Kluwer Arbitration Blog

Navigating the Jurisdictional Boundaries: Insights from Two Ontario Courts' Decisions on Arbitrators' Jurisdiction

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In July and August 2024, the Court of Appeal for Ontario (**CA**) and the Ontario Superior Court of Justice (**SCJ**) have addressed critical questions concerning the jurisdiction of arbitration tribunals. Two noteworthy decisions have emerged: the first shedding light on the tribunal's authority to correctly apply matters within its own jurisdiction, and the second on the deemed waiver of the right to object. Although neither award was set aside on jurisdictional grounds, the rulings clarify the scope of arbitration jurisdiction in an evolving legal landscape.

In the first case, ***Clayton v. Canada (Attorney General)***, 2024 ONCA 581 ("***Clayton***"), the CA held that an error of law is not deemed a true jurisdictional issue under s.34(2)(a)(iii), sch.1 of the *Commercial Arbitration Act*, R.S.C 1986, c.17 (the "**Commercial Arbitration Act**"). In the second case, ***The Joseph Lebovic Charitable Foundation et al. v. Jewish Foundation of Greater Toronto***, 2024 ONSC 4400 ("***Lebovic***"), the SCJ dismissed the application brought under s.17(8) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 (the "**Arbitration Act**"), deciding that it was brought out of time after the appellant has taken positive steps towards the arbitration process.

The Requirement of a True Jurisdictional Issue—Section 34(2)(a)(iii) of the Commercial Arbitration Act

In *Clayton*, the CA dismissed an appeal from an order dismissing an application to set aside an arbitral award rendered pursuant to Chapter 11 of NAFTA. The challenge in question was brought before the SCJ under s.34(2) of the Commercial Arbitration Act on the ground that the tribunal exceeded its jurisdiction by failing to determine the element of causation required to award Clayton damages on the balance of probabilities standard, which it alleges the tribunal was required to apply.

Background

The appellants (Clayton) sought to develop a quarry in Nova Scotia that required approval from both the federal and provincial Ministers of the Environment. The approval was denied, following which Clayton invoked the NAFTA arbitration process (see past posts **here**, **here**, and **here** for a detailed historical context and analysis of the NAFTA arbitration). The arbitration tribunal issued

two awards: In the *first* finding the respondent liable for conducting a flawed environmental assessment that lacked fairness and non-arbitrariness, and the *second* dismissing Clayton's claim for lost profits on the ground that the causal link between the NAFTA breach and the purported damages was not established "in all probability" or with a "sufficient degree of certainty" that Clayton would be operating profitably if the environmental assessment process had operated properly.

Clayton alleged the tribunal did not apply the correct standard of proof in international law, therefore accusing the tribunal of having decided a matter beyond the scope of submission to arbitration. The SCJ dismissed the application. The issue on appeal to the CA was whether the Tribunal had exceeded its jurisdiction by not applying the balance of probabilities standard. The CA found that:

> *"[13] Section 34 imposes strict limits on the ability of courts to interfere with arbitration awards. Subsection 34(2)(a)(iii) makes clear that a court may set aside the tribunal's award only if the appellants establish that it determined matters beyond those that were submitted to the tribunal for arbitration. "True jurisdictional questions" is a term that has been used to describe the limited nature of reviewable error under s. 34(2)(a)(iii), and the standard of review for such errors is correctness."*

Relying on ***Alectra Utilities Corporation v. Solar Power Network Inc.***, 2019 ONCA 254, itself concerned with domestic arbitration, the CA emphasized the limited scope of judicial oversight in domestic (*Arbitration Act*, s.46(1)(3)) as well as international (Commercial Arbitration Act, s.34((2)(a)(iii)) arbitrations. The CA held that such a challenge, which is not a 'true jurisdictional question' under any of the domestic or international regimes, "is not an occasion for courts to review final and binding arbitration awards for either correctness or reasonableness." Indeed, *Clayton* reaffirms the principle of minimal judicial intervention in arbitration and underscores the importance of respecting the finality of arbitration awards. It also highlights the high threshold that must be met to challenge an arbitration award on jurisdictional grounds successfully.

The Timely Objection to an Arbitrator's Jurisdiction—Section 17(8) of the Arbitration Act

In *Lebovic*, the SCJ upheld an arbitrator's ("**Arbitrator**") jurisdiction to hear disputes arising from a consent order rendered by the Arbitrator in a prior arbitration and by which the parties have agreed on the commercial resolution of their dispute without proceeding with the arbitration. The challenge in question sought a determination that the Arbitrator erred in finding that he had jurisdiction over the consent order.

