Appeal rights continue to be very limited for arbitration awards

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In the recent decision of *Pilgrim v True-Line Contracting Ltd*, 2023 ABCA 126, the Court of Appeal of Alberta reinforced that it will apply a high threshold to cases which were decided in arbitration and have already been appealed to the Court of King's Bench.

In 2020, the Court of Appeal stated it "will apply a higher threshold for permission to appeal a second time than it would for a first" and its decision in *Pilgrim* has demonstrated adherence to this principle.

Background

The parties became involved in a dispute over a construction project and the dispute was submitted to arbitration.

The arbitrator set the deadline for the parties to provide statements by Dec. 1, 2021. The parties were warned that "failure to engage in these discussions may have an impact on your ability to seek remedies" and that failing to meet deadlines would have consequences. The applicants sought an extension of the deadline, which was then set for March 1, 2022. Despite the generous extension, the applicants missed the extended deadline to submit their statement.

On March 2, the respondent submitted an application seeking dismissal of the applicants' claim due to the applicants' failure to comply with deadlines, pursuant to section 27 of the *Arbitration Act*, RSA 2000, C A-43.

Section 27 of the *Arbitration Act* allows a tribunal to dismiss a claim if the commencing party does not submit a statement in accordance with the time period specified by the arbitrator, unless the party has a satisfactory explanation. Further, if a party fails to a appear or provide documentary evidence, the arbitrator may make an award on the evidence before them.

The arbitrator requested a response from the applicants on the application brought by the respondent and informed the applicants, that absent a response, he would decide the application on the information available to him. The applicants did not respond.

On March 29, 2022, the newly retained counsel for the applicants was informed that the arbitrator had already commenced writing the award for the section 27 application, but that submission could still be provided on behalf of the applicants. The arbitrator warned that depending on when the applicants' materials were received, the award may already be decided.

On April 4, 2022, the arbitrator issued the section 27 award against the applicants. The applicants' materials were received later that day, after the award had been issued. The applicants had made no submissions in response to the section 27 application in their materials.

Procedural history

Section 45(1)(f) and (g) of the *Arbitration Act* permits a justice of the Court of King's Bench to set aside an award if the applicant was treated unfairly, was not given an opportunity to present a case or if the procedures followed in the arbitration did not comply with the *Arbitration Act*.

Section 44 of the *Arbitration Act* permits a party to appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact.

The applicants argued two issues before the Court of King's Bench Chambers Justice:

1. Should the award be set aside on procedural grounds in accordance with section 45(1)(f) and (g) of the *Arbitration Act*?
2. Should the applicants be granted leave to appeal a substantive error in the arbitration award in accordance with section 44 of the *Arbitration Act*?

The chambers justice dismissed both issues.

The applicants then sought permission under section 48 of the *Arbitration Act* to appeal the chambers justice's refusal to set aside the award.

Decision

The Court of Appeal considered four factors in determining whether to grant permission to appeal:

1. Is the issue reasonably arguable?
2. Is deciding the issue likely to affect the result of the litigation?
3. Is the answer likely to be of interest to others or likely to influence later suits?
4. Is there any independent reason not to re-litigate the question or to limit the scope of the appeal?

The Court of Appeal acknowledged that none of these factors alone was conclusive. Nonetheless the Court of Appeal dismissed the application on the basis that none of the factors listed above were satisfied.

On the first factor, the Court of Appeal found the applicants had not shown the appeal was reasonably arguable. In coming to this conclusion the Court of Appeal cited its previous decision in *ENMAX Energy Corporation v TransAlta Generation Partnership*, 2020 ABCA 68 at paragraph 67 which stated that unfairness or unequal treatment, pursuant to section 45(1)(f) of the *Arbitration Act*, must go "to the heart of the process and effectively undermine its fairness or have the effect of preventing the party from putting forward its case". Regarding any procedural unfairness, the Court of Appeal stated the threshold is whether the fundamental validity of the process was challenged.

In this case, the Court of Appeal agreed with the Chambers Justice that the parties were given multiple opportunities to make their case, were not treated unfairly or unequally and the procedure followed by the Arbitrator was in compliance with the *Arbitration Act*.

Regarding the second factor, the Court of Appeal concluded any decision on the two grounds argued by the applicants would not affect the arbitral award.

On the third factor, the Court of Appeal concluded the applicants had not shown that their fact-specific procedural questions would be of interest to others.

Finally, since there was no reasonable prospect of unfairness, the Court of Appeal found there was no compelling reason to allow the litigation to continue, especially considering dispute resolution processes are meant to resolve issues without engaging the judicial process.

In coming to this decision, the Court of Appeal stressed that the Court of King's Bench is the primary appellant court for arbitration matters and that granting permission to appeal would lead to a second level of appeal. As such, the Court of Appeal stated it would apply a higher threshold for permission to appeal a second time than it would for a first. The policy of courts is to encourage settlement of disputes and that policy "militates against setting aside an arbitration award except in the most compelling of circumstances".

Takeaways

Arbitration awards are not easily appealable at first instance before the courts, and it is clear that the Court of Appeal will be taking a hard line and applying an even higher threshold to granting a second level of appeal for cases originating in arbitration. This increases the imperative on parties to reach resolution outside of the court system. Parties should consider whether they may want appeal rights when considering arbitration for dispute resolution.

By

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