Kluwer Arbitration Blog

The Standard of Review of Arbitration Awards in Canada

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In *Vento Motorcycles, Inc. v. United Mexican States* ("*Vento*"), a recent decision of the Ontario Court of Appeal in an investor-State arbitration case, a proposed intervener suggested that procedural fairness protections under the UNCITRAL Model Law should be harmonized with those of domestic administrative law. This suggestion fuels the debate, which has been raging since the Supreme Court of Canada's 2019 decision *Canada (Minister of Citizenship and Immigration) v. Vavilov* [*Vavilov*], over the application of administrative law standards of review to commercial arbitration awards (examples where this issue arose were previously highlighted on this blog). *Vento* also exposes how arguments in support of applying administrative standards of review in the arbitration context, taken to their logical conclusion, threaten to undermine both domestic and international arbitration in Canada. This post therefore argues that *Vavilov* and administrative law standards of review should not be extended to commercial arbitration.

Having been previously addressed on this blog, e.g., here and here, this post does not recount the underlying facts nor the reasons from the *Vavilov* judgment. By way of a brief reminder, the Supreme Court revised the judicial standards of review applicable to statutory administrative tribunals, holding that reasonableness is the presumptive standard of review in the administrative context but that this presumption can be rebutted where the legislature has indicated that appellate standards of review should apply. Such legislative intention may be gleaned, for instance, from the provision of a "statutory right of appeal" from an administrative decision to a court (*Vavilov*, para. 39). Applying appellate standards of review means that the standard of "correctness" applies to questions of law.

On its face, *Vavilov* has nothing to do with commercial arbitration, and even less to do with international commercial arbitration. In fact, *Vavilov* makes no mention of arbitration or of the Supreme Court's prior jurisprudence (notably, *Sattva* and *Teal Cedar*), which had set out a standard of reasonableness for practically all questions on appeal from commercial arbitration awards under Canada's domestic arbitration acts (other than constitutional questions and questions of law of central importance to the legal system as a whole). The provincial and territorial international commercial arbitration acts in Canada, all based on the Model Law, do not even allow for appeals of arbitration awards (and in Québec even domestic arbitral awards may not be appealed).

Nevertheless, as one post on this blog forewarned, *Vavilov* continues to threaten arbitration in Canada. Some Canadian courts (e.g., the Court of Appeal for the Northwest Territories, the Court of King's Bench of Alberta, the Ontario Superior Court of Justice, and three judges of the Supreme

Court), as well as commentators (see, e.g., here and here), have taken the view that *Vavilov* extends to appeals of domestic commercial arbitration awards, mandating a correctness review by the courts on questions of law. The basic rationale is that the Supreme Court in *Vavilov* established an overarching principle that *any* statute with the word "appeal" in it, be it in the administrative, "criminal or commercial law context", is indicative of the legislature's intention that appellate standards of review be applied by the courts (*Vavilov*, para. 44). Any differences between commercial arbitration and administrative decision?making, the argument goes, are irrelevant to this legislative intent.

An additional rationale is that extending *Vavilov* to commercial arbitration would be compatible with the principle of party autonomy. Under most domestic arbitration acts in Canada, parties may opt into a contractual right of appeal or opt out of a statutory right of appeal. Parties therefore exercise their autonomy by choosing to have the merits of their award reviewed by the courts or by remaining silent and not opting out of a statutory right of appeal. And, unless they explicitly provide otherwise in their arbitration agreement, parties to commercial contracts can be presumed to understand that with the choice of appeal to the courts come appellate standards of review.

These rationales for extending *Vavilov* to commercial arbitration are misguided and should be rejected: the domestic arbitration acts conflict with *Vavilov*, party autonomy does not justify extending *Vavilov* to arbitration, and commercial arbitral tribunals are not equivalent to administrative tribunals.

The Domestic Arbitration Acts Conflict with *Vavilov*

It is difficult to see how presumed legislative intent behind the word "appeal" can be isolated and treated as paramount while legislative intent behind the arbitration acts as a whole is disregarded. Indeed, in interpreting the Ontario *Arbitration Act* ("AA") in *TELUS Communications Inc. v. Wellman*, the Supreme Court stated that its words "are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of the Parliament."

The language, purpose, and context of the domestic arbitration acts conflict with the legislative intent attributed in *Vavilov* to the word "appeal". A primary objective of these acts, including their appeal provisions, is to limit court intervention in arbitrations. Accordingly, most domestic arbitration acts include a general clause expressly limiting court intervention to specific purposes, such as enforcing arbitration awards (see, e.g., AA, section 6). Ensuring that arbitral decisions are "correct" is not one of those limited purposes. Most domestic arbitration acts also allow parties to contract out of a statutory appeal right on questions of law, as well as out of the application of the law altogether (see, e.g., AA, section 3). Ensuring the "correctness" of arbitral legal findings is thus clearly not a legislative priority. Where legislatures do not want courts to defer to arbitral decisions, for instance with respect to jurisdiction, they use clear words to this effect such as the court will "decide the matter" (see, e.g., AA, section 17(8)).

