

# APPEALING THE ARBITRATOR: A NEW AVENUE OF APPEAL IN BRITISH COLUMBIA

Posted on January 28, 2017

**Categories:** [Insights](#), [Publications](#)

Recent changes to the Domestic Commercial Arbitration Rules of Procedure<sup>[1]</sup> (the “Rules”) of the British Columbia International Commercial Arbitration Centre (the “Arbitration Centre”) expand parties’ options to appeal arbitral decisions.

With a few exceptions, domestic arbitrations conducted in British Columbia are governed by the *Arbitration Act*.<sup>[2]</sup> The *Arbitration Act* in turn provides that, unless the parties to an arbitration otherwise agree, the Rules of the Arbitration Centre will be applied.

Under the *Arbitration Act*, appeals to the Supreme Court of British Columbia from commercial arbitration decisions are narrowly circumscribed. Appeals are limited to: (1) questions of law where the parties consent to the appeal; or (2) questions of law where the parties do not consent but where the court grants leave to appeal. Leave may be granted only where the court determines that:

- the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice;
- the point of law is of importance to some class or body of persons of which the applicant is a member; or
- the point of law is of general or public importance.

Even if these statutory requirements are met, the court retains a residual discretion to deny leave. The 2014 Supreme Court of Canada decision in *Sattva Capital Corp. v. Creston Moly Corp.*<sup>[3]</sup> emphasized the difficulty in identifying a question of law in an appeal from an arbitral decision and affirmed that courts will limit their intervention to cases where the results can be expected to have an impact beyond the parties to the particular dispute.

## The Arbitration Centre Introduces Arbitral Appeals

In September 2016, the Arbitration Centre made a significant change to the Rules by instituting an internal appeal process. The Rules now provide that parties may appeal to a three-person panel appointed by the Arbitration Centre (the “Appeal Tribunal”).

According to the Rules, an appeal may be brought on any ground provided for in an arbitration agreement, and can include a question of law, a question of mixed fact and law, or a question of fact. If an appeal is brought on a ground agreed to, no leave is required, and it will be heard on those specified grounds. If no grounds of appeal are specified in the arbitration agreement, an appeal may be brought on a question of law and may be heard with leave of the Appeal Tribunal or by agreement of the parties. This mirrors the standard in the *Arbitration Act* for seeking leave to appeal to the Supreme Court of British Columbia.

### Takeaways

The appeal process may be defined at the commencement of the arbitration or through a pre-existing agreement. Parties negotiating commercial agreements containing arbitration clauses should consider at the outset whether they want to incorporate, exclude, or limit this new arbitral appeal process.

As discussed above, access to the courts' appeal process is limited to questions of law and the courts maintain discretion to decline to hear a case even if the statutory requirements are met. The Appeal Tribunal's ability to hear appeals on broader grounds may be of interest to parties wishing to ensure their commercial disputes are correctly resolved without needing to resort to the court system.

However, the recency of these changes means the scope of appeals from the Arbitration Centre's Appeal Tribunal to the courts is not yet settled. If parties are able to bring a matter to the Appeal Tribunal and then, when dissatisfied with those results, still bring the matter before the courts, this will defeat the common reasons why parties choose arbitration. As the British Columbia Court of Appeal has said, commercial arbitration is intended to provide a speedy and, in the vast majority of cases, final determination of the issues between the parties.<sup>[4]</sup> Another layer of appeal may be inconsistent with the parties' intentions.

by Melanie J. Harmer & Ruth Nieuwenhuis, Articled Student

[1] The Domestic Commercial Arbitration Rules of Procedure are found at:

<http://bcicac.com/arbitration/rules-of-procedure/revised-domestic-commercial-arbitration-rules-of-procedure/>

[2] *Arbitration Act*, R.S.B.C. 1996, c. 55

[3] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633

[4] *Boxer Capital Corporation v. JEL Investments Ltd.*, 2015 BCCA 24

### A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

© McMillan LLP 2017



mcmillan