IS YOUR ARBITRATION CLAUSE APPEALING? NO APPEAL AVAILABLE WHERE CLAUSE SAYS DISPUTE IS "FINALLY SETTLED" BY ARBITRATION

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Subsection 45(1) of the *Ontario Arbitration Act*, 1991 (the "***Act***") provides that if an arbitration clause does not deal with appeals on questions of law, a party may seek leave of the court to appeal an award on such questions. In its recent decision, *Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C.* ("***Baffinland***"), 2023 ONCA 245, the Ontario Court of Appeal ("**ONCA**") considered whether an arbitration clause stating that disputes shall be "finally settled" by arbitration precluded the losing party from seeking leave to appeal on questions of law.

In concluding that such language did so, the ONCA upheld the lower court's decision and adopted the common-sense approach to contractual interpretation espoused in *Sattva Capital Corporation v. Creston Moly Corp.* ("***Sattva***") [1] More specifically, the ONCA rejected the appellant's contention that the application judge failed to properly apply the presumption of consistent expression. The appellant argued that the parties used the phrase "final and binding" in other parts of the contracts and that, because they used a different phrase ("finally settled") in the arbitration clause, they intended it to have a different meaning.

Background

In 2017, Baffinland Iron Mines LP ("**BIM**") and Tower-EBC G.P./S.E.N.C. ("**TEBC**") entered into two largely identical standard form contracts that required TEBC to assist with construction of a railway to transport ore from BIM's mine to a nearby port.[2] Both contracts provided that disputes not capable of being settled amicably, or resolved by the Dispute Adjudication Board (whose decisions, in some circumstances, were referred to as "final and binding"), "shall be finally settled" by arbitration "under the Rules of Arbitration of the International Chamber of Commerce" (the "**ICC Rules**").[3]

When BIM terminated the contracts for delay, TEBC commenced an arbitration challenging BIM's termination and claiming damages.[4] The majority of a three-member arbitral tribunal awarded damages to TEBC in excess of $100 million.

BIM then sought leave of the Ontario Superior Court to appeal the award on questions of law. The preliminary

issue before the application judge was whether the contracts precluded an appeal on such questions under s. 45(1) of the *Act*.[5]

Application Judge's Decision

The application judge held that the parties had expressly contracted out of all rights to appeal, given that the arbitration clauses stated that the dispute "...shall be finally settled by... arbitration" and "...shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce". The application judge noted that his conclusion was supported by ICC Rule 35(6), which provides:

> Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay ***and shall be deemed to have waived their right to any form of recourse*** insofar as such waiver can validly be made [emphasis added].[6]

The application judge therefore dismissed BIM's application for leave to appeal. BIM then appealed the application judge's decision to the ONCA, and lost again.

ONCA Decision

The ONCA began by noting that s. 45 of the *Act* contemplates three different scenarios regarding appeals to the court on questions of law:

1. Where the arbitration agreement expressly provides for such appeals – there is an appeal as of right.
2. Where the arbitration agreement is silent – there is an opportunity to appeal, but only with leave of the court.
3. Where the arbitration agreement expressly precludes such appeals – there is no right of appeal or opportunity to seek leave to appeal at all.

Because the arbitration clauses in this case did not expressly provide for an appeal on questions of law, the issue is whether they are silent on the subject (in which case, BIM could seek leave to appeal) or whether they expressly preclude such appeals.[7]

BIM first argued that the application judge misconstrued the contractual interpretation principle known as the presumption of consistent expression. Under that principle, it is presumed that contractual language is used consistently, with the same words meaning the same thing and, by corollary, different words must indicate an intention to refer to different things. BIM argued that, because the contracts refer to some decisions of the Dispute Adjudication Board as being "final and binding" (language which has long been held to preclude appeals), but the arbitration clauses use the expression of "finally settled", applying the presumption of consistent expression requires giving "finally settled" a different meaning than "final and binding".[8]

The ONCA rejected this argument. The ONCA began by noting the Supreme Court of Canada's recognition in *Sattva* that "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" and that courts are to "give effect to the intent of the parties by reading the contract as a whole, giving the words used their ordinary and grammatical meaning, in light of the factual matrix".[9] The ONCA observed that while the presumption of consistent expression may in some cases be a helpful interpretive tool, it should not be used as a "dominating technical rule of construction that overwhelms the interpretation of a contract based on the ordinary and grammatical meaning of its text".[10]