Background

The arbitration process included three arbitrations. The first was resolved by the said consent order, which included a clause referring "any disputes regarding the matters referred to in this Order" back to the Arbitrator for resolution. The second arbitration never took off and was overtook by a

third arbitration that the respondents commenced relying on the consent order and the underlying agreement with Lebovic, who brought counterclaims after purporting they were arbitrable under the consent order, among others. However, a week prior to the main hearing, Lebovic brought a motion objecting to the Arbitrator's jurisdiction. The motion was dismissed by the Arbitrator who went on to render his award on jurisdiction, subject matter of the challenge before the SCJ.

The rationale of the arbitrator's jurisdiction over the consent order is not the subject matter of this note and, in any event, was not reviewed by the SCJ, who, citing ***Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.***, [1994] S.C.R. 490, dismissed the motion on the ground that Lebovic had repeatedly demonstrated its agreement to remit all matters in dispute to the Arbitrator, and concomitantly, its waiver of any jurisdictional challenge. Lebovic 'express' waiver was determined based on its (i) counterclaiming for relief which it argued the Arbitrator had jurisdiction to address, and (ii) challenge that was not asserted until 18 months after the respondents' notice of demand for arbitration was issued.

Comments

Both the CA and SCJ's decisions confirm the courts of Ontario's longstanding position set out in ***Mexico v. Cargill, Incorporated***, 2011 ONCA 622, 107 O.R. (3d) 528 (C.A), discussed **here**, and ***Alectra Utilities Corporation v. Solar Power Network Inc.***, 2019 ONCA 254, 145 O.R. (3d) 481 (C.A), limiting their interference with arbitrators' decisions. That being said, the contrast with domestic arbitration is that the position under the Arbitration Act is similar to that applied under the English Arbitration Act 1996, in that appeals are allowed on a question of law unless the parties have excluded (which requires fine language, as decided in ***Baffinland Iron Mines LP v. Tower-EBC G.P./S.E.N.C.***, 2023 ONCA 245) the possibility of such an appeal. Beyond the discrepancy related to the right of appeal, courts have applied restraint when it comes to interfering with and reviewing domestic and international awards aside from the limited grounds for setting aside awards (Commercial Arbitration Act, s.34 and Arbitration Act, s.46).

In this spirit, *Clayton* confirms that a purported error in applying the law, i.e., an error *within* the tribunal's jurisdiction, does not elevate the same to a jurisdictional error, permitting the CA to set aside the award. In effect, Clayton invited the court to scrutinise the award for an error of law that is otherwise immune from appeal under the Commercial Arbitration Act. The CA has rightly confirmed that s.34(2)(a)(iii) is limited to true jurisdictional questions, i.e., whether the tribunal decided a matter that it was asked to decide as opposed to deciding that matter correctly. Even then, the distinction is so fine as to be manipulable (*see* Lord Denning's dictum in *Pearlman v. Keepers and Governors of Harrow School*, [1978] EWCA Civ 5, [1979] Q.B. 56). Clayton's challenge was not one of those questions. At least, however, it was raised in time compared to Lebovic's challenge to the jurisdiction of the Arbitrator, asserted only after having taken positive steps in the arbitration process.

Lebovic reminds us of the importance for counsel to raise jurisdictional objections in time and, most importantly, to do so before taking any steps which amount to foregoing reliance on some right or defect in the performance of the other party. For any such step to be deemed an express or implied 'waiver,' a party must have (i) full knowledge of the deficiency which might be relied upon; and (ii) the unequivocal intention to relinquish the right to rely on it. The SCJ determined that such 'knowledge' and 'intention' materialise by raising issues in the agreement containing the

arbitration clause and counterclaiming for relief that allegedly fell under the scope jurisdiction of the Arbitrator. This is not defeated by ss.4(1) and 17(3) of the Arbitration Act, which speak to when waiver of the time to object will be deemed, without restricting a court or tribunal's ability to conclude that the right to object was waived at some time prior. That time is upon the first occasion on which the party submits a statement to the tribunal 'without' including an objection as to the tribunal's jurisdiction (Arbitration Act, ss.17(3) and46(3)). Any steps taken beyond that point in time would be deemed positive steps towards asserting the jurisdiction of the tribunal.

Conclusion

Both the CA and SCJ's decisions dismissing the challenges to jurisdiction underscore the importance of adhering to established statutory requirements in both domestic and international arbitrations, including the importance of raising timely objections to jurisdiction essential to maintaining the integrity of the arbitration process. If any, such challenges must raise true jurisdictional questions, reinforcing the principle that not all disputes regarding an arbitrator's authority warrant judicial intervention.

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