Ontario Court of Appeal rules on arbitrator's power to grant summary judgment motion under Arbitration Act

March 28, 2023

In Optiva Inc. v. Tbyatel, 2022 ONCA 646, the Ontario Court of Appeal provides guidance on the scope of an arbitral tribunal's powers to fashion arbitration proceedings, and addresses the law on how the rulings of an arbitral tribunal can best be challenged before the court under Ontario's Arbitration Act, 1991.

The decision is a reminder for parties to seek the input of experienced arbitration practitioners when drafting an arbitration agreement. While parties can deliberately incorporate or exclude certain procedures in their arbitration agreements, it can be difficult to draft effectively in anticipation of all potential scenarios. For this reason, in the hands of experienced arbitrators, broadly worded arbitration agreements can operate to allow for the implementation of properly tailored procedures. However, to avoid surprises, parties should anticipate that arbitration procedures may deviate from court litigation procedures and any attempt to implement court procedure into an arbitration risks introducing confusion and a lost opportunity to implement more appropriate procedures.

Background

Optiva and Tbyatel were parties to a services agreement. Tbyatel terminated the agreement, alleging breach of contract by Optiva. The parties went to binding arbitration, pursuant to the agreement's arbitration clause, and appointed a sole arbitrator with certain defined powers. After convening a case conference, the arbitrator directed that Tbyatel could seek summary judgment of several of its claims. While responding to the motion, Optiva raised a preliminary objection to the arbitrator's jurisdiction to rule on the motion, absent consent of the parties. The arbitrator ruled that he possessed jurisdiction to entertain the motion for summary judgment given section 20 of the Act and the parties' arbitration agreement.

After a two-day motion, the arbitrator ultimately held in favour of the moving party, holding that Tbyatel lawfully exercised its right to terminate the agreement.

Optiva's challenge before the application judge and the Court of Appeal

Optiva applied to the Superior Court of Justice to set aside the award, under sections 17 and 46 of the Act, and sought leave to appeal on questions of law under section 45. Optiva argued the arbitrator did not have the power to proceed by way of summary judgment. During its response to this position, Tbyatel also raised the issue that Optiva was out of time to bring the application. Optiva's application was ultimately dismissed by the Superior Court of Justice and the decision was upheld by the Court of Appeal.

Lessons from the court

The Court of Appeal addressed two main issues in its decision:

1. whether the decision of an arbitral tribunal to entertain a summary judgment motion is procedural or jurisdictional in nature; and
2. where the Superior Court has held that an arbitral tribunal's decision to entertain a summary judgment motion is jurisdictional in nature, such that it falls under section 17 of the Act, should the decision have been challenged within 30 days (as required under section 17(8))?

With respect to whether the decision to employ summary judgment was procedural or jurisdictional, the Court of Appeal relied on its earlier decision in *Inforica Inc v CGI Information Systems and Management Consultants Inc*, 2009 ONCA 642, which addressed the power of an arbitrator to order security for costs. In that case, the court described section 17 as concerned only with the arbitrator's jurisdiction to entertain the entire subject matter of the dispute, and not with the jurisdiction to make interlocutory or procedural orders along the way. Relying on this assessment, the court characterized the arbitral tribunal's decision to entertain a summary judgment motion as a procedural order, and not falling under the ambit of section 17, or its short-lived window to commence a challenge under section 17 (8).

In other words, the Court of Appeal determined that Optiva's challenge to the arbitrator's decision was not time-barred and was rightly brought under the appeal and set aside provisions of the Act.

Further, and with respect to whether the arbitration provision permitted summary judgment at all (which Optiva argued on the appeal), the court focused on paragraph 8 of agreement – which gave the arbitrator the power to rule upon "all motions during arbitration". While this paragraph listed several motions that the arbitrator could consider during arbitration (not including summary judgment), the list was explicitly non-exhaustive. The same paragraph gave the arbitrator the broad power to interpret the agreement, including the arbitration provision.

What parties need to be cautious about

When entering into an arbitration agreement, the parties should consider the extent to which the powers of the arbitrator should be defined. While an attempt to include or exclude certain powers in the arbitration agreement may seem sensible at the time of

drafting, once interpreted at the time of a dispute, the language may result in unexpected outcomes for one or both parties. In this regard, drafting arbitration clauses often benefits from restraint, rather than an attempt to address all eventualities. For this reason, it is most frequently appropriate to simply adopt established institutional rules, which have been the subject of input from experienced users of arbitration, have been used successfully in many cases, and which calibrate the balance between ensuring that the arbitrator has the specific powers necessary to do justice in particular cases without being inappropriately prescriptive. In all cases, parties should bear in mind that, when fashioning rules governing the conduct of the arbitration, there is a limited role for judicial oversight of the conduct or outcome of the ensuing proceedings. (*Popack v Lipszyc*, 2016 ONCA 135 at paragraph 26).

Undecided issues

The question may remain whether the *Arbitration Act, 1991*, provides a sufficient basis for an arbitrator to rule upon a "summary judgment motion", or if explicit language granting power to hear such motions is required under the arbitration agreement. That is particularly so because, while "summary judgment motions" are an aspect of litigation practice with an established body of law surrounding them, "partial awards" on certain issues – which do not appear to be substantively different from the circumstances presented in Optiva, are issued by arbitrators all the time. Optiva may simply be an example of another situation in which litigation concepts exist uneasily with established arbitral practice.

For more information, please reach out to any of the key contacts listed below.

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