COURT OF APPEAL CONFIRMS SETTING ASIDE AN ARBITRAL AWARD IS A "TALL" ORDER

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The Ontario *Arbitration Act* gives parties the right to appeal arbitration awards to the Court on questions of law.[1] The recent Ontario Court of Appeal ("**ONCA**") decision in *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 5516 emphasizes the Court's reluctance to interfere with arbitration awards where the parties agreed to limit their appeal rights.

Background

The City of Brockville ("**Brockville**") and Tall Ships Landing Development Ltd. ("**Tall Ships**") entered into an agreement to develop waterfront property in downtown Brockville (the "**Project**"). The Project included Tall Ships' performance of remediation work and the development of a condominium building and Maritime Discovery Centre ("**MDC**").[2]

Once construction was completed, the MDC was nearly 6,000 square feet larger than designed and approximately $1,800,000 over budget.[3] Tall Ships claimed these additional costs from Brockville, in addition to other remediation and interest costs. Brockville denied liability.

The parties submitted Tall Ships' claims to arbitration. The parties' agreement provided that only questions of law would be subject to appeal. The arbitrator dismissed all of Tall Ships' claims by way of three arbitral awards.[4]

Tall Ships appealed the arbitrator's decisions to the Ontario Superior Court of Justice. The application judge allowed the appeal and found in favour of Tall Ships on the basis that the arbitrator made errors of law and made rulings in a manner that was procedurally unfair. The application judge therefore set aside the three arbitral awards and ordered a new arbitrator to be appointed to reconsider the matters.[5]

Court of Appeal Decision

Brockville appealed the application judge's decision to the ONCA. A unanimous panel of judges at the ONCA overturned the application judge's decision. The ONCA held that none of the issues before the arbitrator were properly subject to appeal because,

1. they were questions of mixed fact and law, not extricable questions of law; and
2. there was no procedural unfairness that could attract review under the *Arbitration Act*.

i. Questions of mixed fact and law

The arbitration agreement between the parties provided that *only* questions of law would be subject to appeal. The parties *did not* contract for appeal rights on questions of mixed fact in law (as they could have done per section 45(3) of the *Arbitration Act*).

The ONCA held that all the issues before the arbitrator were matters of contractual interpretation involving questions of mixed fact and law.[6] As such, the ONCA held that the application judge was wrong to interfere with the findings of the arbitrator on these issues.

More specifically, the questions of mixed fact and law determined by the arbitrator included:

1. whether Tall Ships provided timely notice of its claim for remediation costs under the contract[7];
2. which party was liable for cost overruns, and whether the contract precluded recovery[8]; and
3. whether Tall Ships could subsequently claim interest on an amount already agreed by the parties to settle one of Tall Ships' claims.[9]

In overturning the application judge's decision, the ONCA reaffirmed the principle that "judges should not be too ready to characterize particular issues as issues of law because doing so may render the point of consensual arbitration nugatory…"[10]

ii. Procedural Fairness

An arbitration award may be set aside where the hearing of the arbitration was itself inherently unfair. Pursuant to s. 46 of the *Arbitration Act*, the Court may set aside an award where "the applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case…".[11]

In other recent decisions, Ontario courts have confirmed that procedural fairness refers to the right to be heard and the right to an independent and impartial hearing. The duty of fairness is concerned with ensuring that adjudicators act fairly in the course of making decisions, but *not* with the fairness of the actual decisions they make.[12]

In this case, the application judge held that the arbitrator erred by relying on implied terms in the agreement that were neither pleaded nor argued, thereby violating Tall Ships' right to procedural fairness in the arbitration.[13]

The ONCA disagreed. It found that the arbitrator did not rely on any implied terms in the agreement to find in

favour of Brockville. The arbitrator relied on the agreement as a whole and the facts put into evidence. There was therefore no basis for an argument of procedural unfairness.[14]

The application judge's decision therefore had the effect of overturning the arbitrator on a question of mixed fact and law framed as a matter of procedural unfairness. That was an error. The ONCA clarified that "s. 46 of the Arbitration Act cannot be used as a broad appeal route to bootstrap substantive arguments attacking an arbitrator's findings which the parties had agreed would be immune from appeal."[15]

Take-Aways from Tall Ships

The key takeaways from the ONCA's decision in *Tall Ships* are as follows:

1. The Courts will strictly enforce parties' agreements that only allow appeals of an arbitrator's decision on questions of law. Courts and parties should be hesitant to try and extract questions of law from issues that are really mixed fact and law, so as not to undermine the parties' consensual arbitration process.
2. Contractual interpretation is a matter of mixed fact and law. Matters of contractual interpretation include, among many others, (i) a determination of whether a party has met notice requirements under a contract, (ii) whether a contract allows for recovery of certain costs and who is liable for said costs, and (iii) whether a party can subsequently claim interest on an amount already agreed to be paid under the contract.
3. Courts will be wary of parties' attempts to re-characterize findings on substantive questions of mixed fact and law as appealable issues of procedural unfairness under s. 46 of the *Arbitration Act*. This approach has already been recently adopted by the Ontario Superior Court in *Canada Soccer* 2023 ONSC 1367 where the Court rejected an attempt by one party to "thinly [disguise]" the substantive merits of an arbitral decision "as a procedural grievance".[16]

[1] Where the arbitration agreement does not deal with appeals on questions of law; *Arbitration Act*, 1991, S.O. 1991, c. 17, ss. 45(1)-(3).
[2] *Tall Ships Development Inc. v. Brockville (City)*, 2022 ONCA 5516 at paras 4-8 [*Tall Ships*].
[3] *Tall Ships* at para 9.
[4] *Tall Ships* at paras 9-12.
[5] *Tall Ships* at para 1.
[6] *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para 50 [*Sattva*].
[7] *Tall Ships* at paras 38, 44, 48-49.
[8] *Tall Ships* at paras 65-72; 86-89.
[9] *Tall Ships* at paras 90, 96.
[10] *Tall Ships* at para 16.

[11] *Arbitration Act*, 1991, S.O. 1991, c. 17, ss. 46(1)(6).
[12] For example see *The Tire Put Inc. v Augend 6285 Yonge Village Properties Ltd.* 2022 ONSC 6763 at paras 22-24; *Baffinland v Tower-EBC,* 2022 ONSC 1900 at paras 77-80.
[13] *Tall Ships* at para 2.
[14] *Tall Ships* at para 82.
[15] *Tall Ships* at para 95.
[16] *Canada Soccer*, paras. 21-22.

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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.