The ONCA went on to hold as follows:

1. the presumption of consistent expression should not bar the use of differently worded but mutually reinforcing phrases which can only be understood to mean the same thing (in other words, there can be more than one way to say appeals are precluded);[11]
2. the ordinary and grammatical meaning of "finally settled", when viewed in the context of the contractual dispute resolution provisions, clearly means no further recourse by appeal in the same way as "final and binding" would;[12]
3. In any event, even if the presumption of consistent expression were applied in this case it would result in the same conclusion. Both phrases ("final and binding" and "finally settled") employ the same word ("final") accompanied by an additional word (in one case, "binding", in the other "settled"). In such circumstances, the presumption of consistent expression militates towards giving the words "final" and "finally" the same meaning, unless the additional word suggests something different. The word "settled", like the words "conclusive" and "binding" simply reinforces the meaning of "final" (meaning, ousting all rights of appeal) and does not suggest anything different.[13]

The ONCA also rejected BIM's second argument: that inconsistent contractual terms must be reconciled in accordance with the priority to which the parties have agreed. BIM asserted that the contracts specified, for the purposes of interpretation, that their provisions (including the arbitration clauses) have priority over other documents incorporated by reference (which include the ICC Rules, one of which clearly precludes appeals). Like the application judge, however, the ONCA held that the phrase "finally settled" is entirely consistent with ICC Rule 35(6) (which provides that the parties "undertake to carry out any award without delay and ***shall be deemed to have waived their right to any form of recourse*** [emphasis added]". Given that there is no inconsistency between the language of the arbitration clauses and the ICC Rules incorporated by reference, the ONCA ruled that this principle was inapplicable.[14] The ONCA accordingly held that the arbitration clauses dealt with appeals on questions of law (by expressly precluding them) and dismissed BIM's appeal.

Key Takeaways

The key takeaways from this decision are as follows:

1. Generally speaking, Canadian courts will be deferential to, and will strive to uphold, valid arbitration clauses. Accordingly, clauses that describe the arbitration as being a final resolution of the dispute (such as "finally settled" or "final and conclusive") are likely to be interpreted as precluding any appeals of the arbitral award. Parties who wish to retain a right to appeal should therefore avoid including such language in their arbitration clauses (and ideally, should expressly articulate whether appeals are available on questions of fact, law or mixed fact and law).
2. The primary concern of contractual interpretation is to give effect to the parties' intentions having regard to the contract as a whole and the ordinary and grammatical meaning of the words used. Because there is more than one way to express the same idea, the courts will not permit technical rules of interpretation (such as the principle of consistent expression) to override this objective where the ordinary meaning of different phrases is clearly the same.
3. For those of you who draft arbitration clauses, be careful when doing so and obtain the advice of a litigator on them whenever you can. While the common-sense result in *Baffinland* is appealing (pun intended), the parties undoubtedly incurred significant legal fees arguing the point before two levels of court. Had the relevant arbitration clauses used language consistent with the rest of the contract (e.g. the phrase "final and binding", like the clauses relating to certain decisions of the Dispute Adjudication Board did, instead of "finally settled"), BIM might not have sought leave to appeal the arbitral award in the first place (which would have resulted in cost savings for both parties).

[1] [2014] 2 S.C.R. 633.
[2] Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C., 2023 ONCA 245 at para 10 [*Baffinland*].
[3] *Baffinland* at para 12.
[4] *Baffinland* at paras 14-15.
[5] *Baffinland* at para 16.
[6] *Baffinland* at paras 13, 18.
[7] Note that the ONCA also considered whether BIM's appeal was properly before the Court. The general rule is that no appeal lies from an order refusing to grant leave to appeal. However, this case fell under an exception to that rule which permits BIM's appeal on the question of whether the application judge mistakenly declined jurisdiction to consider whether BIM's grounds were deserving of leave to appeal.
[8] *Baffinland* at paras 34-35.
[9] *Baffinland* at para 36.
[10] *Baffinland* at para 37.
[11] *Baffinland* at para 38.

[12] *Baffinland* at para 39.
[13] *Baffinland* at paras 40-44.
[14] *Baffinland* at paras 46-47.

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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.