Kluwer Arbitration Blog

The Emancipation of Arbitration: Recent Developments from the Supreme Court of Canada

Alexa Biscaro (Norton Rose Fulbright Canada LLP) · Wednesday, June 30th, 2021

The approach historically taken by Canadian courts to playing the role of guardian with respect to domestic commercial arbitration has sometimes been both confused and confusing, a situation only cofounded by recent Supreme Court of Canada ("Supreme Court") jurisprudence.

With the release of *Sattva* in 2014 and *Teal Cedar* in 2017 , the Supreme Court declared that the right to appeal domestic commercial arbitration awards is to be construed narrowly. The Supreme Court reiterated that courts are to review awards according to a deferential standard – reasonableness – in order to advance the central aims of commercial arbitration: efficiency and finality. This state of affairs has seemingly come undone with the Supreme Court's recent decisions, including the 2020 decision in *Uber* and the very recent February 2021 concurring reasons in *Wastech,* which remind us that the recognition of domestic arbitration's independence still does not sit well with all Canadian judges.

Domestic commercial arbitration exists as a private, contractually-based dispute mechanism that necessarily requires a healthy distance from over-bearing court minders. I propose here, as I have argued before, that the key to maintaining a functional relationship between Canadian courts and domestic arbitration is to take a cue from dysfunctional parent-child relationships: allow arbitration to emancipate itself (at least in part) from the domestic judicial system. Only by removing the option to appeal arbitral awards altogether can we achieve some sort of co-existence that recognizes the true purpose of domestic commercial arbitration as an independent and fully realized dispute resolution mechanism, rather than an unruly child that requires constant supervision.

Vavilov, *Wastech*, and the appeal conundrum

In its landmark 2019 decision in *Vavilov* (a decision previously discussed on the Blog), the Supreme Court ruled that, if a statute explicitly provides for the right to *appeal* an administrative decision, the appellate standard of review applies. This means that questions of law are reviewed on a correctness standard, while questions of fact or mixed fact and law are reviewed on a standard of reasonableness. Since *Vavilov*, lower courts have split on whether the new rule for appellate review of administrative decisions also applies to the review of domestic commercial arbitration awards under the various provincial statutory rights of appeal.

In the more recent decision in *Wastech*, the Supreme Court addressed this issue for the first time. The parties raised arguments about the applicable standard of review to the commercial award at issue, but relied on the arbitration-specific decisions of *Sattva* and *Teal Cedar*. However, the Supreme Court had other ideas.

The majority left unanswered the issue of whether *Vavilov* affects the standard of review applicable to arbitral awards set out in *Sattva* and *Teal Cedar*. Instead, the Supreme Court dropped two contradictory hints to keep us on our toes. First, the majority was "mindful" that *Vavilov*, which was released after the appeal was heard in *Wastech*, "set out a revised framework for determining the standard of review a court should apply when reviewing the merits of an administrative decision" (at para. 45). This implies that *Vavilov* may be applicable to the review of domestic arbitral awards. Second, the majority noted that *Vavilov* "does not advert either to *Teal Cedar* or *Sattva*, decisions which emphasize that deference serves the particular objectives of commercial arbitration" (ibid.), suggesting that these decisions have not been overturned.

The concurring judges (Côté, Brown and Rowe JJ.), however, firmly believed that in light of the contradictory lower court decisions, the issue of *Vavilov*'s effect on domestic arbitration appeals should be addressed. In just five paragraphs, the concurring judges washed away principles confirmed in *Sattva* and *Teal Cedar*, disregarded the fundamental differences between statutorily-created administrative tribunals and private commercial arbitration tribunals, and decreed that a word must be given the exact same meaning in each and every statute in which it appears, regardless of context or the legislator's intent (at paras. 117-121).