Furthermore, while some domestic arbitration acts provide for a default right of appeal, other acts only allow for a contractual right of appeal (see, e.g., Nova Scotia's *Commercial Arbitration Act*, section 48). While those acts enable the exercise of such a contractual appeal right, they arguably

do not create a "statutory right of appeal" reflecting the legislature's intention that appellate standards of review be applied. Still other arbitration acts are silent on appeal rights, so they clearly do not create a "statutory right of appeal" (see, e.g., Newfoundland and Labrador's *Arbitration Act*). These differences between the domestic arbitration acts' approach to appeals may result in different standards of review applied in different provinces if the *Vavilov* framework is extended to arbitration, which would undermine both the framework itself and Canadian arbitration law.

Party Autonomy Does Not Justify Extending *Vavilov* to Commercial Arbitration

The correctness standard of review on questions of law operates to replace the arbitrator's decision with the court's decision. While parties' choice of an appeal right indicates they want *some* review by the courts, there is no reason to assume they want a court to step into the shoes of the arbitrator and for questions of law to be relitigated. Such an assumption does not respect parties' fundamental choice to contract out of litigation and their choice of a decision-maker, expert or not, nor their expectations of judicial non-intervention and finality. These choices and expectations reflect the foundational tenets of arbitration and support a default standard of reasonableness unless the parties *clearly* agree otherwise.

The mere choice of a right of appeal (especially in arbitration agreements entered into pre-*Vavilov*), let alone contractual silence, are insufficient to evidence parties' intention to adopt a correctness standard on questions of law. It is accepted that arbitration is exceptional in allowing parties to exclude the court's jurisdiction to review their award. It should therefore be unremarkable that the word "appeal", in both arbitration legislation and agreements, carries a different meaning than in other contexts. It means a deferential review by the courts to ensure that arbitral findings of law are reasonable.

Commercial Arbitral Tribunals are Not Equivalent to Administrative Tribunals

A fundamental problem with extending *Vavilov* to commercial arbitration is the failure to appreciate the crucial differences between private commercial arbitration and statutory administrative tribunals. These differences make *Vavilov*'s underlying rationale inapplicable in the arbitration context. Private commercial arbitral tribunals are not created by legislatures and do not administer statutory schemes. The delegation of authority from the courts to arbitrators is done by the parties rather than by the legislature, and arbitrators' powers are derived primarily from the parties rather than from statute. The public law dimension of administrative law is also inapplicable in private commercial arbitration. Therefore, the standard of review of commercial arbitration awards should reflect deference to the decision-maker chosen by the parties, even where they have agreed on a right of appeal.

Equating private commercial arbitral tribunals with statutory administrative tribunals also risks unintended consequences. Doing so may limit legislatures' ability to restrict parties' right of appeal and/or judicial review of arbitration awards, as is the case with statutes governing administrative

tribunals (see, e.g., *Crevier v. A.G. (Québec) et al.* and post-*Vavilov* commentary). Indeed, courts could potentially grant judicial review of arbitral findings notwithstanding statutory restrictions contained in the arbitration acts (see, e.g., Prince Edward Island's *Arbitration Act*, sections 63-64). This would make little sense, however, and courts have not done so, because the constitutional rationale for mandating judicial review of administrative tribunals, namely to ensure the legality of *state* decision-making, does not apply in private commercial arbitration.

Finally, accepting that arbitral and administrative tribunals are equivalent in order to extend *Vavilov* to domestic commercial arbitration also threatens international arbitration in Canada, notwithstanding the absence of an appeal right in the international commercial arbitration acts. As mentioned above, this threat is evident in *Vento*, an investor-State arbitration case in which the Court of Appeal for Ontario refused to grant leave to intervene. The appeal in *Vento* was from the lower court's refusal to set aside an award on grounds of procedural unfairness under the Model Law. In an effort "to protect vulnerable contracting parties from an award resulting from a materially unfair arbitral process", the proposed intervener offered to "canvass[] how procedural fairness protections are addressed in other contexts, such as judicial review of administrative action" and suggested that "the standard should be harmonized across different areas of Canadian law "in a manner that assures access to justice in the arbitral forum" (*Vento*, paras. 14, 23). In refusing the motion to intervene, the Court of Appeal noted that the case involved "two sophisticated parties with capable counsel in a complex international trade dispute. The appeal focuses on narrow, fact-specific issues…No access to justice or constitutional issues are engaged" (*Vento*, para. 21). Nevertheless, the proposed intervener's suggestion to harmonize procedural protections under the Model Law with those under Canadian administrative law exemplifies the risks that a failure to appreciate the uniqueness of arbitration presents for domestic as well as international arbitration in Canada.

Conclusion

Extending *Vavilov* and administrative law standards of review to private commercial arbitration conflicts with the language, purpose, and context of Canadian domestic arbitration acts and does not accord with party autonomy. Doing so also disregards the *sui generis* nature of commercial arbitration by equating it with statutory administrative tribunals. This false equivalency risks undermining the foundation on which domestic and international arbitration have been carefully constructed by Canadian legislatures and courts.

** This post is inspired by a talk the author gave during the 2024 CanArb Week in Toronto, at which 11 Canadian and international arbitration organizations and institutions presented programs under the theme "Practically Speaking."*

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