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Protecting Judicial Deference to Commercial Arbitration in Canada after Vavilov: Following the English Approach to Appeals on Questions of Law?

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The Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 potentially poses an inadvertent, yet serious, threat to judicial deference to domestic commercial arbitration in Canada. Until *Vavilov*, courts hearing appeals on questions of law from arbitral tribunals applied the deferential "reasonableness" standard of review. *Vavilov* raises the question of whether the standard of review is now "correctness" – i.e., the appellate standard. As a solution, I propose that Canadian courts follow the English approach to appeals on pure questions of law, and only grant leave to appeal decisions rendered by domestic arbitral tribunals on the basis of stringent criteria modeled on s. 69(3)(c) of the *Arbitration Act 1996*, c. 23 (which applies in England, Wales, and Northern Ireland, but not in Scotland).

The standard of review for commercial arbitrations under Canadian law

Under Canada's federal Constitution, commercial arbitration falls under provincial jurisdiction. The nine common law provinces (i.e., all those other than Quebec) have separate statutes for domestic and international commercial arbitration. The international arbitration legislation implements the Model Law, which does not provide for appeals. By contrast, all domestic arbitration statutes do provide for such appeals from arbitral decisions – in three, only by agreement of the parties (Nova Scotia, Newfoundland and Labrador, and Prince Edward Island), and in the remaining six, by the parties' agreement or by leave of the court to which the appeal is made (Alberta, British Columbia, Manitoba, New Brunswick, Ontario, and Saskatchewan) – although in three of these six (Ontario, Manitoba and Saskatchewan), parties can contract out of the statutory provision, as will soon be the case in British Columbia as well (*Arbitration Act*, SBC 2020, c. 2).

Most Canadian courts have trivialized the leave requirement, and instead calibrated their oversight of commercial arbitral decisions through their standard of review, which is developed from the legal framework for judicial review of the decisions of administrative tribunals. In the decade prior to *Vavilov*, Canadian administrative law provided two standards of review for administrative decisions – "reasonableness" and "correctness". The choice between the two was based on a "contextual" analysis including the expertise of the decision-maker and the nature of the legal

question (*Dunsmuir v. New Brunswick*, 2008 SCC 9). Correctness is the appellate standard of review, whereas reasonableness accords a greater degree of deference. The contextual analysis meant that reasonableness could even apply to a statutory right of appeal.

In the context of commercial arbitral awards, Canadian courts reasoned in a parallel manner that appeals from a final arbitration award should be adjudicated on the reasonableness standard. They justified reasonableness on the basis of contextual factors, including that "parties engage in arbitration by mutual choice … and select the number and identity of the arbitrators" (*Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 104), the choice of arbitrators is "based on their expertise" (ibid. at para. 105), and "from a policy expertise, the deliberate aim [of commercial arbitration] is to maximize efficiency and finality" (*Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 74).

Vavilov

Vavilov threatens to destabilize the *status quo*, because it holds that courts hearing statutory appeals from administrative tribunals should always decide those cases on a correctness standard. Thus, *Vavilov* raises the question of whether appeals from commercial arbitration tribunals are now also to be reviewed on correctness, or whether *Sattva* and *Teal* – applying the reasonableness standard – remain good law following *Vavilov*.

Vavilov did not squarely address the issue. On the one hand, it placed great emphasis on legislative intent to justify applying the correctness standard to statutory rights of appeal, which would seem to apply to appeals from domestic commercial arbitral awards as well. Specifically, *Vavilov* stated "there is no convincing reason to presume that legislatures mean something entirely different when they use the word 'appeal' in an administrative law statute than they do in … a … commercial law context" (at para. 44). *Vavilov* also declared that expertise was no longer relevant to determining the standard of review, which was a crucial factor in the reasoning underlying *Sattva* and *Teal*. But on the other hand, *Vavilov* was a public law case about administrative decision-makers, not domestic commercial arbitral awards, and cited neither *Teal* nor *Sattva*.

The lower courts have quickly stepped into the breach and are divided. Some have held that the standard of review for domestic commercial arbitral awards is now correctness (*Buffalo Point First Nations v. Cottage Owners Association*, 2020 MBQB 20 at paras. 46 to 48), while others have held that reasonableness remains the standard of review (*Cove Contracting v. Condominium Corporation No. 102 598*, 2020 ABQB 106 at paras. 3 to 12; *Ontario First Nations (2008) Limited Partnership v. Ontario Lottery and Gaming Corporation*, 2020 ONSC 1516 at paras. 62 to 74). The issue seems destined to be resolved by the Supreme Court of Canada.

Should Canada follow the English approach?