The concurring judges provide their four reasons for doing so in two paragraphs: (i) the "important" differences between arbitration and administrative decision-making do not affect the applicable standard of review, which is purely a matter of statutory interpretation; (ii) the word "appeal" should have the same meaning across all statutes; (iii) the fact that domestic arbitration statutes use the word "appeal" overrides any factors justifying deference to arbitrators, including respect for the parties' selection of a private method of dispute and of an appropriate adjudicator; and (iv) *Vavilov* must be read as overturning both *Sattva* and *Teal Cedar* for the principles of statutory interpretation set out in *Vavilov* to have any meaning (at paras. 119-120).

***Wastech*, *Northland Utilities* and the fear of helicopter parenting**

The *Wastech* concurring judgment would not be as alarming if it did not align with several lower court decisions finding that *Vavilov* changed the standard of review applicable to appeals of commercial arbitration awards. This includes the judgment of the Northwest Territories Court of Appeal in *Northland Utilities* , which was decided by a panel of judges from Alberta's Court of Appeal. In a recent article, my colleagues and I expressed the concern that lower court judges who are uncomfortable with domestic commercial arbitration may rely on the *Wastech* concurring reasons to bolster the precedential value of the *Northland Utilities* judgment and exercise tighter judicial control over domestic arbitration awards.

This concern appears confirmed. In late March, an Alberta judge commented in *obiter* that, because the concurring *Wastech* reasons are consistent with *Northland Utilities* – which was decided by a panel of judges from the Alberta Court of Appeal – they agreed that *Vavilov* had displaced the *Sattva/Teal Cedar* standard of review. Courts in other provinces, including in the

recent *Johnston* decision, have also hinted that they may be bound by the concurring reasons in *Wastech*.

The British Columbia Court of Appeal's upcoming judgment in the *lululemon* case, which will likely have to deal with the issue head-on, is one to watch. In the meantime, parties resolving disputes via domestic commercial arbitration in Canada are left wondering exactly just how "efficient" and "final" domestic arbitration really is in the face of potentially overbearing judicial oversight.

The case for the emancipation of arbitration

Domestic commercial arbitration and domestic courts in Canada have had a turbulent relationship over the years. While at times it appears that Canadian courts are willing to recognize domestic arbitration's value as an independent, parallel method of dispute resolution, every step forward seems to be followed by two big steps back. At this point, it is difficult to believe that Canadian courts will ever stop acting as helicopter parents rushing to involve themselves in domestic commercial arbitration at the first sign of trouble, real or perceived. Arbitral tribunals are not administrative tribunals, nor are they lower courts. Domestic commercial arbitration is a valid, proven, *alternative* dispute resolution mechanism. It is not part of the court system nor its competitor: it runs in parallel, freeing up precious judicial resources for pressing and substantial matters, including ever-increasing case backlogs. To ensure the efficiency and effectiveness of two systems working and existing alongside one another, courts have to resist the urge for constant oversight. While cutting the cord is difficult, the time has more than come for courts to let go.

To that end, provincial legislators need to step in and (partially) emancipate Canadian domestic arbitration: the right to appeal domestic commercial awards needs to be abolished. Although the "opt-in" appeal regime presented by the Uniform Law Conference of Canada in 2016 is enticing, it still leaves the option to appeal – and the accompanying uncertainty – on the table. In fact, the draft Act proposed by the Toronto Commercial Arbitration Society in February 2021 still contains a provision allowing parties to opt-in to the right to appeal a domestic award on a question of law. It is important to recall that domestic commercial arbitration is based in contract. Parties willingly choose arbitration and are well aware of its pros and cons. If they do not want to give up the right to appeal, they can choose to rely on the courts.

