the factual matrix overwhelm the words of the contract when he interpreted an amended settlement agreement between the parties"[9]? This question was posed in two ways:"(1) whether the arbitrator allocated excessive weight to the factual matrix; or (2) whether the arbitrator's interpretation of the factual matrix was isolated from the words of the contract,"[10] effectively creating a new agreement between the parties (Settlement Issue).

3. A question of statutory application: Did the arbitrator err in "denying compensation to Teal Cedar relating to improvements associated with one of its licences [the Lillooet Licence] because it never lost access to those improvements, in contrast with other licences where it lost such access"[11] (Lillooet Issue).

It is important to note that the governing legislation for the dispute, the Arbitration Act,[12] limited judicial appeals to questions of law. As additional context, the SCC's decision in Sattva – which clarifies that, in general, contractual interpretation is a question of mixed fact and law – had not yet been released at the time of the application before the lower court, or the initial decision of the British Columbia Court of Appeal (BCCA). Accordingly, when Teal Cedar first sought leave to appeal to the SCC, the SCC remanded the case back to the BCCA a second time, for disposition in accordance with Sattva. Teal Cedar subsequently sought leave to appeal to the SCC after the second BCCA decision.

The test for appellate review of arbitration awards

On appeal, the SCC applied the three-step analysis set out in Sattva for appellate review of arbitration awards under the Arbitration Act:

1. Jurisdiction: whether the appellate court has jurisdiction to review the alleged error;
2. Standard of review: if so, whether the standard for the review is reasonableness or correctness; and
3. Review: whether the arbitration award withstands scrutiny under the applicable standard of review.[13]

1: Jurisdiction to review

The SCC determined that it had partial jurisdiction over the Valuation Issue. While it had jurisdiction to review which methods of valuation were acceptable under the Revitalization Act (i.e. a matter of statutory interpretation and therefore a question of law), it did not have jurisdiction to review which specific valuation method should ultimately be applied (a mixed question, inextricably linked to the evidentiary record at the arbitration hearing).[14]

With respect to the Settlement Issue, only the second formulation of the issue – whether the arbitrator's interpretation of the factual matrix was isolated from the words of the contract – raised a legal question. "As the Court recognized in Sattva, the use of the factual matrix in contractual interpretation is limited by the legal principle that contractual interpretation must remain grounded in the text of the contract so as to avoid effectively creating a new agreement between the parties."[15] However, "merely raising a legal question does not exhaust the requirements for jurisdiction under s. 31 of the Arbitration Act."[16] In order for a court to grant leave on such a question of law, the Arbitration Act requires the court to be satisfied that the ground of appeal also has "arguable merit" and, in this instance, the legal question lacked the requisite arguable merit such that the SCC found it did not have appellate review jurisdiction.[17]

The Court further determined that it had no jurisdiction over the Lillooet Issue, which it found to be a mixed question involving the arbitrator's application of his chosen valuation methodology, and beyond the scope of appellate review.[18]

2: Standard of review

As held in Sattva, under the Arbitration Act the standard of review is "almost always" reasonableness; a standard which Gascon J. expressly notes is reflective of key policy considerations of efficiency and finality in commercial arbitration.[19] Only rare questions of law attract the correctness standard, such as questions of a constitutional nature, or a question of central importance to the legal system and outside the adjudicator's expertise. [20] By contrast, where a civil litigation decision is under review, factual and mixed questions are reviewed for "palpable and overriding errors"

and legal questions (including extricable questions of law) are reviewed for correctness. As a result, the characterization of a question on review has a very different consequence in an appeal from an arbitration award versus an appeal from a civil litigation judgment; the identification of a legal question when appealing an arbitration award will not necessarily preclude a review on reasonableness, and when appealing a civil litigation judgment the "nature of the question is dispositive of the standard of review." [21]

3: Review of the Valuation Issue

The SCC was, however, divided with respect to the application of the standard of review to the Valuation Issue. In a majority decision written by Gascon J., the SCC determined that the appropriate review standard was reasonableness. In reaching this decision he SCC noted that, amongst other things, the parties selected the arbitrator to determine this issue, therefore affirming their acceptance of his expertise, favouring a reasonableness standard.[22] The majority further held that the arbitrator's choice of acceptable valuation methodology was supported by s. 6(4) of the Revitalization Act, and fell within a range of possible, acceptable outcomes, and that the arbitrator's decision was defensible on the specific facts and in light of his reasons as a whole.[23]

A minority decision from Justices Moldaver, Côté, Brown and Rowe, written by Justices Moldaver and Côté, found the opposite; regardless of whether the standard of review was correctness (which the majority found was the standard applied by the BCCA) or reasonableness (as held by the majority), the arbitrator's determination on the Valuation Issue could not stand.[24] This was, in part, due to the minority's view that s. 6(4) of the Revitalization Act only entitled the claimant to value for improvements as a licence holder, a limited interest and different from a full ownership interest. As such, on either a reasonableness or correctness standard, it was not open to the arbitrator to adopt the valuation method that he did, which the minority found did not account for this "limited interest." [25]

Held

The majority allowed the appeal on the Valuation Issue and restored the arbitrator's decision. With regard to the Settlement Issue – a question of contractual interpretation, and Lillooet Issue – a question of statutory application, the SCC held that there was no jurisdiction to review the arbitrator's decision on those issues, and accordingly, restored the arbitrator's determination on such issues. [26]

Takeaways

It is well-established that in the context of a dispute under the Arbitration Act, only a legal question which meets the other jurisdictional requirements of the legislation is open to appellate review. In light of comments made by the SCC in Teal Cedar, under this standard review courts are to be vigilant in distinguishing between a party alleging that the legal test should have resulted in a different outcome (a question of mixed fact and law), as opposed to a party alleging that the legal test may have been altered in the course of its application, resulting in a different outcome (an extricable question of law). This narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to arbitral jurisdiction over factual findings. This decision also highlights the importance for parties looking to appeal an arbitral award to be aware of the differences between appellate practice from civil litigation decisions and appellate practice from commercial arbitral awards. Lastly, the division within the SCC on the Valuation Issue, and the minority's opinion that the arbitrator's choice of valuation methodology was subject to review, underscores the difficulty in applying a standard of review in the particular circumstances of this case.

1. 2014 SCC 53.↩
2. 2017 SCC 32 (Teal Cedar).↩
3. S.B.C. 2003, c. 17.↩
4. Teal Cedar, supra note 2 at para 8.↩
5. Ibid at para 9.↩
6. Ibid at para 11.↩
7. R.S.B.C. 1996, c. 55 (Arbitration Act).↩
8. Teal Cedar, supra note 2 at para 3.↩
9. Ibid at para 4.↩
10. Ibid.↩
11. Ibid at para 5.↩
12. Arbitration Act, supra note 7.↩
13. Teal Cedar, supra note 2 at para 39.↩
14. Ibid at paras 50-51.↩
15. Ibid at para 63.↩
16. Ibid at para 64.↩
17. Ibid.↩
18. Ibid at para 69.↩
19. Ibid at para 74.↩
20. Ibid.↩
21. Ibid at paras 46 and 75-76.↩
22. Ibid at paras 79-81.↩
23. Ibid at paras 84 and 87.↩
24. Ibid at para 108.↩
25. Ibid at paras 119-126.↩
26. Ibid at para 103.↩

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