There is a third approach that accepts that *Vavilov* now requires correctness for appeals on questions of law in the commercial arbitration, while reaffirming judicial deference to the final awards issued by domestic commercial arbitral tribunals. This approach draws upon the English experience with appeals from arbitral tribunals (both domestic and international) under s. 69 of the *Arbitration Act 1996*.

The origins of s. 69 were helpfully recounted by Lord Thomas in his 2016 BAILII lecture. Historically, English courts adjudicated frequently on questions of law arising out of arbitral awards, not through the remedy of correcting an error of law on the face of the record, but rather via the mechanism of parties stating a case on a question of law for the opinion of a court.

In response to concerns about efficiency and finality, and the potential competitive disadvantage that the stated case procedure placed London as a seat of arbitration, the *Arbitration Act 1979* created an appeal procedure. Appeals were subject to leave granted by the High Court on the basis that "the determination of the question of law concerned could substantially affect the rights of one or more of the parties in the arbitration agreement" (s. 1(4)). In *The Nema*, [1982] A.C. 724, Lord Diplock narrowly construed this language to confine the grounds for granting leave to two circumstances: (a) where the arbitrator was "obviously wrong", or (b) the legal issue raised was not merely a "one-off" and had implications for other disputes. These criteria were codified by 69(3)(c) of the *Arbitration Act 1996*, which provides that leave "shall be given only if the court is satisfied" that "the decision of the tribunal on the question is obviously wrong" or "the question is one of general public importance and the decision of the tribunal is at least open to serious doubt". The first ground for granting leave is confined to truly egregious errors, described by Akenhead J. in *Braes of Doune Wind Farm (Scotland) Ltd. v. Alfred Mcalpine Business Services Ltd.*, [2008] EWHC 426 as "a major intellectual aberration" (at para. 31). The second ground for granting leave is that the question of law raised is of broader importance beyond the confines of the specific dispute at issue. Once leave is granted on one of these two criteria, courts apply the appellate standard of review, or what a Canadian court would call the correctness standard of review.

Section 69 of the *Arbitration Act 1996* dramatically reduced the adjudication of appeals on questions of law in commercial arbitration in England. Moreover, since parties can contract out of s. 69, the practical extent of appeals on questions of law is narrower still. The leave criteria in s. 69 offer an attractive solution for the potential upheaval created in Canada by *Vavilov* for commercial arbitration. In those Canadian provinces where one party can appeal an arbitral award to the court with leave, the courts should develop common law criteria for the granting of leave that match two limbs of s. 69(3)(c). Only appeals which satisfy those demanding criteria would then be subject to correctness review, consistent with *Vavilov*.

Decisions that are "obviously wrong" should be exceedingly rare. Indeed, in England, this is a very high bar to clear. Of greater potential use in Canada would be the criterion that a case be of broader public interest. The development of common law criteria to identify such cases will require great care. One guide is the leave to appeal practice of the Supreme Court of Canada. Under s. 40(1) Supreme Court of Canada Act, the Supreme Court only grants leave to appeals that raise questions of "public importance", which the Supreme Court has interpreted to include appeals on questions of law where:

- the law is unsettled;
- there is a novel point of law;
- there has been sustained academic criticism of a precedent; and/or
- where Canadian jurisprudence is out of step with the law in other common law jurisdictions.

These criteria could be applied to leaves to appeal from final domestic arbitral decisions as well in effect, only those appeals that might ultimately merit attention by the Supreme Court itself – which would be a very small number, since the Supreme Court's private law docket is slim.

Conclusion

The consensus is that s. 69 of the *Arbitration Act 1996* has had the effect of dramatically reducing the adjudication of questions of law arising from commercial arbitration in in England. In 2016, Lord Thomas argued that matters had gone "too far", because it had come at the expense of the development of the common law by the courts and public transparency – meeting with vigorous responses from Sir Bernard Elder, William Rowley Q.C. and Lord Saville. Notwithstanding these disagreements, the English courts have continued their policy of deference to commercial arbitration.

One possible response to *Vavilov* would be to amend domestic commercial arbitration legislation in every province to switch from the current opt-out regimes for appeals on questions of law to a uniform system of opt-in regimes, as has been proposed by the Uniform Law Commission of Canada in its Uniform Arbitration Act. If parties opt-in to appeals, they consent to the correctness standard of review. In the interim, an alternative would be for the Canadian courts to develop common law criteria for the granting of leave in cases of obvious error or public interest by following the English approach. In the very few cases that would meet that demanding test, courts should apply the correctness standard of review. The Canadian courts should maintain judicial deference to domestic commercial arbitral awards.

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