Where courts are given oversight powers, there is always the risk that they will try to broaden them, often with the misguided rationale that parties should be saved from an "incorrect" award. Common law jurisdictions seem to forget that Quebec does not allow appeals from domestic commercial arbitration awards and the sky has yet to fall.[1)] It is also important to recall that parties are not left in the cold if their right to appeal domestic awards is taken away. Egregious situations involving partial arbitrators or serious breaches of procedural fairness can be remedied by the set aside mechanism, consistent with the Model Law. This allows commercial parties to enjoy the advantages of arbitration, efficiency and finality, without being exposed to gross unfairness. And yes, the arbitration tribunal might get it wrong. But so do courts, even at the highest level. Indeed, what basis does a judge have to conclude that he or she is better placed or more experienced to identify the "correct" solution to a commercial dispute than an expert arbitrator who was chosen by the parties? More kicks at the can does not make something a better process; rather, it creates costs, takes time, and perpetuates uncertainty. It is time to let domestic arbitration make its own way in

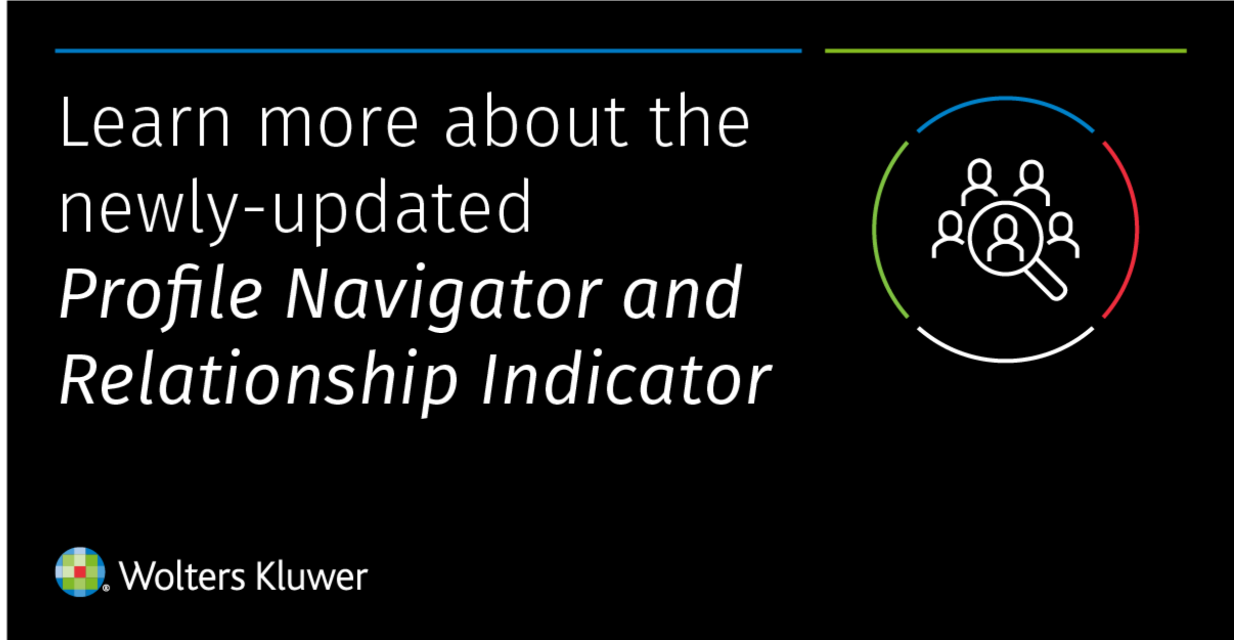
the world, knowing that this independent system works just fine without constant judicial oversight.

The author is grateful to Charles Feldman for his insightful comments, as always.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

Profile Navigator and Relationship Indicator
Includes 7,300+ profiles of arbitrators, expert witnesses, counsels & 13,500+ relationships to uncover potential conflicts of interest.

Learn how **Kluwer Arbitration** can support you.



References

?1 Article 2638 of the *Civil Code of Quebec* states that "An arbitration agreement is a contract by which the parties undertake to submit a present or future dispute to the decision of one or more arbitrators, to the exclusion of the courts".

This entry was posted on Wednesday, June 30th, 2021 at 8:00 am and is filed under Appeal, Canada,

Domestic arbitration

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.