Focus

ALTERNATIVE DISPUTE RESOLUTION

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Appealing arbitration

SCC reversal changes test for award reviews while raising questions as to their necessity

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On Aug. 1, the Supreme Court of Canada unanimously reversed a decision of the British Columbia Court of Appeal and restored an arbitration award which the latter court had found to be "absurd." The award had been delivered in 2008 by Leon Getz, a seasoned commercial arbitrator in Vancouver.

Sattva Capital v. Creston Moly Corp. [2014] S.C.J. No. 53, is a seminal decision in commercial arbitration for several reasons. Justice Marshall Rothstein, writing for the court, dealt with issues affecting not only the process of appealing an arbitration award but also the interpretation of commercial contracts.

Briefly, the important principles established in the reasons include:

- A statutory right to seek leave to appeal on a question of law does not confer a right to seek leave to appeal on a question of mixed fact and law.
- A question of law must be "extricable" from issues of fact and raise a question of principle that could affect other cases.
- Interpretation of a written contract is not a question of law but is a question of mixed fact and law. The old approach treating interpretation of a written contract as an issue of law is now "abandoned."
- Questions of law raised by an arbitration award are not reviewable on the standard of correctness, but on a standard of reasonableness. Unless the question of law raises a constitutional issue or an issue fundamental to our system of justice, the award will not be reversed unless the result is unreasonable.
- Assuming that a question of law meeting these criteria is made out, the test for granting leave to appeal is "arguable merit."
- The court provides a practical common-sense approach on interpretation of contracts which is not to be dominated by technical rules of construction (par. 47) and a clearer statement of how one should deal with the parole evidence rule (par. 60).

Given the ultimate outcome (award confirmed after five trips to the court over a six-year period, following a one-year arbitration process) it is legitimate to ask how much the parties were benefited by having access to an appeal process. It is often argued that an appeal process ensures a "correct" result. But assume the SCC was right when they reversed the Court of Appeal and restored the award (which by definition they are), consider what the situation would have been if they had not granted leave, or do not

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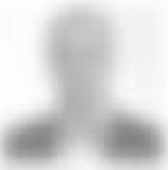

Benefits: In most cases, appeals are pointless

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grant leave in the next similar case, or if the losing party in the Court of Appeal had run out of time or money to pursue a further appeal. The parties would have ended up with an incorrect result as a result of an appeal process which, in this case, is mandated by the B.C. *Arbitration Act*.

In any event, the SCC has substantially undermined the argument that appeals from arbitration awards are necessary to ensure adherence to correct legal principles. Adherence to correct legal principles is no longer the test. The test is reasonableness (or unreasonableness) of the result.

In most cases, the *Sattva* decision will render an appeal from an arbitration award pointless — which seems to be the point the SCC is trying to make. The question remains whether the enlightened principles in *Sattva* will have the salutary effect intended if parties are unable to escape from an appeal regime, as is the case in B.C. and Alberta, or if they choose to adopt an appeal process as they may do elsewhere in Canada. For example, how difficult would it have been for the B.C. Court of Appeal (which found the award in *Sattva* to be "absurd") to have reached exactly the same result (now known to be wrong) by navigating through the new principles set out in *Sattva*?

In 1810, Jeremy Bentham, in *The Rationale of Evidence*, described arbitration as a process by which the parties consent to the judgment of a third person *without recourse to the courts*. There are clear benefits to this form of dispute resolution when it is chosen by the parties. All of those benefits are compromised by an appeal process which leads them into the very court system they sought to avoid.

Consider only one of those benefits: the timeliness of the arbitration proceedings, contrasted with the glacial pace of the court process. The dispute in *Sattva* arose in early 2008. The arbitrator heard the case in late September and early October 2008. His reasons were rendered on Dec. 23, 2008. The case then entered the court process, including five trips to the courts over the next 5½ years, with all the legal costs and expenses attendant thereto. In the end, what the arbitrator accomplished in a year provided the parties with more value than what the court system laboured mightily to deliver in six.

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